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REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 4 July 2012

on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

Practical cases

by

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FONDAZIONE ITALIANA DEL NOTARIATO

Introduction. The Succession Regulation of 4 July 2012 ("SR") has finally come into force on 17 August 2015. It binds 25 of the 28 member States of the European Union, as the United Kingdom, Ireland and Denmark opted out. As it is shown in some of the practical cases below, it is controversial whether the States that opted out of the SR are to be considered as Member States or Third States, even if the majority of commentators agree in only considering as Member States, for the purposes of the SR, the States that are bound by it. This means that each of United Kingdom, Ireland and Denmark should be treated as a Third State, especially with reference to article 34 of the SR, which provides for *renvoi*.

The SR has certainly changed the Private International Law ("PIL") of the States bound by it, but certainly not the PIL of the Third States, which will continue to apply their own PIL. The aim of the SR, that is the

ability for EU citizens to organise their succession in advance, might lead to some difficulty for citizens belonging to a Third State insofar they provide for a system of scission in determining the law applicable to the succession. The main change introduced by the SR, in fact, is that the connecting factor to determine the law applicable to a succession is the habitual residence of the deceased at the time of death. Therefore,

if the deceased had his habitual residence in a Third State, it may be that, by applying the principle of *renvoi* under article 34 of the SR, the succession is governed by two or more different laws.

The main aim of the SR is to pursue the principle of unity of the succession, not only with reference to the law applicable, but also with reference to jurisdiction. Basically, the law applicable and the jurisdiction will coincide even if, under article 5 and following ones of the SR, different courts may have jurisdiction as to the succession.

During the seminars held in 2015 in Bucharest, Monaco and Madrid, several practical cases were displayed and discussed in order to evaluate the impact of the SR with reference to the different systems of law, both on theoretical level and – most importantly – on practical level. One of the aims of the project was to make professionals (lawyers, notaries, judges) aware of the new approach provided for by the SR, and to promote a common interpretation of the provisions of the SR itself.

In this paper, the practical cases debated at the different sessions of the seminar are displayed. Other cases raised during the implementation of the project are also herewith added, for a total of 18 cases.

The solutions proposed may be (and certainly will be) questioned. The main aim of the paper is in fact to stimulate debate.

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Case 1: "Mark"

(law applicable)

Mark is a British citizen, who has been in Florence for 3 years. He is not married and has no children, and works as manager for an English company, travelling between the London seat and the Italian branch.

Mark owns immovables in the UK and in Italy, and has a bank account in the UK where his wage is credited.

He usually spends the first 4 days of the week in England and, on Thursday evening, he comes back to Italy.

In which country does Mark have his habitual residence under Regulation 650/2012?

Solving this case is not easy, because Mark works between the UK and Italy and his estate is located both in the UK and Italy.

Despite the widespread use of the expression "habitual residence", the SR does not define it; this means that it should in any case be interpreted autonomously, so as to ensure a correct and uniform application of the SR. Although the SR does not define the concept of habitual residence, it provides the commentator with some guidelines in the recitals, namely recitals no. 23 and no. 24.

As shown by recital no. 24 of the SR, this may be a "complex case", which arises «... where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States» - the recital continues - «his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.»

In Mark's situation what may be relevant (if not decisive) is his citizenship, or the location of the most part of his estate or, in addition or alternatively, the value of the UK estate compared to that of the Italian estate.

Case 2: "Tatiana" (law applicable)

Tatiana is a Romanian citizen who has been working in Italy for 10 years as caregiver. She has her residence recorded in Italy and a bank account in Italy where her wage is credited. She also transfers her wage monthly, partly to her family in Romania and partly to another bank account she owns in Romania.

Her children, her mother and her sister live in Romania. She bought a house in Romania as well.

In which country does Tatiana have her habitual residence?

Tatiana's case might be deemed one of the "complex cases" described in recital no. 24.

In Tatiana's situation, two aspects seem to be conflicting: on the one hand, she has been living and working in Italy for 10 years; on the other hand, she has some family members in Romania.

Recital no. 23 states that in determining the habitual residence the authority should consider «... in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.»

