

# THE FORMAL VALIDITY OF THE *MORTIS CAUSA* PROVISIONS IN THE REGULATIONS 650/2012 (EU): AN ARTICLE ON SPANISH LAW

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## I. INTRODUCTION

The purpose of the following commentary is to address the relative question of the applicable law to the formal validity of a *mortis causa* provision to the basis of the July Fourth, 2012 Regulation 650/2012 (Regulation 650/2012 or Regulation) of the European Parliament and Council, concerning the competence, applicable law, recognition and execution of resolutions, acceptance and execution of public documents in the field of *mortis causa* inheritance and to the creation of a European certificate of inheritance.<sup>1</sup> Without prejudice to the need and requirement of

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1. See, REGULATION 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of July 4, 2012, in relation to the competence, the applicable law, the acknowledgement and enforcement of the

an autonomous interpretation of the law of the European Union, the proposed commentary incites, in particular, some issues that can arise if Spanish law is applied to a particular case. The configuration of the Spanish state as a pluralist state, for example, with different parliamentary bodies endowed with legislative capacity and competence, will then require determining which among the different Spanish laws is applicable to the particular case.<sup>2</sup> The question is not merely based on form; but on the contrary, it is in the field of *mortis causa* inheritance and successions in which the most striking differences between the various inheritance systems that exist in the Spanish state emerge with high intensity. Undoubtedly, all this paints a scenario conducive to highlighting some major disagreements between Spanish State and Catalan law on *mortis causa* inheritance.<sup>3</sup>

Based on the preceding information, the question of the formal validity of *mortis causa* provision requires contextualizing very briefly Regulation 650/2012.

## II. OVERVIEW OF THE JULY FOURTH, 2012 REGULATION 650/2012 OVER INHERITANCE CASES

These general aspects concern the nature of the chosen policy instrument, its contents, and applicability.

### A. *The Normative Act: The Regulation*

The European Regulation, as a legal act, guarantees immediate normative uniformity in the ambit of the European Union. The uniformity is apparent because the entry into force of the Regulation will imply that all European Union member states govern what is established under the same regulations for the entire territory.<sup>4</sup> However, going beyond than just an identity of universal rules, the Regulation's defining aspect is its immediate and direct efficiency. The Regulation is not necessarily accurate, and unlike the European Union directives, a regulatory act of the different member states tends to incorporate or transpose its contents into the national system in question.

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resolutions, to the acceptance and enforcement of the public documents on successions *mortis causa* and the creation of a European certificate of succession, 2012 O.J. (L 201/121) [hereinafter DOUE].

2. SPANISH CONSTITUTION [C.E.] B.O.E. n. 311, Dec. 29, 1978, art. 149(1)(8). (Spain).

3. See generally, CIVIL CODE OF SPAIN [C.C.Spa] (Spain); CIVIL CODE OF CATALUÑA [C.C.CAT.] (Spain).

4. See, Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, Mar. 30, 2010, 2010 O.J. (C 83) [hereinafter TFUE].

### B. The Content: The Applicable Law

The proper rubric of the Regulation visualizes that its content is not wasted with the provision of rules concerning applicable law in matters of inheritance—in addition, about “the competition . . . the recognition and enforcement of judgments . . . the acceptance and enforcement of public documents in matters of *mortis causa* inheritance and . . . the creation of a European certificate of inheritance.” Considering that our interest is focused only on those dispositions that determine the applicable national system, it is necessary to point out the following.

First, the Regulation defines its substantive scope by reference to a general statement—“[t]he current Regulation shall apply to successions upon death.”<sup>5</sup> This statement, however, is accompanied by a series of exclusions, that is, a relation of aspects that, withstanding their successive impacts, in any case fall on the margin of the Regulation.<sup>6</sup> The European text, therefore, does not indicate the applicable law pertaining to these issues—for example, the presumed death of a natural person;<sup>7</sup> the questions relating to the matrimonial property regimes;<sup>8</sup> and the creation, administration, and dissolution of trusts.<sup>9</sup>

Second, there are three areas in which the applicable law is determined: thus, *stricto sensu* inheritance;<sup>10</sup> the *mortis causa* provision—articles 26 and 27 and certain precedent declarations from one to whom it is offered certain attributions of inheritance<sup>11</sup>—in particular, article 28, which relates to “the acceptance or waiver of the inheritance, of a legacy, or the legitimate or a declaration destined to limit the liability of the person who executes it.”<sup>12</sup> All this, in turn, requires some nuance. First, concerning the applicable law to the *mortis causa* provisions, would be that the Regulation determines, in fact, two applicable laws; thus, that which governs its admissibility and material validity,<sup>13</sup> and that which is applicable to its formal validity.<sup>14</sup> Also, it adheres to the formal validity of the statement of the law at issue in article

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5. 2012 O.J. (L 201) art. 1(1).

6. 2012 O.J. (L 201) art. 1(2).

7. 2012 O.J. (L 201) art. 1(2)(c).

8. 2012 O.J. (L 201) art. 1(2)(e).

9. 2012 O.J. (L 201) art. 1(2)(j).

10. 2012 O.J. (L 201) art. 23.

11. 2012 O.J. (L 201) art. 26 – 27.

12. 2012 O.J. (L 201) art. 28.

13. 2012 O.J. (L 201) art. 26.

