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Nothing Certain About Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions

Jennifer Bost

NOTHING CERTAIN ABOUT DEATH AND TAXES (AND INHERITANCE): EUROPEAN UNION REGULATION OF CROSS-BORDER SUCCESSIONS

INTRODUCTION

On July 4, 2012, after almost fifteen years of preparatory work, the European Parliament and the Council of the European Union (Council) passed a regulation intended to simplify international inheritance cases.[1] The Regulation addresses issues regarding appropriate jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance and enforcement of authentic instruments for international inheritance (Cross-Border Succession).[2] It also creates a European Certificate of Succession.[3] However, the Regulation expressly does not apply to any tax issues related to inheritance.[4]

One of the objectives of the Cross-Border Succession Regulation was "[t]o allow citizens to efficiently plan and to organise their succession in advance in a cross border context."[5] Barriers to free movement can arise from differences among laws governing international successions in EU member states.[6] The free movement of persons is a fundamental right guaranteed to EU citizens under its Founding Treaties[7]—realized by citizens through freedom, security, and justice without internal borders. This fundamental principle of free movement between member states is enshrined in Article 3(2) of the Treaty on

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[1] Regulation 650/2012, of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, 2012 O.J. (L 201) 107 [hereinafter Cross-Border Succession Regulation].

[2] *Id.*

[3] *Id.* art. 62.

[4] *See id.* pmbl., para. 10.

[5] *See Commission Staff Working Document Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession, Summary of the Impact Assessment*, at 5, SEC (2009) 411 final (Oct. 14, 2009) [hereinafter *Summary of the Impact Assessment*]; *see* Cross-Border Succession Regulation, *supra* note 1, pmbl., para. 67.

[6] *Summary of the Impact Assessment*, *supra* note 5, at 3.

[7] Treaty on European Union pmbl., Feb. 7, 1992, 1992 O.J. (C 191) 2 ("Reaffirming their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by including provisions on justice and home affairs in this Treaty . . . .") [hereinafter Treaty of Maastricht].

European Union, Articles 21(1) and 45 of the Treaty on the Functioning of the European Union, and developed by EU secondary legislation and the case law of the Court of Justice of the European Union (CJEU).[8] Since the establishment of the European Coal and Steel Community (ECSC),[9] the Council has passed a number of regulations to foster free movement of persons, a major goal of European integration.[10]

Approximately eleven million EU citizens have exercised their right of free movement under the treaties.[11] This movement of people makes it more likely

[8] Consolidated Version of the Treaty on European Union art. 3(2), Oct. 26, 2012, 2012 O.J. (C 326) 1, 17 [hereinafter TEU]; Consolidated Version of the Treaty on the Functioning of the European Union arts. 21(1), 45, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam]; Protocol Integrating the Schengen *Acquis* into the Framework of the European Union, 1997 O.J. (C 340) 93; The Schengen Acquis-Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, Sept. 22, 2000, 2000 O.J. (L 239) 13 [hereinafter Schengen Agreement]; Directive 2004/38, of the European Parliament and of the Council of 29 April 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 Amending Regulation (EEC) 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158); Case C-168/91 Christos Konstantinidis, 1993 E.C.R. I-1191, 1211 (stating that an EU citizen is entitled to earn his living in the European Community he will be treated in accordance with a common code of fundamental values).

[9] Treaty Instituting the European Coal and Steel Community art. 26, Apr. 18, 1951, 261 U.N.T.S. 140, 163. The Council originally appeared as the Special Council of Ministers. *Id.* art. 7.

[10] *See* Directive 2004/38, *supra* note 9. "This directive merges into a single instrument all the legislation on the right of entry and residence for Union citizens, consisting of two regulation and nine directives." SERGIO CARRERA & MASSIMO MERLINO, CTR. FOR EUR. POLICY STUDIES, STATE OF THE ART ON THE EUROPEAN COURT OF JUSTICE AND ENACTING CITIZENSHIP 24 (2009). The Directive also sets out to reduce to the bare minimum the formalities that Union citizens and their families must complete to exercise their right of residence. Directive 2004/38, *supra* note 9, art. 6; *see also* TFEU art. 20(2), *supra* note 9, at 47, 56–57. "[T]he Treaty establishing the European Community secures the free movement of workers simply as an adjunct to the other freedoms." Kristina Touzenis, *Free Movement of Persons in the European Union and Economic Community of West African States: A Comparison of Law and Practice*, *in* UNESCO MIGRATION STUDIES 23 (U.N. Educ., Scientific and Cultural Org., Ser. No. 4, 2012) (citations omitted); *see* Treaty Establishing the European Community art. 48, Aug. 31, 1992, 1992 O.J. (C 224) 6, 20 (as in effect 1992) (now TFEU 45) [hereinafter EC Treaty]. "European citizenship notably confers on every citizen a fundamental and personal right to move and reside freely without reference to an economic activity." Touzenis, *supra*, at 23; TFEU 20(2), *supra* note 8, at 56–57.

[11] DIRECTORATE-GEN. FOR JUSTICE, EUR. COMM'N, FREEDOM TO MOVE AND LIVE IN EUROPE: A GUIDE TO YOUR RIGHTS AS AN EU CITIZEN 5 (2010); *see also* Eveline Ramaekers, *Cross-border Successions. The New Commission Proposal: Contents and Way Forward. A Report on the Academy of European Law Conference of 18 and 19 February 2010, Trier*, ELECTRONIC J. COMP. L., Dec. 2011, at 1, http://www.ejcl.org/151/art151-5.pdf .

that a decedent's estate and heirs are spread out over several member states.[12] Additionally, marriages between nationals of different member states are increasing in frequency.[13] These marriages often entail the acquisition of property in multiple member states,[14] which has the potential to create inheritance complications at the death of a spouse.[15]

Substantial differences in substantive succession laws among many member states are another major source of complications in both testate and intestate cross-border successions.[16] Additionally, member states have conflict of laws rules on cross-border succession that can make it difficult for heirs and testators to assert their rights.[17] The uncertainty with how courts in different member states can hinder the free movement of people that is contrary to principles enshrined in the Founding Treaties.[18]

In July 2012, the European Parliament and the Council passed the Cross-Border Succession Regulation to minimize these complications and simplify the cross-border succession process for EU citizens.[19] The regulation entered into force on August 16, 2012;[20] however, only three articles of the Cross-Border Succession Regulation took immediate effect,[21] whereas a substantial portion of the Regulation will not apply until August 17, 2015.[22] Before the Regulation takes full effect, member states will continue to apply "the rules of private international law . . . in force, at the time the disposition was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession."[23]

The Cross-Border Succession Regulation leaves several issues unresolved and creates new succession planning challenges for EU citizens. The European Parliament and the Council need to address some of these shortcomings and

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12 Ramaekers, *supra* note 11, at 2.
13 *Commission Green Paper: Succession and Wills*, at 3, COM (2005) 65 final (Mar. 1, 2005).
14 *Id.*
15 *See id.*
16 *See Summary of the Impact Assessment*, *supra* note 5, at 3.
17 *Id.*
18 *See* TEU art. 3(2), *supra* note 8, at 17; TFEU art. 45, *supra* note 8, at 65–66; *Id.*
19 Cross-Border Succession Regulation, *supra* note 1.
20 *Id.* art. 84.
21 *Id.* Articles 77–78 will take effect on January 16, 2014. *Id.*
22 *Id.*
23 *Id.* art 83(3).

new challenges to adequately promote the free movement of people under the Maastricht Treaty. The European Parliament and the Council must also focus their resources on tackling cross-border inheritance tax inequalities within the European Union.

