

ADAPTATION OF RIGHTS IN REM ACCORDING TO THE EU REGULATION ON MATRIMONIAL PROPERTY REGIMES

ZAVADILOVÁ, LUCIE*

Abstract: In June 2016 the Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes has been adopted. According to its Preamble, the Regulation should not affect the limited number of rights in rem (the *numerus clausus* principle) known in the national law of the particular Member State. Nevertheless, the spouses should be allowed to enjoy in another Member State the rights which have been created or transferred to them as a result of the matrimonial property regime. Therefore, Article 29 of the Regulation provides for the adaptation of an unknown property right to the closest equivalent right under the law of that other Member State. The aim of this contribution is to describe the concept of adaptation and analyse how adaptation of rights in rem can be used in the context of matrimonial property regimes.

Keywords: Adaptation, Adaptation of Rights in Rem, Matrimonial Property Regimes, Matrimonial Property Regulation, Succession Regulation.

1. Introduction

The increasing mobility of persons in contemporary globalized world inevitably leads to a significant increase in the number of marriages with cross-border element.¹ This covers not only mixed and migrant marriages, but also situations when the spouses acquire property abroad.² On June 24, 2016, almost ten years after the presentation of the Green Paper by the European Commission, the Council of the European Union passed a Regulation implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes³ (“Matrimonial Property Regulation”). Its aim is “to provide married couples with legal certainty as to their property and offer them a degree of

* Masaryk University, Faculty of Law, Department of International and European Law, e-mail: ZavadilovaLucie@seznam.cz

¹ *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, Brussels: European Commission, COM(2016) 106 final, 4.

² DIAGO DIAGO, MARIA DEL PILAR: The Matrimonial Property Regime in Private International Law, in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*. Volume II – 2000, 2000, Kluwer Law International, Hague, 180.

³ Council Regulation (EU) 2016/1103 (24th June 2016) implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.



predictability”.⁴ To achieve this goal, the adopted regulation covers all rules concerning the matrimonial property regimes in a single instrument.⁵

Lately, discussion about the adoption of so called Rome 0 Regulation has also been launched.⁶ Questions concerning the general part of private international law are traditionally of great importance in this legal area. Nevertheless, the European legislator has chosen a way of a step-by-step codification of the several special areas concerning the conflict-of-law rules in which institutes of the general part are regulated.⁷ The Matrimonial Property Regulation deals with several of them as well. Those are – adaptation of rights *in rem* (Article 29), overriding mandatory rules (Article 30), public policy clause (Article 31), and renvoi (Article 32). The Matrimonial Property Regulation is not applicable yet,⁸ but this contribution seeks to address at least one of the possible challenges which might occur in practice.

In this paper, the author would like to focus on a very specific issue – the instrument of adaptation. The aim of this contribution is to describe the concept of adaptation and analyse how adaptation of rights *in rem* can be used according to the Matrimonial Property Regulation. To fulfil this goal the author will also deal with the Regulation (EU) No 650/2012 of the European Parliament and of the Council 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 Succession⁹ (“Succession Regulation”), which also contains provision on adaptation and constitutes a source of inspiration, in more details.

⁴ Recital 15 of the Preamble to the Matrimonial Property Regulation.

⁵ *Ibid.*

⁶ More to this initiative see LEIBLE, STEFAN – MICHAEL, MÜLLER: The Idea of a “Rome 0 Regulation”, in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*. Volume XIV – 2012/2013, 2013, Sellier, European Law Publishers, Munich, 137-152; WAGNER, ROLF: Do We Need Rome 0 Regulation?, in *Netherlands International Law Review*, Vol. 61, Issue 2. (2014), 225-242.

⁷ KÖHLER, ANDREAS: General Private International Law Institutes in the EU Succession Regulation – Some Remarks, in *Analni Pravni Fakulteta Univerzitetu u Zenici*, Issue 18. (2016), 169-171.

⁸ The Matrimonial Property Regulation will be used for the determination of the applicable law to spouses who marry or choose the law applicable to their property regime after 29 January 2019. See Articles 69(3), 70(2) of the Matrimonial Property Regulation.

⁹ Regulation (EU) No 650/2012 of the European Parliament and of the Council (4th 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. The regulation is applicable to the succession of persons who die on 17 August 2015 or later. See Article 83 of the Succession Regulation.