14. 2012 O.J. (L 201) art. 27.

28.<sup>15</sup> Secondly, with regard to those substantive areas about which the applicable law is declared, would also raise the question of its scope or extent. And, this, because while articles 23 and 26 make explicit which elements remain subject, respectively, to the law of inheritance and to the law of material validity of the dispositions, there is no existent similar accuracy in articles 27 and 28.<sup>16</sup> Nor is it indicated if the listings of articles 23 and 26 are exhaustive or are *ad exemplum*.<sup>17</sup>

Third, the Regulation also includes, although in an exceptional form, material norms, that is, not so much conflicting norms that determine the applicable law to a pertinent case, rather incorporates itself as the legal rule to apply. For example, article 32, which facilitates a rule of this nature, “none of the deceased persons shall have any rights to the inheritance of the other or others.”<sup>18</sup>

### C. Temporal and Territorial Application

Although Regulation 650/2012 entered into force on the twentieth day following its publication in the Official Journal of the European Union, the applicability of most of its provisions was postponed until August 17, 2015.<sup>19</sup> Adhering to the ambit of the applicable law from a territorial perspective, it should be noted: first that the Regulation will be applicable to the extent in which it is recognized by the tribunal of the pertinent member State.<sup>20</sup> Second, that such application will be consistent with the international nature of the inheritance, that is, to the circumstance of presenting connecting points, objectively or subjectively, with distinct national systems.<sup>21</sup> Third, to the tenure of article twenty “[t]he designated law by the current Regulation will be applied when it is not one of a member State.”<sup>22</sup> From there lies the universal character or *erga omnes* of the text.

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15. 2012 O.J. (L 201) art. 28.

16. 2012 O.J. (L 201) art. 23, 26–28.

17. 2012 O.J. (L 201) art. 23, 26.

18. 2012 O.J. (L 201) art. 32.

19. 2012 O.J. (L 201) art. 84.

20. DOUE, *supra* note 1, note 82–83.

21. Alfonso Ybarra Bores, *Succession Mortis Causa of English Citizens Residents of Spain: Problems and New Perspectives*, in Vol. 7, No. 1 TRANSNATIONAL LAW NOTEBOOKS 226, 230 n.17 (UC3M 2015), <http://e-revistas.uc3m.es/index.php/CDT/article/view/2519.pdf>.

22. 2012 O.J. (L 201) art. 20.

### III. THE FORMAL VALIDITY OF THE *MORTIS CAUSA* PROVISIONS

It is the expression that anticipates Code 52 of the Regulation and leads into article 27 of this text.<sup>23</sup> There are three questions which this previous consideration could facilitate, namely the rapprochement of its significance and its ambit of application. It would be the first time, without anything being unedited or original, that the Regulation dissects the validity of the *mortis causa* provisions, distinguishing between the material and the formal.<sup>24</sup> The second would occur by finding the trend, whose spatial and temporal generalization is well known, to design and regulate the type *mortis causa* businesses as formal or solemn businesses. That is, as declarations of intent which must necessarily be expressed in a certain way to be valid, or even reach existence.<sup>25</sup> The last point, which is more specific, refers to article 25 of the Regulation which orders ratifying states of the October 5, 1961 Convention of The Hague (CH 61), regarding conflict of laws relating to the form of the testamentary dispositions,<sup>26</sup> to apply the latter text and not article 27 when it is about the formal validity of a testamentary disposition.<sup>27</sup>

#### A. *The Expression*

Having said that, the general purpose of article 27 suggests a double analysis: the one for the category of “*mortis causa* provisions” and the one for the very concept of “formal validity.”<sup>28</sup> This will be the order to follow.

### 1. Mortis Causa Provisions

#### a. *Mortis Causa Provisions v. Testamentary Provisions*

The Regulation does not provide a definition of what is a *mortis causa* provision; not even a definition of its sole purpose. However, article 3 entitled, “Definitions,” limits itself in identifying certain acts and

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23. 2012 O.J. (L 201) art. 27; *Green Papers; Successions and Testaments*, at 2.2, COM (2005) 65 final (March 1, 2005) [hereinafter *Successions and Testaments*]; See Draft Report on Succession and Wills, EUR. PARL. DOC. PV 2148(INI)(2005).

24. 2012 O.J. (L 201) 48, 50; 2012 O.J. (L 201) art. 26; C.C. ESP. art. 9(8), 11(1), 16(1).

25. JOSE PUIG BRUTAU & RAMON MA ROCA SASTRE, PRIVATE LAW STUDIES 98 (Aranzadi 1st ed. 2009); JOSÉ LUIS DE LOS MOZOS, THE JURISTIC BUSINESS: CIVIL LAW STUDIES 141 (Montecorvo 1987).

26. 2012 O.J. (L 201) art. 75; See, Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, Oct. 5, 1961 [hereinafter CH61].

27. 2012 O.J. (L 201) art. 27.

