



GOVERNING INHERITANCE STATUTES  
AFTER THE ENTRY INTO FORCE  
OF EU SUCCESSION REGULATION

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# Formal and/or substantial validity issues in testaments' circulation across the European legal area

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# ITALIAN DISCIPLINE BEFORE THE REGULATION (Law 31 May 1995, 218)

- **Art. 47**

Capacity to make a will, modify or revoke it: the settlor's national law at the time of the will, modification or revocation.

- **Art. 48**                    **form of the testament**

It is valid if so considered: by the law of the State in which the testator has made the will, or of the State in which, at the time of the will or death, he was a citizen or where he had the domicile or residence.



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## NEW DISCIPLINES FROM THE REGULATION

- **Art. 26**

The capacity to make a will falls within the concept of substantial validity (of the will). The law that regulates it is that of the so called anticipated succession i.e. the law that would have been applied if the testator had died at the time of writing the testament (Article 24), unless the testator has chosen another law pursuant to art. 22.

This choice can only fall on that of the State of which the testator has citizenship.

- **Relevance**

The choice can also concern only the will. Therefore, in contrast to the principle of unity of the succession, it will be possible to apply two different laws (that of the will and that of the succession). Therefore we have a division of the succession (dépeçage). The partial choice raises many questions of interpretation.



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- **Art. 27**

Plurality of criteria, in accordance with the principle of "favor testamenti", providing for five alternative hypotheses; these criteria also apply to the form of the modification or revocation. It is advisable that the identification of the adopted criterion results from the written document.

### **Important:**

The provisions of the law limit the capacity with reference to age, citizenship or other personal qualities of the testator.

### **Example:**

A 16-year-old Italian citizen living in France drafts a will for half of his assets (valid in France); subsequently he returns to Italy and establishes his residence there. Then he dies: the succession will be regulated by Italian law. The will shall be valid even if Italian law does not allow a person under 18 years of age to draft a will. The validity of the will is in fact regulated by the French law.



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- **Art. 27**

It introduces the principle of cross-border validity of wills once their validity has been verified according to the its criteria of conformity which will cover all possible choices. It innovates and repeals all the rules of private international law of the individual Member States. However, the comparison between the laws of the two countries could lead to an unpredictable result, namely the formal invalidity of the will and, therefore, its ineffectiveness.

### **Example:**

An Italian citizen, with habitual residence in Spain, draws up a holographic testament applying Italian law. Subsequently he transfers his habitual residence in England; during a trip to the United States, he revokes the first with a new holograph will (which is valid because it is governed by Italian law).

Then he dies: the holographic testament is not valid in the USA, but it is valid according to Italian law. The succession will be governed by English law (last habitual residence); but this law does not admit the holograph will. The revocation is valid, but it makes the previous testament fail and does not make the new one effective because the latter is not allowed by English law.



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## FRAUDULENT EXERCISE OF THE CHOICE OF LAW

Recital 52 states that a fraudulent choice of law to circumvent the rules relating to formal validity should be ignored. The application of this principle is, however, almost impossible since the relative proof is extremely difficult. On the other hand, the same result could be achieved through a residence's transfer, whose fraudulent intent could hardly be proved.



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## INTERPRETATION OF THE DISPOSAL

Before the entry into force of the Regulation, the testament has to be interpreted in accordance to the law indicated by the internal rules.

With the Regulation the interpretation is defined as pertinent to the substantial validity, regulated by the art. 24.

We therefore have the singularity that the interpretation of the will, in all cases in which a choice of law is lacking (Article 24 No. 2), must be made with the law of the moment of its writing.

If a different law (habitual residence of the testator) is applied for the succession, we will have a problematic situation above all in terms of ascertaining the status of heir or legatee that also derives from the interpretation of the will.



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## PREFERENCE FOR OPERATIONAL PURPOSES OF THE CHOICE OF LAW

The circulation of wills, in order to achieve a useful purpose of clarity and uniformity, should be supported by a specific choice that should concern the whole succession. Legal professionals should advise citizens on the choice of "total" law and deepen their knowledge of the various internal laws, also through international legal relations.



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## APPLICATION OF INTERNATIONAL CONVENTIONS

The Regulation is without prejudice to the application of international conventions concerning matters governed by the Regulation itself (Article 75) between one or more Member States and third States. Operators, therefore, have to first ascertain whether the formal and / or substantial validity of the will is regulated by an international agreement with third States or between third States and only after the outcome of a negative assessment, to apply the Regulation.



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# Problemas de validez formal y/o sustancial en la circulación de los testamentos en el área jurídica europea

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# DISCIPLINA ITALIANA ANTES DEL REGLAMENTO (Ley de 31 de mayo de 1995, 218)

- **Art. 47**

Capacidad para testar, modificar o revocar la ley nacional del ordenante, en el momento del testamento, modificación o revocación.

- **Art. 48**                   **forma del testamento**

Es válido si así lo considera: la ley del Estado en que el testador ha ordenado, o en el Estado en el que en el momento del testamento o muerte era ciudadano o donde tenía el domicilio o la residencia.