2. Adaptation

2.1. General outline

Adaptation (also adjustment) – as a conflict-of-law instrument¹⁰ – is recognized in most continental legal systems but is hardly known in the common law countries.¹¹ “*The problem of adaptation has its source in the analytical approach of private international law, according to which an appropriate law has to be determined for every raised legal question.*”¹² In practice, it is not unusual that the cross-border situation has to be decided in compliance with two or more legal systems (so called *dépeçage*), which are applied simultaneously or subsequently.¹³ Since the relevant legal systems are not synchronized with each other, their combined application may lead to inconsistency.¹⁴ It may even produce result which none of the involved legal systems would presume, if they decide the whole case on their own.¹⁵

Dannemann calls this situation “accidental discrimination”.¹⁶ It means that a case which is linked to several legal systems is treated differently than a comparable case which is connected only with one of those systems; provided the different treatment is not justified.¹⁷ Dannemann even considers “adjustment of applicable rules” to be one of three methods available for determining the rules which influence the outcome of the case having cross-border implication. “*Adjustment occurs when courts modify or ignore applicable rules in order to avoid accidental discrimination.*”¹⁸

Besides, adaptation may be used in situations when a right *in rem* is invoked in the state which is not familiar with the property right in question. This may especially occur

¹⁰ It is interesting to mention that Dannemann comes up with innovative idea that the adaptation is a method. More to this concept see below.

¹¹ DANNEMANN, GERHARD: Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdictions, in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*, Volume X – 2008, 2009, Sellier, European Law Publishers, Munich, 124.

¹² KÖHLER: *op. cit.* 179.

¹³ ROZEHNALOVÁ, NADĚŽDA: Adaptace a jiné obdobné procesy [Adaptation and similar processes], in ROZEHNALOVÁ, NADĚŽDA: *Instituty českého mezinárodního práva soukromého* [Institutes of the Czech Private International Law], 2016, Wolters Kluwer, Praha, 152.

¹⁴ Bodgan uses “*the metaphor of the construction of a car using spare parts that are faultless as such but need to be adjusted to each other because they are of different models*”. See BOGDAN, MICHAEL: Private International Law as Component of the Law of the Forum. General Course on Private International Law, in *Recueil des Cours, Collected Courses of the Hague Academy of International Law* – 2010, Vol. 348, 2011, Martinus Nijhoff Publishers, Leiden/Boston, 232, footnote 641.

¹⁵ KÖHLER: *op. cit.* 179.

¹⁶ DANNEMANN: *op. cit.* 114.

¹⁷ *Ibid.* 120, 128.

¹⁸ Dannemann differentiates between three methods – application of substantive rules selected by conflict-of-law rules, the consideration of non-applicable rules, and adjustment of the applicable rules. This is, however, outside the scope of this paper. For more details see DANNEMANN: *op. cit.* 113-114.

in the course of succession proceedings or matrimonial property regime proceeding.¹⁹ In all these cases,²⁰ the inconsistent result may be adjusted by the relevant conflict-of-law instrument – adaptation.²¹

In practice, adaptation can be carried out in two different ways. Since adaptation on the level of private international law and adaptation on the level of substantive law are traditionally being distinguished.²² According to the first approach “*the inconsistency could be eliminated by a teleological modification of conflict-of-law rules insofar as they mandate only one law to govern the whole respective legal relationship as a result. This could be achieved by revising the scope of the concerning rules or by developing a completely new conflict-of-law rule. In both cases, the dépeçage as a source of inconsistency would be directly eliminated.*”²³ The second approach which deals with inconsistent results “*is exclusively located on the level of substantive law without affecting the codified conflict-of-law rules. In this case, the applicable substantive law has to be modified or completely ignored and replaced by new substantive rules, which have to be developed modo legislatoris.*”²⁴

Similarly, Dannemann distinguishes so called conflicts solution (i. e. choosing a different law) and a substantive law solution, which means modification, ignoring or creation of a new substantive rule.²⁵ According to some authors, the substantive law solution should take precedence over the conflicts solution,²⁶ because it allows more differentiated modifications and constitutes smaller intervention in the legal structure.²⁷

Adaptation should be admitted as *ultima ratio* to prevent accidental discrimination, especially to prevent infringement of the principle of equal treatment, right to liberty and property. In each case, adaptation should be understood restrictively, as an instrument by which the courts and other authorities intentionally ignore or modify applicable rules. This means that exceptional reason must be found in order to justify such an act. It is therefore necessary to distinguish adaptation from legal application and interpretation. In practice, adaptation constitutes a device “*by which courts ‘correct’ the legislator*”.²⁸ It is up to the discretion of the judges to reach a reasonable solution in each specific case.²⁹

¹⁹ ROZEHNALOVÁ: *op. cit.* 152.

