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SOME REMARKS ON CHOICE OF COURT ISSUES IN EU CROSS-BORDER SUCCESSION CASES

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This article reassesses the choice of court rule from Art. 5 of the European Succession Regulation (ESR) in light of its systemic relation to the rules on adjustment of jurisdiction when the choice of law has been made (Arts. 6 – 9 ESR) and other rules of ESR, primarily to the choice of law rule from Art. 22 ESR and relevant ESR Recitals. Firstly, it examines whether the parties concerned with succession may choose to leave out some succession matters to the jurisdiction of the courts competent under Arts. 4 and 10 (1) ESR, as a literal interpretation of Art. 5 (1) ESR suggests, or whether the jurisdiction of the prorogated court of the chosen law shall encompass the succession as a whole. Then, it explores which interpretation is more aligned with ESR's rules and objectives and better off in the pursuit of the effective operation of Arts. 5 – 9 ESR in practice. To that end, the present article considers a test example of the EU cross-border succession case that exposes challenges to the proper functioning of justice caused by inadequate interpretation and application of Arts. 5 – 9 ESR and reviews the ongoing legislative discussions for the amendment of choice of court rule of ESR through the scope of its foregoing findings.

Key words: *choice of court; Arts. 5 – 9 ESR; systemic interpretation; EU cross-border succession; the proper functioning of justice.*

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I OVERVIEW OF ART. 5 ESR AND ITS RELATION TO ARTS. 6 – 9 ESR

European Succession Regulation (abbr. 'ESR')¹ enables testators to enhance their estate planning by choosing the law applicable to their succession.² Chosen law shall only be the law of the state whose nationality the testator possessed at the time of making the choice or at the time of death.³ This limited choice of law averts the choice from being made to encroach legitimate expectations of successors and to affect the rights of the forced heirs to the reserved portion. When selected, the law of the testator's nationality governs succession as a whole.⁴ Based on Art. 22 (2) ESR, choice of law must be expressed in the form of disposition of property upon death, which, under Art. 3 (1) lit. d ESR, is characterized as a will, a joint will, or an agreement as to succession.⁵ As ESR rules are devised so as to ensure that the authority dealing with the succession would, in most cases, be applying its own law, Arts. 5 – 9 ESR provide for the adjustment of jurisdiction when choice of law has been made. These rules pursue the synchronization of forum and ius by relocating the competence from the default courts of the habitual residence under Art. 4 ESR and courts competent under Art. 10 (1) ESR⁶ to the courts or non-judicial authorities of

¹ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201 27. 7. 2012, 107.

² Recital 38 ESR: "This Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession. That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share."

³ Art. 22 (1) ESR: "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. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death."

⁴ The scope of the chosen law is listed in Art. 23 (2) ESR.

⁵ Art. 3 (1) lit. d ESR: "Disposition of property upon death means a will, a joint will or an agreement as to succession." Consequently, the choice of law cannot be made as a separate juridical act for the intestate succession.

⁶ For a court to exercise jurisdiction under Art. 10 (1) ESR, the testator must have had their last habitual residence in a third State, while their assets must be located within the jurisdiction of the court competent under Art. 10 (1) ESR. However, the additional connecting factors in Art. 10 (1) ESR – namely, that the deceased either held the nationality of that Member State at the time of death or had habitually resided there within the five years preceding the court's seisure – do not rule out the choice of court e.g. if the deceased was a national of another Member State and had, accordingly, chosen the law of that state. To that effect, Art. 6 ESR expressly speaks of the effects of a choice of court for the courts seised under Arts. 4 and 10 ESR. On the contrary, effects of Art. 6 are not applicable to the court competent under Art. 10 (2) ESR as it

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the chosen law. However, the destiny of this synchronization depends solely on the will of all subjects to the proceedings. For that reason, different prospects are possible.

By virtue of Art. 5 (1) ESR, the parties concerned may agree that a court of the Member State whose law is chosen by the testator is to have exclusive jurisdiction to rule on any succession matter.⁷ Consequently, choice of court in favour of third State courts is not allowed under ESR. Observing this rule from a systemic perspective, a few implications follow: First, under Arts. 6 (1) lit. b and 7 (1) lit. b ESR, the court seised pursuant to Arts. 4 and 10 ESR must decline its jurisdiction if parties to the choice of court agreement conferred jurisdiction on the court of the chosen law,⁸ which proceeds from the exclusivity of such choice under Art. 5 (1) ESR.⁹ Secondly, whereas the choice of court agreement refers to ‘parties concerned’, it might produce effects even if not concluded by all parties, since Art. 9 (2) ESR provides that those who were not a party to the choice of court agreement can contest the jurisdiction of the chosen court anytime during the course of the proceedings where, if so happens, the chosen court shall decline it.¹⁰ Thirdly, the textual interpretation of Art. 5 (1) ESR

assumes that the testator was not a national of any Member State. It is of note that multiple nationalities equally give rise to jurisdiction under Art. 10 (1) ESR, and that the testator’s nationality shall be determined as a preliminary question pursuant to Recital 41 ESR. Since courts will treat the nationality of their forum as the most relevant one, eventual conflicts of jurisdiction have to be resolved through the *lis pendens* rule of Art. 17 ESR.

⁷ Art. 5 (1) ESR: “Where the law chosen by the deceased to govern his succession pursuant to Article 22 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.”

⁸ It may seem practical to use the term ‘national court’ when referring to the prorogated court of the chosen law. However, since the court competent under Art. 10 (1) ESR may also be the court of the testator’s nationality, it is preferable to distinguish these two for the sake of semantic clarity.

⁹ Arts 6 (1) lit. b ESR: “Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the court seised pursuant to Article 4 or Article 10 shall decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law; Art. 7 (1) lit. b ESR: “The courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall have jurisdiction to rule on the succession if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of that Member State.”

¹⁰ Art. 9 ESR: “Where, in the course of proceedings before a court of a Member State exercising jurisdiction pursuant to Article 7, it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court. If the jurisdiction of the court referred to in paragraph 1 is contested by parties to the proceedings who were not party to the agreement, the court shall decline jurisdiction. In that event, jurisdiction to rule on the succession shall lie with the courts having jurisdiction pursuant to Article 4 or Article 10.”

suggests that parties may request the chosen court to rule on ‘any succession matter’ rather than the succession as a whole. This would result in a fragmentation of jurisdiction and thereupon introduce obstacles to the uniform application of the applicable substantive law by the courts of different Member States. Accordingly, the question is whether the courts having jurisdiction under Arts. 4 and 10 (1) ESR are allowed to limit the scope of their proceedings only to matters not dealt with by the chosen court, since Art. 5 (1) ESR lacks clear guidance on the issue. Once the part of the succession matter is excluded by the parties from the proceedings of the chosen court, shall the court having jurisdiction under Arts. 4 and 10 (1) ESR reassert its jurisdiction over the excluded matter, and if so, on what grounds is it justified? Inasmuch as the meaning of the sentence ‘any succession matter’ from Art. 5 (1) ESR is treated differently in the literature,¹¹ the examination of its preferred interpretation will be decisive for the analysis of issues related to the choice of court.

Additionally, Art. 6 (1) lit. a ESR enables one of the parties to the proceedings to request courts seised under Arts. 4 and 10 (1) ESR to decline its jurisdiction and examine if the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account, inter alia, the habitual residence of the parties and the location of the assets.¹² If the answer is positive, the jurisdiction will be transferred to the court of the chosen law. However, if the transfer of competence occurs, nothing seems to prevent other heirs to contest transferred jurisdiction, which means that in both situations – where the choice of court is made by an agreement (Art. 6 (1) lit. b ESR) and as a result of the request of one of the parties (Art. 6 (1) lit. a ESR) – the choice of court remains unstable, and its effect depend on all subjects of the succession proceedings.