Part I of this Comment describes the harmonization of international succession laws through private international laws. Part II discusses the Cross-Border Succession Regulation passed by European Parliament and the Council in July 2012. Part III analyzes the shortcomings of the new regulation and the objections to it made by the United Kingdom, Ireland, and Denmark. It also notes obstacles that member states may face once the Regulation goes into effect. Finally, Part IV suggests solutions to some of the shortcomings of the Cross-Border Succession Regulation.

I. BACKGROUND

The European Union's Cross-Border Succession Regulation passed in July 2012 is the product of decades of development.[24] From the emergence of private international laws on cross-border succession through the recent efforts of the European Parliament and the Council to harmonize cross-border succession laws with the European Union, there is a long history of progress in this area of law.[25] Despite these developments, the European Parliament and the Council still need to address several potential complications that can arise in cross-border successions. Private international law treaties that address cross-border succession are inadequate to resolve the uncertainties within the European Union, because few member states have ratified those treaties.[26] In 1998, the European Council and the European Commission adopted the Vienna Action Plan,[27] which would become the genesis of the Cross-Border Succession Regulation passed by the European Parliament and the Council in July 2012.[28]

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[24] *See infra* Part I.B.

[25] *See infra* Part I.B.

[26] *See infra* Part I.B.

[27] 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, 1999 O.J. (C 19) 1 [hereinafter Vienna Action Plan].

[28] *See* Cross-Border Succession Regulation, *supra* note 1.

A. The Need for a Solution to Complications Involved in Cross-Border Successions in the European Union

The differences among member states' private international law rules on cross-border succession create complications that conflict with the fundamental human right to own and transfer property.[29] In 2009, the Commission estimated that every year in the European Union "around 9–10% of the total number of successions (ca. 450,000) involves an 'international' dimension,"[30] each with an average value of €274,000, which is "around double the value of an average estate."[31] Based on these numbers, cross-border successions in the European Union involve around €123 billion each year.[32] Cross-border successions present unique difficulties and problems for testators, beneficiaries, and administers.[33]

These problems include: (1) determining which member state's judicial system has legal competency to handle a particular cross-border succession; (2) resolving conflict of laws issues; (3) limited freedom of choice of law for testators; (4) restricted recognition and enforcement of judgments, non-contentious decisions, and notarial deeds; and (5) being recognized as an heir or administrator of an estate with assets and heirs located in multiple countries.[34] These problems arise out of divergence among national substantive laws, procedural rules, and conflict of laws rules on succession among member states.[35] The consequences of these problems include: (1) intended heirs failing to inherit estate assets; (2) unintended persons inheriting estate assets; (3) heirs receiving shares of estate assets differing from what was intended; (4) heirs facing long delays in obtaining their inheritances; (5) added costs in

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[29] *Opinion of the European Economic and Social Committee on the Green Paper on Succession and Wills (COM(2005) 65 final)*, 2006 O.J. (C 28) 1, 2 [hereinafter *Opinion of the EESC on the Green Paper on Succession and Wills*].

[30] *Summary of the Impact Assessment*, *supra* note 5, at 4; *accord* Ramaekers, *supra* note 11, at 1.

[31] *Summary of the Impact Assessment*, *supra* note 5, at 4.

[32] *Id.*

[33] *See Commission Staff Working Document, Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Successions and on the Introduction of a European Certificate of Inheritance, Impact Assessment*, at 8, SEC (2009) 410 final (Oct. 14, 2009) [hereinafter *Commission Impact Assessment*].

[34] *Id.* at 10–14; *Opinion of the EESC on the Green Paper on Succession and Wills*, *supra* note 29, at 2.

[35] *Opinion of the EESC on the Green Paper on Succession and Wills*, *supra* note 29.

international estate administration; and (5) difficulty in international succession planning.[36]

The first problem driving the development of the Cross-Border Succession Regulation was the difficulty heirs faced when determining which country's judicial system was competent to administer a cross-border succession.[37] Before the Cross-Border Succession Regulation, it was possible that the laws of two or more member states could apply to a succession and the authorities of those member states would both attempt to administer it.[38] Eveline Raemakers proposes the example in which an intestate Polish decedent, whose last habitual residence was in France, would have his habitual residence determine the applicable law of succession, under French law.[39] Polish law, on the other hand, focuses on the decedent's nationality, which would make Polish law applicable to the decedent's succession.[40] This is known as a positive conflict of jurisdiction.[41]

Alternatively, another potential conflict is a negative conflict of jurisdiction.[42] In this situation, both countries' law does not seem to apply to a succession, and the authorities of both member states may decline to handle the succession.[43] For example, a French decedent's last habitual residence was in Poland. According to French law, the decedent's last habitual residence determines the applicable law.[44] That would indicate that Polish law applies. However, according to Polish law,[45] the decedent's nationality determines which law is applicable,[46] which would indicate that French law applies to the succession. Here, neither county's laws seem to apply.

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36 *Commission Impact Assessment*, *supra* note 33, at 15.

37 *Id.* at 10.

38 *Id.*

39 CODE CIVIL [C. CIV.] arts. 102–03, 111, 720 (Fr.); Ramaekers, *supra* note 11, at 3.

40 Ustawa z dnia 4 lutego 2011 r. Prawo Prywatne Międzynarodowe [Private International Law] art. 64, §§ 1–2, Dz. U. 2011 Nr. 80, Poz. 432, at 4904 (Pol.); *see also* Ramaekers, *supra* note 11, at 3.

41 *Commission Impact Assessment*, *supra* note 33, Annex 1–Glossary, at 51.

42 *Id.*

43 *See* Ramaekers, *supra* note 11, at 3. The following example is based on Ramaeker's explanation of the conflict by using the composer Frédéric Chopin. *Id.*

44 CODE CIVIL [C. CIV.] arts. 102–03, 111, 720 (Fr.); *see* Ramaekers, *supra* note 11, at 3.

45 Prawo Prywatne Międzynarodowe [Private International Law] art. 64, §§ 1–2 (Pol.); Ramaekers, *supra* note 11, at 3.

46 Prawo Prywatne Międzynarodowe [Private International Law] art. 64, §§ 1–2 (Pol.).

These positive and negative conflicts that give rise to problems in cross-border successions occur primarily, because member states have adopted widely varying and conflicting connecting factors to determine the competence of their courts in international succession cases.[47] Connecting factors determine which member state's succession law applies.[48] Among the different connecting factors member states use are: the last habitual residence of the decedent; in cases of contentious litigation, the nationality of the decedent and the habitual residence of the parties; and the location of the property.[49] Additionally, some countries apply different state succession laws based on dividing property based on the nature of the asset; for example, the law of the decedent's last habitual residence applies to movable assets, and the law of the location of property applies to immovable assets.[50] These differing connecting factors make it difficult for citizens to determine which country's court will have competence to extend jurisdiction over a succession.[51]

A second problem the drafters of the Cross-Border Succession Regulation sought to resolve were discrepancies among the conflict of laws rules among EU member states.[52] For example, seventeen member states have unitary systems in which all succession property, wherever it is located, is subject to a single law.[53] Less than half of the EU member states have systems in which movable and immovable property can be subject to different laws if they are located in different states.[54] The conflict between these two approaches is apparent in a hypothetical situation in which an Italian decedent habitually residing in Italy, has a house in England. Italy has a unitary system, so Italian courts would apply Italian succession law to the entire estate,[55] including the house in England.[56] However, English courts would apply English succession law, which follows the law of the property's location.[57]