²⁰ For more examples see BOGDAN: *op. cit.* 232-234.

²¹ KÖHLER: *op. cit.* 179.

²² For example KÖHLER: *op. cit.* 184; KUČERA, ZDENĚK – MONIKA, PAUKNEROVÁ: *Adaptace (přizpůsobení)* [Adaptation (adjustment)], in KUČERA, ZDENĚK; PAUKNEROVÁ, MONIKA; RŮŽIČKA, KVĚTOSLAV ET AL.: *Mezinárodní právo soukromé* [Private International Law], 2015, Aleš Čeněk, Plzeň, 180.

²³ KÖHLER: *op. cit.* 180.

²⁴ *Ibid.* 180.

²⁵ DANNEMANN: *op. cit.* 132.

²⁶ For example KUČERA – PAUKNEROVÁ: *op. cit.* 180; KÖHLER: *op. cit.* 185.

²⁷ KÖHLER: *op. cit.* 185.

²⁸ DANNEMANN: *op. cit.* 124.

²⁹ ROZEHNALOVÁ: *op. cit.* 154.

We can summarize that adaptation is a flexible instrument which can be used in various situations³⁰ and may manifest itself in numerous forms. Nevertheless, in this paper author would like to focus on adaptation of rights *in rem* which is especially relevant in matrimonial property regime proceedings. Since the rights *in rem* does not necessarily have to be governed by the *lex rei sitae*. On the contrary, the law applicable to matrimonial property regimes often applies. The same holds true for the area of succession law, which will also be analysed in more details.³¹

2.2. Succession Regulation

The concept of adaptation of rights *in rem* has for the first time been explicitly introduced in the EU law by the Succession Regulation. It is interesting to note that the Commission's proposal did not contain any adaptation rule.³² Nevertheless, in its comments on this proposal the Max Planck Institute for Comparative and International Private Law suggested that the instrument of adaptation of rights *in rem* should also be addressed by the regulation.³³

The Succession Regulation now provides three different adaptation rules (Articles 31 – 33). It should, however, be noted that also other forms of adaptation cases can arise in the context of succession which are not covered by these provisions. For example, if the spouse's right of succession – governed by foreign succession law – has to be combined with a claim concerning the distribution of matrimonial property governed by the matrimonial property law.³⁴ The reference to adaptation in these situations is not precluded by Article 31 of the Succession Regulation.³⁵ This implies that other forms of adaptation are also permissible.

Nevertheless, as has already been mentioned, author would only like to focus on the adaptation of rights *in rem* according to Article 31 of the Succession Regulation.³⁶

³⁰JÚDOVÁ, ELENA: Nová úprava adaptácie v Zákone č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom [New Regulation of Adaptation in Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure], in ROZEHNALOVÁ, NADĚŽDA – DRLÍČKOVÁ, KLÁRA – VALDHANS, JIŘÍ (eds.): *Days of Law 2015, 2016*, Masarykova Univerzita, Brno, 110-111.

³¹JÚDOVÁ: *op. cit.* 113.

³²*Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*. Brussels: European Commission, COM(2009) 154 final.

³³For more details see *Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*. Max Planck Institute for Comparative and International Private Law, March 2010, 90-91, 94-95.

³⁴KÖHLER: *op. cit.* 170, 184. For specific example with possible solution see BOGDAN: *op. cit.* 232-233.

³⁵Recital 17 of the Preamble to the Succession Regulation. See WELLER, MATTHIAS: Article 1: Scope, in CALVO CARAVAGA, ALFONSO L. – DAVÍ, ANGELO – MANSEL, HEINZ-PETER (eds.): *The EU Succession Regulation: A Commentary*, 2016, Cambridge University Press, Cambridge, 108.

