A PRACTICAL PROBLEM IN THE APPLICATION OF THE REGULATION ON SUCCESSION IN SPAIN: HOW TO RESOLVE THE INTERNAL CONFLICT BETWEEN APPLICABLE LAWS

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The 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 (from now on, Regulation on Succession) establishes that, unless otherwise provided for in the Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death, except for the case where it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State of his habitual residence at the time of death, in which case the law applicable to the succession shall be the law of that other State (article 21).

In addition to that, the Regulation also establishes 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 (what is known as *professio iuris*). This choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition (article 22).

On the other hand, article 36.1 of the Regulation states that where the law specified by the Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of succession, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

This is the particular case of Spain, where there are several territorial units each of which has its own rules of law in respect of succession (which are Galicia, Basque Country, Navarre, Aragón, Catalonia, and the Balearic Islands, and the rest of the territory, where the law applied is named «common law») and there is a particular and internal regulation to solve the conflicts of law arising between these units, and therefore the Regulation on Succession does not apply to it.

For this purpose, article 16.1 of Spanish Civil Code establishes that conflicts of laws which may arise from the coexistence of different civil laws in the national territory shall be resolved according to the rules contained in Chapter IV (which deals with rules on international private law) with the following particularities: (1) The personal law shall be that determined by the civil neighborhood. (2) The provisions of paragraphs 1, 2 and 3 of Article 12 on qualification, remission and public order will not be applicable.

The problem arises with this first particularity: according to it, in connection with article 9.8, to determine the applicable law to the succession of a person among these different rules of law that co-exist in Spain, we must turn to the concept of «civil neighborhood». This concept will determine which civil law, among those existing in Spain, will be applicable to Spanish nationals. The problem is: it is never applied to foreign citizens, that is, a foreign citizen will never have a civil neighborhood in Spain.

If we sum up the criteria set out by the Regulation on Succession at the beginning, we can raise the following case study: a national of Portugal who has not chosen the Portuguese law as the law to govern his succession in his will or other form of disposition of property, has his habitual residence at the time of death in Spain (in particular, in Navarre, a region inside Spain with its own rules of law on succession) and is not manifestly more closely connected with a different State at this time of his death.

If we apply articles 21 and 22 of the Regulation, we arrive at the conclusion that the Spanish law is in this case the applicable law to the succession of our *de cuius*. But, which Spanish law, among those co-existing in Spain, will be the applicable one?

As we have said before, the conflict should be solved applying the «civil neighborhood» of the deceased person, but a Portuguese national has no civil neighborhood in Spain.

Some authors consider that the solution might be given by article 13.2 of the Civil Code, according to which in all other matters, and with full respect for the special laws of the provinces or territories in which they are in force, the Civil Code shall govern as supplementary law, in the absence of the law in force in each of the provinces or territories in accordance with their special rules, and therefore, in any case of foreigners that have their habitual residence in Spain, the «common civil law» (that is, the so named Civil Code) should be applied.

But this solution does not seem very consistent with the spirit of the EU Regulation on succession. In the case of our deceased, a Portuguese national who has his habitual residence in Navarre, a region of Spain, might find that the law that governs his succession is a law that is not either his national law -the Portuguese one- or the law applicable at the place of his habitual residence -which would be the Navarre law-, but a law fully strange to his residence, connections and interests by the time he was alive, as would be the Spanish common civil law.

To solve this problem and find a solution more consistent with the spirit of the Regulation, we could turn to paragraph 2 of article 36 of the Regulation on Succession, which is applicable in the absence of such internal conflict-of-laws rules: that is, in this case we do have internal conflict-of-laws rules, but they become not applicable since the connecting factor -the civil neighborhood- is not existing for foreigners, and thus we could consider this as an absence of conflict-of-laws rule for this matter. That would lead us to sub paragraph (a) of this paragraph 2 and therefore the applicable law would be the law of the territorial unit in which the deceased had his habitual residence at the time of death (the law of Navarre in our case).

Another solution would be considering the application in this case of paragraph 2 of article 21 of the Regulation: where, by way of exception, it is clear from all the

circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1 (the habitual residence of the deceased), the law applicable to the succession shall be the law of that other State. In the case of our Portuguese national with habitual residence in Navarre, Spain, if we consider that the general rule of paragraph 1, in addition with Spanish conflict-of-laws rules, lead us to the application of the Spanish common civil law, this could be a case of exception, in which we find that the deceased was manifestly more closely connected to a State -region or territory in our case- other than that which would be applicable under the general rule. But the truth is that, as we said before, the same Regulation addresses to the national laws to solve these conflicts…

In any case, as we can see all these possibilities mean a certainly forced or twisted application of the Regulation, and therefore it is not at all a clear topic or a solved issue. The optimal solution would go through a modification and clarification of Spanish national conflict-of-internal-laws rules, so that these cases are clearly solved. Until then, only a judgement by a national Court or by the CJEU could give as light to solve problems like this one.