28. 2012 O.J. (L 201) art. 27.

determinations as *mortis causa* provisions.<sup>29</sup> In any case, it includes the will or testamentary document, a joint will, and inheritance agreements. The latter are formally defined in the same article 3.1, subsections (b) and (c). However, both cases present a partial or incomplete definition. The reason being that those definitions turn, at one moment or another, to the very testamentary concept, which is what the Regulation also fails to define. For its part, the CH 61 reverts to the category of “testamentary provisions.” An authentic interpretation of the term permits identification of the provisions which are, not just *mortis causa* provisions, but also provisions of a final volition; therefore, essential and freely revocable provisions.<sup>30</sup> The contrast between one concept and the other—*mortis causa* provisions v. testamentary provisions—permits the demarcation of the ambit of application of one text from another. Hence:

The CH 61 is not applicable to the formal validity of inheritance agreements precisely because of its lack of liberty of revocability.<sup>31</sup> It is, however, with the purpose of the form of any other provision for which, although not with lack of internal right towards specific testamentary *nomen*, shares with the unilateral and character of a provision of final volition. In the context of the Convention, this interpretation permits restructuring the category of testamentary provisions with the specific codicils and testamentary memories.<sup>32</sup>

The Regulation is expressly applicable to the form of inheritance agreements as to the mode or type of the *mortis causa* provision.<sup>33</sup> Furthermore, and following the guideline of interpretation for the conformity of the Regulation and CH 61,<sup>34</sup> the undefined concept of the testament could be interpreted in a broad sense as to the effects it can have also on the dispositions which, though not designated under domestic law as “testaments,” are in the same manner *mortis causa* instruments, unilateral and freely revocable.<sup>35</sup>

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29. 2012 O.J. (L 201) art. 3; Ferran Badosa Coll, *The Succession Mortis Causa in the Fourth Book of the Civil Code of Cataluña, Universal and Particular*, in CATALAN SUCCESSION LAW ISSUES 11, 13-14 (Marcial Pons 2015), <https://www.marcialpons.es/static/pdf/97888416212460.pdf>.

30. CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, TOME III ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION 19 (Imprimerie Nationale 1961), <http://documents.law.yale.edu/sites/default/files/conference%20hague%201960.pdf>.

31. *Id.* at 25; C.C.CAT. art. 431(21).

32. C.C.CAT. art. 421–20, 421–21; C.E. Transitory dispositions, Second.

33. 2012 O.J. (L 201) art. 3.

34. 2012 O.J. (L 201) 52.

35. C.C.CAT. art. 421(20)–(23).

The Regulation expressly excludes from its ambit of applicability the formal validity of the *mortis causa* provisions executed in oral form.<sup>36</sup> However, on the other hand, such oral forms of *mortis causa* provisions are applicable under the CH 61. It indirectly derives from article 10, which permits members states to reserve their right to not recognize in certain circumstances the formal validity of executed oral inheritance provisions. Therefore, the point of partition is its inclusion in of ambit of the applicable text.<sup>37</sup> The overall result is that the inheritance agreement executed in oral form—if it is properly recognized in a particular governing system—the business which its formal validity similarly falls at the margin of CH 61 and as to the Regulation.

The joint testamentary, the Regulation offers, as has been said, a definition in article 3.1(c). Beyond the units of the action and the instrument, the provision raises plurality to a defining element of the type “granted by an act by two or more people.”<sup>38</sup> Unless granted orally, it does not raise doubt that its validity is subject to its text. For its part, the CH 61 also currently has it present. The CH 61 relates to this notion in its article 4 which, without qualifying it as jointly, alludes to “the executed testamentary provisions in its same document by two or more people.”<sup>39</sup> This integration, however, raises some questions. It would be the first time that this admission, without more, could raise problems with its ambit of natural application from the Convention,<sup>40</sup> in which those supposed in a joint will obligates to qualify or limit the free revocability of the testament by each one of the testators.<sup>41</sup>

The second question refers back to article 4. If the joint is a kind of testamentary provision, was it necessary a norm such as this one? Without it article 1 would not be equally applicable to the same text, which is destined to point out the possible applicable laws to the provision forms. Most likely the answer should be in the affirmative, and from this perspective, perhaps article 4 might seem like an unnecessary provision. In any case, what undoubtedly results from the acts of the Conference is what in any case would not be sought, through the introduction of a particular provision, was to identify the admissibility of the joint testament as a matter of form. If it were,

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36. 2012 O.J. (L 201) art. 1(2)(f).

37. CH 61, *supra* note 26, art. 10.

38. 2012 O.J. (L 201) art. 3(1)(c).

39. CH 61, *supra* note 26, art. 4.

40. See generally, Ángel Serrano de Nicolás, *Particular Attribution Agreements: Between the Anticipated Succession and its Complementarity with the Last Will Dispositions*, in CATALAN SUCCESSION LAW ISSUES 213, 213-248 (Marcial Pons 2015), <https://www.marcialpons.es/static/pdf/97788416212460.pdf>.