From this point of view, it should be quite clear that Tatiana had her habitual residence in Italy. The fact that the centre of interests of her family is still in Romania should not lead to the conclusion that Tatiana may be «… considered still to have his habitual residence in his State of origin...», which would entail applying article 21.2 of the SR, because this article, which reads: "Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State." is only applicable "by way of exception", that is, "very limited cases" that should be justified by strong evidence.

The purpose of the SR is to give certainty about the law applicable to the successions and a shallow application of article 21.2 put this certainty at risk, transforming it into a sort of "escape clause", to be used in order not to apply the general rule of article 21.1.

Case 3: "Carlo" (regarding the choice of law)

- Carlo is an Italian citizen who has been residing in England for a number of years, where he is *domiciled* (in the English meaning of the term) and works as orchestra leader.
- He owns movables and immovables in England, and immovables in Italy. He wishes to plan his succession choosing the English & Wales law of succession.

The law applicable to succession is now the law of the State in which the deceased had his habitual residence at the time of death (article 21.1. of the SR).

The connecting factor of the habitual residence of the deceased at the time of death is the default rule, under the SR, to determine the law applicable to the entire succession. In other words, the law applicable shall govern all questions related to the succession, from the start of the succession to the transfer of ownership of the assets forming part of the estate to the beneficiaries, including the administration of the estate. Furthermore, the same law shall govern the succession of all assets forming the estate, regardless of their nature (movables or immovables) and their location.

Under article 21.1 of the SR, the law of the State in which the deceased was habitually resident at the time of death might also be the law of a 'Third State' (so called *erga omnes* or universal application). If the law determined under article 21.1 is the law of a state bound by the SR, the existence of a uniform connecting factor shall avoid any conflict of laws.

On the other hand, when the law of habitual residence is the law of a Third State, the Private International Law rules (PIL) of that State should be also considered. If those rules, for example, provide for *renvoi* either

to the law of a Member State or to the law of a Third State that would apply its own law to the succession, such *renvoi* should be accepted under the SR (see article 34.1 of the SR).

As everyone knows, after intensive discussions, the UK opted-out (i.e. did not adopt the SR). However, whether the UK is to be considered as a "Member State" or a "Third State" under the SR is a question that does not appear to be solved, yet.

The SR, in fact, does not contain a definition of "Member State" (unlike other European instruments and the SR proposal of 2009). In this respect, recital no. 82 of the SR does not help clarifying this issue, as it indicates that the UK and Ireland are "Member States", although they are 'not taking part in the adoption of this Regulation and not [being] bound by it or subject to its application'. This problem of interpretation will probably be solved by the European Court of Justice, even though most commentators only include in the definition of Member State under the SR the EU Member States that are bound by the SR.

As a result, the UK shall be considered as "Third State" and shall apply its own conflict law rules based on two different connecting factors related to the nature of the assets (immovable estate or movables). The succession of movables is governed by the law of *domicile*, the succession of immovables is governed by the *lex situs* (or *lex rei sitae*).

In Carlo's case, under article 21.1 and article 4 of the SR, the English law of succession will apply to the whole succession, and the English courts will have general jurisdiction on the whole succession. Yet, under English PIL rules, the law of the *domicile* will apply to the succession of movables and the *lex rei sitae* to the succession of immovables.

Thus, English PIL makes a *renvoi* to Italian law of succession for immovables located in Italy. Being Italy a Member State, it would accept the *renvoi* under article 34 of the SR.

To avoid the *renvoi* to the Italian law of succession, could Carlo make a choice of law (viz the English & Wales law of succession)?

Firstly, the choice of law is not allowed by article 22 of the SR, because Carlo is an Italian national and not a British one. Article 22 provides that the testator can elect the law of his nationality (or the laws of one of

his nationalities in case of multiple nationalities) at the time of choice or at the time of death (it will be important to clarify this point, because the choice will remain valid even if the testator loses or changes his nationality).

Secondly, the choice of law is not allowed by English PIL, which allows a choice of law only to construe the will, unless the SR triggered a change in the English PIL allowing a choice of law even in cases in which the English PIL would lead to the application of other laws (e.g. the law of the place where the real property is located).