¹¹ Slavko Đorđević considers that a clear wording of Art. 5 ESR read together with Recital 28 ESR supports the interpretation which enables parties to deliberately break the ‘unity of succession’ on the jurisdictional level, see in: S. Đorđević, *Some Remarks on Prevention and Resolution of Positive Jurisdiction Conflicts Between Croatian (Member State) and Serbian Courts in Cross-border Succession Cases – From Croatian (EU) and Serbian Point of View*, *Pravni vjesnik - Journal of Law and Social Sciences of the Faculty of Law Josip Juraj Strossmayer University of Osijek*, 36/2, 2020, 30; On the contrary, Felix Odersky believes that, due to systemic reasons, Art. 5 ESR must satisfy the requirements of the Art. 22 ESR and, consequently, refer to the ‘succession as a whole’, whereas Recital 28 ESR serves as a guiding principle to determine who are the ‘parties concerned’ in the choice of court agreement for the purposes of Art. 5 ESR; see F. Odersky, *Article 5*, in: *EU Regulation on Succession and Wills – Commentary* (ed. U. Bergquist *et. al.*), Verlag Dr. Otto Schmidt KG, Cologne, 2015, 70 – 74.

¹² Art. 6 (1) lit. a ESR: “Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the court seised pursuant to Article 4 or Article 10 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.”

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Finally, ESR allows parties to settle their succession amicably out-of-court, irrespective of whether the courts of Member States initiate probate proceedings ex offio. If they do, Art. 8 ESR enables parties to avoid the jurisdiction of Member States under Arts. 4 and 10 ESR and opt for the out-of-court proceedings in the Member State of the chosen law.¹³ If the courts do not commence probate proceedings ex offio,¹⁴ Art. 8 ESR is not applicable but, instead, Recital 29 sentence 2 and 3 ESR allows the parties to amicably settle succession in a Member State of their choice if that is possible under the law of that Member State.¹⁵ These rules, therefore, create the potential for several out-of-court settlements regarding the same succession to proceed parallelly across Member States. In such a situation, Recital 36 ESR instructs the parties involved, once they become aware of the parallel proceedings, to agree among themselves on how to proceed.¹⁶ If the agreement cannot be reached, the succession would have to be dealt with by the courts having jurisdiction under Arts. 4 and 10 ESR.

¹³ Art. 8 ESR: “A court which has opened succession proceedings of its own motion under Article 4 or Article 10 shall close the proceedings if the parties to the proceedings have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the deceased pursuant to Article 22.”

¹⁴ The majority of Member States follow the principle of ipso iure succession, meaning that estate is transferred to heirs ex lege at the moment of the deceased’s death, without any specific procedure being required, see https://e-justice.europa.eu/topics/family-matters-inheritance/inheritance/succession_en, visit date: 12. 03. 2025. There are also different approaches, such as in case of, e.g., Austrian and Italian succession laws. Aside from specific exceptions, Austrian law does not grant heirs the ipso iure succession of the estate, and a non-contentious proceeding must be initiated by heirs to formally declare the acceptance of the estate (*Einantwortung*). Similarly, under Italian law estate passes to an heir only after the so-called *accettazione* is submitted before the notary or a clerk of the competent court for succession; See §797, and §819 Austrian Civil Code 1811, <https://www.jusline.at/gesetz/abgb/gesamt>, visit date: 12. 03. 2025. and Arts. 459, and 470 – 476 Italian Civil Code 1942, <https://faolex.fao.org/docs/pdf/ita197336.pdf>, visit date: 12. 03. 2025.

¹⁵ Recital 29 sentence 2 and 3 ESR: “Where succession proceedings are not opened by a court of its own motion, this Regulation should not prevent the parties from settling the succession amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the succession is not the law of that Member State.” See also Judgment of 16 July 2020, *E. E*, C-80/19, EU:C:2020:569, para. 87.

¹⁶ Recital 36 ESR: “Given that succession matters in some Member States may be dealt with by non-judicial authorities, such as notaries, who are not bound by the rules of jurisdiction under this Regulation, it cannot be excluded that an amicable out-of-court settlement and court proceedings relating to the same succession, or two amicable out-of-court settlements relating to the same succession, may be initiated in parallel in different Member States. In such a situation, it should be for the parties involved, once they become aware of the parallel proceedings, to agree among themselves how to proceed. If they cannot agree, the succession would have to be dealt with and decided upon by the courts having jurisdiction under this Regulation.”

Correspondingly, in the absence of the choice of court agreement and where the courts competent under Arts. 4 and 10 (1) ESR do not initiate probate proceedings ex offio, it may happen that some of the parties agree to settle the succession amicably out-of-court in the preferred Member State while others may seek to assert their claims before the court of the deceased's last habitual residence unaware of the former proceeding. Given that non-judicial authorities are not subject to the rules of jurisdiction laid down in the ESR,¹⁷ a lack of coordination between these parallel proceedings may result in a disharmonious adjudication. Since the courts of the deceased's habitual residence cannot rely on the *lis pendens* rule of Art. 17 ESR, the result of parallel succession proceedings hinges solely on which authority decides first, while the parties to the out-of-court proceedings are left with the hope that the succession certificate issued in those proceedings will satisfy conditions of Art. 3 (1) lit. i ESR and be recognized as an authentic instrument under Arts. 59 (1) and 60 (1) ESR in a Member State of the deceased last habitual residence. Likewise, it is possible that those judicial and non-judicial authorities involved may treat the testator's national law differently due to their *ordre public* rules, which means that the substantive results of the same succession case could diverge significantly.

Having regard to the reasoning above, the adjustment of jurisdiction under Arts. 5 – 9 ESR between Member States in matters of succession seems to create issues for procedural economy if all subjects involved (courts/non-judicial authorities, heirs, and beneficiaries) disagree on how to conduct the probate proceedings. In addition, inconsistent treatment of the chosen law by different Member State courts may lead to a result that would be incompatible with the testator's last will. Considering that party autonomy of Art. 22 ESR protects the predictability and stability interests of the deceased, the volatile choice of court could not be regarded as serving those interests. Hence, by creating uncertainty and obstacles to the harmonious functioning of justice, inadequate application of Arts. 5 – 9 ESR undermines the objectives of the ESR stipulated in Recital 38 ESR and, therefore, denies the benefits of the internal market to parties concerned with the succession.

In light of those circumstances, the present article will thereafter consider a case exposing the challenges to the proper administration of justice caused by the inadequate interpretation and application of Arts. 5 – 9 ESR and offer the optimal interpretation of these rules to prevent and resolve described challenges in practice. Finally, it will briefly assess the recent recommendations of the Notaries of Europe (abbr. 'RNE')¹⁸ on the amendment of ESR's choice of court rule through the scope of its foregoing findings.

¹⁷ Judgment of 16 July 2020, *E. E.*, C-80/19, EU:C:2020:569, paras. 67 – 68.