41. GOVERNMENT OF ARAGÓN, STATUTORY CODE OF LAW 240, art. 421 ¶ 3 (José Antonio Serrano García ed., 2011); <http://www.boa.aragon.es/EBOA/pdf/DERECHOFORAL.pdf>.

the member state that was applying the Regulation should necessarily admit a joint testament that would formally result validly under the auspice of any of the laws outlined in article 1.<sup>42</sup> The chosen tactic was, on the contrary, the reserve of admissibility as a question of depth, judging the margin of CH 61.<sup>43</sup>

Today, if we pay attention to the Regulation 650/2012, the difference between admissibility and the formal validity of the provision will establish, it least in theory, in a neater form; while article 24 will deal with the first and the valid material, the formal validity which is reserved to CH 61 or, in its case, to article 27 of Regulation 650/2012.<sup>44</sup> However, it has been said, that it is about a theoretical perception. The reason is that the same concept of "admissibility" fails to take shape.<sup>45</sup>

### b. *Mortis Causa Provision v. Business Mortis Causa*

Both with the CH 61 and Regulation 650/2012 the formal validity is predicated on only the business formalities of the ones that are properly business *mortis causa*.<sup>46</sup> Somehow, the formal validity is predicated only on the continent or instrument, but not the contents. Therefore, if the latter would be accompanied by specific procedural requirements,<sup>47</sup> it would have to be seen whether its formal validity would also be subject to CH 61 or article 27 of Regulation 650/2012.<sup>48</sup>

## 2. The Formal Validity

### a. *Presupposition: What is Form?*

The formal validity is that which is preached about when looking at *mortis causa* provisions. The expression suggests going back to the most elementary question relative to what ought to be understood by its form. At its most basic profile, there is sufficient appeal not just for the manner of

42. CONFÉRENCE DE LA HAYE, *supra* note 30, at 88; *Id.* at 87.

43. JAVIER CARRASCOSA GONZÁLEZ. REGULATION OF EUROPEAN SUCCESSION 650/2012 OF JULY 4, 2012: CRITIC ANALYSIS 238 (Comares 2014).

44. Inmaculada Espiñeira Soto, *The Admissibility and Validity of the Mortis Causa Dispositions Principal Law, The Professio Iuris Incidence* NOTARIES AND RECORDERS, <http://www.notariosregistradores.com/LEYESEXTRANJERAS/ARTICULOS/2012-validez-disposiciones-mortis-causa.htm> (last visited Feb. 10, 2015).

45. JOAN EGEA FERNANDEZ, THE JOINT ORDINATION OF THE SUCCESSION OF SPOUSES. PREVENTIVE INHERITANCE OR JOINT WILL? 5–8 (InDret 2015), [http://www.indret.com/pdf/1135\\_es.pdf](http://www.indret.com/pdf/1135_es.pdf).

46. MARTA MOLINA PORCEL, LAW OF SUCCESSIONS 583–84 (Legal Dissemination 2007), <http://www.difusionjuridica.com.bo/bdi/biblioteca/biblioteca/libro119/lib119-9.pdf>.

47. C.C.CAT. art. 423-2; S.T.S.CAT., Sept. 9, 2013 (R.O.J., No. 6527, p. 6–7) (Spain).

48. C.C.CAT. art. 451-8(1); C.C.ESP. art. 849; 2012 O.J. (L 201) art. 23(2)(d).



exteriorizing the voluntary will, but also all of the formalities that, with mayor or minor intensity, contextualize or accompany the declaration. Hence, the CH 61 and Regulation 650/2012 are limited in treating themselves to the formal validity. Both laws accomplish this without defining the form and without also providing a list like the one shown, for example, in the relative articles 23 and 26 of the Regulation 650/2012, respectively, to the ambit of the law of inheritance and the ambit of the valid material.<sup>49</sup> The expression “formal validity” would come across in an isolated way if not for some facts that contribute to the delimitation of the formal matters that are not to be.

The list in article 26 of Regulation 650/2012 would fulfill, indirectly, this function.<sup>50</sup> In the manner in which it relates its pertinent aspects to the ambit of the material validity, it can be logically discarded that it would affect the shape of the provisions.

For its part, article 27.3 of Regulation 650/2012 almost literally reproduces article 5 of the CH 61 considering how “questions of form” relate to all the legal prescriptions, about the various testamentary dispositions contemplated, incorporate limitations on grounds of age, nationality or as an open closing clause “because of other personal circumstances of the deceased.”<sup>51</sup> And the same rule follows (therefore, such issue will also be) those demands of a similar nature affecting witnesses and depending upon the effectiveness of the testament.<sup>52</sup> For example, if the law that governs the form allows a holographic testament to a person under eighteen years old, so that this is—having reached eighteen years of age—the minimum age required by the law of material validity, the will cannot be nullified by being exclusively based on a defect of absence of capacity because of insufficient age. Conversely, the provision should be considered formally valid and, where appropriate, may slow down due to lack of natural capability.<sup>53</sup>

Above and beyond: what to do if there are doubts about whether a certain aspect belongs or not to the ambit of the form? The question is formulated in the context of the applicable law to the pertinent form; this is, when there is doubt about whether any of the contemplated demands are formal or not. It is not about an abnormal risk. In fact, such doubts can

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49. 2012 O.J. (L 201) art. 23, 26.

50. 2012 O.J. (L 201) art. 26.

51. 2012 O.J. (L 201) art. 27; CH 61, *supra* note 26, art. 5.

