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EU LAW TRAINING IN ENGLISH LANGUAGE:
BLENDED AND INTEGRATED CONTENT AND LANGUAGE TRAINING
FOR EUROPEAN NOTARIES AND JUDGES



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Regulation No. 650/12 and public policy

Daniele Muritano
Civil law notary in Empoli

This Project is implemented by Coordinator



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CASSA NAZIONALE DEL NOTARIATO



Magyar Országos
Közjegyzői Kamara



Notary Chamber of Bulgaria



International
Association of
Judges

promoting an independent judiciary worldwide

Sources

Art. 35

Public policy (*ordre public*)

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.



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Sources

Recital 58

Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.



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Public policy in the international context

Are excluded by public policy:

- the necessary implementing rules (Article 30 and recital 54 Reg.);
- the evasion of law (*fraude à la loi*) (Recital 26 reg.).



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The public policy exception

It can be raised:

- in cases where the law of the forum is not applicable;
- when the application of foreign law is contrary to the fundamental principles of the legal system.



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The public policy exception

- International public policy is not an "European" concept.
- It is responsibility of each State to identify the content of international public policy.
- The Court of Justice **monitors** the application of the provisions relating to public policy laid down in European legislation (see *Krombach v Bamberski*, 28.3.2000, C7-98 and *Diageo Brands BV*, 16.7.2015, C68-13).



The public policy exception

- The provision of Article 35 must be interpreted restrictively because the connection with the legal system is weaker.
- The preconditions for raising the exception:
 - domestic provisions which are deemed to have been breached must form part of domestic international public policy;
 - the applicable foreign provisions must be **manifestly** incompatible with domestic ones.
- Article 35 applies only in exceptional cases.



The definition of international public policy

Italian Supreme Court 30.9.2016, no. 19599

(see also 24.6.1996, no. 5832 and 30.6.2014, no. 14811)

The concept of public policy, for the purpose of private international law, has to be assessed as international public policy and, therefore, in terms of compliance with the complex set of principles that characterize internal system in a given historical period and based on **the needs of the protection of fundamental human rights, common to the various systems and, therefore, on the basis of shared values in the supranational legal community, under European Court of Human Rights (ECHR) and European Court of Justice (ECJ) case-law.**



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The definition of international public policy

Italian Supreme Court, Grand Chamber, 5 July 2017, no. 16601

The harmonizing results, mediated by supranational charters, may often facilitate innovative effects, **but Constitutions and legal traditions with their differences constitute a limitation.** There can therefore be no retreat of control over the essential principles of the "lex fori" in matters ...which are governed by a set of systemic rules implementing the foundation of the Italian Republic. At the same time, it will not be possible to look for a full correspondence between foreign law and and Italian law.



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The definition of international public policy

Italian Supreme Court, 8 May 2019, no. 12193 and 11 November 2019, no. 29071

To recognize foreign decisions, the compliance with public policy, required by law No. 218 of 1995, Art. 64 and following, must be assessed not only looking at the fundamental principles of our Constitution and those resulting in the international and supranational sources, but also looking at the way the same have been embodied in the ordinary discipline of single matters, as well as of the interpretation given to them in constitutional and ordinary case law, whose synthesis and reassembly work gives birth to the "living law" that cannot be ignored to identify the notion of public policy, as a whole of the founding values of the legal system in a given historical time.



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Public order and protection of forced heirs

Italian rules before 17.8.2015

Article 46 of Law of 31.5.1995, no. 218

A person may choose (expressly and in a will) as law applicable to their succession, the law of the State of their residence.



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Italian rules before 17.8.2015

Article 46 of Law of 31.5.1995, no. 218

The choice is ineffective if at the time of death the person was no more resident in that State.



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Public order and protection of forced heirs

Italian rules before 17.8.2015

Article 46 of Law of 31.5.1995, no. 218

Protection of forced heirs

If the deceased is an Italian national, the choice of law do not compromise the forced heirs' rights if the heirs are resident in Italy at the time of death of that person.