³⁶„Where a **person invokes a right in rem** to which he is **entitled under the law applicable to the succession** and the law of the Member State in which the right is invoked **does not know the**

This is connected with the fact that the details of the property rights recognized among the EU Member States vary. Situation is especially problematic if the right *in rem* that should be recognized is not known in the state in which the right is invoked.³⁷ For example, the Dutch right of usufruct differs from the French right of *l'usufruit*. According to Dutch law the holder of the right of usufruct is allowed to consume the assets under usufruct without a duty to replace. In comparison, under French law the holder of *l'usufruit* is obliged to restore the assets with similar quantity and quality at the end of the duration of the relationship.³⁸

It should be emphasised that the Succession Regulation differentiates between the transfer of rights and obligations by succession (which is governed by the succession law), and the nature of rights *in rem*. The nature of property rights is based on the principle of *numerus clausus* and is excluded from the material scope of the Succession Regulation. The same holds true for any recording in a register of rights in immovable or movable property.³⁹ In fact, the borderline is delimited between the law of succession and the law of property.⁴⁰ It follows that the *lex successionis* determines the rights (including the rights *in rem*) granted to each heir or legatee, but it is for the *lex situs* of the assets (i. e. property status) to determine the rights *in rem* for them.⁴¹ If the boundary is not clear, the Court of Justice of the European Union will need to decide.⁴²

In many cases, there are no difficulties when the succession law coincides with the law of the Member State where the rights *in rem* are relied upon. However, problem may arise if there is distinction between the succession law and the law of the state where the right is exercised. For example, estate includes assets in other Member State than the state in which the deceased had his habitual residence.⁴³

To handle these kind of situations, Article 31 of the Succession Regulation provides for the adaptation rule on the level of substantive law. The provision covers situations when the *lex successionis* itself generates a right *in rem* concerning the

right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it. (emphasis added).

³⁷ BOST, JENNIFER: Nothing Certain About Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions, in *Emory International Law Review*, Vol. 27, Issue 2. (2013), 1164-1165.

³⁸ *Ibid.* 1164-1165. For more examples see LAGARDE, PAUL: Article 31: Adaptation of rights in rem, in BERGQUIST, ULF – DAMASCELLI, DOMENICO – FRIMSTON, RICHARD et al. (eds.): *EU Regulation on Succession and Wills: Commentary*, 2015, Sellier. European Law Publishers, Köln, 167.

³⁹ Recitals 15, 18, 19 of the Preamble; Article 1(2)(k, l); Article 23(2)(e) of the Succession Regulation. See LAUKEMANN, BJÖRN: The European Certificate of Succession: Portrait of a New Instrument in European Private International Law, in HESS, BURKHARD – BERGSTRÖM, MARIA – STORSKRUBB, EVA (eds.): *EU Civil Justice: Current Issues and Future Outlook*, 2016, Bloomsbury Publishing, Oxford, 161-182.

⁴⁰ SOLOMON, DENNIS: The Boundaries of the Law Applicable to Succession, in *Analī Pravnog Fakulteta Univerzитета u Zenici*, Issue 18. (2016), 217.

⁴¹ LAGARDE: *op. cit.* 166.

⁴² FRIMSTON: *op. cit.* 49.

⁴³ WAUTELET, PATRICK: *Art. 31 Succession Regulation (650/2012) – a first look at a mysterious provision* (2013).

inheritance, which is unknown to the *lex rei sitae*⁴⁴ – especially domestic register law or insolvency law.⁴⁵ If this is the case, a judge is allowed to adapt a foreign right *in rem* to the closest equivalent property right of that other Member State. Provided this is necessary for the preservation of the limited number of rights *in rem* (the *numerus clausus* principle) in the national law of the particular state.⁴⁶ Since Article 31 of the Succession Regulation does not distinguish between movable and immovable assets, the adaptation of rights *in rem* to the *lex situs* must be made for both movable and immovable property,⁴⁷ including intellectual property.⁴⁸

Nevertheless, it should be emphasised that the Member State is also allowed to refuse (i. e. not recognize) the foreign property right. Since the Succession Regulation makes the adaptation of the right *in rem* only necessary in limited circumstances.⁴⁹ The judge is supposed to take into account “the aims and interests pursued by the specific right *in rem* and the effects attached to it”.⁵⁰ In this context, Bost objects that the ability of refusal might not lead to the simplification and predictability, i. e. the goals pursued by the Succession Regulation.⁵¹

It is also necessary to mention that the judge is entitled to refuse to apply certain provision of a foreign law “if such application is manifestly incompatible with the public policy (*ordre public*) of the forum”.⁵² However, Laukemann states that the *numerus clausus* principle should not be understood as a reason extending the public policy exception.⁵³ In other words, the public policy exception is the instrument distinct from adaptation, because they serve different purposes.⁵⁴ Moreover, the public policy exception has much higher threshold.⁵⁵ Those instruments are therefore not interchangeable.