52. C.C.CAT. art. 421–11(3); C.C.ESP. art. 681–82.

53. C.C. CAT. art. 421–11(3); 2012 O.J. (L 201) art. 26(1)(a).

present themselves in the internal ambit, i.e., when applying the corresponding domestic law in the absence of any international element.<sup>54</sup>

*b. Form and Formal Validity of the Disposition*

The form is made dependent on the “validity,” which is not defined and that, as a category, “admissibility” hardly differs. In dealing with this, article 24, without either defining it,<sup>55</sup> treats it in the mode of *prius* from the material validity of the provision. Despite being a muted category in article 27, the *mortis causa* provision must also be admissible—whatever this term should mean—in that order indicating its formal validity. That is, the admissibility is not a reserved plot to the law of article 24.<sup>56</sup> It is something that must also be assessed, first, in the light of article 27.<sup>57</sup> The reason being that it is difficult to judge the formal validity of an inadmissible business. That which is only explicitly shown in article 24 means that the implied admissibility of article 27 is not sufficient. But it is not in the same manner which is not sufficient for the formal validity of the provision to the effect that it governs in the question of inheritance: it must also be admissible and valid according to the law of article 26.<sup>58</sup>

The form requirement of the provision already mentioned is malleable—insofar as it may refer, strictly, to the mode of exteriorizing the will, i.e., before a notary, in writing or, in a broader sense, in the aforementioned manner that it should be executed, day, time and place, or to the conjunction of other circumstances that must accompany or follow the declaration.<sup>59</sup> This malleability may impact the degree or intensity of the associated “invalidity” with non-compliance of a formal requirement.<sup>60</sup> Whether or not this possibility of remediating a formal requirement exists, or that, in any case, the deficiency does not necessarily haul the invalidity of the provision, it is a matter to be determined in accordance with the law being

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54. C.C.CAT. art. 423–1; C.C.CAT. art. 427–1; C.C.CAT. art. 422–1(2); C.C.CAT. art. 422–6(1); MANUEL DURAN I BAS, MEMOIRS OF THE CIVIL LAW INSTITUTIONS OF CATALUÑA 172, 185 (Barcelona 1883).

55. ISABEL RODRIGUEZ-URÍA SÁNCHEZ, THE APPLICABLE LAW TO THE SUCCESSIONS MORTIS CAUSA REGULATION (UE) 650/2012 35 (InDret 2013), <http://www.indret.com/pdf/972.pdf>.

56. 2012 O.J. (L 201) art. 24.

57. 2012 O.J. (L 201) art. 27.

58. 2012 O.J. (L 201) art. 26.

59. C.C.CAT. art. 421–8; C.C.CAT. art. 421–19; C.C.CAT. art. 422–4(3).

60. See generally, *supra* note 25.

judged by its formal validity.<sup>61</sup> It should also discipline the regime of nullification that, because of formal defect, should fit to stand.<sup>62</sup>

## B. *The Law Applicable to Formal Validity*

### 1. The Favor Negotii: Connection Points and the Multiplying Effect

This relates to a regime inspired by *favor negotii*. The observation serves both that which provides CH 61 and that which provides Regulation 650/2012. The purpose would be to facilitate the formal validity of the provision knowing that, being formally valid, will still have to overcome the difficulty of its admissibility and material validity.<sup>63</sup>

That guideline is implemented by welcoming a plurality of connection points which designate other different and susceptible laws, theoretically, to sustain the formal validity of the provision. There is no hierarchy among the first; logically, nor between those laws.<sup>64</sup> Moreover, the connections chosen by Regulation 650/2012 coincide, in essence, with those already provided for in CH 61: the place of executing the act, the nationality of the deceased, their habitual residence, their home and the location of their real estate—regarding, exclusively, to the inheritance in their ownership.<sup>65</sup> But this plurality of eventually applicable laws exceeds these two lists. They are detected, in both texts, as sort of multiplying factors.

As well, subsections (b)—concerning the nationality of the deceased, (c)—to his pertinent home, and (d)—and to his habitual residence under articles 1 of CH 61 and 27 of Regulation 650/2012, respectively, take in as temporary references two distinct moments: the granting of the execution of the act and the time of death—moment in which, relating to *mortis causa* businesses, the act will acquire business efficiency. The result is that, under those subsections, the contemplation of, not three possible applicable laws, but six.<sup>66</sup> Moreover, this double temporal criterion suggests some comments. The first, from a practical standpoint, would be that those sections should also govern in those cases in which, without having changed nationality, the domicile or habitual residence of the deceased. What would undergo some change is the national law, that of the domicile or the residence being that

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61. C.C.CAT. art. 422-1(2); S.T.S.CAT., Sept. 9, 2013 (R.O.J., No. 6527, p. 6-7) (Spain).

62. CARRASCOSA, *supra* 43, note 234.

63. 2012 O.J. (L 201) art. 24-25.

64. CARRASCOSA, *supra* 43, note 234.

65. Draft Report on Succession and Wills, EUR. PARL. DOC. PV 2148(INI) Recommendation No.4 (2005).

66. 2012 O.J. (L 201) art. 27; ANDREA BONOMI & PATRICK WAUTELET, *THE EUROPEAN LAW OF ESTATES: FUND REGULATION N° 650/2012* 433 (Bruylant 2013).

which, being the disposition initially invalidated, resulting in a change valid at the time of death through the work of the legislative amendment.<sup>67</sup> The second focuses only on one of those temporal references: the time of death. It would be simple to note that insofar as we move away from the moment in which the act is established, predictability is lost, i.e., the validity or formal invalidity of the act can end up being judged under cover of a law—the one in force at the time of death—that, logically, the originator should not or could not be present at the time of carrying out the business.<sup>68</sup> From a more theoretical perspective, one might think that the prescript operates with a sort of special conversion. This specialty would obey the fact itself, not of another business or of another form under cover of which the granted can become formally valid, but of another ordinance; in particular, in an order different from than in force at the time at which the act is granted.

