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## **THE CHOICE OF THE LAW APPLICABLE TO THE SUCCESSION UNDER REGULATION 650/2012 – AN OUTLINE**

### I. INTRODUCTION

Art. 22 para 1 of Regulation 650/2012 grants to the testator the right to choose his/her national law instead of the law of his/her last habitual residence as the law applicable to his/her succession (*lex hereditatis*). It states that

*“a person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death”.*

This provision reflects the freedom of the testator to dispose of his/her property at will in the field of conflict of laws.

The main pros and cons of the *professio juris successoria*, as the choice of the testator regarding the law governing the succession to the estate is called, are the following: The right to choose the *lex hereditatis* enables the testator to submit all questions related to his/her inheritance to the law he/she considers as more appropriate to be applied, either because it is more closely linked to the succession or because it may result in securing the best way to solve the questions concerning the succession on the level of substantive law. The main drawback the choice of the law applicable to the succession may entail lies in the likelihood of the testator's choice being on purpose prejudicial to some persons who could expect to be the heirs. This is in particular the case when the law chosen by the testator downsizes to a bigger or lesser extent the protection granted to those persons who are entitled to a reserved share, i.e. the heirs (presumable family members) who cannot be totally disinherited.

It derives that the dilemma arising out with regard to the *professio juris* is between the freedom of the testator and the protection of the persons entitled to a reserved share.

Some Private International Law (hereinafter PIL) codifications in the

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19<sup>th</sup> century have been favorable to the *professio juris successoria* (Bolivia, Peru, Mexico, Italy, Switzerland). However, a negative approach has prevailed in the codifications of the first half of the 20<sup>th</sup> century, to the effect that only Switzerland remained faithful to the *professio juris*. Its acceptance has resurfaced in the last quarter of the 20<sup>th</sup> century: the choice of the law applicable to the succession has been confirmed in Swiss PIL (Art. 90 para 2 of LDIP 1987), while at the same period it was admitted to some extent in German PIL (Art. 25 para 2 EGBGB as amended in 1986). Besides, Art. 5 para 2 of the Hague Convention of 1.8.1989 on the Law Applicable to Succession to the Estates of Deceased Persons introduced the choice of the law applicable to the succession, whereby the reluctance of most States to ratify this Convention was also attributed to the “innovative” contents of this provision. At any rate, some of the last decades’ PIL codifications in Europe recognized the right of the testator to choose the law applicable to the succession (Romania, Italy, Finland, Estonia, Belgium, Bulgaria). It has to be noted that according to English law the testator may designate the law according to which his/her will has to be interpreted. A similar right was granted by the Uniform Probate Code of 1969 in the USA.

The concise version of this paper results in it being written as a kind of skeleton argument without footnotes.

## **II. Main Features of the Choice of the Law Applicable to the Succession under**

### **Regulation 650/2012**

#### **1. Exception to the application of the law of the testator’s last habitual residence as the law governing the succession**

Art. 21 para 1 of the Regulation provides that the law governing the succession is the law of the country of the deceased’s last habitual residence. This is the general rule for the Member States bound by the Regulation, notwithstanding the fact that nationality prevailed in the past as the connecting factor in a significant part of domestic PIL rules in matters of succession. The option left to the testator as to choosing the law applicable to the succession strikes the balance between the law of the habitual residence and the law of nationality: although the Regulation’s drafters preferred the last habitual residence over the last nationality of the deceased, they accepted that the latter may consider that the law of the State he/she is a national of has to be applied.

This is a restricted choice of law, in particular in comparison to the freedom granted to the contracting parties as to the choice of the law applicable in matters of contract. However, the difference between contracts and successions should be borne in mind.

## **2. The law chosen by the testator governs the entirety of the succession to the estate**

It derives from the wording of Art. 22 para 1 that the testator cannot submit the inheritance to more than one laws. There is no room left for a *dépeçage* of the *lex hereditatis*, even to the advantage of the law applicable in accordance with the general rule contained in Art. 21 para 1. If the testator opts for the application of the law of the State he/she is a national of, the recourse to the law of his/her habitual residence is completely excluded. This is in line with the principle of the unity of the succession prescribed by the Regulation.

## **3. Choice in case of mutual and joint wills**

The choice of the applicable law to the succession can be done even when the inheritance is regulated through a mutual or a joint will. It should be borne in mind that mutual and/or joint wills are prohibited in some domestic laws, including the domestic laws of some Member States. From this point of view the choice of the national law of one of the persons involved may be instrumental in securing the validity of the choice.