According to Rožehnalová, adaptation may generally occur either during the course of proceeding itself or at the stage of recognition and enforcement of foreign judgment. Article 31 of the Succession Regulation provides for the adaptation of rights *in rem* in the course of succession proceeding. Moreover, this provision seems to be applicable only upon the initiative of an entitled person (the beneficiary). It means that Article 31 of the Succession Regulation is not applicable *ex offi*.⁵⁶

⁴⁴KÖHLER: *op. cit.* 180.

⁴⁵LAUKEMANN: *op. cit.* 161-182.

⁴⁶Recitals 15, 16 of the Preamble; Article 31 of the Succession Regulation. See KÖHLER: *op. cit.* 180.

⁴⁷LAGARDE: *op. cit.* 167.

⁴⁸WELLER: *op. cit.* 107.

⁴⁹BOST: *op. cit.* 1165.

⁵⁰Recitals 15, 16 of the Preamble; Article 31 of the Succession Regulation.

⁵¹BOST: *op. cit.* 1165.

⁵²Recital 58 of the Preamble; Article 35 of the Succession Regulation.

⁵³LAUKEMANN: *op. cit.* 161-182.

⁵⁴ROZEHNALOVÁ: *op. cit.* 160, 162.

⁵⁵WAUTELET: *op. cit.*

⁵⁶Recitals 15, 16 of the Preamble; Article 31 of the Succession Regulation. See ROZEHNALOVÁ: *op. cit.* 152, 163.

Solomon remarks that the method of adaptation “is subject to a very sophisticated, highly technical debate that threatens to transcend the needs of practical jurisprudence”.⁵⁷ In this context, Article 31 of the Succession Regulation “strikes a balance by giving useful (albeit: quite general) guidelines for a practical approach to the problem without getting lost in theoretical battles”.⁵⁸ We found his conclusion convincing.

2.3. Matrimonial Property Regulation

The original proposal for a regulation on matrimonial property regimes presented by European Commission in 2011 did not contain any adaptation rule.⁵⁹ Nevertheless, inspired by the Article 31 of the Succession Regulation, the instrument of adaptation has been incorporated in the revised proposal for a regulation on matrimonial property regimes presented in 2016, i. e. the proposal which has afterwards been adopted by way of enhanced cooperation.⁶⁰ Weller states that adaptation has become “a normatively recognized tool of European choice-of-law methodology”.⁶¹

The Matrimonial Property Regulation regulates the concept of adaptation of rights *in rem* in its Article 29.⁶² This provision is inserted in the chapter III – Applicable law. Therefore, the adaptation of rights *in rem* can be performed in the course of matrimonial property regime proceeding.⁶³ It is the adaptation on the level of substantive law, so the applicable substantive rules can be modified.⁶⁴

Before we analyze the instrument of adaptation of property rights in more details, several remarks should be made. Since the Matrimonial Property Regulation is based on the principle of unity, the law applicable to a matrimonial property regime shall apply to all assets (movable and immovable), regardless of where the assets are located.⁶⁵ It

⁵⁷ SOLOMON: *op. cit.* 217.

⁵⁸ *Ibid.* 217.

⁵⁹ *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*. Brussels: European Commission, COM(2011) 126 final.

⁶⁰ *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*. Brussels: European Commission, COM(2016) 106 final. Unfortunately, the explanatory memorandum does not provide further details about this provision.

⁶¹ WELLER: *op. cit.* 108.

⁶² „Where a **person invokes a right in rem** to which he is **entitled under the law applicable to the matrimonial property regime** and the law of the Member State in which the right is invoked **does not know the right in rem** in question, that **right shall**, if necessary and to the extent possible, **be adapted to the closest equivalent right** under the law of that State, **taking into account the aims and the interests** pursued by the specific right in rem and the **effects** attached to it.” (emphasis added).