Other interesting questions arise from this case.

The first one is whether it would be useful for Carlo to choose the English & Wales law as the law governing his succession, as it is the law of his habitual residence.

- The choice of the English & Wales law would exclude an implied choice of law in favor of the Italian law (the law of the nationality) and could help clarifying that England his Carlo's habitual residence.

The second one is whether the choice of the English law by Carlo in this circumstances would exclude the application of the Italian law of succession to Italian immovables under article 34.2 of SR (and recital no. 57), which provides that "No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30."

Let us examine the second question before, because it is easier to solve. Even if Carlo elects the English & Wales law to govern his succession, the *renvoi* to the Italian law as to immovables will apply because English & Wales law is not the law of Carlo's nationality (Carlo is an Italian citizen, not a British one); furthermore, article 34.2 excludes the *renvoi* to operate *only* with respect to the law referred to in article 22, that is the law of nationality.

As to the first question (if Carlo can choose the English & Wales law notwithstanding the fact that he is an Italian national) the answer should be no, because the English & Wales law is the law of the State of habitual residence and - formally - the SR does not allow to choose the law of habitual residence.

The question, then, is whether the SR allows to choose a law in order to "confirm" the general rule of article 21. If not, we should admit that, under the RS, a will might be drafted only if it contains the choice of the law of nationality as the one governing the testator's succession. In my view, this conclusion is not acceptable, and a citizen habitually residing abroad can draft a will under the succession law of the State in which he resides, expressly confirming its applicability. Otherwise, as in the example, a will was drafted under the English law (that to some extent allows testators to freely dispose of their assets), a disgruntled heir might claim an implied election of national law and consequently the forced heirship rules.

Another question is whether the choice of law whose purpose is to "confirm" the applicability of the habitual residence law excludes *renvoi* under article 34.2 of the SR. Literally, article 34.2 states that *renvoi* shall not apply only with respect to the laws referred to in article 22, that is the national law. In Carlo's case, the choice of law is not a "choice of law under article 22", because it is the habitual residence law and not the national law. Therefore *renvoi* shall apply.

If Carlo's wishes to be sure that Italian law shall not apply to his succession, it is better for him to acquire the British citizenship.

Case 4: "Molly" (law applicable - formal validity of dispositions of property upon death made in writing)

Molly is an American citizen who lived in South Dakota, USA, until her marriage (she married in 1970). Since 1970 she never moved back to the USA (she only visited her parents occasionally, until their death in 1980). She lived in Scotland from 1970 to 1980 with her husband, who was a British citizen, and from 1981 until her death she lived in Italy with her husband. Molly and her husband had a child who is resident in England.

Molly, who was recorded as a resident of Italy in 1986, owns immovables and a bank account in Italy and movables in Scotland.

She made a first will in 1996 in Scotland under formal requirements of Scottish law (one witness, according to "*Requirements of Writing (Scotland) Act 1995",* which came in force on 1 August 1995) and a second will

in Italy in 2012, under the formal requirements of Scottish law by which she revoked the previous will, bequeathing all her estate to her husband.

Molly died in Italy after 17 August 2015.

Under article 21 of the SR, the law applicable to succession will be the Italian law, that is the law of Molly's habitual residence (Italy). Also under Scottish PIL the Italian law of succession will be applicable to movables and immovables (entirely located in Italy).

As to the law applicable to formal validity and revocation of wills, the "1996 will" is valid because it was drafted in compliance with the Scottish law (the will was made in Scotland). The "2012 will", drafted in Italy, is invalid under article 48 of Italian PIL (law 31 May 1995, no. 218, applicable *ratione temporis*), because it does not comply with the formal requirements of Italian law neither when the will was made nor when Molly died; it also does not comply with formal requirements of South Dakota law (law of nationality). The "2012 will" is also invalid under Scottish and English law (Wills Act 1963, reproducing The Hague Convention of 5 October, not ratified by Italy but ratified by the UK) because it was drafted in Italy and Molly was American, not Scottish. Nor would it would be valid according to the Washington Convention (Unidroit) of 1973 on international wills, which bounds Italy, the USA and the UK.

