



FINAL CONFERENCE

EU Cross-Border Succession Law



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Fondazione Italiana del Notariato



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



UNIVERSITÀ DEGLI STUDI DI MILANO
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ITALIANO E SOVRANAZIONALE

EU Regulation n. 650/12

Applicable Law: Choice of Law

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THE PROJECT IS IMPLEMENTED BY COORDINATOR



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CO-BENEFICIARIES



Article 22

Choice of law

1. 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.

Reasons for the *professio juris*

- Predictability and certainty of the applicable law
- Usefulness for overcoming the difficulty in determining the habitual residence
- Wish to select a single law for matrimonial property (or property consequences of registered partnerships) and succession

Proposal on Matrimonial Property / Proposal on the property consequences of registered partnership of 2011

- Compromise text (November 2014)
- 2 March 2016 the European Commission adopted a proposal for a Council decision authorising enhanced cooperation: 2 Proposals (COM(2016) 106 final) and (COM(2016) 107 final).

Professio juris

Law of:

- **nationality at the time of making the choice**
 - **nationality at the time of death.**
- Universal application (*Art. 20*)
 - No close connection with the national State is required
 - *Moroccan national born and living in Italy*
 - *Italian born in Germany loses the Italian nationality after the choice*
 - Multiple nationalities
 - The determination of the nationality or the multiple nationalities is a preliminary question (*Rec. 41*) → choice of the law of either of the nationalities → no test based on effectivity
 - Exclusion of *renvoi* (*Art. 34.2*)

The scope of the chosen law

Art. 23

- **Unitary approach** →
 - the whole of the estate
- **All succession law issues** →
 - also the administration of the estate (*Rec. 42*)

...but see

– *Art. 31* (Adaptation of rights *in rem*); *Art. 33* (Estate without a claimant); *Art. 39* (Application of the probate procedure in civil law jurisdictions)

The scope of the chosen law

- Determination of the **beneficiaries** (*Art. 23.2.b; Rec. 47*)
- Preliminary question
 - the spouse/partner's right to succession may depend upon the validity of the marriage/partnership
- Family status excluded from Regulation's scope (*Art. 1.2.a*)
 - no common rules on marriages, parentage, adoption
 - independent / dependant solution

Spanish national, habitually resident in Italy, who has concluded a same-sex marriage in Spain according to the Spanish law. He owns immovables in Italy and dies in Italy. In his will he bequeaths all his estate to his spouse, choosing the Spanish law as applicable law

Formal validity

Art. 22(2)

A choice of law should be made “**expressly** in a declaration in the form of a disposition of property upon death”

or

tacit choice

“be demonstrated by the terms of such a disposition” (e.g. reference to specific provisions of the chosen law:)

no circumstances of the case (e.g. language)

➤ Formal requirements → referral to *Art. 27*

Dispositions of property upon death

Partial choice:

- *Art. 24.2*
choice of the law applicable to a **disposition of property upon death**, as regards its admissibility and substantive validity
- *Art. 25.3*
choice of the law applicable to an **agreement as to succession**, as regards its admissibility, its substantive validity and its binding effects between the parties
→ same conditions as *Art. 22*

Italian wife and German husband both living in Italy and in Germany. Agreement as to succession according to the German law. The wife chooses the Italian law as applicable to her succession.

Material validity

Existence and validity of the *professio juris*

Art. 22(3)

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

Admissibility

- “even if the chosen law does not provide for a choice of law in matters of succession” (*Rec. 40*)

Consent issues

- “whether the person making the choice may be considered to have understood and consented to what he was doing” (*Rec. 40*)

Transitional provisions

- *Art. 83(2)*

Choice of the applicable law prior to 17 August 2015

→ valid

«if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.»

The protection of close family members

- **Risk of abuse** (*Rec. 38* – limitation to the optio legis)
- No protective rules
- **Public policy** (*Art. 35*)?
- Restrictive interpretation (*Rec. 58*)
 - Art. 27.2 Commission Proposal “Differences between the laws relating to the protection of the legitimate interests of the relatives of the deceased must not be used to justify its use”
 - Depends on circumstances of the case
 - ✓ C. Cassazione, 24.6.1996, n. 5832; Trib. Supremo, 15.11.1996, Lowenthal
 - ✓ BVerfG 19.4.2005
- **Fraude à la loi** (*Rec. 26*)?
- acquisition of a State’s nationality for the purpose of the choice – effectivity not required

Thank you for your attention!

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