¹⁸ Notaries of Europe, *Monitoring and Evaluating the Application of the Succession Regulation EU 650/2012*, 2023, <https://www.notariesofeurope.eu/en/notaries/mape-successions/>, visit date: 12. 03. 2025

II CHALLENGES OF THE APPLICATION OF ARTS. 5 – 9 ESR IN PRACTICE

The analysis of the international jurisdiction in succession matters within the EU requires several lines of observation. The scrutiny of whether a court may take the case, i.e., whether it ‘has’ jurisdiction under ESR, concerns the determination of the following factors: first, according to the Recitals 7 and 67 ESR, the presence of the international element of the case;¹⁹ secondly, whether the deceased last habitual residence was in the forum or, failing that, whether there are additional links and legitimate interest of the forum to exercise jurisdiction under Arts. 10 or 11 ESR; and thirdly, whether capable parties concerned are properly notified of the action and given adequate opportunity to plead.²⁰ If none of the requirements mentioned are met, the court shall decline its jurisdiction under Art. 15 ESR. Conversely, the inquiry into whether a court will take the case, i.e., whether it chooses to exercise the jurisdiction it ‘has’ under ESR, involves two further questions: first, whether the court should decline jurisdiction under Art. 17 (2) ESR and Art. 8 ESR or, at least, may do it under Art. 6 (1) lit. a ESR; and secondly, whether it must do so under Arts. 6 (1) lit. b and 7 (1) lit. b ESR owing to the choice of court agreement. Alongside, the independence of a court in the exercise of its functions requires it to be able to examine its international jurisdiction in the light of all the data available to it, while pursuing the objective of the proper administration of justice, which underlies the EU law.²¹

In order to efficiently resolve cross-border succession cases, most jurisdiction rules of ESR (Arts. 4, 10 (1), and 11 ESR) favour a uniform treatment of the succession, meaning that the court having jurisdiction will rule on the succession as a

¹⁹ The requirement of ‘cross-border implications’ for the application of ESR is expressly confirmed in the Judgment of 21 June 2018, *Oberle*, C-20/17, EU:C:2018:485, para. 32.

²⁰ This condition stems from Arts. 16 and 40 (1) lit. b ESR; Due to their right to an effective remedy and a fair trial under Art. 47 of the Charter of Fundamental Rights of the European Union (abbr. ‘CFR’), parties affected by the succession must be properly served with the process constituting succession proceedings, which has to contain necessary information about the circumstances of the first hearing and the grounds on which the proceedings rely, in order to ensure them with sufficient time to arrange the case. If such a relationship between the court and parties concerned cannot be established, the jurisdiction, in principle, should not be exercised; Similarly, while Member State courts are not required to ex offio verify the existence of a final judgment from other Member States in order to exercise jurisdiction over the succession at hand, it proceeds from Art. 40 (1) lit. c and d ESR that if a party files the res iudicata objection, a court seised must decline jurisdiction to avoid conflicting judgments.

²¹ See to that effect Judgment of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, para. 64, and Judgment of 16 June 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449, para. 45; However, per Advocate General Campos Sánchez-Bordona, this discretion does not entail an active duty to ‘investigate’ whether the evidence submitted by applicants is reliable enough to provide for the conclusive basis for jurisdiction; See Opinion of the Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in *V A and Z A v TP*, C-645/20, EU:C:2021:977, para. 84.

whole,²² while applying one succession law to the entire estate regardless of the type of the assets.²³ Correspondingly, when a choice of law is made by a testator, Art. 5 (1) ESR vests into the parties themselves an opportunity to prorogate a court of that chosen law. The choice of court rule therefore harmonizes forum and ius, ensures that a jurisdiction is available in the Member State of the testator's nationality, and that the selection of the most suitable jurisdiction for the proceedings is entrusted to those for whom the succession bears the prevailing interest.

However, the wording of Art. 5 (1) ESR suggests that the parties concerned may grant jurisdiction to the chosen court for a specific matter rather than the succession as a whole, which, in turn, breaks the unity of succession on a jurisdictional level and may frustrate the testator's intent for the chosen law to govern the entire succession. If such interpretation is correct, the succession proceedings might be partitioned between the court of the chosen law and the courts having jurisdiction under Arts. 4 and 10 (1) ESR. In that respect, there are two possible scenarios. First, a court having jurisdiction under Arts. 4 or 10 (1) ESR is presented with a choice of court agreement that designates specific matters of the case to the chosen court while leaving others in its jurisdiction. Namely, the parties may specify that the court of the testator's nationality shall have jurisdiction over the succession of an immovable property situated there, while preferring the succession of movable assets located at the testator's place of the last habitual residence to be dealt with by those courts. Consequently, the court first seised is bound to decline jurisdiction over the prorogated matter while retaining jurisdiction over what has been left out from the choice of court agreement. Secondly, a court competent under Arts. 4 or 10 (1) ESR is addressed after the choice of court agreement has been presented to the prorogated court. In that case, the courts other than the chosen court would be required to 'reclaim' jurisdiction over the matters that the parties had excluded from the choice of court agreement.

In both instances, nonetheless, a court having jurisdiction under Arts. 4 and 10 (1) ESR will be compelled to exercise jurisdiction contrary to the intended scope of these rules, as they cover the succession as a whole. Albeit Art. 12 (1) ESR enables a court seised to limit the scope of the proceedings to assets located in its jurisdiction, the rule is to be applied solely in succession cases connected to third States, if it is expected that a forum's decision in respect of the assets located in a third State will not be recognized or enforced therein due to the conflict rules of the respective third State.²⁴ Hence, for the forum to exercise jurisdiction under Arts. 4 and 10 (1) ESR

²² See Judgment of 7 April 2022, *VA and Z A v TP*, C-645/20, EU:C:2022:267, para. 37.

²³ Where jurisdiction is based on Arts. 10 (1) and 11 ESR, Member State courts will apply renvoi under Art. 34 ESR. If the referred third State's conflict rules follow the dualist principle and, for example, refer with regard to immovables to a Member State and with regard to movables to another Member State or third State which accepts renvoi, the 'unity of succession' regarding applicable law would be broken.

²⁴ Art. 12 (1) ESR: "Where the estate of the deceased comprises assets located in a third State, the court seised to rule on the succession may, at the request of one of the parties, decide not to

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over the matters excluded from the choice of court agreement by limiting the scope of the proceedings to those matters, it would require the adaptation of the scope of Art. 12 (1) ESR in order to do so. In addition, if the succession proceedings are divided between the courts of the Member State of the testator's last habitual residence and those of the Member State of the testator's nationality, different treatment of the chosen law by the courts of the testator's last habitual residence is possible due to their ordre public rules and, consequently, there appears a risk of divergent results being reached regarding the same succession case.²⁵ Let us now analyse all aforesaid aspects of Art. 5 (1) ESR through the test example.²⁶

The testator died habitually residing in Hamburg, was a Dutch national, and chose Dutch law to govern his succession as a whole. In his last will, testator left all of his estate – a flat in Groningen, a vehicle located in Hamburg, and a cottage situated in Bremen – to his two daughters. Several months before the death, the testator gifted his wife an inter vivos gift – a beautiful seasonal house in the coastal city of Noordwijk – believing that her job as an IT programmer at a major tech company would be sufficient for her financial needs. Consequently, he structured his estate planning primarily to ensure his two young daughters receive the estate to secure their future. Upon the testator's death, all heirs decided to grant Dutch courts the exclusive jurisdiction to rule on the flat located in Groningen as they were in the best position to apply their succession law and all related rules for the conveyance of that property to heirs. Moreover, as all heirs were living in Hamburg with the testator in spouse's flat, it seemed natural to them to conduct the probate proceedings regarding property located in Germany at the local courts of their habitual residence. Assuming for now that German courts would be able to limit their scope of proceedings to the assets located in their jurisdiction, they would apply Dutch law to those assets pursuant to Art. 22 ESR.

However, from the perspective of German courts, the application of Dutch law in the present case may raise significant challenges. Namely, under Art. 4:63 (2) (3),

rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State.”