Article 24 refers to “dispositions of property upon death other than agreements as to succession”. Para 2 thereof endorses the choice of the applicable law as it states that

*“Notwithstanding paragraph 1, a person may choose as the law to govern his disposition of property upon death, as regards its admissibility and substantive validity, the law which that person could have chosen in accordance with Article 22 on the conditions set out therein”.*

A “disposition of property upon death” means a will, a joint will or an agreement as to succession pursuant to Art. 3 para 1 (d). According to Art. 3 para 1 (c) a joint will is the one drawn up in one instrument by two or more persons

Mutual wills are explicitly covered by the term ‘agreement as to succession’, as the latter is being defined by Art. 3 para 1 (b). In consequence, the choice of the *lex hereditatis* through a mutual will is regulated by Article 25 para 3. The text of this provision is the following:

*“Notwithstanding paragraphs 1 and 2, the parties may choose as the law to govern their agreement as to succession, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons whose estate is involved could have chosen in accordance with Article 22 on the conditions set out therein”.*

As mutual and joint wills refer to the succession of more than one persons, it is likely that the choice can be effectuated between more than one *leges patriae*. If A is national of the country X and B is national of the country Y, it has to be accepted that they may choose the law of X, whereby it would be irrelevant whether the law of Y does not accept the *professio juris*.

#### **4. Scope of application of the law chosen by the testator**

It derives from Art. 23 para 1 that the scope of application of the law chosen by the testator covers all questions related to the succession. This has to be read in conjunction with point no 47 of the Preamble, where it is clarified that the law applicable to the succession determines who the heirs are, including the person who are entitled to a reserved share.

#### **5. No distinction between the laws of a Member State (MS) and of a third State**

Art. 20 encapsulates the principle of universal application of the Regulation. This means that it applies even if the law of a third State (including the law of one of the MS that opted out) is designated in the case at issue by the relevant conflict of laws rule of the Regulation. This entails that the testator who is national of a third State is allowed to choose this law as applicable pursuant to Article 22.

#### **5. No room left to the heirs for a choice of the applicable law**

The choice of the *lex hereditatis* is in principle left to the testator. However it could be envisaged to ensure that the heirs may choose the law applicable to issues related to the transfer of the succession. This was the solution prescribed by Art. 46 para 3 of the Italian Act on PIL. However the Regulation does not recognize this option. The reluctance to provide the heirs with the option to determine the law applicable to the transfer of the succession can be subject to criticism.

## 6. Impact of the choice of law on the international jurisdiction

According to point no 27 of the Preamble “*the rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he is a national*”.

In principle, the choice of the law applicable on the merits leads to the dissociation of *forum* and *jus*, because the court of the last habitual residence of the deceased seized upon the basis of Art 4 shall apply the law of the nationality of the deceased. However the dissociation can be dissipated and the correlation (or coincidence) of *forum* and *jus* (the so called *Gleichlauf*) reestablished, provided that the law chosen by the testator is the law of a Member State. This correlation is impossible if the law chosen by the testator is the law of a third State, on the grounds that the Regulation does not regulate the international jurisdiction of third States who are bound by their own rules in this matter. The correlation of *forum* and *jus* occurs in the following cases:

a) Art. 5 of the Regulation allows the parties to proceed to a choice of court agreement in favor of the courts of the law chosen by the testator on the grounds of being his/her national law. In such an event, the courts of the Member State the law of which has been designated as applicable pursuant to Art. 22 have international jurisdiction according to Art. 7b, provided that all parties agree. In this case the choice-of-court agreement of the heirs leads to the *post mortem* impact of the testator’s choice regarding the applicable law on the issue of international jurisdiction. Art. 6 b) prescribes that if the parties have prorogated the international jurisdiction of the courts of the State the deceased was a national of, their agreement obliges the courts seized upon the basis of Art. 4 (courts of the place of the last habitual residence) or upon the basis of Art. 10 (subsidiary/ancillary international jurisdiction of the courts of the place where the property is located) to decline their jurisdiction.

b) Pursuant to Art. 7c the courts of the Member State the law of which has been designated as applicable pursuant to Art. 22 are competent if the parties have explicitly accepted the jurisdiction of the court seized.

c) The third case is an illustration of the *forum conveniens* approach

within the context of EU Law. Art. 6a allows the court of the deceased's last habitual residence (Article 4) or of the place where the property is located (Art. 10) to consider upon request of one of the parties that the courts of the law of the Member State chosen by the testator as applicable to the substance are more appropriate to decide the case. These courts become competent according to Art. 7a. It has to be noted that such a decision may be delivered despite the refusal of the other parties to accept the transfer of jurisdiction to courts not initially seized. In most cases it will be the respondent who will try to convince the initially seized court to transfer the jurisdiction to the courts of the deceased's Member State.