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47 *Commission Impact Assessment*, *supra* note 33, at 8.
48 *Id.* at 11.
49 *Id.* at 10.
50 Ramaekers, *supra* note 11, at 2.
51 *Commission Impact Assessment*, *supra* note 33, at 10.
52 *Id.* at 11.
53 *Id.* at 12.
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*

A third problem driving the development of the Cross-Border Succession Regulation was the limited choice of law for testators in cross-border succession planning.[58] Most EU member states do not allow testators to designate the law with which they want to govern their succession in their will.[59] Those member states that do allow testators to choose place strict limitations on the choice of law.[60] This creates a problem for those EU citizens who take advantage of their right to free movement. Many people who move are not aware that a will may no longer have its intended effect in their new state residence.[61]

A fourth problem the difficulties created by restricted recognition and enforcement of judgments, non-contentious decisions, and notarial deeds among EU member states in cross-border succession cases.[62] The recognition and enforcement of judgments regarding matters of succession were specifically excluded from the scope of The Brussels I Regulation, which focused generally on the mutual recognition of judgments within the European Union.[63] Under Brussels I, a member state must recognize a judgment given by a court or tribunal of any other member state without special proceedings, unless the recognition is contested.[64] Under no circumstances may a judgment from another member state be reviewed as to its substance.[65] Because the Regulation specifically exempts matters of succession, member states were left with uncertainty as to whether a judgment by a court in one member state would be recognized and enforced in another member state.[66]

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58 *Commission Impact Assessment*, *supra* note 33, at 13.

59 *Id.* "No choice of law is admitted in Austria, [Croatia,] Cyprus, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Spain, Sweden, and Czech Republic." *Id.* at 13 n.17; *accord* Conseil des Notariats de l´Union Européenne, *Which Law Applies? Can I Choose the Law Applicable to My Succession?*, SUCCESSIONS IN EUR., http://www.successions-europe.eu/en/croatia/topics/which-law-applies_can-i-choose-the-applicable-law-to-my-inheritance/ (last updated July 10, 2012).

60 *Commission Impact Assessment*, *supra* note 33, at 13. For example, "[a]lthough Belgium grants a limited choice, this choice is not valid if the result is to deprive one of the heirs of his/her rights to a reserved portion to which he/she would be entitled according to the succession law normally applicable." *Id.* at 13 n.18.

61 *Id.* at 13.

62 *Id.*

63 Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters, 2000 O.J. (L 12) 1 (EC) [hereinafter Brussels I].

64 *Id.* art. 33.

65 *Id.* art. 36.

66 *Commission Impact Assessment*, *supra* note 33, at 13.

Finally, the drafters of the Cross-Border Succession Regulation recognized that heirs and administrators of estates have difficulty gaining recognition by authorities in multiple states, and have trouble identifying whether a decedent has wills in multiple jurisdictions.[67] Also, prove their status as an heir or administrator, they are often faced with costly, time-consuming, and redundant procedures, because each member state uses its own criteria and requires different evidence levels.[68] For example, banks in Luxembourg are often faced with questions of the legal value and validity of documents—like the German *Erbschein* or the French *act de notoriete*,[69] because these are not documents that are used in Luxembourger succession cases.[70]

B. The Development of Private International Law on Cross-Border Succession

Cross-border succession problems that emerge when a decedent dies with estate assets in multiple states are not unique to the European Union.[71] These problems span the entire globe. For this reason, the international community sought to create private international law to resolve these issues as early as 1961.[72] Although there have been many treaties relating to cross-border succession issues,[73] they have been largely ineffective within the European Union because of the low number of member states that are signatories to each of the relevant treaties.[74]

The Hague Convention of October 5, 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions,[75] known as the Hague Convention on Form, was an early attempt to resolve conflict of laws created by international cross-border successions. Around the world there is a wide

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67 *Id.* at 14.

68 *Id.*

69 *Id.*

70 *Id.*

71 *See, e.g.*, G. Warren Whitaker & Michael J. Parets, *My Client Married an Alien: Ten Things Everyone Should Know About International Estate Planning*, PROB. & PROP., Mar./Apr. 2004, at 25–31 (discussing similar problems in an American context).

72 Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Oct. 5, 1961, 510 U.N.T.S. 175 [hereinafter Hague Convention on Form].

73 *See, e.g.*, *id.*; Convention Concerning the International Administration of the Estates of Deceased Persons, Oct. 2, 1973, 1856 U.N.T.S. 5 [hereinafter Hague Convention on Administration].

74 *See* Hague Convention on Form, *supra* note 72, at 177 n.1; *see also* Hague Convention on Administration, *supra* note 73, at 20 n.1.

75 Hague Convention on Form, *supra* note 78.

variation in the requirements for executing wills, and this convention provides for more uniform guidelines.[76] Under this convention, a testator can choose to create a will according to: (1) the laws of the state where the testator executed it; (2) the laws of the testator's nationality; (3) the law of the state where the testator is domiciled or has a habitual place of residence at the time the will is executed or at the testator's death; or (4) the law of the state where any immobile property is located.[77] Nineteen out of twenty-eight EU member states have signed this convention; seventeen have also ratified or acceded to it.[78]

Although the Hague Convention on Form addressed testator choice of law,[79] there was still a risk that a testator's will would not be found upon their death. The 1972 Basel Convention on the Establishment of a Scheme of Registration of Wills was an attempt by the Council of Europe to resolve the difficulty of locating wills.[80] The Basel Convention provides for a system by which testators can register their wills in an attempt to reduce the risk of a will remaining unknown or being found belatedly.[81] The Basel Convention allows registration of formal wills declared to a notary public, wills deposited with an authorized authority, and holographic wills deposited with a notary public may be registered.[82] The Basel Convention also provides a simple process for persons to obtain information about a testator after the testator's death by presenting proof of death.[83] Only thirteen EU member states are signatories to this convention, and only ten have ratified it.[84]

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[76] *Id.* art. 1.

[77] *Id.*

[78] See *Overall Chart of Signatures, Ratifications and Accessions of the Hague Conventions*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/upload/statmtrx_e.pdf [hereinafter *Overall Chart of Signatures, Ratifications and Accessions of the Hague Conventions*] (last updated Nov. 12, 2013), for a list of signatures, ratifications and accessions to the Hague Conventions. The member states that are parties to this Convention are: Austria, Belgium, Croatia (as a successor to the former Yugoslavia), Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovenia (as a successor to the former Yugoslavia), Spain, Sweden, and United Kingdom. *Id.*

[79] *See* The Hague Convention on Form, *supra* note 78.

[80] Convention on the Establishment of a Scheme of Registration of Wills pmbl., *opened for signature* May 16, 1972, E.T.S. No. 77, 1138 U.N.T.S. 243 [hereinafter Basel Convention].

[81] *Id.* pmbl.

[82] *Id.* art. 4(1).

[83] *Id.* art. 8(2).

[84] Belgium, Cyprus, Denmark, Estonia, France, Germany, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom signed the Convention. See Council of Eur. Treaty Office, *Chart of Signatures and Ratifications: Convention on the Establishment of a Scheme of Registration of Wills: CETS No.: 077*, COUNCIL EUR., http://www.conventions.coe.int/Treaty/Commun/print/ChercheSig.asp?