²⁵ The issues related to the obstacles of access to foreign law and its improper application due to technical reasons of procedure are quite important aspect in this regard as well. However, they are of secondary relevance for the present investigation as those issues might arise regardless of the will of the forum to apply the chosen law exactly as it would be applied by the chosen court.

²⁶ The course of analysis will start from issues stemming from the application of the chosen law since if the jurisdictional issues are to be answered first, i.e., in a way that shows that courts competent under Arts. 4 and 10 (1) ESR are barred from limiting the scope of succession proceedings in cases connected to other Member States to matters left out by the choice of court agreement using Art. 12 (1) ESR, it would turn out that issues of application of the chosen law would be pointless to discuss. However, the aim is to challenge the presumed literary interpretation of Art. 5 (1) ESR from all aspects available to further justify the different interpretation of Art. 5 (1) ESR.

Sec. 4.4.3 Dutch Civil Code (abbr. 'BW'), a surviving spouse is not considered a forced heir.²⁷ Based on Art. 4:29 – 4:31, Sec. 4.3.2 BW, a spouse is only entitled to a right of usufruct of the estate to the extent that they are in need of support and the right of continued residence under Art. 4:28, Sec. 4.3.2 BW which enables the spouse to make use of the home and household for a period of six months.²⁸ Conversely, based on the § 2303 (1) (2) German Civil Code (abbr. 'BGB'), the spouse excluded from succession by disposition mortis causa is entitled to demand the compulsory share from the heirs.²⁹ In its judgment of 29 June 2022, the German Federal Court of Justice (abbr. 'BGH') ruled that, as an institutional guarantee, the right to a compulsory portion is part of the German *ordre public*.³⁰ It relied on the seminal decision of the German Federal Constitutional Court (abbr. 'BVerfGE') of 19 April 2005, which ruled that, in the light of Arts. 6 (1) and 14 (1) sentence 1 Basic Law (abbr. 'GG')³¹ and following a principle of family solidarity, the testator's children

²⁷ Art. 4:63 (2) and (3), Sec. 4.4.3 BW 2003: "A forced share of a forced heir is a part of the value of the estate of the testator to which the forced heir may lay a claim in spite of testamentary dispositions made under the last will of the testator and gifts (donations) made by the testator during his life. Forced heirs are the descendants of the testator who are called by law to his estate as his intestate heirs, either on account of their own right or on account of a right of representation of an heir who is not alive anymore or who is unworthy at the moment of the devolvement of the estate."

²⁸ See the entire Sec. 4.3.2 BW at <http://www.dutchcivillaw.com/civilcodebook044.htm>, visit date: 17. 03. 2025; About the mandatory family protection in the Dutch succession law, see more in W. D. Kolkman, *Compulsory Portion and Family Provision in Netherlands in: Comparative Succession Law, Mandatory Family Protection* (ed. K. G. C. Reid, M. J de Waal, R. Zimmermann), Oxford University Press, Oxford, 2020, 319 – 343.

²⁹ § 2303 (1) (2) BGB 2002: "If a descendant of the testator is excluded by disposition mortis causa from succession, then they may demand their compulsory share from the heir. The compulsory share is one-half of the value of the intestate portion. The parents and spouse of the testator have the same right if they have been excluded from succession by disposition mortis causa. The provision of §1371 remains unaffected."

³⁰ BGH, judgment of 29. 6. 2022 – IV ZR 110/21 = ZEV 2022, para. 14; The case concerned the English testator who died habitually residing in Germany and chose the English law in a will to govern his succession (which consisted of, inter alia, immovable property in Germany). By this disposition he disinherited his adopted son, a German national and resident. Under relevant English rules, precisely Sec. 1 (2) (b) and Sec. 2 (1) The Inheritance (Provision for Family and Dependents) Act 1975, the English courts could at their discretion, provided that the deceased was domiciled in the UK, grant the descendants 'reasonable financial provisions' as it would be necessary for their maintenance in light of the circumstances of the case. Due to the clear difference in the level of protection, the BGH determined that the Inheritance Act 1975 does not guarantee descendants an irrevocable minimum share in the deceased's estate regardless of their financial need, nor does it provide any stable alternative of maintenance or financial compensation in its absence. As a result, being incompatible with the German *ordre public* in the sense of Art. 35 ESR, English law did not apply.

³¹ Art. 6 (1) GG: "Marriage and the family shall enjoy the special protection of the state."; Art. 14 (1) sentence 1 GG: "Property and the right of inheritance shall be guaranteed."

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right to a compulsory portion has a character of a fundamental right in the sense of an inalienable and needs-independent minimum economic share in the testator's estate.³² Because a spousal bond equally fall under the scope of Art. 6 (1) GG, surviving spouse's compulsory share shall therefore have a protection of the German ordre public.³³

Since the spouse was excluded from the will in our case, German courts would, upon her claim, disregard applicable rules of Dutch succession law under Art. 35 ESR, and apply in lieu relevant rules of German succession law.³⁴ Pursuant to §2303 sentence 3 and §1371 (1) BGB, a spouse is entitled to half of her intestate portion (1/4 of the estate) increased by the equalized accrued gains.³⁵ Alongside, where the fragmentation of jurisdiction occurs in cross-border succession proceedings, German courts would apply the applicable law to the part of the estate under their jurisdiction as if they ruled on the entire estate, regardless of the other courts' adjudication over remaining assets.³⁶ In light of those circumstances, German courts would rule as follows: Assuming that the value of the assets located in Germany is €100000, the

³² BVerfGE, judgment of 19. 4. 2005 – 1 BvR 1644/00 u. 1 BvR 188/03 = ZEV 2005, paras. 301 – 304.

³³ See also H. Jarass, *Art. 6 GG* in: Grundgesetz für die Bundesrepublik Deutschland, Kommentar (ed. H. Jarass, B. Pieroth), C.H. Beck, Munich, 2024, 254 – 288.

³⁴ As Art 35 ESR does not spell out how to fill the gap created by the application of ordre public, the question is which rule should be applied instead of the incompatible foreign rule. Generally, there is a strong tendency towards lex fori rule. However, German academia appear to favor a more nuanced approach, emphasizing that the judge must first see whether a suitable solution can be derived by adjusting the foreign rule before resorting to the law of the forum in order to minimize interference with the applicable foreign rule and its own conflict of laws system; To that effect see Deutscher Bundestag 10. Wahlperiode, *Artikel 6 EGBGB* in: Begründung zum Regierungsentwurf eines Gesetzes zur Neuregelung des Internationalen Privatrechts, 10/504, 1983, 42 – 44, available at: <https://dserver.bundestag.de/btd/10/005/1000504.pdf>, visit date: 18.03. 2025.; W. Wurmnest, *Public Policy in European Private International Law* in: Public Policy and Private International Law, A Comparative Guide (ed. O. Meyer), Edward Elgard Publishing Limited, Cheltenham, 2022, 35; For the lex fori approach see P. Mankowski, S. Langenhagen, *Germany* in: Public Policy and Private International Law, A Comparative Guide (ed. O. Meyer), Edward Elgard Publishing Limited, Cheltenham, 2022, 203.

³⁵ §1371 (1) BGB: "If the property regime ends by reason of a spouse's death, then the equalisation of the accrued gains is effected by the intestate portion of the surviving spouse being increased by one quarter of the inheritance; it is irrelevant in this context whether the spouses in the individual case achieved accrued gains."; Based on §1373 BGB: "Accrued gains means the amount by which the final assets of a spouse exceed the initial assets"; The regime of the 'community of accrued gains' ('Zugewinnngemeinschaft') applies if the nuptial agreement was not concluded by the spouses.