Another question arising is whether the revocation of the "1996 will" is valid or not.

Article 27 of the SR provides that "The modification or revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under paragraph 1, the disposition of property upon death which has been modified or revoked was valid."

Art. 2 of the Hague Convention of 1961 on the conflicts of laws relating to the form of testamentary dispositions provides that "the revocation of the first will would be valid as it complies with the law according to the terms of which the testamentary disposition that has been revoked was valid".

As the "2012 will" is formally compliant with the "1996 will" (containing the disposition revoked) the revocation of "1996 will" is also valid.

As a result, Molly's succession will be governed by intestate Italian law of succession.

Case 5: "Joseph" (law applicable - choice of law)

Joseph is a British national who has been living in Switzerland for 15 years. He is retired and married in Switzerland. His wife is Swiss. Joseph and his wife have two children living in Italy.

Joseph owns movables in Switzerland and immovables in Switzerland, Italy and the UK.

Joseph wishes to plan his succession and, in particular, he would bequeath all his estate to his wife under the England & Wales law.

First of all, let us see which law will apply to Joseph's succession under the SR if he would die intestate.

Under Swiss PIL ("Loi federal sur le droit international prove (LDIP) of 18 December 1987" - articles 90-92) – with Switzerland being a Third State –, the law applicable would be that of his last domicile. "Domicile" is defined by article 23 of the Swiss Civil Code: "A person's domicile is the place in which he or she resides with the intention of settling". So, the Swiss authorities will apply the Swiss law to the entire succession.

The English PIL law provides for a system of scission. Accordingly, the law applicable to movables will be the Swiss Law (if the "domicile" of the deceased would be deemed Swiss), whereas the law applicable to immovables will be the lex rei sitae (three different succession laws will be applicable to immovables: the England & Wales law, the Swiss law, and the Italian law).

Joseph's succession leads to a "positive" conflict of laws between England and Switzerland, because both States wish to apply their own succession law to the English immovables.

Italy will apply the SR, therefore, under article 21, the law of the habitual residence of the deceased at the time of death, that is the Swiss law (if the Swiss domicile is the habitual residence of the deceased).

Conflict of laws remains between England and Switzerland.

As to the succession planning (Joseph wish to plan his succession and, in particular, he would bequeath all his estate to his wife under the England & Wales law), under article 90 of Swiss PIL foreign citizens may choose their own national law.

Under article 22 of the SR, Joseph may choose his national law.

Instead, the England & Wales law does not allow *professio juris*, but many commentators argue that, after 17 August 2015, English courts shall probably accept the choice of the England & Wales law by their citizens.

From an Italian perspective, the choice of the English law will exclude the application of *renvoi* under article 34.2 (as Joseph elected national law under article 22 of the SR).

Likewise, the choice of national law will be valid under Swiss PIL.

Case 6: "Martin" (exception to general rule in article 21.1)

Martin is a Dutch national and is employed by the European Commission in Brussels , where he moved with his family. He rented an apartment and enrolled his children at a school in Brussels.

He left in The Netherlands his friends and his family of origin, and their main assets are located in The Netherlands.

Unfortunately, Martin dies one month after he moved to Brussels.

The case seems easy to solve, by interpreting article 21.1 and 21.2. in the light of recitals no. 23 and no. 24.

Recital no. 23 states that in determining the habitual residence, the authority should consider «... in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.»

In this framework, it appears to be clear that Martin had his habitual residence still in The Netherlands, especially looking at the short duration of his stay in Brussels. Therefore, article 21.2 of the SR would apply, which provides that "Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State."

In this case there is strong evidence that Martin's centre of interests was still in The Netherlands

Case 7: "Jennifer" (case regarding exception to general rule in article 21.1)

Jennifer is a Canadian national. She is retired and bought a house in Spain where she usually spent her summer holidays. During a stay in Spain, she has an accident and is admitted to hospital for a quite long period of recovery; she cannot leave Spain.

Two years after the accident, Jennifer dies in Spain

Jennifer's case is very similar to that of Martin (case 7). In fact, she has no permanent stay in Spain, as she usually only spent in Spain her summer holidays.