### **III. Special Questions related to the Choice of the Law Applicable to the Succession**

#### **1. Main goal: The protection of persons entitled to a reserved share**

The restrictions imposed on the testator as to the laws he/she may choose instead of the law of the last habitual residence were to a large extent dictated by the concern to avoid any unfavorable treatment of the persons entitled to a reserved share. It is likely that the testator proceeds to the choice of a law other than the law of his/her last habitual residence in order to circumvent the latter's provisions aimed at protecting some persons. It is mentioned in point 38 of the Preamble that the choice of the law applicable to the succession

*“should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share”.*

There is no doubt that nationality (citizenship) is an element indicating a strong link between the deceased and the country he/she is a national of. Limiting the options of the testator between the law of his/her last habitual residence and his/her nationality is a guarantee for the persons entitled to a reserved share, particularly if compared to other options the testator could have been provided with (for instance, choosing the law of the country where a part of the estate is located). The question arises as to whether this safeguard is sufficient, will be discussed under III 2-3 and IV 1-2.

#### **2. The *conflit mobile***

International successions have always been a good example for

stressing the importance of intermediate changes affecting the connecting factor (the so called *conflict mobile*). In particular this is true for those domestic PIL rules prescribing that the succession is governed by the law of the deceased's last nationality. An example could be the will containing the sentence "my succession shall be regulated by the law of my nationality".

Article 22 para 1 first sentence states that the testator may choose

*"the law of the State whose nationality he possesses at the time of making the choice or at the time of death"*.

Some interpretation issues arise out of this provision. For instance:

a) which is the law applicable to the merits if the testator loses his/her initial nationality?

b) is there any impact to be attributed to the fact that the testator designed the acquisition of a new nationality at the time of making the choice? The Regulation leaves open the room for construing its contents with regard to the constellation of facts at issue.

In contrast, Art. 90 para 2, 2<sup>nd</sup> sentence of the Swiss LDIP clearly states that the choice is not valid if the testator has lost the nationality of the State he/she was a citizen of at the time of the choice.

### **3. The case of the testator having more than one nationality**

Pursuant to Art. 22 para 1 second sentence

*"a person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death"*.

This means that the testator is allowed to choose the law of a country he/she is not closely connected with. It suffices that he/she is a national of, irrespective of the relationship being a tenuous one. The solution is in compliance with the prevailing approach in EU Law according to which all nationalities are set on an equal footing (for instance, ECJ, 7.7.1992, Micheletti, C-369/90, points 10-11, ECJ, 16.7.2009, Hadadi/Hadadi, C-168/08, points 51-56).

Given the rule set by Art. 20, no distinction can be made between the nationality of a Member State and of a third State.

More importantly: the testator may choose the law of a State before he/she becomes a national of that State. In such an event, the choice

of the law applicable to the succession is made before the link with the State the law of which is chosen can be established. However the choice is valid and the law of the new nationality supersedes the law of the initial nationality.

#### **4. Form of the choice**

Art. 22 para 2 of the Regulation concerns the form the choice can be made:

*“The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition”.*

This implies that the choice may be done indirectly (or not expressly), for instance if the testator designs the will using the terms of the law of his/her nationality.

Among the interpretation issues is the following one: what if the testator does not rightly understand the meaning of the terms he/she uses? It is not unlikely that the testator has recourse to the terms of the law of his/her nationality, but he/she may understand them as these terms or their equivalent are meant in the relevant provisions of the law of his/her last habitual residence.

#### **5. Substantive validity of the act whereby the choice of law was made**

Pursuant to Art. 22 para 3

*“The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law”.*

This solution has to be approved as it enhances legal certainty. As it is explained in the Preamble (point no 40, first sentence), the choice is valid even if the law chosen by the testator does not provide for a choice of law in matters of succession. This approach is to be compared to Art. 5 para 2, 3<sup>rd</sup> sentence of the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons. According to that provision, if the designation is invalid under the law chosen by the testator *“the law governing the succession is determined under Art. 3”*.

However the second sentence of the same point of the Preamble prescribes that applying the law chosen to the substantial validity of the choice is to be construed as to encompass the question whether the

testator was aware of the consequences his/her choice entails and as to whether he/she accepted them (“*whether the person making the choice may be considered to have understood and consented to what he was doing*”).