³⁶ See. S. Đorđević, *O problemima nekoordiniranog raspravljanja zaostavštine jednog lica u različitim pravnim porecima* in: Pravni Sistem Srbije i Standardi Evropske Unije i Saveta Evrope (ed. S. Bejatović), Pravni fakultet, Kragujevac, 2010, 383, n. 29.

spouse would receive €25000 while two daughters would receive €37500 each. On the other side, Dutch courts would apply its law to the estate located in Groningen. Since Dutch law does not recognize compulsory share for the surviving spouse, it would fully comply with the last will of the testator. Assuming that the value of the flat is €70000, the two daughters would therefore receive €35000 each. Hence, by the final result of this fragmented adjudication, two daughters would receive €72500 respectively. Such an outcome disrespects the last will of the testator as each daughter is intended to obtain €85000. Moreover, the outcome of the case is fully determined by the forced heirship rule of the German law that was not supposed to be applied at all.

It seems that the result of the hypothetical case is not supported by the ESR. Namely, as of Recital 7 ESR and Art. 22 ESR, the chosen law of the testator's nationality is purported to govern the succession as a whole, corresponding with a presumption that the proper functioning of the internal market is only maintained if the testators are able to organize their succession in advance.³⁷ This interpretation aligns with the general objective of the ESR for establishing uniform regime applicable to all civil law aspects of succession to the estate of a deceased person with cross-border implications.³⁸ Therefore, the choice of law rule enables testator to avoid the application of the default law of habitual residence and protects the estate from being subject to several laws whose application may result in incompatibilities with the testator's predictability interests. As the fulfillment of the testator's will is observed provided that the rights of the parties concerned with that will are achieved, Recital 37 ESR requires the rules of ESR to be construed to effectuate legal certainty for the citizens to know which law will be applied to their succession.³⁹ Nevertheless, the fragmentation of estate on the jurisdictional level between Member State courts might not only disrespect the last will of the testator, it may as well concede the application of one substantive law to produce different solutions across the internal market which, thereby, counters the principles of certainty and foreseeability of the

³⁷ Recital 7 ESR: "The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed."

³⁸ See Judgment of 9 September 2021, *UM*, C-277/20, EU:C:2021:708, para. 33.

³⁹ Recital 37 ESR: "In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession. Harmonised conflict-of-laws rules should be introduced in order to avoid contradictory results. The main rule should ensure that the succession is governed by a predictable law with which it is closely connected. For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State."

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substantive result. If decisions given by two Member State courts gravely disagree on the result, as is the case in our example, the general principles of the Recitals 34 and 59 ESR thereof, which seek to avoid the irreconcilable decisions to be given in the different Member States, will be frustrated.⁴⁰ At long last, considering that a party concerned who did not participate in the choice of court agreement may revoke it and, consequently, preclude the chosen court to exercise the jurisdiction, a court competent under Art. 4 or 10 (1) ESR would be required to repeatedly modify the extent of its competence, irrespective of its will and contrary to the scopes of Arts. 4 and 10 (1) ESR, which would exacerbate its efficiency to deliver justice to parties. It is scarcely conceivable that such an unpragmatic solution is intended by the ESR.

One may offer two systemic counterarguments here. Since the choice of law under Art. 22 ESR is limited, it shall not be recognized as an underlying principle of ESR and therefore it does not require absolute respect in every case.⁴¹ In addition, the two jurisdictional regimes of the ESR envisage that the principle of the unity of succession may be disregarded in certain cross-border settings to achieve other conflict of laws considerations: namely, Art. 8 and Recital 29 sentence 2 and 3 ESR with regard to the relocation of the jurisdiction in cases where the succession may be amicably settled out-of-court, and Arts. 10 (2) and 12 (1) ESR, although designed for the succession cases connected to third States. However, it cannot be inferred that these regimes support the fragmentation of the estate on a jurisdictional level between courts of Member States. As a choice of court is limited to Member States, it aims to synchronize the chosen law and court of a Member State. Consequently, pursuant to Recital 7 ESR thereof, it intends to realize the proper functioning of the internal market for EU citizens. Hence, the systemic relation of Art. 5 (1) ESR with other rules of ESR shall be primarily conceived through the requirements of Art. 22 ESR as defining the reach of the sentence ‘any succession matter’ from Art. 5 (1) ESR. Since the application of Art. 5 (1) ESR is conditional upon the choice of law, it follows that the reasons of systemic consistency require their scopes to be interpreted as having the same reach.

Finally, the lingering jurisdictional question warrants consideration. It may be rightly argued that if all Member States involved uniformly applied the chosen law of the testator’s nationality, the sole issue arising out of the fragmentation of jurisdiction would be the uncertain basis for the courts under Arts. 4 and 10 (1) ESR in exercising the limited scope of jurisdiction than provided for by these rules. As said previously, courts having jurisdiction under Arts. 4 and 10 (1) ESR are instructed to exercise jurisdiction over the succession as a whole. In cases where some of the succession matters are allotted to the court of the chosen law, courts competent under Arts. 4 or 10 (1) ESR could not exercise jurisdiction over the entire estate as that would place them in a more favorable position compared to the chosen court, which would

⁴⁰ See Judgment of 21 June 2018, *Oberle*, C-20/17, EU:C:2018:485, para. 53 et seq.

⁴¹ That position the CJEU held in Judgment of 12 October 2023, *OP v. Notariusz Justyna Gawlica*, C-21/22, EU:C:2023:247, para. 33.

frustrate the principle of equal allocation of jurisdiction in succession matters in the sense of Recital 30 ESR,⁴² and disregard the exclusive character of the choice of court agreement. Hence, what is left for the courts competent under Art. 4 or 10 (1) ESR in the present situation is to limit the scope of their proceedings to the matters excluded by the parties from the choice of court agreement. The only way to do it, we recall, is to invoke Art. 12 (1) ESR. It was also reasoned that these courts would have to adapt Art. 12 (1) ESR in order to limit the scope of the proceedings to the assets located in their jurisdiction in cases connected to other Member States.⁴³ However, it is barely plausible that the adaptation of Art. 12 (1) ESR has any sense here when all we need for the reasonable and easy solution of the jurisdiction question is to properly interpret the conflict rule of Art. 5 (1) ESR to imply that the choice of court refers to the succession as a whole. Likewise, if one estimates that the adaptation of jurisdiction rules of ESR is, or might be, desirable and justified in certain cases, the principle of the coherence of the internal market⁴⁴ requires such action to be ultimately subjected to the CJEU's evaluation for the purposes of the uniform application of EU law.⁴⁵

⁴² Recital 30 ESR: "In order to ensure that the courts of all Member States may, on the same grounds, exercise jurisdiction in relation to the succession of persons not habitually resident in a Member State at the time of death, this Regulation should list exhaustively, in a hierarchical order, the grounds on which such subsidiary jurisdiction may be exercised."

⁴³ About the use of adaptation method ('Anpassung') in private international law see S. Đorđević, *Prilagodavanje u međunarodnom privatnom pravu* (doctoral thesis), Belgrade, 2010, 52 et seq; G. Dannemann, *Die ungewollte Diskriminierung in der internationalen Rechtsanwendung*, Mohr Siebeck, Tübingen, 2004, 153 – 217; G. Kegel, *Begriffs und Interessenjurisprudenz im Internationalen Privatrecht* in: Festschrift für Hans Lewald (ed. M. Gerwig, et. al), Verlag Helbing & Lichtenhahn, Basel, 1953, 259 – 283; For the appealing critique of the adaptation method see A. A. Ehrenzweig, *Specific Principles of Private Transnational Law*, Recueil, Brill, 1968, 252 – 253.

