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UNIVERSITÀ DEGLI STUDI DI MILANO
DIPARTIMENTO DI STUDI INTERNAZIONALI, GIURIDICI E STORICO-POLITICI

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EU Regulation n. 650/12
JURISDICTION:
GENERAL RULES AND CHOICE OF COURT

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EU RULES ON JURISDICTION IN SUCCESSION MATTERS

- An exhaustive and complete system of rules on jurisdiction (Art. 15).

- An effective connection between the legal relationship and the court: the general criterion of habitual residence.

- The **principle of the universality of jurisdiction**: the court has the jurisdiction to rule on the succession «as a whole» (Art. 4) – choice for the unionist approach:
  - Only one judicial authority with jurisdiction to rule on all succession matters;
  - It does not depend on the movable or immovable nature of the assets.

- Tendential **coincidence between forum and ius**: identity between the general jurisdiction rule (Art. 4) and the conflict of laws rule (Art. 21).

- Broad notion of **court**.

THE BROAD NOTION OF «COURT» FOR THE PURPOSES OF THE REGULATION

Art. 3.2: Other authorities and legal professionals

- Application of the well-known principles matured in the context of other European regulations (CGEU, C-210/06 Cartesio, C-414/92 Solo Kleinmotoren), to go even further...

- Three possible scenarios, in which judicial functions
  - are **provided by the law**; or
  - are exercized pursuant to a **delegation** by a judicial authority; or
  - are exercized under the **control** of a judicial authority.

- The most important requisite: the **exercize of judicial functions**.
- **Guarantees**: impartiality, right of the parties to be heard, possibility to challenge the decision before a judicial authority, the same force and effect of a decision.

- The position of **notaries** (Recital n. 21): in systems in which the notary can't be qualified as a «court», the notarial deed will be subject to the circulation regime provided for authentic instruments (Art. 59 ff.).

THE COINCIDENCE BETWEEN FORUM AND IUS: THE GENERAL RULE (ART. 4)…

- **Art. 4**: «The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole».

- If the deceased was habitually residence in a Member State, the last habitual residence is the only general criterion of jurisdiction: the other grounds are applicable only if the deceased has exercized his right to choose the law applicable to the succession (Art. 22).

- In the majority of cases, the competent court will apply its **domestic law**.

- The universality of jurisdiction favours a swift and centered administration of the succession: **the presence of assets in other Member States** is irrelevant (the possibility to limit the jurisdiction, provided by **Art. 12**, is applicable only in respect of assets located in a third State).

…AND THE ROLE OF PARTY AUTONOMY

- In the context of the Regulation n.650/2012, the promotion of party autonomy is centered upon the person of the **deceased**, in order to facilitate the planning of his/her succession.

- As regards **jurisdiction**, the enhancement of party autonomy in the selection of the competent court is not the primary goal, compared with the intent to pursue the principle of the application of the *lex fori* by the competent authority.

- Recital n. 27: «*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 was a national*».

- Recital n. 28: «*One such mechanism should be to allow the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law*».

CHOICE-OF-COURT AGREEMENTS- ART. 5

- **Formal requirements**:
  a) Written form
  b) Date
  c) Subscription

- A fundamental prerequisite is the **prior choice of law made by the deceased**, which must be valid according to Art. 22.

- As a consequence, no agreement can be concluded if the deceased was a third State national (among which: UK, Ireland and Denmark).

- The conferral of jurisdiction must be **exclusive** (in absence of a specific indication, the exclusive nature of jurisdiction is **presumed**).

- Existence of an effective ***consensus*** between the parties

(*following*) CHOICE-OF-COURT AGREEMENTS

- The agreement must be concluded among the «**interested parties**».

  A) Extensive interpretation: every person who is involved in a succession procedure.

  B) Agreements concluded between only some of the concerned parties and in relation with **specific issues**:
  - Recital n. 28 provides specific conditions: in particular, «the decision by that court on that issue would not affect the rights of the other parties to the succession»;
  - Protection of the excluded parties**: Art. 9** (tacit acceptance of jurisdiction).