⁶³ Since there is barely any literature dealing with Article 29 of the Matrimonial Property Regulation, author will use sources concerning Article 31 of the Succession Regulation similarly. Those provisions are almost identical.

⁶⁴ Similarly KÖHLER: *op. cit.* 180.

⁶⁵ Recital 43 of the Preamble; Article 21 of the Matrimonial Property Regulation. More to the unity principle see *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and*

should also be noted that matters such as the nature of rights *in rem* and the requirements for the recording in a register of a right in property are explicitly excluded from the substantive scope of this regulation. Nevertheless, the creation or the transfer resulting from the matrimonial property regime of a property right as provided for in the law applicable to the matrimonial property regime should be permitted. Provided the *numerus clausus* of property rights known in the national law of particular Member States is not affected. It means that a Member State should not be required to recognise a right *in rem* relating to property located in its territory, if the property right in question is unknown to its legal system.⁶⁶ On the other hand, the spouses should be allowed to enjoy in another Member State the rights which have been created or transferred to them as a result of the matrimonial property regime. For these reasons, the Matrimonial Property Regulation contains a provision which admits the adaptation of rights *in rem*.⁶⁷

Article 29 of the Matrimonial Property Regulation is applicable upon the fulfilment of three conditions. Firstly, initiative of an entitled person invoking a right *in rem*, is necessary.⁶⁸ Secondly, the right invoked must be a right *in rem* according to the relevant matrimonial property law. Last but not least, the right *in rem* in question cannot exist in the Member State where it is invoked,⁶⁹ which means that there are significant differences between the property rights.⁷⁰ If these conditions are met, a judge shall find the closest equivalent right *in rem* to the foreign property right invoked. Under a literal interpretation, the judge should choose among the property rights known to his legal system, i. e. from a limited list of rights *in rem* (*numerus clausus*). In case there is not an equivalent right, a literal interpretation would deprive a claimant of his protection. Because of this, the Matrimonial Property Regulation provides useful guidelines in order to ensure the claimant an adequate protection of the right invoked, since it also admits other forms of adaptation. It means that the court acquires a wide discretion to identify the closest equivalent right *in rem*.⁷¹

The judge is entitled to adapt an unknown property right to both movable and immovable assets – provided this is necessary and to the extent possible – to the closest (functionally) equivalent right under the law of that other Member State. Nevertheless, the Member State is also allowed to refuse foreign property right. In each case, the aims and the interests pursued by the particular right *in rem* and the effects attached to it should be taken into account.⁷²

enforcement of decisions in matters of matrimonial property regimes. Brussels: European Commission, COM(2016) 106 final, 9.

⁶⁶ Recitals 19, 24, 27, 28 of the Preamble; Article 1(2)(g, h) of the Matrimonial Property Regulation.

⁶⁷ Recital 25 of the Preamble to the Matrimonial Property Regulation.

⁶⁸ Similarly ROZEHNALOVÁ: *op. cit.* 163.

⁶⁹ Similarly CALZOLAIO, ERMANNIO – LAURA, VAGNI: Article 31: Adaptation of Rights in rem, in CALVO CARAVAGA, ALFONSO L. – DAVÍ, ANGELO – MANSEL, HEINZ-PETER (eds.): *The EU Succession Regulation: A Commentary*, 2016, Cambridge University Press, Cambridge, 445.

⁷⁰ Similarly WAUTELET: *op. cit.*

⁷¹ Recital 26 of the Preamble to the Matrimonial Property Regulation. See CALZOLAIO – VAGNI: *op. cit.* 448.

⁷² Recital 26 of the Preamble; Article 29 of the Matrimonial Property Regulation.

In summary, the instrument of adaptation provides an answer to a variety of problems. On the other hand, Article 29 of the Matrimonial Property Regulation is not a device permitting general and complete application of *lex rei sitae* to all rights *in rem*. Instead, it offers a limited possibility to deviate – in limited number of circumstances – from ordinary application of the law applicable to matrimonial property regime. The adaptation constitutes an exception from otherwise applicable matrimonial property law.⁷³ However, it does not provide for straightforward answers. Instead, it is the task of judges to find appropriate solution upon the precise facts of the case. We can conclude, that Article 29 of the Matrimonial Property Regulation ensures a high degree of flexibility, but it leads to a divergence among the Member States at the same time.⁷⁴

3. Conclusion

In private international law it is often a case that court is obliged to apply foreign law on particular cross-border situation. The aim of this contribution was to describe and analyse the concept of adaptation of rights *in rem* according to the Matrimonial Property Regulation. However, attention has also been paid to the Succession Regulation.