## 6. Amendment or revocation of the choice

Art. 22 para 4 states that

*“any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death”.*

This provision is not a pattern for legal clarity. Therefore it has to be interpreted in the light of the third sentence contained in point no 40 of the Preamble, where it is specified that the chosen law is to be applied as to the substantial validity of the amendment or revocation.

## IV. Restrictions to the Choice of the Law Applicable to the Succession

Among the characteristic features of the Regulation is the importance of the provisions addressing the general questions of PIL. Some of them affect the choice of the law applicable on the merits. Unsurprisingly, the acceptance of *renvoi* does not impact the choice of the *lex hereditatis* (Art. 34 para 2: “*No renvoi shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30*”). This is in line with the generally accepted refusal of *renvoi* when the law applicable on the merits is being chosen by the parties involved in the legal relationship at issue (for instance, in contractual obligations): having recourse to the conflict of laws rules of the law already chosen would jeopardize the choice already made to the detriment of foreseeability.

### 1. Public policy

Despite the recent ideas about abandoning public policy in EU Private International Law Regulations, Art. 35 sticks to the general rule according to which the application of the law designated by the relevant provision of the Regulation

*“may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum”.*

As in all recent PIL Regulation, the word “*manifestly*” indicates that judges should not be prone to resort to the mechanism of public policy

in order to invalidate the determination of the law applicable to the succession. When the testator has chosen the applicable law the main issue as to the activation of public policy concerns the case of the applicable substantive provisions that are prejudicial to the rights of the persons entitled to a reserved share. It has to be borne in mind that the initial proposal of Regulation in 2009 took the view that there is no violation of public policy if the law chosen by the testator does not respect the rights of the persons entitled to a reserved share.

My personal opinion on this issue is that the interference of public policy in order to protect these persons should be the exception. The starting point is that the testator should be free to design the way his/her property is going to be shared by the persons he/she prefers to designate (directly through the will or indirectly by the mere choice of the applicable law). The freedom of the testator to dispose of his/her property at will is consistent with the fundamental social changes: the increase of the average age entails that inheritance has ceased to be one of the mechanisms ensuring that young persons are provided with the means accumulated by their parents and deemed necessary for the beginning of their adult life. It suffices to take into account that it happens often that the children of testators being in their seventh, eighth or ninth decade of life are already at the threshold of retirement from active professional life.

Therefore, the interference of public policy should be admitted only when it derives from the circumstances of the case at issue that the testator deprived his/her descendants (or the person he/she is married to) in a way that constitutes an abuse of his/her right to dispose of his/her property at will.

## **2. *Fraude à la loi***

There is no provision on the mechanism of *fraude à la loi*, although the drafters of the Regulation have cared to tackle the questions belonging to the General Part of PIL. However the Preamble contains the following guideline in its point 26:

*Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as fraude à la loi in the context of private international law.*

Consequently, courts are invited to have recourse to the mechanism of *fraude à la loi*, when they draw the conclusion that a change was

done on the purpose of circumventing the application of the law that would have been designated pursuant to the Regulation. Regarding the choice of the applicable law pursuant to Art. 22, the main example is a fraudulent change of nationality through which the testator undertakes to submit his/her succession to another law than the law he/she could have chosen as the law of nationality. The fraudulent change takes place on purpose, i.e. in order to achieve through the rules of PIL the application of substantive law provisions tailored to the testator's will.

Bearing in mind that in many cases the main goal of the testator is to deprive the persons entitled to a reserved share of their rights, accomplishing the main aim of the fraudulent change of nationality is indirectly enhanced by the guideline stemming from point no 47 of the Preamble: the law applicable to the succession determines who the beneficiaries are in a given succession, including who are the heirs and the persons who are entitled to a reserved share

Therefore the interference of *fraude à la loi* in the context of private international law is of major importance in view of preventing the testator's ill-natured disposition of property upon death, because the sanction is drastic if the fraudulent change of nationality is confirmed: the choice of the law applicable to the succession is not valid.