- What is the **law applicable** to the substantial validity of the agreement?
  - considerations on the different role of party autonomy in the Brussels I-*bis* Regulation and the Succession Regulation;
  - *lex causae*?

- Which is the **competent court** to assess the validity of the choice of court agreement?

IN ABSENCE OF A CHOICE-OF-COURT AGREEMENT: I) ART. 6(a)

- Three mechanism to re-establish coincidence between *forum and ius.*

- **Art. 6(a):** *forum more conveniens* (exceptional criterion?)*.*

- The role of **party autonomy**: Art. 6(a) can't be included among the rules inspired by the promotion of party autonomy.
  - the request from only one of the parties is sufficient for the activation of the mechanism;
  - Such request is not binding for the court;
  - Irrelevance of any opposition of the other parties.

(*following*) ART. 6(a)

- **A wide margin of discretion of the court** in the assessment, which is based, in particular, on:

  - practical circumstances of the succession;

  - habitual residence of the parties;

  - location of the assets.

- **What is the time limit for the submission of the request**? Application of national rules of procedure.

  The issue is relevant, considering the ever-changing nature of the elements that are at the basis of the assessment.

II) EXPRESS ACCEPTANCE - ART. 7(c)

- Art. 7(c) represents a **particular mode of conclusion of a choice-of-court agreement,** following the commencement of the proceeding.

- Even in this case the prorogated court must be the court of the member State of the chosen law.

- The **validity requirements** can be inferred from **Art. 5** can be fulfilled by the procedural acts (especially as regards written form, date and subscription).

- **Deadline** by which the jurisdiction can be expressly accepted → procedural rules of the *lex fori.*

III) TACIT ACCEPTANCE – ART. 9

- **Prerequisite**: The court has been seized on the basis of a choice-of-court agreement, validly concluded among some parties to the proceedings.

Outside this particular case, the tacit acceptance of jurisdiction is not admitted: the court shall declare its incompetence by its own motion (art. 15).

- The “excluded” party may enter an appearance for the specific purpose to contest jurisdiction: in this case, the court has to declare its incompetence.

- If, on the other hand, the excluded party appears without raising such exception, the jurisdiction of the court is considered accepted.

(*following*) TACIT ACCEPTANCE

- The seized court doesn't have the duty to ascertain that the absence of objection was determined by a **conscious and informed choice**.

- As regards the **relevant moment** in which to challenge the jurisdiction of the court, the *lex fori* applies, with two limits:

  - The defendant should be allowed to make a submission for the specific purposes of contesting the court's jurisdiction, without the need to present his/her defence on the merits;

  - Such challenge can't be submitted once the defendant has made submission on the merits.

CLOSING OF OWN-MOTION PROCEEDINGS IN THE EVENT OF A CHOICE OF LAW – ART. 8.

- Art. 8 refers to the eventuality that the parties have decided to amicably settle the dispute, or more generally to conduct the succession proceedings outside of court.

- Prerequisites:

  A) It only applies to **own-motion proceedings**.

  B) Prior **choice of law** by the deceased, in favour of the law of a Member State.

  C) **Joint intention of the parties** continue the proceedings outside the court **in the Member State of the chosen law**.

- The rule doesn't require that a settlement has already been reached.

- No particular requirements of substantial and formal validity.

COORDINATION OF JURISDICTION AMONG DIFFERENT COURTS

- Art. 15: The seized court has to determine on its own motion if it has jurisdiction, even in presence of a choice-of court agreement:

  - Art. 6(b) makes no reference to the duty of the parties to provide evidence of the existence of a prorogation agreement, neither to rise the relative exception;

  - Art. 7(b):«*The courts of a Member State whose law had been chosen by the deceased pursuant to Article 22* ***shall*** *have jurisdiction to rule on the succession if...the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of that Member State*».

- As a consequence, **the existence of a prorogation agreement must be ascertained on its own motion by the seized court**.

- Furthermore, in the event of a declaration of incompetence, **the acceptance of the other court is not required**.

- <u>The same mechanism applies in relation to Art. 6(a) </u>(*forum more appropriate*).

Thank you for your attention!