We can conclude that adaptation is a conflict-of-law instrument which allows a judge to adjust inconsistent results caused by simultaneous or subsequent application of several legal systems on the cross-border case. Adaptation is a flexible instrument and can be used for *ad hoc* solution in a variety of situations. Moreover, technically well-performed adaptation may contribute to the better understanding and treatment of foreign law. Since it will not be necessary to refuse to apply a provision of the foreign law with regard to the public policy exception or to deny the recognition of a foreign judgment due to its conflict with *ordre public*.

Adaptation of rights *in rem* which is especially relevant in succession proceedings and matrimonial property regime proceedings is newly regulated in the EU law. Since the general choice-of-law rule for determining the law applicable to a matrimonial property regime (or succession) covers all kinds of assets (i. e. movable and immovable), adaptation will in practice be of great importance.

The division between the *lex rei sitae* and the law applicable to a matrimonial property regime is not always easy. Because of the principle of *numerus clausus* of rights *in rem*, the Member States are not obliged to recognize foreign property right to assets located in their territory. Instead, they are (only) required to provide for the adaptation of an unknown right *in rem* to the nearest equivalent property right under the law of that Member State in order to allow the spouses to enjoy the rights *in rem* created or transferred to them under the law applicable to their matrimonial property, irrespective of where the property is located and whether the jurisdiction there knows such a right or not.⁷⁵ The same holds true with regard to the succession.

Even it is quite difficult to deal with these general institutes of private international law, author considers Article 29 of the Matrimonial Property Regulation (as well as

⁷³ Similarly WAUTELET: *op. cit.*

⁷⁴ CALZOLAIO – VAGNI: *op. cit.* 451.

⁷⁵ Similarly WELLER: *op. cit.* 106-107.

Article 31 of the Succession Regulation) as useful guideline for a practical approach. In author's opinion, express regulation can draw judges' attention to this instrument and help them reach a reasonable and fair solution in each particular case.

List of references

Books, chapters in a book, articles

- [1] BOGDAN, MICHAEL: Private International Law as Component of the Law of the Forum. General Course on Private International Law, in *Recueil des Cours, Collected Courses of the Hague Academy of International Law* – 2010, Vol. 348, 2011, Martinus Nijhoff Publishers, Leiden/Boston, 9-252.
- [2] BOST, JENNIFER: Nothing Certain About Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions, in *Emory International Law Review*, Vol. 27, Issue 2. (2013), 1145-1174, <https://www.ebscohost.com/> [2016.12.11.]
- [3] CALZOLAIO, ERMANNIO – LAURA, VAGNI: Article 31: Adaptation of Rights in rem, in CALVO CARAVAGA, ALFONSO L. – DAVÍ, ANGELO – MANSEL, HEINZ-PETER (eds.): *The EU Succession Regulation: A Commentary*, 2016, Cambridge University Press, Cambridge, 442-451.
- [4] DANNEMANN, GERHARD: Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdictions, in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*, Volume X – 2008, 2009, Sellier. European Law Publishers, Munich, 113-134.
- [5] DIAGO DIAGO, MARIA DEL PILAR: The Matrimonial Property Regime in Private International Law, in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*, Volume II – 2000, 2000, Kluwer Law International, Hague, 179-203.
- [6] FRIMSTON, RICHARD: Article 1: Scope, in BERGQUIST, ULF – DAMASCELLI, DOMENICO – FRIMSTON, RICHARD et al. (eds.): *EU Regulation on Succession and Wills: Commentary*, 2015, Sellier, European Law Publishers, Köln, 38-51.
- [7] JÚDOVÁ, ELENA: Nová úprava adaptácie v Zákone č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom [New Regulation of Adaptation in Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure], in ROZEHNALOVÁ, NADĚŽDA – DRLIČKOVÁ, KLÁRA – VALDHANS, JIŘÍ (eds.): *Days of Law 2015*, 2016, Masarykova Univerzita, Brno, 106-118, <https://www.law.muni.cz/dokumenty/34592> [2016.12.14].
- [8] KÖHLER, ANDREAS: General Private International Law Institutes in the EU Succession Regulation – Some Remarks, in *Anali Pravog Fakulteta Univerzitetu u Zenici*, Issue 18. (2016), 169-191, <https://www.ebscohost.com/> [2016.12.11].
- [9] KUČERA, ZDENĚK – MONIKA, PAUKNEROVÁ: Adaptace (přizpůsobení) [Adaptation (adjustment)], in KUČERA, ZDENĚK – PAUKNEROVÁ, MONIKA – RŮŽIČKA, KVĚTOSLAV et al.: *Mezinárodní právo soukromé* [Private International Law], 2015, Aleš Čeněk, Plzeň, 180-181.
- [10] LAGARDE, PAUL: Article 31: Adaptation of rights in rem, in BERGQUIST, ULF – DAMASCELLI, DOMENICO – FRIMSTON, RICHARD et al. (eds.): *EU Regulation on Succession and Wills: Commentary*, 2015, Sellier. European Law Publishers, Köln, 166-167.
- [11] LAUKEMANN, BJÖRN: The European Certificate of Succession: Portrait of a New Instrument in European Private International Law, in HESS, BURKHARD – BERGSTRÖM, MARIA – STORSKRUBB, EVA (eds.): *EU Civil Justice: Current Issues and Future Outlook*, 2016, Bloomsbury Publishing, Oxford, 161-182, <https://books.google.cz/> [2016.12.13].
- [12] LEIBLE, STEFAN – MICHAEL, MÜLLER: The Idea of a “Rome 0 Regulation”, in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*, Volume XIV – 2012/2013, 2013, Sellier, European Law Publishers, Munich, 137-152.