⁴⁴ Based on the Judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Case C-283/81, EU:C:1982:335, para. 20, the principle of coherence of the internal market requires every EU law rule to be put into its context and interpreted in the light of the ever-evolving EU law as a whole; For those uninitiated, about the internal coherence ('innerer Zusammenhang') as a central feature of a normative system read W. Krawietz, *Recht als Regelsystem*, Franz Steiner Verlag Wiesbaden, Stuttgart, 1984, 68–73, and N. Luhmann, *Das Recht der Gesellschaft*, Suhrkamp, Frankfurt am Main, 1993, 165 – 214.

⁴⁵ While the CJEU's has not expressed its standpoint yet, Advocate General Maciej Szpunar considers that the adaptation method is broadly permissible at both the 'level of conflict-of-law rules by redefining their scope in such a way as to avoid contradictions and resolve the case pursuant to one applicable law, or at the level of the rules of substantive law by amending provisions which are contrary to one another'; See Opinion of the Advocate General Szpunar delivered on 13 December 2017, *Doris Marget Lisette Mahnkopf v Sven Mahnkopf*, Case C-588/16, EU:C:2017:965, para. 63–64; However, the CJEU's general rules for the interpretation of EU law should be heeded, see Judgment of 18 October 2011, *Oliver Brüstle v Greenpeace eV*, C-34/10, EU:C:2011:669, para. 25: "It must be borne in mind that, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express

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In light of the foregoing exposition, Art. 5 (1) ESR should be construed as that the parties concerned to the choice of court agreement confer exclusive jurisdiction to the chosen court over the succession as a whole. Bearing that in mind, the following analysis of Arts 6 (1) lit. a and 8 ESR and Recital 29 sentence 2 and 3 ESR will be based on the presumption that Art. 5 (1) ESR does not allow the parties to define the scope of the proceedings of the chosen court as they prefer. Consequently, it will be tried if the suggested interpretation offers any practical advantages and enables the persons to exercise their succession rights more effectively.

III TENTATIVE INTERPRETATION OF ARTS. 5 – 9 ESR

At the request of one of the parties to the proceedings, Art. 6 (1) lit. a lets the court seised under Arts. 4 or 10 ESR to decline jurisdiction if it considers that the court of a chosen law is better placed to rule on the succession.⁴⁶ In so doing, a court must weigh all the practical aspects of the case, including the habitual residence of the parties and location of the assets. Unlike the compulsory transfer of jurisdiction under Art. 6 (1) lit. b ESR, in this context, courts competent under Arts. 4 or 10 (1) ESR have the discretion to determine whether to take or decline jurisdiction, whereas a request from just one of the parties is sufficient for them to entertain the mechanism of Arts. 6 (1) lit. a and 7 (1) lit. a ESR. If a court decides to transfer jurisdiction to the court of chosen law, it follows from Art. 7 (1) lit. a ESR that the prorogated court cannot review if it is better placed to rule on the succession, which makes its jurisdiction temporarily perpetuated. Identifying a party to the proceedings requires consistency with the notion of the ‘party concerned’ in the sense of Art. 5 (1) ESR and Recital 28 ESR. However, if there is only one party to the proceedings who cannot conclude an agreement with oneself, it falls to the court seised to assess whether the court of the chosen law is better suited to rule on the succession.

The question arises whether Art. 9 (2) ESR is applicable when Art. 6 (1) lit. a ESR is triggered. As observed in the introduction, Art. 9 (2) ESR enables a party who was not a party to the choice of court agreement to contest the jurisdiction of the court exercised under Art. 7 ESR. Yet, if there is only one heir to the succession (without creditors and other interested parties), the transfer of jurisdiction can only occur via the discretion of the court competent under Arts. 4 or 10 (1) ESR. Conversely, one may ponder why would any of the parties, if there are more of them, use the right of Art. 6 (1) lit. a ESR instead of Art. 6 (1) lit. b ESR when it is in their interest to settle

reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union.”

⁴⁶ Although neither Art. 6 nor Art. 7 ESR explicitly refers to the declining of jurisdiction, the CJEU has affirmed that for jurisdiction to be declined under Art. 7 (1) lit. a ESR it is not necessary for a court competent under Arts. 4 or 10 ESR to explicitly decline its jurisdiction, as the decline follows ipso iure after the transfer of jurisdiction occurs under Art. 6 (1) lit. a ESR; See Judgment of 9 September 2021, *RK v CR*, C-422/20, EU:C:2021:718, para. 36.

the succession effectively and without interruption from some of the parties who were excluded from the choice of court agreement?⁴⁷ Having in mind that Art. 9 (2) ESR is applicable when choice of court was made, parties to the proceedings shall be encouraged by the court or notary to make the agreement if they want the court of the chosen law to rule on their succession and to minimize the potential objections of that jurisdiction by other heirs.

Nevertheless, it seems that Art. 9 (2) ESR is meant to be applied in the case of Art. 6 (1) lit. a ESR as well. Although Art. 9 (2) ESR expresses only the challenge of the choice of court agreement, Art. 6 (1) lit. a ESR instructs court to assess the habitual residence of the 'parties' as a practical circumstance of the case, implying that there may be more than one party to the proceedings. However, if a court accepts a request from one party to transfer jurisdiction to the court of the chosen law, while other parties to the proceedings are either absent or reluctant to respond at this stage, they should not be barred from later contesting the transferred jurisdiction. This is especially important because the court of the chosen law cannot review its own jurisdiction under Art. 7 (1) lit. a ESR. Given that the court of the chosen law rules on the succession as a whole, the other parties to the proceedings would be placed at a clear disadvantage compared to the party requesting the transfer of jurisdiction if they were denied the right to consent to that transfer. This disadvantage is further exacerbated by the fact that they are unable to bring their claims before the courts competent under Arts. 4 or 10 (1) ESR due to effects of Art. 7 (1) lit. a ESR. Hence, the proposed interpretation of Art. 5 ESR enables Art. 9 (2) ESR to cover the cases where the transfer of jurisdiction occurs under Art. 6 (1) lit. a ESR which, thereby, supports the procedural equality of heirs and aligns with the condition for the application of Art. 9 (2) ESR, namely, if the jurisdiction is established under Art. 7 ESR, both in cases of lit. a and b.

In contrast, Art 8 ESR and Recital 29 sentence 2 and 3 ESR give more freedom to parties compared to Arts. 6 (1) lit. b and 7 (1) lit. b ESR. These rules regulate the choice of the parties who want to settle their succession amicably outside of the judicial proceedings. But there is a substantial difference in effect depending on whether a court initiates probate proceedings ex offio or not. In the first case, parties to

⁴⁷ The main issue with this reflection is the assumed rationality of the parties in cross-border cases. Although objective and subjective connecting factors incline parties towards a particular jurisdiction, they are often influenced by various cognitive and emotional biases that affect both their choice of law or court and the process by which such choices are made. Hence, it is for the authority dealing with the cross-border case to prevent that parties suffer from their own miscount and to make sure their biased conduct is not exploited by others. At times, this may even justify the modified interpretation of default conflict rules to effectuate justice in real-life circumstances; About this conception in both continental and common law traditions see J. Ungerer, *Nudging in Private International Law, The Design of Connecting Factors in Light of Behavioural Economics*, *RabelsZ* 86, Tübingen, 2022, 1 – 31, and M. J. Whincop, M. Keyes, R. Posner, *Policy and Pragmatism in Conflict of Laws*, Ashgate Dartmouth, Aldershot, 2001, especially 127 – 167.