Article 27 of Regulation 650/2012 intensifies the multiplier effect when that granted is an inheritance agreement. In order to judge its formal validity, in subsections (b), (c) and (d) the link represented by the nationality, domicile or residence—at the time of granting the act or at the time of death—it is sufficient to consider in relation to one, any of the grantors of the agreement. Therefore, the more grantors there are, the higher the number of potential applicable laws to the form of the business. In any case, it should deal with grantors-originators. It is not sufficient, for this purpose, with being only a grantor-beneficiary or, simply a grantor of the pact, “persons whose inheritance is the subject of an inheritance agreement.”

In the establishments of such agreements, there will be a phenomenon of opposite sign—that is, reduction of the laws with the possibility of formally adjudicating the provision—when it deals with resolving, in the life of the deceased, issues linked to the eventual *inter vivos* that can derive from the agreement, thus, for example, with the limitation terms of dispositive faculties. Before death, it is needless to say that the temporal benchmark, which provides the time of death, results inoperative.

A last multiplier factor, both in the Regulation and in CH 61, is detected at the time of formally assessing the validity of a revocation provision. Article 2 of CH 61 and article 27.2 of Regulation 650/2012 allow: or rating them regardless of its revocation effectiveness—and, therefore, applying to the provision the available criteria of article 1 of CH 61 and article 27.1 of

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67. It seems even the possibility of maintaining the formal validity of the disposition of property due under the law-so, nationality, residence or domicile-force at the time of death operates in any case, that is, apart from if the legislative change that favors validity that is not contemplated or domestic law with retroactive effect.

68. Consider, for example, in the situation of who provides a will and has knowledge-understood, grant it-time after that business is formally null. Imagine, too, that this situation-die intestate-and it looks good, so being that as a result of a subsequent change of nationality, domicile or habitual residence, that provision may end up resulting valid.

Regulation 650/2012—or justifying its formal validity under the law which, in its case, formally endorses the revoked provision.<sup>69</sup>

## 2. The Applicable Law in Particular Individuals, Plurilateral Instruments, and Real Property Cases

Apart from the determination of applicable law in plurilegislative member states, two other notions deserve mention: the first, the particularity is subjective in nature; in the second, the particularity is objective. The first would appeal to those cases in which there are different originators—that is, more than one—who formalize a unique and only document their willingness to have *mortis causa* provisions. The different and respective businesses *mortis causa*—that designate themselves as heir, legacy management—will continue being of a unipersonal nature. It is an essential feature which, therefore, neither is lost nor formally qualifies with other business of an identical nature ordained by another originator.<sup>70</sup> The joint will and inheritance agreements share this condition in the eyes of the Regulation.<sup>71</sup> In the second case, it is the existence of a real estate which allows to depend upon another potential applicable law to the form of the provision. It is the law of the place of location of the property.

In dealing with a unilateral instrument, connections relating to the place of execution, or to the nationality, residence or domicile of the deceased, do not present greater difficulty than the consistent in specifying, in each case, the meanings of these terms.<sup>72</sup> In line with the aforementioned, that one of them is the place in which the provision is given permits to suggest different scenarios: thus, existing in the will or testament a place different to the one that was actually executed in or, simply, or to the one in which there is no mention in this regard. These supposed provisions will be reduced to holographic wills. In both cases, if it proves otherwise where the business was carried out effectively, it will be possible to apply the law governing in that particular location—which, in its case, shall determine, for the purposes of formal validity of the provision, the consequences of this lack of accurate indication of the place of execution. In the case of not being able to determine this location, there will be a decline in the possibility of resorting to the law of article one of CH 61 and article 27.1 of Regulation 650/2012.

In cases in which the place of granting is not a personal connection, there would be no particularity when the provision which is executed is a

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69. Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions] [hereinafter Hauge Convention], Oct. 5, 1961 art. 1–2; 2012 O.J. (L 201) art. 27(1).

70. Badosa, *supra* 29, note 13.

71. 2012 O.J. (L 201) art. 3(1).

72. 2012 O.J. (L 201) art. 23, 24, 25, 27. 2012 O.J. (L 201) art. 21(1), 21(2), 22.

plurilateral instrument. However, subsections (b), (c) and (d) of CH 61 and Regulation 650/2012, respectively, suggest other problems. The reason being that the subject matter of these subsections contain personal links that, when applied to plurilateral instruments, can also cause a call for the plurality of laws. The issue occurs in significantly different terms as it is seen in light of CH 61 or Regulation 650/2012.