- [13] ROZEHNALOVÁ, NADĚŽDA: Adaptace a jiné obdobné procesy [Adaptation and similar processes], in ROZEHNALOVÁ, NADĚŽDA: *Instituty českého mezinárodního práva soukromého* [Institutes of the Czech Private International Law], 2016, Wolters Kluwer, Praha, 151-164.
- [14] SOLOMON, DENNIS: The Boundaries of the Law Applicable to Succession, in *Analí Pravnog Fakulteta Univerziteti u Zenici*, Issue 18. (2016), 193-220, <https://www.ebscohost.com/> [2016.12.11].
- [15] WAGNER, ROLF: Do We Need Rome 0 Regulation?, in *Netherlands International Law Review*, Vol. 61, Issue 2. (2014), 225-242, <https://www.ebscohost.com/> [2017.03.02].
- [16] WELLER, MATTHIAS: Article 1: Scope, in CALVO CARAVAGA, ALFONSO L. – DAVÍ, ANGELO – MANSEL, HEINZ-PETER (eds.): *The EU Succession Regulation: A Commentary*, 2016, Cambridge University Press, Cambridge, 73-111.

Electronic sources

- [1] *Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*. Max Planck Institute for Comparative and International Private Law, March 2010, <http://www.europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf> [cit. 2017-03-06].
- [2] WAUTELET, PATRICK: *Art. 31 Succession Regulation (650/2012) – a first look at a mysterious provision* (2013), [https://orbi.ulg.ac.be/bitstream/2268/159168/1/Succession%20Regulation%20and%20Property%20Law%20\(Ius%20commune%2030%2011%202013\).pdf](https://orbi.ulg.ac.be/bitstream/2268/159168/1/Succession%20Regulation%20and%20Property%20Law%20(Ius%20commune%2030%2011%202013).pdf) [cit. 2017-03-08].

Legal and other sources

- [1] Council Regulation (EU) 2016/1103 (24th June 2016) implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.
- [2] *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*. Brussels: European Commission, COM(2011) 126 final, available at: <http://eur-lex.europa.eu/> [2016.12.13].
- [3] *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*. Brussels: European Commission, COM(2016) 106 final, available at: <http://eur-lex.europa.eu/> [2016.12.13].
- [4] *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*. Brussels: European Commission, COM(2009) 154 final, available at: <http://eur-lex.europa.eu/> [2017.03.06].
- [5] Regulation (EU) No 650/2012 of the European Parliament and of the Council (4th 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.