### 3. Article 29

The lengthy provision of Article 29 contains special rules on the appointment and the powers of the administrator of the estate. Given the concise reference to the issues in this presentation, what has to be briefly mentioned in connection with the choice of the applicable law is the likelihood of applying to some extent the law of the court seized (*lex fori*) instead of the *lex hereditatis*. When the latter is the law of the testator's nationality, its application may be invalidated. This is for instance the case referred to in Art. 29 para 2 second subparagraph. Pursuant to this provision

*“Where the law applicable to the succession does not provide for sufficient powers to preserve the assets of the estate or to protect the rights of the creditors or of other persons having guaranteed the debts of the deceased, the appointing court may decide to allow the administrator(s) to exercise, on a residual basis, the powers provided for to that end by its own law and may, in its decision, lay down specific conditions for the exercise of such powers in accordance with that law”.*

#### **4.. Article 30**

The application of the law of the testator's nationality chosen as *lex hereditatis* is hindered if mandatory rules of the place where certain immovable, certain enterprises or other special categories of assets are located must be applied according to Article 30. This provision results in special rules “*which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets*”, being applicable, irrespective of the law to be applied as *lex hereditatis* upon the basis of Art. 21 ff. In such an event, the impact of the choice of the law applicable to the succession is reduced.

#### **V. Concluding remarks**

1. The general assessment on the provisions contained in Regulation 650/2012 as to the right of the testator to choose the law applicable to his/her succession is positive.
2. Interpretation issues arise out of the provisions related to the choice of the law applicable to the succession, in particular when the choice is made by a mutual or a joint will or regarding the substantive validity or the form of the choice.
3. As to the crucial point of the protection of the persons entitled to a reserved share, the conclusion to be drawn is that these persons are in danger of being deprived of their rights through the choice of the *lex hereditatis*. They may to a large extent rely on the general mechanisms of PIL (public policy- *fraude à la loi*) in view of successfully preventing a choice of the applicable law done at their expense. This is a good example of the role of general PIL provisions in the context of a detailed and specialized codification.

**ABSTRACT**

Art. 22 para 1 of Regulation 650/2012 grants to the testator the right to choose his/her national law instead of the law of his/her last habitual residence as the law applicable to his/her succession (*lex hereditatis*). It states that “*a person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death*”. This provision reflects the freedom of the testator to dispose of his/her property at will in the field of conflict of laws. The main pros and cons of the *professio juris successoria*, as the choice of the testator regarding the law governing the succession to the estate is called, are the following: The right to choose the *lex hereditatis* enables the testator to submit all questions related to his/her inheritance to the law he/she considers as more appropriate to be applied, either because it is more closely linked to the succession or because it may result in securing the best way to solve the questions concerning the succession on the level of substantive law. The main drawback the choice of the law applicable to the succession may entail lies in the likelihood of the testator’s choice being on purpose prejudicial to some persons who could expect to be the heirs. This is in particular the case when the law chosen by the testator downsizes to a bigger or lesser extent the protection granted to those persons who are entitled to a reserved share, i.e. the heirs (presumable family members) who cannot be totally disinherited.

**Keywords:** EU Succession Regulation; *professio juris successoria*; choice of the law applicable to the succession.

## IZBOR MJERODAVNOG PRAVA ZA NASLJEĐIVANJE PREMA UREDBI 650/2012 - PREGLED

### SAŽETAK

Član 22. st. 1 Uredbe 650/2012 priznaje pravo ostaviocu da odabere svoje nacionalno pravo umjesto prava svog posljednjeg redovnog boravišta kao mjerodavni statut za nasljeđivanje (*lex hereditatis*). U navedenom članu se navodi da “osoba može, za pravo koje će urediti u cjelosti njezino nasljeđivanje, izabrati pravo države čiji je državljanin u trenutku izbora ili u trenutku smrti”. Ova odredba odražava pravo ostavioca da slobodno raspoláže svojom imovinom u oblasti sukoba zakona. Osnovne prednosti i nedostaci *professio juris successoria*, kako se zove izbor ostavioca u vezi sa mjerodavnim pravom za nasljeđivanje, su sljedeće: pravo izbora *lex hereditatis* omogućava ostaviocu da sva pitanja u vezi sa njegovim/njenim nasljedstvom podvrgne pravu koje smatra podesnijim za primjenu, bilo zato što je uže povezano sa nasljeđivanjem ili zato što može dovesti do povoljnijeg materijalnog rješenja svih pitanja povezanih sa nasljeđivanjem. Glavni nedostatak do kojeg izbor mjerodavnog prava za nasljeđivanje može dovesti se tiče mogućnosti da mjerodavno pravo bude ciljano odabrano kako bi se nanijela šteta osobama koje očekuju da budu nasljednici. Ovo je posebno slučaj onda kada odabrano pravo smanjuje, u većoj ili manjoj mjeri, zaštitu predviđenu za nužne nasljednike (obično članovi porodice) koji ne mogu biti lišeni nasljedstva.

**Ključne riječi:** Uredba EU o nasljeđivanju; *professio juris successoria*; izbor mjerodavnog prava za nasljeđivanje.