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Public order and protection of forced heirs

Rules applicable after 17.8.2015
Successions Regulation no. 650/12

Not many reference in the SR to the forced heirs' position.
(Articles 13, 23(h), 29, 77)

Different rules between Member States.



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Public order and protection of forced heirs

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References to forced heirship rules in the recitals of the SR.
(relevant for interpretation)



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Public order and protection of forced heirs

Rules applicable after 17.8.2015
Successions Regulation no. 650/12

Recital 38

This Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession. That choice 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.**



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Public order and protection of forced heirs

Rules applicable after 17.8.2015
Successions Regulation no. 650/12

Recital 50

The law which, under this Regulation, will govern the admissibility and substantive validity of a disposition of property upon death and, as regards agreements as to succession, the binding effects of such an agreement as between the parties, should be without prejudice to the rights of any person who, under the law applicable to the succession, **has a right to a reserved share or another right of which he cannot be deprived by the person whose estate is involved.**



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Public order and protection of forced heirs

Rules applicable after 17.8.2015

Successions Regulation no. 650/12

Recital 54

[...] neither conflict- of-laws rules subjecting immovable property to a law different from that applicable to movable property **nor provisions providing for a reserved share of the estate greater than that provided for in the law applicable to the succession** under this Regulation may be regarded as constituting **special rules** imposing restrictions concerning or affecting the succession in respect of certain assets.



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Public order and protection of forced heirs

Rules applicable after 17.8.2015
Successions Regulation no. 650/12

Are Italian forced heirs' protection provisions public policy rules?



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Public order and protection of forced heirs

Rules applicable after 17.8.2015

Successions Regulation no. 650/12

Italian Supreme Court 24.6.1996, no. 5832: «As art. 42 of the the Constitution, does not refer to forced heirs, the reserved share represents a limitation of the intestate succession or of the testamentary dispositions, which the legislator may modify and even suppress; therefore the provisions of law about forced heirship do not form part of public policy».



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Public order and protection of forced heirs

Rules applicable after 17.8.2015

Successions Regulation no. 650/12

Italian Supreme Court no. 14811 of 30.6.2014: «With particular reference to article 29 of Constitution, it must be noted that this provision protects the person's interest in the intangibility of the sphere of affection and of mutual solidarity within the particular social formation of the family, and does not extend to the provisions of law regarding forced heirship, which is not protected by Constitution».



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Public order and protection of forced heirs

Assessment "*in concreto*"

(e.g. a person excluded may be in economic difficulties or in state of need)



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Public order and protection of forced heirs

Relevance of any remedies available to the excluded person?

Example

An English citizen having assets in Italy drafts a will, chooses English law and excludes his son. English law also applies to the succession of the property in Italy.

The child - if the deceased is domiciled in England - can act (within 6 months) under the Inheritance (Provision for family and dependants) Act 1975 to obtain inheritance rights: is this a sufficient guarantee to exclude a breach of public policy?



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Public policy and prohibition of agreements as to succession

- The prohibition of agreements as to succession is not part of the international public policy, since the reg,. has expressly provided for them.
- An agreement as to the succession **may** be contrary to public policy order if "*in concreto*" conflicts with the value of the person and his dignity.



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Public policy and recognition of same-sex marriages

Court of Justice, 5 June 2018 (Case C673-16, Coman)

(1) In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.



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Public policy and recognition of same-sex marriages

Court of Justice, 5 June 2018 (Case C673-16, Coman)

(2) Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.



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Public policy and shariah laws

Possible inheritance discrimination?
(sex, religion)

Analysis of the material case.



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Public policy and shariah laws

ECHR Molla Sali v Greece

(19.12.2018, case No 20452/14)

The difference in treatment suffered by Ms Molla Sali as the beneficiary of a will drawn up under the Civil Code by a Greek testator of Muslim faith, as compared with a beneficiary of a will drawn up under the Civil Code by a Greek testator not of Muslim faith, had not been objectively and reasonably justified.

Violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights, read in conjunction with Article 1 of Protocol No. 1 (protection of property) to the Convention.



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