In the context of CH 61, it has been noted that the issue arises with regard to joint wills.<sup>73</sup> Having died one of the originators—one would say that the difficulty in the question raises the issue relative to the validity of the provision—the formal validity of the provision: how it should be judged? Should it consider exclusively the deceased and estimated enough to be formally valid in accordance with its national law or with the law of the place where they reside or are domiciled? Or is it necessary, also, that it be formally valid in relation to the rest of the originators—either on the basis of the same or another connection point? If it's the first scenario, would it be possible then, having died another grantor, result for them formally null or the formal validity appreciated in terms of the first implied formal validity of the instrument for all the grantors? If one opts for the second scenario, the observation that ensues is that judging the formal validity of the provision in relation to all the grantors when one of them dies—thus, the first to do it—implies not being able to apply the criteria of article 1 in all of its entirety. The reason is that the reference to national law, of the residence or domicile “at the time of their death” is only an option predicable by the deceased, not by the rest of the grantors.<sup>74</sup>

The issue is also not resolved in Regulation 650/2012. The text rehearses a guideline concerning the inheritance agreements, maybe applicable by analogy to the joint testament. The reference to national law, of the residence or domicile “of at least one of the persons whose inheritance is the subject of an inheritance agreement” allows one to plea for a very generous application of the *favor validitatis*.<sup>75</sup> Logically, in the text, we refer to those given inheritance agreements, as a minimum, by two people who participate in it as grantors-originator. The expression allows one to understand that, concerning the inheritance of any of the grantors, it is enough that the formal validity of the agreement be based on national law, of the residence or domicile of any of them, whether or not the pertinent grantor is the one who is deceased.<sup>76</sup> From this results the being formally valid for

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73. CONFÉRENCE DE LA HAYE, *supra* note 30, at 85.

74. *Id.* at 81–88, 167.

75. 2012 O.J. (L 201) art. 27.

76. SANTIAGO ÁLVAREZ GONZÁLEZ, THE APPLICABLE LAW TO THE AGREEMENTS AS TO SUCCESSION: THE LIMITS OF A SUBSTANTIVE APPROACH (Univ. of Santiago de Compostela, Vol. 22 2013).

one, but what is also valid for the rest.<sup>77</sup> However, the temporal benchmark that provides for the time of death—at the moment of death—can only be logically judged in relation to the grantor who has died.<sup>78</sup>

Two differences are noted between article 1 of CH 61 and article 27.1(e) of Regulation 650/2012: one, it would seem trivial—that “real estate” in CH 61 appear as “real estate” in the Regulation;<sup>79</sup> another, certainly more important: while CH 61 designates as applicable the law of “place” in which they a person is located, Regulation 650/2012 also focuses on the situation but calls on the corresponding state law—“the law of the member state in which the person is located.”<sup>80</sup>

Considering other connections, it would seem that the one represented by the place of location of the real estate is as immovable as that of the place of the granting of the provision, at the time that is of a greater eventuality than that of the nationality, domicile or residence. This is because, being a possibility, it is unlikely that these personal connections cannot be applied because of the deceased’s lack of nationality, residence or domicile. On the other hand, that the connection of article 27.1 (e) of Regulation 650/2012 cannot be applied is not a remote possibility if one considers the standard assumption, as well: that the deceased dispose of his real estate property because only then the connection will function, and that they have it at the time of their death because it is in relation to them that the formal validity of the provision will be judged. On the other hand, what is not necessary is for them to have such real property at the time of the execution of the provision, being enough to contemplate it somehow.<sup>81</sup> On another hand, that security of tenure would follow from the nature of the real property, which logically cannot be changed.<sup>82</sup>

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77. 2012 O.J. (L 201) art. 25(2).

78. It will also be inapplicable when the question arises about the effects on the inheritance pact life. See *supra* p. 2.1.1. The course can certainly suggest an anomalous case: think of the inheritance pact, with the death of one of the grantors, formally is null. Regarding, this death, one of the remaining grantors change of nationality, residence or domicile, and being that, while dying, its national law, the domicile or residence formally endorse the provision. *Quid* respect to the first cause and his succession?

79. CH 61, *supra* 26, art. 1 ¶ 3; 2012 O.J. (L 201) art. 27(1).

80. CH 61, *supra* 26, art. 2.

81. Thus, if through the arrangement the payer is limited to establishing different legacies on real or designate an heir to all its furniture heritage, it is clear that the further acquisition of property is not allowed, in order to assess the formal validity of that provision, consider the law of the place of situation of those. However, if a legacy of a building—the good it does not hold the time available, but the death—or the cause is simply limited to appoint an heir of all its assets is ordered, ownership property at the time of death will encourage recourse to the *lex rei sitae*, in case.

82. What may vary, of course, is the law governing at that place can be a time of execution of the arrangement and a different time of death. Whenever the formal validity should be determined at the time of opening of the succession, it is understood to be the law in force at that time to be applied. And

That said, it can be anticipated that to resort to the law of the location of the immovable property, but only to judge the formal validity of the provision in relation to these may involve, eventually, splitting the applicable law to the form or, where appropriate, impose the need to resort to another way of deferring the inheritance—that way, in case no other *mortis causa* provision exists. One aspect and another deserve some comment:

The splitting or duplication of applicable laws to the form is due to the fact of applying a law in order to formally validate a provision in terms of real property situated in the territory of that law and that, logically, has been disposed of, and another—the place of execution, residence, domicile—in order to justify the formal validity of the provision with regard to the remaining assets. Are we necessarily speaking about two *mortis causa* provisions—two wills—or is it that the supposed issue arises in relation to a unique will? In other words: do the plurality of laws applicable to the form also imply plurality of *mortis causa* provisions?

In the first case, any time two *mortis causa* provisions exist, the added question to consider is if the nearest at the time of death of the testator repealed or not and, where appropriate, to what extent it was previously granted. *Favor validitatis*, in relation to the provisions that amend or revoke a previous one, has already been indicated in article 27.2 of Regulation 650/2012. The subsistence of both will be possible, in terms of principles, when in the application of the law that is in question is addressed, in some way, in the content of the provisions and its compatibility, abandoning a strict chronological criterion, according to which the subsequent provision always repeals the previous provision.