Her two-years stay in Spain, - which might be interpreted as an element of strong connection with that country, leading to consider Spain as Jennifer's habitual residence – I should not be overestimate. As a matter of fact, Jennifer was obliged to stay in Spain due to her physical conditions, and that was not a decision she made

As a result, the exception provided by article 21.2 of the SR shall apply, and Jennifer's habitual residence at the time of death will continue to be in Canada.

(Pursuant to Article 21.2,"Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State

whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.").

Case 8: "Yoko" (choice of law)

Yoko is a Japanese national. She has her habitual residence in Italy and owns immovables in Italy and in Japan.

Yoko wishes her succession to be governed by Japanese succession law.

Japan is a civil law country and its PIL provide that:

- a choice of law is not admitted
- the law applicable to succession is the national law
- the formal validity of testamentary dispositions is governed by The Hague Convention of October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (Japan is bound by the Convention).

Under Japanese PIL, the succession will be governed by national law, whereas under SR (applicable in Italy), the law applicable to the succession will be that of the State in which the deceased had his habitual residence at the time of death.

Yoko may make a will in Italy (valid as regards form under Italian law) and may choose Japanese law (national law) to govern her future succession

In so doing, the law applicable to Yoko's succession will comply to Japanese PIL and Japanese law will be applicable to the entire succession

Case 9 "Pedro" (choice of law - multi-legislative States)

Pedro is a Spanish national, he is retired and lives with his wife in Italy. He owns a bank account and an apartment in Italy, a bank account and an apartment in Madrid, and another apartment in Barcelona. Pedros' sons live both in Madrid.

Pedro wishes to plan his future succession by drafting a will and choosing the Spanish law as governing his succession.

How can the notary advise Pedro taking into account that Spain is a multi-legislative State?

It is important to remember that Spain has seven Succession Law systems, with fairly different characteristics and institutions in many aspects. Thus, the Spanish Civil Code of 1889, book III title III of

which contains the 331 articles on succession mortis causa (articles 657-1087 Cc), is complemented by the specific civil regulations of six Autonomous Communities, which are entitled to "conserve, modify and develop" their Civil Law within the limits established by the Spanish Constitution (article 149.1.8 of the Constitution). As a result, following the latest reforms, there are now different regulations governing the succession of the deceased in Aragón (1999), in the Balearic Islands (1990), in the Basque Country (2015), in Catalonia (1991), in Galicia (2006) and in Navarre (1973).

The seven Spanish succession systems are co-ordinated by the same conflict of law rule governing international successions. The key factor is not nationality ,but "legal residence" ("*vecindad civil*"), determined on the basis of filiation, marriage or time of continuous residence in a given territory (article 14 Cc).

Vecindad civil is a mixture, a sort of domicile and a sort of sub-nationality. It is the personal connecting factor that submits Spanish citizens to any of the Spanish laws and only Spanish citizens have *vecindad civil*.

Therefore, Pedro may choose, as law governing his succession, the law of the Spanish territory whose *vecindad civil* he owns.

Case 10: "Anna" (law applicable - succession planning)

Anna is a German national and lives in London, where she works at a bank in the City of London. She owns an apartment in London, in addition to her old apartment in Frankfurt, that she has rented out. She is not sure whether she will be going back to Germany, especially because she wishes to marry James, whom she met in London and with whom she wishes to start up a family.

Anna wants to draft a will in England, excluding her relatives in Germany and leaving all her assets to her (future) husband James. How can Anna plan her future succession?

If Anna did not draft a will, we need to identify her habitual residence and her *domicile*, as she lives in London.

If Anna's habitual residence were in London, her succession would be governed by the England & Wales law, but under England & Wales PIL, *lex rei sitae* will apply to the immovable situated in Frankfurt (as England & Wales PIL makes *renvoi* to *lex rei sitae* as applicable to succession) and Germany, being a Member State, will accept the *renvoi* under article 34, para. 1, lett. a) of the SR.