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the proceedings may agree to settle their succession out-of-court but only in the Member State of the chosen law. In the latter case, when a court does not initiate probate proceedings of its own motion, parties can settle amicably out-of-court in the Member State of their preference provided that is possible under the law of that Member State. Hence, Art. 8 ESR accommodates cases when the parties want to choose a non-judicial authority of the chosen law to rule on the succession, which would not be possible under Art. 5 ESR, while Recital 29 sentence 2 and 3 ESR enables parties to freely agree among themselves in which Member State to settle their succession before a non-judicial authority. Considering that parties confer exclusive jurisdiction to the court of the chosen law to rule on the succession as a whole, the application of Art. 8 ESR and Recital 29 sentence 2 and 3 ESR shall generate more certainty in practice.

Particularly, Art. 8 ESR is relevant where the non-judicial authority has a legitimate interest to rule on the succession. For instance, the testator died habitually residing in the Czech Republic, was a French national, and chose French law to govern his succession as a whole.⁴⁸ In the Czech Republic probate proceedings are opened by the courts ex offo.⁴⁹ Since the testator's spouse and minor child live in France, they want the succession to be settled out-of-court by a French notary under the 'act de notoriété', which is required for minors under French procedural laws.⁵⁰ Were it not for Art. 8 ESR, the heirs would be prevented from doing so, as Art. 5 (1) ESR does not allow the choice of a non-judicial authority that does not qualify as a court under Art. 3 (2) ESR.⁵¹ Hence, if parties agree to settle their succession before

⁴⁸ The following example, with further expounding, is adapted from F. Odersky, *Article 8 in: EU Regulation on Succession and Wills – Commentary* (ed. U. Bergquist et. al.), Verlag Dr. Otto Schmidt KG, Cologne, 2015, 83.

⁴⁹ See at: <https://www.successions-europe.eu/Answers.aspx?c=cz&l=en&q=18>, visit date: 20. 03. 2025.

⁵⁰ The act de notoriété attests the status of an heir at the time of the opening of the succession proceedings. Under French succession law, act de notoriété is compulsory if the assets of the estate are valued at more than € 5000, if the deceased left a minor heir or an incapacitated adult, if it is necessary to use a genealogist to find the heirs, if the deceased had drawn up a marriage contract during his lifetime, and if the assets of the estate include immovables; See Arts. 710-1 and 730-1 French Civil Code 2025 at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/, visit date: 20. 03. 2025. and Chambre des Notaires de Paris, *Comment obtenir un act de notoriété?*, at https://paris.notaires.fr/sites/default/files/acte_notoriete_mars_2013.pdf, visit date: 20. 03. 2025.

⁵¹ Art. 3 (2) ESR: "For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate: (a) may be made the subject of an appeal to or review by a judicial

the French notary, it is compulsory for the Czech court to close the proceedings under Art. 8 ESR. Due to that, Art. 8 ESR shall produce the same effects as Art. 5 ESR, meaning that the conferred jurisdiction of the French notary shall be exclusive and encompass the succession as a whole.

As for cases covered by Recital 29 sentence 2 and 3 ESR, the predicament is somewhat offbeat. The choice of the non-judicial authority of the preferred Member State can be quite frequent since many Member States do not initiate probate proceedings *ex offio*.⁵² In such circumstances, heirs are entitled to pursue out-of-court proceedings in a Member State, even if the non-judicial authority in question will not apply its law. Since non-judicial authorities are not subject to the ESR's rules of jurisdiction, they may exercise their jurisdiction under national laws on bases different from those of the ESR. Hence, it may be that several out-of-court proceedings or one court proceeding and one out-of-court proceeding are initiated in parallel across Member States regarding the same succession. Recital 36 ESR envisages that conflict between those parallel proceedings shall be resolved either by the agreement of parties or, in its absence, by the compulsory reference of the jurisdiction to the courts competent under Arts. 4 or 10 (1) ESR. In light of the scope of the choice of court rule under Art. 5 ESR, the same extent of jurisdiction should be relevant for Recital 29 sentence 2 and 3 ESR. Consequently, if the parties agree on a non-judicial authority of a preferred Member State, that authority shall have jurisdiction over the succession as a whole. Conversely, if the parties are unable to reach an agreement, thereby triggering the jurisdiction of courts competent under Arts 4 or 10 (1) ESR, the parties will be able to exercise all rights under Arts. 6 and 7 ESR.

However, parties and courts or non-judicial authorities may not be aware that the succession proceedings in different Member States have commenced. For example, the testator lived in Saarbrücken, was a Luxembourgish national, and chose Luxembourgish law to govern his succession as a whole, leaving half of the estate to his two sons in equal shares and half to his spouse. The elder son is a practicing solicitor in Ghent, while the younger son works as an engineer in Lyon. Their mother lived with the testator in Saarbrücken. As none of the courts in the relevant jurisdictions (Germany, Belgium, France, and Luxembourg) initiate cross-border probate proceedings *ex offio*,⁵³ the heirs sought the services of notaries. The decision was a consequence of their inability to reach an agreement on the choice of court because the elder son and the mother had been on bad terms and without communication in the period preceding the testator's passing, while the younger son was rather indifferent towards the estate and unaware of the testator's will. Assume that the spouse addressed a Luxembourgish notary for the issuance of a European

authority; and (b) have a similar force and effect as a decision of a judicial authority on the same matter."

⁵² See *supra* note 14; Currently, 22 Member States recognize authentic acts issued by notaries in succession matters, see <https://www.authentic-acts.eu/>, visit date: 20. 03. 2025.

⁵³ See internet link at *supra* note 14.

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Certificate of Succession ('ECS')⁵⁴ to establish her status as an heir based on the testator's will, the elder son initiated the probate proceedings before the German notary, whereas the younger son entered a procedure of waiving his testamentary share in favor of his mother before the French notary. Consequently, there will be a disharmonious adjudication if the parties and notaries involved remain unaware of the parallel proceedings, especially when those proceedings are handled at different points in time. If the German notary rules based on the testator's will, not cognizant of the younger son's renunciation of the share, its decision would be inconsistent with that of the French notary. Likewise, the accuracy of the ECS issued to the spouse would be compromised as it reflects only her entitlement based on the compulsory portion and the added share allocated through the testator's last will.⁵⁵

Albeit, perhaps, rare, the lack of cooperation between parties in cases where succession is dealt with by notaries across different Member States clearly hampers the efficiency of the cross-border succession proceedings and alleviates the free movement of heirs by introducing barriers to the exercise of their succession rights in full capacity across the EU. To effectively safeguard the guaranteed rights of successors in cross-border cases, notaries acting under Recital 29 sentences 2 and 3 ESR shall ensure that all parties involved in the succession are properly informed of any parallel proceedings, preferably via the e-Justice portal or other available official channels.⁵⁶ Likewise, it is equally important that the notaries serve the extra-judicial documents and notices to the parties in a direct and rapid way, using all means provided by the EU Service Regulation.⁵⁷

IV RECOMMENDATIONS OF THE NOTARIES OF EUROPE: THE BETTER LAW-MAKING ASSESSMENT

⁵⁴ Pursuant to Art. 63 (1) (2) ESR: "The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate. The Certificate may be used, in particular, to demonstrate one or more of the following: (a) the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate; (b) the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate; (c) the powers of the person mentioned in the Certificate to execute the will or administer the estate.