Another succession issue that remained unaddressed by a majority of member states was how to administer a cross-border succession while minimizing conflict between states. The Hague Convention Concerning the International Administration of the Estates of Deceased Persons (Convention on Administration), was created to facilitate the administration of cross-border successions.[85] The Convention on Administration established an international certificate designating the administrator of a particular estate that would then be recognized among the other contracting states.[86] This certificate creates a solution to the difficulty of administrators being recognized in multiple countries in cross-border successions. The Convention on Administration designates that the state of the decedent's habitual residence should have its appropriate authority draw up the certificate of administration and clarifies what law is to be used when designating the holder of the certificate.[87] It also provides narrow situations in which the recognition of the certificate of administration can be refused by a contracting State.[88] Only seven EU member states are signatories and ratifiers to the Convention on Administration.[89]

Next, the International Institute for the Unification of Private Law (UNIDROIT) Convention Providing a Uniform Law on the Form of an International Will, established an "international will" that would eliminate the need to follow the domestic will-drafting laws of the contracting states.[90] An annex to this convention provides that a will shall be valid irrespective of the place where it was made and of the nationality, domicile, or residence of the testator if it was made in a form that complies with the requirements of the Annex.[91] This convention offers a valid solution to the problem of different laws applying to wills and the execution of wills in different member states,

NT=077&CM=8&DF=29/10/2013&CL=ENG (last visited Sept. 24, 2013), for a list of all signatories to and ratifiers of the Basel Convention.

85 *See* Convention on Administration, *supra* note 79, pmbl.

86 *Id.* art. 1.

87 *Id.* arts. 2–3.

88 *Id.* arts. 13–17.

89 *The Hague Conventions: Signatures, Ratifications and Accessions by the European Union and its Member States*, *supra* note 78.

90 Convention Providing a Uniform Law on the Form of an International Will cmt., Oct. 26, 1973, S. TREATY DOC. NO. 99-29 (1986).

91 *Id.* annex, art. 1.

but only eight of the twenty-eight EU member states signed and/or ratified this convention.[92]

Twelve years later, the Hague Convention on the Law Applicable to Trusts and on their Recognition, established a common provision on the laws applicable to trusts.[93] It also provides contracting states with some predictability when a trust is established with assets located in more than one contracting state.[94] The convention gives the settlor of the trust the authority to choose the law that will govern the trust.[95] It also provides the default law of the jurisdiction most closely connected to the settlor and trust to apply when the settlor does not specify the applicable law.[96] Only seven of the twenty-eight EU member states are parties for have acceded to this convention.[97]

Finally, the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons establishes common provisions on the law applicable to the succession of decedents' assets.[98] The convention provides that where decedents were nationals of their habitual residence, that state's laws govern the succession.[99] However, if the decedent was not a national in the state of their habitual residence, that state's law only governs if the decedent had been a resident of that state "for a period of no less than five years immediately preceding his death."[100] Otherwise, the law of the state where the decedent was a national governs, "unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies."[101] A unique feature of this convention is that it applies

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92 Int'l Inst. for the Unification of Private Law, *Status Report: Convention Providing a Uniform Law on the Form of an International Will*, UNIDROIT, http://www.unidroit.org/english/implement/i-73.pdf (last visited October 28, 2013).

93 Convention on the Law Applicable to Trusts and on Their Recognition pmbl., July 1, 1985, 1664 U.N.T.S. 311.

94 *Id.* art. 1

95 *Id.* art. 6.

96 *Id.* art. 7.

97 The Convention on the Law Applicable to Trusts and on Their Recognition has entered into force in seven EU Member States: Cyprus, France, Italy, Luxembourg, Malta, Netherlands (European territory only), and the United Kingdom (including thirteen Dependent Territories/Crown Dependencies). *The Hague Conventions: Signatures, Ratifications and Accessions by the European Union and its Member States*, *supra* note 78.

98 Convention on the Law Applicable to Succession to the Estates of Deceased Persons pmbl., Aug. 1, 1989, 28 I.L.M 150.

99 *Id.* art. 3(1).

100 *Id.* art. 3(2).

101 *Id.* art. 3(3).

even if the applicable law is the law of a "non-Contracting State."[102] This means that there is potential for a Contracting State to apply the law of a non-contracting state. The Netherlands and Luxembourg are the only EU members that have signed this convention.[103]

There are several conventions in place on issues surrounding cross-border succession. These conventions are largely ineffective within the European Union, however, because not all member states that have ratified them.[104] As a result, the European Union needed to promulgate legislation simplifying cross-border succession supported by all, or at least a majority, of its member states.

C. The Genesis of the Current Regulation

In 1998, the European Council and the European Commission adopted the Vienna Action Plan,[105] which outlined the priorities of the European Union for the upcoming five years.[106] Among the priorities was the adoption of a European instrument relating to successions.[107] Then, in 1999, the European Council called for the development of a genuine European Area of Justice where the complexity and incompatibility of legal and administrative systems of EU member states would not prevent or discourage individuals and businesses from exercising their rights, including the right to free movement.[108] Though listed as a priority in 1998 in the Vienna Action Plan and addressed again in 1999 by the European Council,[109] the area of cross-border succession was excluded from some of the important legal documents that made progress toward the creation of a genuine system of European Area of Civil Justice. Specifically, succession was left out of the Brussels I Regulation.

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[102] *Id.* art. 2.

[103] *See Ratifications and Accessions by the European Union and its Member States*, *supra* note 78.

[104] *See supra* notes 79, 80, 91, 96, 101, 104, 109.

[105] *See* Vienna Action Plan, *supra* note 27.

[106] *Id.* at 2, para. 4.

[107] *Id.* at 10, para. 41(c).

[108] Nicole Fontaine, President of the Eur. Parliament, Presidency Conclusions: Tampere European Council, No. 03/S-99, para. 28 (Oct. 15–16, 1999) [Presidency Conclusions: Tampere European Council].

[109] *See* Vienna Action Plan, *supra* note 29, at 10, para. 41(c); Presidency Conclusions: Tampere European Council, *supra* note 108.

The Tampere European Council advocated for the Council and the European Parliament to draft an instrument on succession.[110] The Commission adopted the Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters in 2001.[111] Furthermore, in 2004, the Hague Programme, endorsed by the European Council, called for a Green Paper reporting on succession that would cover a range of issues,[112] including applicable law, jurisdiction, and recognition and administrative measures to simplify succession.[113] On March 1, 2005, a Green Paper on succession and wills was presented by the Commission,[114] starting the debate and discussion that led to the drafting of the Cross-Border Succession Regulation, simplifying cross-border inheritance across member states.[115]

Over the next seven years, the Commission worked with the European Economic and Social Committee (EESC), European Parliament, and Council to write the Regulation before its adoption on July 4, 2012.[116]

II. OVERVIEW OF THE CROSS-BORDER SUCCESSION REGULATION

The drafters of the Cross-Border Inheritance Regulation recognized early in the drafting process that a full harmonization of the rules of substantive law on successions and wills among member states was improbable,[117] so they focused the Cross-Border Succession Regulation on conflict of laws rules.[118]

The European Parliament and the Council drafted the Cross-Border Succession Regulation aiming to: (1) allow EU citizens to plan successions in

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[110] *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*, at 3, COM (2004) 401 final (June 2, 2004).

[111] Council Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters, 2001 O.J. (C 12) 1, 8.

[112] *Communication from the Commission to the Council and the European Parliament–The Hague Programme: Ten Priorities for the Next Five Years, The Partnership for European Renewal in the Field of Freedom, Security and Justice*, at 31, COM (2005) 184 final (May 10, 2005).

