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Formal validity of dispositions of property upon death

1. The formal validity of dispositions of property upon death and the scope of the Regulation

1.1. Current situation: Formal validity of dispositions of property upon death would not be covered by the scope of Chapter III SuccReg.: 

Article 19
Scope of applicable law

1. The law determined in Chapter III shall govern the succession as a whole, from its opening to the final transfer of the inheritance to the beneficiaries.  
2. This law shall govern in particular:

(k) the validity, interpretation, amendment and revocation of a disposition of property upon death, with the exception of its formal validity; 

1.2. Existing international conventions

- Hague Convention of 5 October 1961 (Hague Conference of PIL) – Harmonisation of the conflicts of law rules
- Washington Convention of 26 October 1973 (Unidroit) – (partial) Harmonisation of the substantive law
- Basel Convention of 16 May 1972 (Council of Europe) – cross-border registration system of wills

2. Possible Solutions for harmonized conflict of law rules concerning formal validity of dispositions of property upon death

2.1. Ratification of the Hague Convention by the remaining Member States

2.2. Extension of the scope of the SuccReg. to the formal validity questions

a) Pros and Cons (arguments)

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1 Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
2 Washington Convention of 26 October 1973 providing a Uniform Law on the Form of an International Will
3 Basel Convention of 16 May 1972 on the Establishment of a Scheme of Registration of Wills
Against:
- Majority of the Member States are already Contracting States of the Hague Convention of 1961: Duplication of the Conflicts of Law rules for these Member States
- Reservations, made by certain Member States to the Convention concerning oral wills

For:
- **Complete** Regulation: Harmonised Conflict of Law rules for all legal questions in the field of Succession Law in the same legal instrument;
- Possibility to regulate the formal validity questions for *all kinds* of the dispositions of property upon death (also for the agreements as to succession!)
- no general exclusion of questions of formal validity from the scope of the SuccReg.: Other Chapters (Jurisdiction, Recognition, Enforcement) shall be applied also in legal disputes concerning formal validity of a will
- Possibility of the interpretation by the Court of Justice

b) reception of the rules of the Hague Convention – by incorporation

Basic principle: favor testamenti – **alternative** connecting factors

- place of the making of the will;
- nationality of the testator (at the time when the disposition was made /at the time of his death);
- domicile of the testator (at the time when the disposition was made /at the time of his death);
- habitual residence of the testator (at the time when the disposition was made /at the time of his death);
- location of the immovable property

Completing with further connecting factors (e.g. lex fori) ?

Application of the same connecting factors for the agreements as to succession *mutatis mutandis*


- legal interpretation of the term „formal validity“ of a disposition of property upon death is unavoidable;
- qualification by lex fori or lex successionis *v.* uniform, independent (autonomous) qualification ?
- evident issues and problematic issues

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4 Austria, Belgium, [Denmark], Estonia, Finland, France, Germany, Greece, Ireland, Luxembourg, Nederland, Poland, Slovenia, Spain, Sweden, United Kingdom