⁵⁵ While Art. 66 (4) ESR imposes an obligation on the issuing authority to take all necessary measures to hear all parties involved in the succession or to make a public announcement to ensure a comprehensive certification of facts, a waiver of succession may occur in another jurisdiction after the ECS has already been issued.

⁵⁶ See at: <https://e-justice.europa.eu/select-language?destination=/node/2>, visit date: 20. 03. 2025.

⁵⁷ Regulation (EU) No 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), OJ L 405 2. 12. 2020, 40.

Although ESR enables parties to choose the court of the chosen law to govern the succession as a whole, such jurisdiction does not enjoy lasting perpetuation due to the prerogative of Art. 9 (2) ESR. In the RNE from 2023, the survey conducted among 2.025 notaries showed that 84% of them have never encountered jurisdictional clauses in succession cases.⁵⁸ In states like Bulgaria, Luxembourg, Lithuania, and Greece choice of court is almost nonexistent, while, in contrast, in states such as Netherlands and Estonia and, to a lesser extent, Austria, Poland and Portugal choice of court is used more frequently.⁵⁹ While the limited use of choice of court may seem surprising, it is likely driven by concerns over its inherent instability and the perception of ESR's addressees that a literal interpretation of the phrase 'any succession matter' in Art. 5 ESR might lead to the scission of succession on jurisdictional level. While this paper aspired to primarily settle the latter concern, addressing the instability of a choice of court requires further legislative activity. In that sense, the RNE conceives the two propositions *de lege feranda*: the choice of court by the heirs in the absence of a choice of law and the choice of court by the testator.

Regarding the former, it is believed that it could prove useful if all the heirs live in the Member State of the testator's nationality, whereas the testator habitually resided in another Member State and did not choose the law.⁶⁰ From a legislative point of view, this could be done either by modifying Art. 15 ESR to exclude the *ex offio* review of jurisdiction when all heirs accept the jurisdiction of the courts of one Member State, or by cutting the link between the choice of court and the existence of a choice of law from Art. 5 ESR.⁶¹ However, the applicable law would still be different from the law of the forum (the courts of the testator's nationality would apply the law of the testator's last habitual residence). Likewise, a mere reason of convenience does not suffice to compromise logic underlying Recital 7 ESR and Art. 22 ESR. If the testator made the will but did not choose the law of their nationality, it means (or it is likely be held as true) that they counted with the law of their last habitual residence to govern the succession, and the *ordre public* rules of the courts of testator's nationality may hinder the effectuation of their will.

As concerns the latter proposal, allowing testators to designate the courts of the Member State of their nationality when they chose that law is said to both enhance the predictability of the result, if the heirs would be bound by such a choice, and reduce the instances where the applicable law does not coincide with the jurisdiction.⁶² However, Art. 9 ESR would need to be supplemented with the separate paragraph

⁵⁸ Notaries of Europe, *MAPE Succession Final Study*, 2023, <https://www.notariesofeurope.eu/en/notaries/mape-successions/>, 31, visit date: 20. 03. 2025.

⁵⁹ Notaries of Europe, *op. cit.*, 31; For a detailed report see: <https://www.notariesofeurope.eu/en/notaries/mape-successions-interactive-dashboard/>, visit date: 20. 03. 2025.

⁶⁰ Notaries of Europe, *op. cit.*, 32.

⁶¹ *Ibid.*

⁶² *Ibid.*, 33.

Јован Живановић, Неколико напомена о споразумном избору суда у наследним односима са елементом иностраности унутар ЕУ (стр. 39-60)

prescribing that parties cannot contest the jurisdiction if the testator chose the court. This means that a choice of court by the testator would have an exclusive character and cover the succession as a whole. But it is difficult to welcome that such an exclusive choice of court could be made unilaterally, as it would significantly constrain the parties' access to justice. Art. 9 ESR exists for a reason, and it is to justify the jurisdiction of the prorogated court unless the continuation of an action there will work injustice because it would be vexatious to some of the parties legitimately entitled to succession or would cause any abuse of due process for those who would be exposed to hardships of being forced to plead in that court.

Instead, it is suitable to introduce clear time limits within which a party excluded from the choice of court or non-judicial authority may challenge such choice, as the sentence 'in the course of proceedings...' in Art. 9 (1) ESR fails to unambiguously give the answer to the matter. This approach would ensure that all heirs have the opportunity to voice their concerns regarding jurisdiction while preventing an unreasonable action to put off the proper functioning of justice in EU cross-border succession cases.

V CONCLUSION

A systemic interpretation of Art. 5 ESR supports the view that the prorogation of jurisdiction in matters of succession shall extend to the succession as a whole, aligning more closely with the objectives and underlying principles of the ESR, but also facilitates the effective application of Arts. 6 – 9 ESR in practice. Accordingly, parties concerned with the succession may therefore synchronize the law chosen by the testator with the courts of that chosen law to encompass the succession as a whole. Allowing parties to create the scission of jurisdiction by excluding certain matters from the jurisdiction of the court chosen under Art. 5 and instead leaving them to courts competent under Arts. 4 or 10 (1) ESR does not only interfere with the intended scope of jurisdiction of those courts but also compromises the legitimate expectations of testators who, pursuant to Art. 22 ESR, anticipate the uniform application of a single substantive law to their succession.

Nevertheless, a key impediment to the proper functioning of justice remains the mechanism under Art. 9 ESR, which permits parties who were not involved in the choice of court or non-judicial authority to challenge such a choice and impair its effects. While the analyzed Recommendations of the Notaries of Europe regarding revision of the choice of court rule from ESR show promise and reflect an exemplary pragmatic view to EU cross-border succession relations, they lack proper engagement with the broader systemic implications. In this regard, we favor the introduction of clear and precise time limits within which the challenges to the jurisdiction of the prorogated court must be raised. It is because any amendment of the choice of court rule from ESR must both take into account practical aspects and be consistent with the ESR's system of rules and principles.

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НЕКОЛИКО НАПОМЕНА О СПОРАЗУМНОМ ИЗБОРУ СУДА У НАСЛЕДНИМ ОДНОСИМА СА ЕЛЕМЕНТОМ ИНОСТРАНСТИ УНУТАР ЕУ

Резиме

У овом раду се анализира правило о споразумном избору суда из чл. 5 ЕУ Уредбе о наслеђивању (Уредба) у светлу његове системске повезаности са правилима о прилагођавању надлежности у случају избора меродавног права (чл. 6 – 9 Уредбе) и другим правилима Уредбе, а првенствено са колизионим правилом о избору меродавног права за наслеђивање из чл. 22. Најпре, испитује се да ли заинтересоване стране у поступку могу одлучити да нека наследноправна питања оставе на одлучивање судовима држава чланица надлежних према чл. 4 и 10 (1) Уредбе, како проистиче из дословног тумачења чл. 5 (1) Уредбе, или надлежност изабраног суда треба да се односи на одлучивање о свим наследноправним питањима (тј. о наслеђивању у целини). Затим, истражује се које је од два тумачења усклађеније са правилима и циљевима Уредбе у смислу да омогућава ефективну примену чл. 5 – 9 Уредбе у пракси. Најзад, анализира се хипотетички пример прекограничног наслеђивања у ЕУ како би се указало на препреке за правилно функционисање правосуђа услед неадекватног тумачења и примене чл. 5 – 9 Уредбе и разматра се текућа законодавна дискусија поводом измене правила о споразумном избору суда кроз призму наведених истраживања.

Кључне речи: споразумни избор суда, чл. 5 – 9 Уредбе о наслеђивању, системско тумачење, прекогранично наслеђивање у ЕУ, правилно функционисање правосуђа.

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