[113] *Id.* at 11.

[114] *Green Paper on Succession and Wills*, *supra* note 13.

[115] *See id.* at 3.

[116] *See* Cross-Border Succession Regulation, *supra* note 1.

[117] *See id.* pmbl., paras. 10–13 (noting aspects of succession law that would not be addressed in the Regulation).

[118] *Id.* pmbl., para. 2.

advance; (2) increase the protection of the rights of potential heirs and creditors; (3) ensure the recognition of rights and decisions; and (4) ensure the freedom of movement of persons between member states.[119]

The Cross-Border Succession Regulation resolves many of the problems that motivated its drafting. It allows a single competent authority, defined as the authority of the decedent's habitual residence, to be appointed to settle the succession case.[120] The Cross-Border Succession Regulation provides for an entire succession to be governed by the law of one member state,[121] avoiding problems that arise from the difficulty of resolving conflict of laws issues between member states and the ability of the testator to choose the applicable law to govern the testator's succession plan.[122] By default, the applicable law will be the law of the decedent's last habitual residence.[123] However, decedents' may elect to have the inheritance law of their county of nationality apply to the entire succession.[124]

The Cross-Border Succession Regulation also addresses problems with restricted recognition and enforcement of judgments, non-contentious decisions, and notarial deeds, and the difficulty of being recognized as an heir or an administrator of an estate in multiple countries when estate assets and heirs are located in multiple countries.[125] Because the Regulation provides for mutual recognition of authentic instruments, people are able to move freely within the EU. States where assets are located cannot impose additional conditions.[126] Under the Cross-Border Succession Regulation, the European Certificate of Succession makes it easier for heirs, legatees with direct right in succession, and executors of wills to prove their status, and respectively their rights as such, in another member state—constituting uniform proof of a person's capacity as heir, or powers as an administrator, of the estate.[127] Member states' domestic courts and authorities must recognize this certificate, which will help simplify and speed up the procedure of administration.[128]

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119 *Id.* pmbl., paras. 59, 80.
120 *See id.* art. 5.
121 *Id.* pmbl., para. 37.
122 *Id.*
123 *Id.* art. 21(1).
124 *Id.* pmbl., paras. 38–39.
125 *Id.* art. 63(1).
126 *Id.* pmbl., para. 7.
127 *Id.* arts. 69(1)–(2).
128 *Id.*

The Cross-Border Succession Regulation does "not affect the competence of . . . Member States['] [domestic authorities] to deal with matters of succession."[129] National laws concerning successions will continue to remain in force.[130] However, the Regulation does enable people to clearly stipulate and, to a certain extent, choose the law applicable to cross-border successions.[131] The Regulation will help facilitate mutual recognition of a person's capacity as heir. The Cross-Border Succession Regulation provides that the member state where property is located is competent to administer the succession if the member state's property law requires the intervention of its authorities to take measures relating to the transmission of the property and its recording in land registries.[132]

The Cross-Border Succession Regulation ensures that member states with laws intended to guarantee support for the relatives of the decedent,[133] in particular, the mechanism concerning the reserved shares of the estate,[134] are respected. [135] Additionally, the Cross-Border Succession Regulation itself does not impinge on testators' ability to make *inter vivos* gifts. It is the member state's domestic succession law (determined to be applicable pursuant to the Cross-Border Succession Regulation) that stipulates whether *inter vivos* gifts are taken into account to determine what an heir will inherit under their domestic succession law.[136] This avoids undermining the mechanisms some member states employ to protect relatives, such as reserved portions.

The United Kingdom, Ireland, and Denmark exercised their ability under the Treaties to opt out of the Regulation.[137] The Cross-Border Succession Regulation will enter into force over the next three years.[138]

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129 *Id.* art. 2.
130 *Id.* pmbl., para. 67.
131 *Id.* art. 22.
132 *Id.* pmbl., para. 18.
133 *Id.* art. 29(3).
134 *Id.*
135 *Id.*
136 *Id.* pmbl., para 14.
137 *See* TFEU, *supra* note 8; Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice arts. 1–2, 4, Oct. 10, 2012, 2012 O.J. (C 326) 295–96 [hereinafter Protocol No. 21]; Protocol (No. 22) on the Position of Denmark arts. 1–2, Oct. 10, 2012, 2012 O.J. (C 326) 299–300 [hereinafter Protocol No. 22]; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]; Treaty of Amsterdam, *supra* note 8.
138 Cross-Border Succession Regulation, *supra* note 1, art. 84.

III. SHORTFALLS OF THE REGULATION

The European Union's Cross-Border Succession Regulation provides for the resolution of several problems previously discussed in cross-border successions. However, in the few months since its passage, several new issues have surfaced and some pre-existing problems still have not been addressed.

Part III of this Comment is divided into Subparts addressing seven problems, some new and some not addressed by the Cross-Border Succession Regulation. Subpart A addresses potential problems that may arise when using "last habitual residence" as a connecting factor to determine the law applicable to a succession. Subpart B addresses the problem of mandatory division schemes in member states' domestic laws. Subpart C addresses the ambiguity in determining which courts have competency and jurisdiction over cross-border succession cases left by the Regulation. Next, Subpart D covers objections to the Regulation from the United Kingdom, Denmark, and Ireland, which opted out of the Regulation, and the problem with their lack of participation. Subpart E addresses the problem created by the Regulation not addressing trusts. Finally, Subpart F addresses problems with overlapping inheritance taxes among member states in cross-border succession cases.

A. The Problem of "Last Habitual Residence" as a Connecting Factor

Using "last habitual residence" as the connecting factor has the potential to create problems in implementing the Cross-Border Succession Regulation.[139] First, "last habitual residence" has not been defined in the Regulation.[140] This was an unwise decision on behalf of the drafters. This term is essential to succession law and, more likely than not, some member states will interpret this term differently.

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[139] *See supra* text accompanying notes 50–53 for an overview of the standard of "last habitual residence."

[140] *See generally* Cross-Border Succession Regulation, *supra* note 1. The regulation merely states:

> In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.

Id. pmbl., para. 23.

The use of the decedent's "last habitual residence" as a connecting factor would be strengthened by defining it in the Regulation. Without a definition, questions are sure to arise. Member states unfamiliar with this term may question how long someone must live within their country before they are considered a habitual resident. For example, a German national retires to the French countryside and dies after living there for less than one month. The decedent's will does not specify that German law should govern the succession. Would the decedent be considered a habitual resident of France, despite living there for less than thirty days? Under the Cross-Border Succession Regulation the answer is not clear. Additionally, "last habitual residence" is not a stable connecting factor. It has the potential to change over a person's lifetime and invites litigation over which member state will determine a decedent's last habitual residence. A more stable connecting factor would be the nationality of a decedent or the location of estate assets.

The term "habitual residence" as a conflict-of-laws concept emerged, after World War II,[141] when European states "resumed their efforts to unify conflicts rules through the medium of the Hague Conference."[142] Though they did not use the term "habitual residence," the first Hague Convention to use the habitual residence concept dealt with guardianship, reflecting the idea that a ward's incompetence to acquire a domicile on his own made "habitual residence" a more appropriate connecting factor.[143] After that time the concept of "habitual residence" was regularly used in international conventions, but never defined.[144] Since 1951, motions have been made to include definitions of "habitual residence" in both preparatory commissions drafting proposed conventions and the plenary sessions of national delegates.[145] These motions have all been rejected.[146]

The concept of "last habitual residence" has not been addressed by the Court of Justice of the European Union (CJEU) in relation to its use as a

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141 David F. Cavers, "*Habitual Residence": A Useful Concept?*, 21 AM. U. L. REV. 475, 477 (1972).