Certainly the connection that provides the place of location of the real estate especially makes sense in those cases in which the formal validity of the provision, in terms of real estate, cannot sustain itself in any other law.<sup>83</sup> Similarly, when this occurs, inheritance is deferred through a testate route and under a unique will requires that there exist another law—thus, the national law of the deceased, that of his residence or domicile, or of the place of execution—which provides a framework or distinct formalities depending on the nature of the personal or real estate property of the estate and which permits, that in spite of its invalidation due to noncompliance with the form required for real estate, the partial validity of the will could remain insofar as

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this, notwithstanding that, as a result of transitional rules, formal validity can eventually rest upon the law in force at the time of grant.

83. CONFÉRENCE DE LA HAYE, *supra* note 30, at 85.



it relates to property. As if, for example, in accordance with national law it would not be allowed to have real property disposed of by *mortis causa* through a holographic will which is permitted by the law of the place of location of any of deceased. And as if permitted by applicable national law allowed, having disposed of the real estate, maintain the validity of the holographic will in terms of the property. If that same will is formally valid according to the law of the place of location of the property, the so-called will, will then be susceptible to a plurality of applicable laws in regards to the form of a unique *mortis causa* provision.

There will be no plurality of applicable laws to the form in those cases in which, having been awarded a single *mortis causa* provision, it is only possible to save its formal validity, and only in terms of real estate, under the protection of the law determined by its location. The latter, however, does not necessarily imply breaking up the obtained inheritance based on the nature of the real and personal property, deferring the real estate through testate means and the invested through intestate method. On the contrary, how to proceed in these cases is a matter reserved to the inheritance law which, in the context of article 23 of Regulation 650/2012, is a unique law.<sup>84</sup>

### 3. Applicable Law in Plurilegislative States

More than just sharing connection points, CH 61 and Regulation 650/2012 coincide in other aspects: both have effective *erga omnes*,<sup>85</sup> and both discard forwarding.<sup>86</sup> However, there is an issue that surfaces differently in one text or another, namely: the related determination of the applicable law in the case of member states with a plurality of territorial jurisdictions.

CH 61, by referring in subsections (a), (c), (d) and (e) to the law of the place in which the provision was executed; in which the domicile or habitual residence is held, or in which the real estate is located, will allow to apply directly the related territorial provision. It is only with regard to the national law, article 1, second paragraph emphasizes the internal rules on the determination of the applicable law. In case of not having them, then it is the same Convention that orders the testator to have a closer link with the internal law. Therefore, in case of a Spanish testator not residing in Spain and not domiciled there, which creates a will abroad, who would be interested in knowing if his will is formally valid under Spanish law, the Convention refers to article 11 of the CCesp. This latter provision: Firstly, it refers to the law of the country in which the act is executed in. In the context of an internal

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84. 2012 O.J. (L 201) art. 26; C.C.CAT. art. 411–3, 462–1; C.C.ESP. art. 912(2).

85. CH 61, supra 26, art. 6; 2012 O.J. (L 201) art. 20.

86. CH 61, supra 26, art. 1; 2012 O.J. (L 201) art. 34.

conflict, a useful interpretation of the standard addresses the law of the place within the Spanish territory in which the provision was executed. In our case, however, the criterion is inoperative insofar as the assumption we are discussing, precisely, of the will created abroad, otherwise, article 1 of CH 61 would govern.

Secondly, it is also necessary to endorse the formal validity of the provision according to the “applicable law to its content” as well as “the personal law of the person making the disposition.” The 9.8 CCesp. in the field of wills allows for both laws to coincide. Therefore, the law of the civil neighborhood would be highlighted by article 1(b), CH 61, and articles 11 and 9.8 of CCesp.<sup>87</sup>

Article 27 of Regulation 650/2012 refers, in any case, to the law of the corresponding member state. If it is a plurilegislative system, article 36.3, which provides a specific rule for the case of an internal conflict derives from article 27. Essentially, this provision: first, refers to the internal conflict rules; second, and in the case of not having them, requires applying the law of the territorial unit with which the testator or grantors of the agreement have a stronger link. Two assumptions demonstrate, essentially, the difference between the adopted system by one and another text.

The first would be of the foreign testator, for example, in Catalonia. If interested in referring to the connection point in the place in which the provision was granted, article 1 of CH 61 would allow us to directly refer to the Catalan law. On the other hand, using the same connection point, the Regulation contains the Spanish law, as well as the Catalan law.<sup>88</sup> The result, therefore, ends up being the same despite that it defers to one another in its textual content.

The second would be that of the foreigner whose domicile or habitual residence is in Catalonia and who has been outside of Spain. If one refers to the connection point of the domicile or the residence, CH 61 directly derives to the Catalan system; the Regulation, again, to article 11 Ccesp<sup>89</sup> being as civil neighborhood is lacking abroad. Then, it should be resorted to the residual discretion of art. 36.3 of Regulation 650/2012 and apply the law of territorial unity that shows close links with the testator, which could be Catalan law.

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87. C.C.ESP. art. 14.

88. 2012 O.J. (L 201) art. 36.3; C.C.ESP. art. 11.

89. CH 61, *supra* 26, art. 1(c)-(d).