If Anna's habitual residence were in Germany, German law would apply to the whole succession, but England would apply its own law to the immovable situated in London as *lex rei sitae*. As to movables, from the England & Wales point of view, *domicile* will have relevance: if Anna's *domicile* was in London, the English & Wales law will apply also to movables situated in Germany, otherwise (that is, if Anna's *domicile* was in Germany), the German law will also apply to movables situated in the UK.

Habitual residence and *domicile* may or may not coincide, and this shall be relevant to identify the law applicable to succession of movables.

If *domicile* was in London and habitual residence in Germany, a positive conflict of law will arise. If *domicile* was in Germany and habitual residence in London, a negative conflict of laws will arise.

How to solve this situation is not straightforward. Might the national law prevail?

Anna might draft a will, only choosing her national (German) law under article 22 of the SR.

From Germany's point of view, national law will govern the whole succession. *Renvoi*, of course, will not be applicable under article 34.2 of the SR.

English Courts will have jurisdiction on the UK immovables, and a probate procedure will take place.

Anna may exclude their relatives from her succession to the extent the German law allows her.

Anna may have some tax questions to solve, because if she is *domiciled* in London, she will be charged the Inheritance Tax (IHT). As the UK and Germany did not sign any treaty preventing double taxation on successions, her tax burden might be high.

Could it be useful to move the bank account to Germany? In this case the bank account is a "movable" located in Germany (for tax purposes), because the bank is based in Germany or does habitual residence have relevance?

Case 11: "Anna" (law applicable - succession planning - variation)

Anna is originally German and lives in London. She has obtained the British citizenship and is "domiciled" in London. Her assets are located in London and in Vienna (Austria).

Anna wishes her German relatives not to inherit anything. Are German forced heirship provisions applicable to Anna's succession?

Being Anna British, she might draft a will choosing the England & Wales law, thus bequeathing her assets freely.

From the Austrian point of view, being Austria bound by the SR, the choice of law will exclude *renvoi* to apply under article 34.2, even if Anna has chosen the law of a Third State. It is also worth to reminding that recital 57 states that «*Renvoi* should, however, be excluded in situations where the deceased had made a choice of law in favour of the law of a third State.»

German forced heirship provision will not be applicable.

Case 12: "Giorgio" (law applicable – succession planning)

Giorgio is an Italian national habitually resident in China. He owns immovables in Italy.

Which is the law applicable to Giorgio's succession. How can Giorgio plan his succession?

This case is about the succession of a Member State national with habitual residence in a Third State: whose law provides for the citizenship as connecting factor to identify the applicable law as to succession.

Chinese law will make *renvoi* to Italian (national law). Being a Member State bound by the SR, Italy will accept the *renvoi* under article 34, para. 1, lett. a) of the SR.

Giorgio can plan his succession choosing Italian law to govern it under article 22 of the SR, as it is the law of his nationality.

Case 13: "Shozo" (law applicable – succession planning)

Shozo is a Japanese and Chinese national (double citizenship), habitually resident in Japan. He owns immovables in Italy.

Which is the law applicable to Shozo's succession? How can Shozo plan his succession?

The deceased, in this case, owns multiple (double) nationality (of Third States), and he is a habitual resident in a Third State.

Under article 21 of the SR, his succession is governed by the Japanese law (Third State) which makes *renvoi* to national law as to succession of immovables.

In this case, which law will prevail? The Japanese law.

Article 38 (National Law) of Japanese PIL

1) If a person has two or more nationalities, the law of the State where he/she has his/her habitual residence shall be his/her national law, insofar as his/her nationality is from that state. If he/she does not have his/her habitual residence in any of the states whose nationality he/she has, the law of the state with which he/she is most closely connected shall be deemed to be his/her national law.

However, where one of his/her nationalities is Japanese, Japanese law shall be deemed to be his/her national law.

Shozo can plan her succession choosing Japanese or Chinese law to govern it under article 22 of the SR, as it is the law of one of his nationalities.

Case 14: "Franz" (implied choice of law)

Franz, a German national, habitual resident in Madrid, draft a mutual will in 2013 whereby he and his wife are mutually heirs, whereas their children are beneficiaries of the surviving spouse.

Which law will be applicable to Franz's succession?