142 *Id.*

143 Convention Internationale pour Régler la Tutelle des Mineurs arts. 2–3, June 12, 1902, 95 B.S.P. 421 (U.K.).

144 Cavers, *supra* note 141, *passim.*

145 L.I. de Winter, *Domicile or Nationality? The Present State of Affairs*, *in* 128 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 347, 428 (1969) [hereinafter *Domicile or Nationality?*]; *cf.* Cavers, *supra* note 141, at 485.

146 *Domicile or Nationality?*, *supra* note 145, at 428; *cf.* Cavers, *supra* note 141, at 485 (quoting *Domicile or Nationality?*, *supra* note 145, at 248) (alteration in original).

connecting factor in succession cases.[147] The concept, however, has been addressed in Case C-523/07, *A*, which involved a parental responsibility dispute between a mother and a public welfare agency.[148] One of the questions in *A* was how to determine a child's habitual residence.[149] The Advocate General's opinion framed the issue with the need for a precise definition of habitual residence.[150] The European Court of Justice (ECJ) endorsed a fact-based habitual residence test.[151] The Court listed several factors it considered in each individual case, including duration and regularity of residence, the reason for the move, the nationality, the linguistic knowledge, and the social relationships.[152] Although the ECJ addressed the concept of "habitual residence,"[153] its meaning in the context of succession law remains unclear because it is unknown whether the Court would apply the same factors when determining the "last habitual residence" of a decedent in a succession case.

B. The Problem of Mandatory Division Schemes

Under the Cross-Border Succession Regulation, the law designated in a decedent's succession plan will govern the mandatory division schemes in which the decedent was a national.[154] However, the Regulation gives member states the power to refuse to apply a mandatory division scheme if its effects are "manifestly incompatible" with national public policy.[155] The application of these division schemes will inevitably lead to problems where a member state declines to apply particular division schemes and a foreign property right is unknown in a country.

In the following two succession scenarios, testators may be motivated to choose between the law of their habitual residence and the law of their country

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147 Case C-523/07, A, 2009 E.C.R. I-2805 (interpreting Council Regulation 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, 2003 O.J. (L 338) 1 (EC)).

148 C-523/07, *A*, 2009 E.C.R. at 2839–40.

149 *Id.* at 2844.

150 Opinion of Advocate Gen. Kokott, Case C-523/07, A, 2009 E.C.R. I-2808; C-523/07, *A*, at 2813–14 (judgement).

151 C-523/07, *A*, 2009 E.C.R. I-2813, at 2846–47

152 *Id.*

153 *Id.* at 2854–55.

154 Cross-Border Succession Regulation, *supra* note 1, art. 22.

155 *Id.* art. 35.

of nationality in their succession plan. The application of the Cross-Border Succession Regulation has the potential to be problematic in both cases.

In one scenario, a citizen lives in a member state other than the jurisdiction of their nationality. That person may wish to use the state of their nationality's domestic legal system if it allows them to use a mandatory division of assets regime. The succession law that the testator chooses will govern division of their assets where the testator dies within the European Union.[156] That law should therefore be recognized in all member states, with the exception of the United Kingdom, Ireland, and Denmark, who have exercised their respective opt-out rights for this Regulation.[157] However, the Cross-Border Succession Regulation allows an exception: "The application of a provision of the law of any State specified by [the] Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum."[158] So, a member state can refuse to apply another member state's domestic law if it argues that it is incompatible with its State's domestic policy.[159] Other member states may similarly decline to enforce mandatory division schemes, even where the testator expressly chose the law containing that division scheme and planned their estate with that scheme in mind.

In a second scenario, a nEU Citizen may want to use a property solution in the form of a limited property right not available in the member state of his or her residence. Under Article 31 of the Cross-Border Succession Regulation:

> Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.[160]

The details of the property rights recognized among member states vary.[161] For example, the Dutch right of usufruct differs from the French right of

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156 *Id.* art. 22(3).
157 *Id.*
158 *Id.* art. 35.
159 *Id.*
160 Cross-Border Succession Regulation, *supra* note 1, art. 31.
161 *Impact Assessment*, *supra* note 34, at 9–10.

l´usufruit.[162] Adaptation, therefore, is always needed to apply national property law. This issue will be most problematic if the property right that must be recognized is not known in the receiving member state. For example, the right of usufruct under Dutch law allows the holder of the right to consume the assets under usufruct without a duty to replace.[163] This consumption right differs from French law.[164] In France, if the holder of *l´usufruit* uses assets such as, "money, grain, [and] liquors," the holder must restore the assets with similar quantity and quality assets at the end of the relationship.[165]

Moreover, the Cross-Border Succession Regulation allows a state to refuse foreign limited property rights. The Regulation makes the transformation of the right only necessary in limited circumstances by directing the member state to take "into account the aims and the interests pursued by the specific right . . . and the effects attached to it."[166] It also gives the member state the power to refuse application "if such application is manifestly incompatible with . . . public policy."[167] This ability of refusal does not seem to provide the simplification and predictability that were the goals when the European Parliament and the Council began drafting the Regulation.

C. The Problem of Determining Competent Courts

Under Article 4 of the Cross-Border Succession Regulation, "[t]he courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole."[168] However, Article 22 of the Regulation provides that "[a] person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death."[169] Under these provisions, if a citizen of Germany dies with France as his habitual residence and his will designates German law to govern his succession, French courts must administer his succession under German law.[170]

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[162] *Compare* BURGERLIJK WETBOEK [BW] [CIVIL CODE] 1992, bk. 3, tit. 8, art. 207 (Neth.), *with* CODE CIVIL (C. CIV.] arts. 582–99 (Fr.).

[163] BURGERLIJK WETBOEK [BW] [CIVIL CODE], bk 3, tit . 8, art. 207 (Neth.).

[164] CODE CIVIL [C. CIV.] art. 587 (Fr.).

[165] *Id.*

[166] Cross-Border Succession Regulation, *supra* note 1, arts. 31.

[167] *Id.* art. 35.

[168] *Id.* art. 4.

[169] *Id.* art. 22.

[170] *Id.*

It would be more logical if the decedent were also allowed to choose the forum where his succession case would be administered. The Cross-Border Succession Regulation requires domestic courts to competently administer wills written in foreign languages and governed by the laws of other member states.[171] However, it is unreasonable to expect courts to have the capability to thoroughly understand and execute the laws of twenty-seven other member states and in twenty-four different languages. Additionally, because courts may not fully comprehend the laws of other member states, the rights of potential heirs may be in jeopardy.[172]

D. The Problem of the United Kingdom, Denmark, and Ireland Opting Out

Without the participation of the United Kingdom, Denmark, and Ireland, the European Union will not achieve a complete harmonization of cross-border succession issues. EU citizens will still encounter complications if they live or have assets in the United Kingdom, Denmark, or Ireland, because these countries have exercised their opt-out.

The United Kingdom and Ireland exercised their opt-out because of potential problems that would arise when combining common law with civil law.[173] They also were concerned over the issues of "claw-back," which allows an heir, with a statutory right to an inheritance, to recoup voluntary donations made by the decedent during their lifetime.[174] This principle is common in a majority of member states, but not in the United Kingdom, Denmark, and Ireland.[175] For example, under French law, residents must leave a "reserved" minimum to children—half to an only child, two-thirds to two children, and three-quarters to three or more children.[176] Because the United Kingdom opted out of the Cross-Border Succession Regulation, their courts are not required to administer an estate under the regulation.

