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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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# Choice of law under Regulation 650/2012

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This Project is implemented by Coordinator



Fondazione  
Italiana  
del Notariato

Partners



Magyar Országos  
Közjegyzői Kamara



Notary Chamber of Bulgaria



International  
Association of  
Judges  
*promoting an independent judiciary worldwide*

- Increasing mobility of EU Citizens in and outside the European Union
- Different PIL successions rules in the different Member states (before SR)
- Need for predictability and certainty



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## **Recital 37, proposition 1 of the Succession regulation (SR):**

In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession.

**How it is done?** By the introduction of harmonised conflict-of-laws rules. The idea is to avoid contradictory results.

**Connecting factor** chosen by the Regulation – the habitual residence at the time of death



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# Difficulties in determining the habitual residence

- George is a Bulgarian citizen and he is a keen yachtsman. He adores to stay on his yacht, to travel around the world and to enjoy new places. That's why he has organised his life in a way to make his passion to become a reality. He has bought an ocean sailing yacht and spends most of the time on it. For some economic reasons, the yacht is registered under the flag of the Marshall Islands, but George does not have any other connection with this State. George is self-employed IT specialist. He works from distance for different projects in different countries. His work is going well so he has bought property in several countries including Bulgaria, Italy and Florida, USA. He is married. His wife looks after their two lovely children and shares her time between the yacht, Bulgaria and Italy, where their children attend a prestigious school. Despite all this international mess, George feels closely connected with his national country – Bulgaria.
- George would like to organise his succession and is asking for advice.



- **Art. 21, par. 1:** Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his **habitual residence** at the time of death.
- Difficulties with the determination of the habitual residence can lead to uncertainty
- A person can feel more connected with a State different than the one of his habitual residence



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**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.

**Art. 22, par. 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.

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.



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- The choice of applicable law is **admissible**
- It is restricted to **the nationality** at the time of making the choice or at the time of death
- In case of multiple nationalities **any one of them** can be chosen



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- **The determination of the nationality is a preliminary question.** It falls outside the scope of the Succession Regulation.
- **Recital 41, proposition 2:** The issue of considering a person as a national of a State is subject to national law, including, where applicable, international Conventions, in full observance of the general principles of the European Union.



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# States with more than one legal system – territorial conflicts of laws – art. 36

- A State which comprises several territorial units each of which has its own rules of law in respect of succession.
- **The internal conflict-of-laws rules** of the State in hand shall determine the relevant territorial unit whose rules of law are to apply (Art.36, par. 1)
- The Regulation provides a **special rule** (art.36, par.2 (b) ) **in the absence of internal conflict-of-law rules**: Any reference to the law of such a State shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the deceased, be construed as referring to **the law of the territorial unit with which the deceased had the closest connection**.



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# States with more than one legal system – inter-personal conflicts of laws – art. 37

- A State which has **two or more** systems of law or sets of rules applicable to different categories of persons in respect of succession
- **The internal rules** of the State in hand shall determine the system of law or set of rules that have to be applied (art. 37, prop.1)
- **In the absence of such internal rules** - the system of law or the set of rules with which the deceased had **the closest connection** shall apply (art. 37, prop.2)



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## Choice of law – practical case

- Kiril, a Bulgarian national, is habitually resident in UK. He owns a real estate in Sofia, Rome and London. He is divorced and has a son and a girl. He is in good connection with his daughter and in bad one with his son. He wants after his death his daughter to become his only heir.
- Is it possible for Kiril to choose the law of England and Wales to govern his succession?
- What can Kiril do?



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## Choice of law – practical case – part 2

- Kiril cannot choose the English Law as he is not national of this state.
- However, his choice will be valid if at the time of his death he already possesses English nationality.
- The acquisition of English nationality only for the purpose to exclude the son from the succession can be regarded as fraud in law.