Being Franz habitual resident in Spain, the applicable law should be the Spanish succession law, under which mutual wills are not admissible.

Yet, as under article 22.2 of the SR, the choice of law « shall be demonstrated by the terms of such a disposition», the succession may be governed by the German law (national law of the deceased), and the disposition may be deemed valid, as Franz mentioned a legal institution (mutual wills) admitted by German law.

In fact, according to Recital no. 39 of the SR «A choice of law should be made expressly in a declaration in the form of a disposition of property upon death or be demonstrated by the terms of such a disposition. 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.».

Case 15: "Karl and Josephine" (agreement as to succession)

Karl, a German national habitually resident in Germany and his wife Josephine, a French national habitually resident in France, wish to enter into an agreement as to their successions.

Is it possible to agree upon the successions?

Karl and Josephine cannot agree upon their successions, because the agreement as to succession is not allowed under the French law.

Pursuant to article 25.2 of the SR, «An agreement as to succession regarding the succession of several persons shall be admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded.»

Therefore, the agreement as to succession must be admissible under German and French Law, which it is not the case.

Case 16: Karl e Josephine (agreement as to succession - variation)

Karl, a German national habitually resident in Germany and his wife Josephine, a Swiss national habitually resident in Switzerland wish to enter an agreement as to their successions.

Is it possible to agree upon the successions?

Karl and Josephine may agree upon their successions because the agreement as to succession is admissible under both German and Swiss law.

Case 17: "Francois e Anna" (agreement as to succession)

Francois, a French national habitually resident in Germany, and his wife Maria, an Italian national habitually resident in Switzerland, wish to enter an agreement as to their successions.

Is it possible to agree upon the successions?

Francois and Anna may agree upon their successions, because the agreement as to succession is admissible under the German and Swiss law, and the parties are habitual residents of Switzerland (so called "anticipated succession law"). They cannot choose their national law because, under the French and the Italian laws, agreements as to succession are void and null.

The court will determine with which law the agreement as to succession is more connected. The substantial validity and the binding effects of the agreement between the parties will be governed by the law it has the closest connection to (for example, the German law if the spouses are habitual residents of Germany, or if most of their assets are situated in Germany).

Case 18: "Mario" (case about issue of “internal” ECS)

Mario is an Italian national and, unfortunately ,his father died a couple of months ago. Mario asks an Italian notary to issue an European Certificate of Succession ("ECS") because his father worked in Spain and he believes that the deceased may have a bank account in Madrid. Mario does not have any evidence of the existence of the bank account.

Can the Italian notary issue the ECS?

The SR provides for the ECS in article 62 and following ones. The ECS is a document issued by a designed authority, after carrying out a procedure provided for by the SR. It is for use by heir and, legatees having direct rights in the succession, and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

In particular ,the ECS may be used to demonstrate the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the ECS and their respective shares of the estate; the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the ECS; the powers of the person mentioned in the ECS to execute the will or administer the estate.

Under article 62.3 of the SR, the ECS shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the ECS shall also produce the effects listed in article 69 in the Member State whose authorities issued it.

The answer to the question whether the ECS may be issued in the absence of any evidence of the existence of a connecting factor with another Member State (e.g. a bank account), should apparently be no. Actually, the SR should only be applied when a cross-border succession is involved, and in Mario's case it is not sure that the succession is transnational.

Yet, there are counter-arguments that may led to an opposite conclusion.

The first one is that, in many cases, evidence may be impossible to obtain. For example, the bank based in another Member State might not give any information to the heir about the existence of any bank accounts in the deceased's name without a certification that the applicant is a heir. Such document might well be the ECS.

Another argument is that the SR does not provide that to issue the ECS, the applicant must prove the existence of a transnational element.

Of course, the application submitted to the issuing authority should be "plausible". At least some information about the possibility that the deceased may had a connection with another Member State should be given.

Otherwise, the authority would issue an ECS related to an internal and not a cross-border succession.

This leads to a different scenario, that is whether the issuing authority may issue the ECS for "internal" successions. It is a complicated matter. Denying the issue of an ECS for only internal successions may, as a matter of fact, determine reverse discrimination.