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171 *Id.* pmbl., para. 16, 73.

172 *Id.* pmbl., para. 43.

173 HOUSE OF COMMONS, EUROPEAN SCRUTINY COMMITTEE, EUROPEAN UNION INTERGOVERNMENTAL CONFERENCE, 35TH REPORT, 2006-07, H.C. 1014, para. 52 (U.K.); Akkermans, *supra* note 127.

174 See Aaron Schwaback, *Of Charities and Clawbacks: The European Union Proposal on Successions and Wills as a Threat to Charitable Giving*, 17 COLUM. J. EUR. L. 447 (2011), for a discussion of "clawbacks."

175 *Id.* at 456, 463, 471.

176 CODE CIVIL (C. CIV.] arts. 913 (Fr.); *see also* Vincent D. Rougeau, *No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law*, 1 CIV. L. COMMENTS. 1, 8 n.15 (2008).

Even though the United Kingdom, Ireland, and Denmark opted out of the Cross-Border Succession Regulation, their citizens may still be affected by the regulation. As EU citizens, they have the right to move and live freely in other member states, where they could use the provisions of the Cross-Border Succession Regulation to create their succession plan under English law, under the regulation's choice of law provision. For example, a Briton living in France may choose to have the laws of the United Kingdom apply, rather than the French law that requires a "reserved" share for children. Additionally, to the extent English, Irish, or Danish private international law refers to the law of another member state as the applicable law in succession matters, the regulation may have indirect effects.[177] Unfortunately, because the regulation will not take full effect until three years after its adoption, the full range of problems created by this scenario have yet to be discovered.

E. The Problem of the Exclusion of Trusts

Trusts are excluded from the Cross-Border Succession Regulation.[178] Paragraph 13 of the Preamble provides:

> Questions relating to the creation, administration and dissolution of trusts should . . . be excluded from the scope of this Regulation. . . . Where a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries.[179]

Because member states need not recognize cross-border trusts created under a will,[180] unbalanced outcomes between member states could occur. For example, one member state may have to recognize foreign property rights that it generally does not recognize under its own law, but other member states would not be required to recognize a trust created under a will even if the testator designated the law of a member state that does recognize trusts to govern his succession. Additionally, with the increasing prevalence of trusts in

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[177] *See MEPs Welcome New Cross-border Inheritance Law*, BBC: DEMOCRACY LIVE (Mar. 12, 2012), http://news.bbc.co.uk/democracylive/hi/europe/newsid_9702000/9702662.stm; *Inheritance Law Changes*, *supra* note 187.

[178] Cross-Border Succession Regulation, *supra* note 2, pmbl., para. 13

[179] *Id.* pmbl., para. 13.

[180] *Id.*

estate planning, this leaves a huge gap in the regulation and the potential for confusion to arise in the future.

F. The Problem of Paying Multiple Inheritance Taxes

One of the goals of the Cross-Border Succession Regulation was to relieve excessive costs to heirs in cross-border inheritance situations.[181] Yet the regulation states that it:

> [S]hould not apply to revenue matters or to administrative matters of a public-law nature. It should therefore be for national law to determine, for instance, how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. It should also be for national law to determine whether the release of succession property to beneficiaries under this Regulation or the recording of succession property in a register may be made subject to the payment of taxes.[182]

The excessive cost due to taxation in cross-border inheritance has not been resolved because tax issues are specifically outside of the scope of the Cross-Border Succession Regulation.[183]

The European Social Committee expressed its belief that it is important to avoid problems that might arise with regard to double taxation on all or part of an estate.[184] Double taxation could result in inequalities amongst the heirs of an estate depending on the nature of the estate assets they inherited and the countries where those assets are located.[185] The Committee also suggested that the Commission consider proposing a model convention against double taxation with respect to international successions, between member states.[186]

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[181] *Id.* pmbl., para. 67.

[182] *Id.* pmbl., para. 10.

[183] *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession*, at 3, COM (2009) 154 final (Oct. 14, 2009) [hereinafter *Proposal for a Regulation in Matters of Succession and the Creation of a European Certificate of Succession*].

[184] *Commission Staff Working Document*, *supra* note 26.

[185] *Commission Staff Working Paper, Impact Assessment Accompanying the Document Commission Recommendation Regarding Relief for Double Taxation on Inheritances*, at 9, SEC (2011) 1489 final (Dec. 15, 2011).

[186] *Id.* at 28.

The Commission Staff Working Document, published in 2009 alongside the Proposed Succession Regulation, stated that the Regulation on succession should be tax neutral and not entail changes to the member states' national legislation on inheritance taxation, because tax issues expressly outside the scope of the current legislation.[187] Although the Cross-Border Succession Regulation was intended to increase predictability and simplify the succession process, it does not protect EU citizens with property in multiple member states from being taxed by multiple states or being subject to taxation rules that were not planned for by the testator.[188]

Although the Cross-Border Succession Regulation was created to relieve the obstacles that deter people from exercising their right of free movement across the borders of member states,[189] it has not fully accomplished this goal. In a Communication to the European Parliament, the European Commission stated that inheritance taxation is among the biggest obstacles keeping EU citizens from fully enjoying the right of free movement.[190] The European Commission currently is working toward a regulation to harmonize inheritance taxation.[191]

IV. WHERE THE EUROPEAN UNION CAN GO FROM HERE

The Cross-Border Succession Regulation leaves several issues unresolved and creates new challenges for European Union citizens in succession planning. To promote the free movement of people under the Treaties, the European Union needs to address the shortcomings of the Regulation and focus its resources on tackling cross-border inheritance tax obstacles within the European Union.

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[187] *Id.* at 47; *see also Summary of the Impact Assessment*, *supra* note 5, at 10; *Proposal for a Regulation in Matters of Succession and the Creation of a European Certificate of Succession*, *supra* note 183.

[188] *Summary of the Impact Assessment*, *supra* note 5, at 10.

[189] Cross-Border Succession Regulation, *supra* note 1, pmbl., para. 1.

[190] *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Removing Cross-Border Tax Obstacles for EU Citizens*, at 3, 5–6, COM (2010) 769 final (Dec. 20, 2012); *see also Communication from the Commission to the European Parliament, The Council and the European Economic and Social Committee, Tackling Cross-Border Inheritance Tax Obstacles Within the EU*, at 2, COM (2011) 864 final (Dec. 15, 2011).

[191] *Id.*

The full scope of the problems regarding the United Kingdom's, Ireland's,[192] and Denmark's[193] opting out of the Cross-Border Succession Regulation and the exclusion of trusts from the Regulation will be unknown for some time. The problem with using "last habitual residence" as the connecting factor can be resolved by amending the Cross-Border Regulation to include factors to determine a decedent's "last habitual residence." The problems with administering mandatory division schemes and determining competent courts in successions can be resolved by amending the Regulation to harmonize the rules on international jurisdiction with the rules on applicable law as much as possible. Additionally, the European Commission can work toward the adoption of a regulation concerning cross-border inheritance taxation.

A. Addressing the Issue of "Last Habitual Residence" as the Connecting Factor Under the Cross-Border Succession Regulation

By amending the Cross-Border Succession Regulation, the European Parliament and the Council could preempt the dispute that would arise over using the poorly-defined term of "last habitual residence" as the connecting factor for determining the applicable law. The amendment should include a specific definition of "last habitual residence," or establish factors to be considered by a court faced with the task of determining the place of a decedent's last habitual residence.