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## Choice of law – practical case – part 3

- What will happen with the succession of Kiril if no choice of law is made?
- Bulgaria and Italy will apply the Succession regulation and the English law will be applicable as Kiril has his habitual residence there.
- UK is a third state under the meaning of the SR and according art.34, par.1 of SR the rules of PIL in force in that state will apply.
- English PIL rules provides that the law of the state where the real estate is situated are to govern the succession of this real estate (*lex rei sitae*). Thus the English law will make a *renvoi* to Bulgarian and to Italian law and they have to accept it.
- The succession of the real estate in Bulgaria will be governed by the Bulgarian law. The succession of the real estate in Italy will be governed by the Italian law.



# Form of the choice

- **Art. 22, par. 2:** 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.
- **Explicit choice** – the person expressly designates the chosen law by a special declaration
- **Tacit choice** – the choice is just demonstrated (can be derived from the terms of the document)



# Tacit choice

- **Recital 39, prop. 2** - A choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law.
- As an example for a specific provision can be regarded the creation of a trust which is known only in some legal systems



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# Form of the choice

- **disposition of property upon death** as defined in art.3, par.1 (d)
- ‘disposition of property upon death’ means a will, a joint will or an agreement as to succession
- **will**
- **joint will** - a will drawn up in one instrument by two or more persons - art.3, par.1 (c)
- **agreement as to succession** - an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement





# Substantive validity of the choice – practical case

- Teresa, an Italian national, who resides in Germany, possesses a movable and immovable property in Germany and in Italy. She is married to a German.
- She intends to enter into an agreement as to succession in which she intends to make a choice of the Italian law as applicable to her succession as a whole.
- Will be such a choice valid and admitted in Italy?
- Will it will be valid and admitted in Germany?



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# Substantive validity

- **Art.22, par. 3** The substantive validity of the act whereby the choice of law was made shall be governed by **the chosen law**.
- **Recital 40:** A choice of law under this Regulation **should be valid even if the chosen law does not provide for a choice of law in matters of succession**. It should however be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing. The same should apply to the act of modifying or revoking a choice of law.



# Substantive validity

- **Art. 24** - admissibility and substantive validity of dispositions of property upon death other than agreements as to succession
- **Art.25** - admissibility, substantive validity and binding effects between the parties of agreements as to succession
- **Art. 26** – elements covered by the substantial validity



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# Formal validity

- **Art. 27, par. 1** – many connecting factors:
- Place
- Nationality
- Domicile
- Habitual residence
- Location of immovable property



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# Validity of choice made prior 17 August 2015

- Such a choice shall be 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. (**Art.83, par.2**)
- If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession. (**Art.83, par.4**)



# Effects of the choice

- **Determination of the applicable law**
  - The law chosen under the provisions of art. 22 will govern **the entire succession**.
    - It is not possible voluntarily to fragment the applicable law on personal, territorial, material or other type of basis.
  - Any law shall be applied whether or not it is the law of a Member State.
    - Member state under Regulation 650/2012 - UK, Ireland and Denmark are not part of the Regulation and are not Member States.



# The chosen law will govern the entire succession

- Petar, a Bulgarian citizen habitually resident in Italy, who owns a property in Bulgaria, wants to choose the Bulgarian Law to govern only his property in Bulgaria.
- Is this possible?
- How such of choice, if it occurs in practice, will be considered? As no choice at all or as a valid choice regarding the succession as a whole?



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# Scope of the applicable law

- Art.23, par. 2 - matters that are explicitly included in the scope of SR
- Art. 1, par. 1 - matters that are explicitly excluded from the scope of SR



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# Effects of the choice

- ***Renvoi* is excluded** – art.34, par. 2
- If there is no choice of law, the application of the law of any third State specified by the Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*: to the law of a Member State or to the law of another third State which would apply its own law.
- If there is choice of law no *renvoi* shall apply
- Examples: UK citizen having his habitual residence in London and immovable property in Italy (no choice made) and UK citizen having his habitual residence in Rome and immovable property in Italy (choice made)



# Effects of the choice

- **Effects on the jurisdiction where the chosen law is the law of a Member State**
- **Admissibility of choice-of-court agreements:** Where the chosen law is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter. (**Art. 5, par.1**)
- **Art. 6** - Declining of jurisdiction in the event of a choice of law
- **Art. 7** - Jurisdiction in the event of a choice of law





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