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# NUEVA DISCIPLINA SEGÚN EL REGLAMENTO

- **Art. 26**

La capacidad de testar recae dentro del concepto de validez sustancial (del testamento). La ley que la regula es la de la denominada sucesión anticipada, es decir, la que se habría aplicado si el testador hubiera muerto en el momento de redactar el testamento (art. 24), a menos que el testador haya elegido otra ley al amparo de lo dispuesto en el art. 22.

Esta elección solo puede recaer en la del Estado del que el testador tiene la nacionalidad.

- **Importancia**

La elección también puede referirse solo al testamento. Por lo tanto, en contraste con el principio de unicidad de la sucesión, será posible aplicar dos leyes diferentes (la del testamento y la de la sucesión). Tenemos entonces la escisión de la sucesión (*dépeçage*). La elección parcial plantea muchas cuestiones en cuanto a interpretación.



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- **Art. 27**

Pluralidad de criterios, de acuerdo con el principio de "favor testamenti", contemplando cinco hipótesis alternativas; estos criterios también se aplican a la forma de la modificación o revocación. Es conveniente que en el escrito conste cuál ha sido el criterio adoptado.

### **Importante:**

Las disposiciones legales que limitan la capacidad con referencia a la edad, la ciudadanía u otras cualidades personales del testador son de carácter formal.

### **Ejemplo:**

Un ciudadano italiano de 16 años residente en Francia redacta un testamento para la mitad de sus bienes (válido en Francia); posteriormente regresa a Italia y establece su residencia allí. Entonces muere: la sucesión se regulará según la ley italiana. El testamento será válido aunque la ley italiana no permita hacer testamento a los menores de 18 años, ya que la validez del testamento se rige por la ley francesa.



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- **Art. 27**

Introduce el principio de validez transfronteriza de los testamentos una vez que se ha comprobado su validez de acuerdo con los criterios de conformidad previstos en él, y que abarcarán todas las opciones posibles. Innova y deroga todas las normas de derecho internacional privado de cada uno de los Estados miembros. Sin embargo, la comparación entre las leyes de los dos países podría conducir a un resultado impredecible, a saber, la invalidez formal del testamento y, por tanto, su ineficacia.

### **Ejemplo:**

Un ciudadano italiano, con residencia habitual en España, redacta un testamento holográfico aplicando la ley italiana. Posteriormente traslada su residencia habitual a Inglaterra; durante un viaje a Estados Unidos revoca el primero con un nuevo testamento holográfico (que es válido porque se rige por la ley italiana).

Entonces muere: el testamento holográfico no es válido en Estados Unidos, pero sí lo es según la ley italiana. La sucesión se regirá por la ley inglesa (su última residencia habitual), pero esta ley no admite el testamento holográfico. La revocación es válida, pero anula el testamento anterior y no le da validez al nuevo porque la ley inglesa no lo admite.



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## EJERCICIO FRAUDULENTO DE LA ELECCIÓN DEL DERECHO

El considerando 52 establece que se debe ignorar una elección de ley efectuada de forma fraudulenta para eludir las normas relativas a la validez formal. Además, la aplicación de este principio es casi imposible, ya que la prueba correspondiente es extremadamente difícil. Por otro lado, el mismo resultado podría lograrse trasladando la residencia, con lo cual la intención fraudulenta difícilmente podría probarse.



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## INTERPRETACIÓN DE LA DISPOSICIÓN

Antes de la entrada en vigor del Reglamento, la ley en base a la cual se debía interpretar el testamento era la establecida por los derechos internos.

Con el Reglamento se define la interpretación pertinente a la validez sustancial, regulada por el art. 24.

Por lo tanto, tenemos la singularidad de que la interpretación del testamento, en todos los casos en que no haya elección de ley (art. 24 no. 2), debe hacerse con la ley del momento de su redacción.

Si se aplica una ley diferente para la sucesión (residencia habitual del testador), tendremos una situación problemática, sobre todo a la hora de determinar la cualidad de heredero o legatario que también se deriva de la interpretación del testamento.



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## PREFERENCIA DE LA ELECCIÓN DEL DERECHO A EFECTOS OPERATIVOS

La circulación de los testamentos para lograr un propósito útil de claridad y uniformidad debe estar respaldada por una elección específica que debería afectar a toda la sucesión. Los profesionales deberían asesorar a los ciudadanos acerca de la elección legal "total" y profundizar su conocimiento de los diversos derechos internos, incluso mediante relaciones jurídicas internacionales de reconocimiento.



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## APLICACIÓN DE LAS CONVENCIONES INTERNACIONALES

El Reglamento se aplicará sin perjuicio de la aplicación de las convenciones internacionales sobre materias reguladas por el propio Reglamento (art. 75) entre uno o más Estados miembros y Estados terceros. Por tanto, los profesionales deberán comprobar en primer lugar si la validez formal y/o sustancial del testamento está regulada por una convención internacional con Estados terceros o entre Estados terceros, y solo después de que la valoración haya dado resultado negativo, aplicar el Reglamento.



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