Some critics suggest that a more stable connecting factor like nationality or location of assets should be used to determine what law will apply when the decedent has not specified this in his or her succession plan.[194] However, the connecting factors of nationality and location of assets would produce their own challenges. For example, if the location of assets was used as the connecting factor, an heir would still be faced with a cumbersome international legal process if the decedent had property located in multiple member states. This would not resolve the issue of the difficulty of being recognized as an heir or an administrator of an estate with assets and heirs in multiple States. Alternatively, complications would likely arise if the decedent held nationality in multiple member states and nationality was used as a connecting factor. In

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192 Protocol No. 21, *supra* note 137.
193 Protocol No. 22, *supra* note 137.
194 *See* Ramaekers, *supra* note 11, at 3.

this situation, there is a high likelihood of parallel proceedings in multiple member states, contravening the Cross-Border Succession Regulation's goal of preventing parallel proceedings in multiple member states.

Amending the Cross-Border Succession Regulation to include factors that courts should consider when faced with the task of determining the place of a decedent's "last habitual residence" is the European Commission's best chance at preempting the disputes that will arise due to the unstable nature of "last habitual residence" as it currently stands. This approach will also preserve the essence of what the Commission wanted to achieve when it decided to use "last habitual residence" as a connecting factor while reducing some of the uncertainty that the concept currently creates for EU citizens.

The Commission should look to the ECJ's 2007 opinion endorsing a fact-based analysis to determine the "habitual residence" of a child in the context of a parental responsibility dispute.[195] Based on the decision in that case, good indicators of "habitual residence" in the succession planning context include the duration, regularity, condition, and reason for the residence and the nationality, linguistic knowledge, and family and social relationships of the alleged resident.[196] By amending the Cross-Border Succession Regulation to include these factors as guidance for determining "last habitual residence," the Commission can ensure that European Union citizens will have a better idea of how to become a "habitual resident" for the purposes of succession planning. Additionally, the national courts of member states will be able to come to more consistent decisions in succession cases where "last habitual residence" is at issue.

B. Resolving the Problems of the Administration of Mandatory Division Schemes and Competent Courts in Succession Cases

Article 4's statement of jurisdiction is problematic if one member state's court is deemed competent to administer an estate under another member state's national succession laws. It is particularly problematic if the applicable law in the succession plan is unknown or runs contrary to the national law of

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[195] Case C-523/07, A, 2009 E.C.R. I-2805 (interpreting Council Regulation 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, 2003 O.J. (L 338) 1 (EC)); *see supra* notes 156–63 and accompanying text.

[196] *A*, 2009 E.C.R. at I-2846; *see supra* notes 156–163 and accompanying text.

the member state administering the estate, such as mandatory division schemes like the French mandatory inheritance for children.[197]

The Cross-Border Succession Regulation should be amended to harmonize the rules on international jurisdiction with the rules on applicable law as much as possible. It would be ideal for the competent court to coincide with the national succession law governing the succession. This already happens if a decedent does not specify a particular law to govern the decedent's succession, because the same connecting factor, "last habitual residence," is used to determine the applicable law and competent court.[198] The problem only arises if a decedent chooses a law other than that of the decedent's habitual residence in the decedent's succession plan, because the decedent cannot also choose the forum for the administration of his estate.[199]

It appears from the language of Articles 5 and 6 of the Cross-Border Succession Regulation that the drafters anticipated these problems, but they did not provide a concrete solution.[200] Article 5 provides that "[w]here the law chosen by the deceased to govern his succession . . . is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter."[201] Article 6 provides:

> Where the law chosen by the deceased to govern his succession . . . is the law of a Member State, the court seised . . . may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets.[202]

The language of Articles 5 and 6 creates solutions for the problems caused by the Cross-Border Succession Regulation's allowance for choice of law and its provision for general jurisdiction, provided that the courts in the member state in which the decedent's habitual residence at the time of death does in

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197 *See supra* notes 204–208 and accompanying text.
198 Cross-Border Succession Regulation, *supra* note 1, art. 4.
199 *Id.* arts. 5–6.
200 *Id.*
201 *Id.* art. 5.
202 *Id.* art. 6(a).

fact decline jurisdiction where there is a more competent court.[203] Rather than leave this to fate, the European Parliament and the Council should amend Article 6 of the Regulation to require that the court of the member state of the decedent's habitual residence at the time of death decline jurisdiction if the decedent designated the law of another member state to govern the succession. This would help ensure that succession plans are properly administered, because the competent court would be interpreting its own law rather the law of another member state.

C. Action at the European Union Level to Relieve Cross-Border Inheritance Tax Obstacles

The Cross-Border Succession Regulation does "not apply to revenue matters or to administrative matters of a public-law nature."[204] Inheritance taxes are outside of the scope of the Regulation, because they fall into the scope of "revenue matters."[205] This is problematic, because heirs in cross-border successions may face taxation in two or more countries if a succession involves a decedent, property, and heirs in member states. The goal of promoting the free movement of people by simplifying the cross-border succession laws has not been fully realized because of the monetary risk to testators and heirs associated with double taxation in cross-border inheritance situations. Although member states can unilaterally create relief mechanisms for double taxation, there also needs to be a solution at the European Union level.

At the EU level, there are several options for a solution. Possible solutions include introducing a EU model tax relief provision or an EU-wide standard on inheritance taxation in the form of a Directive. Another approach would be for the European Union to establish common rules to determine the basis of taxation. These common rules could base taxes on the location of the assets of an inheritance. However, it would be more consistent with the Cross-Border Succession Regulation to base taxation on the "last habitual residence" of the decedent. Additionally, the European Union should harmonize common taxation concepts and definitions used throughout the member states.

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203 *Id.* arts. 5–6.
204 *Id.* pmbl., para. 10.
205 *Id.* art. 10.

By addressing the issue of double taxation in inheritance situations, the European Union can come closer to enabling the free movement of people within the European Union by reducing the costs and uncertainties in cross-border succession cases.

CONCLUSION

The European Parliament and the Council made great strides toward promoting the free movement of people within the European Union when it passed the Cross-Border Succession Regulation. The regulation offers substantial improvement to problems on: (1) determining which member state's judicial system has competency to administer cross-border successions; (2) the difficulty resolving conflict of laws issues; (3) issues with limited choice of law for testators; (4) problems with restricted recognition and enforcement of judgments, non-contentious decisions, and notarial deeds; and (5) difficulty of being recognized as an heir or administrator of an estate in multiple member states when estate assets and heirs are located in multiple States. Although many of the problems that motivated the Cross-Border Succession Regulation were resolved, the Regulation is an incomplete solution. By amending the regulation to include factors for member states' national courts to consider when determining "last habitual residence," to require that the court of the member state in which the deceased had his habitual residence at the time of death to decline jurisdiction if the decedent has designated the law of another member state to govern the succession, and by addressing the issue of double taxation in inheritance situations at the European Union level, the European Parliament and the Council can create a more impactful and lasting solution to the challenges faced by EU citizens in cross-border inheritance and succession planning.

JENNIFER BOST*

* Executive Symposium Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2014); B.A. Art History, *magna cum laude*, Florida State University. The author would like to thank Professor Jeffery Pennell for his help with this Comment. The author would also like to thank the executive board and all staff of the *Emory International Law Review*. Finally, the author would like to thank her family for their loving support in all of her endeavors. Without the encouragement and hard work of those mentioned above, this would not be possible.