



Towards the entry into force of the succession regulation:
building future uniformity upon past divergencies



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Towards the entry into force of the succession Regulation:
Building Future Uniformity Upon Past Divergences

Conflicts of law in Romanian and Italian private international law

- practical cases -
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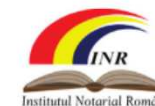
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Preamble

The following are two hypothetical cases of conflict of law between Romania and Italy.

Please note that, where the Romanian law is applicable to a succession, there are three different possibilities provided by the Romanian private international law (P.I.L.), depending on the date when the succession was opened, i.e. on the *time of death of the De cujus*:

Accordingly, the following rules (and conflict laws) shall apply:

The *De cujus* died before the 1st of October, 2011:

Rules of conflict of law and jurisdiction provided by Law no.105/1992 - Romanian International Private Law Act, (partially repealed by the entrance into force of the Romanian Civil code, on 01.10.2011, and integrally repealed by the entrance into force of the new Romanian Procedure Code on 15.02.2013);

The *De cujus* died on or after the 1st of October, 2011, but before the 17th of August, 2015:

Rules of conflict as provided by the Romanian Civil code, currently in force (hereinafter, ***the Code*** or the ***Civil code***), in matters of law applicable to succession, and either by Law no.105/1992 or by the Romanian Civil Procedure code, as indicated above, in matters of jurisdiction;

The *De cujus* will die on or after the 17th of August, 2015:

Rules of conflict as provided by Regulation no. 650/2012 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 (hereinafter, ***the Regulation***).

It is worth noting that the Romanian Civil code currently in force contains rules on conflict of law in matter of successions that are very similar to those set in by the Regulation. When drafting these rules of international conflict of law, the Romanian legislator simply transposed the provisions of the project of the Regulation into the Civil code. The differences between the provisions of the Romanian civil code and those in the Regulation arise from the fact that, during and after the entrance into force of the Code, the project of the Regulation was subject to various amendments.

PRACTICAL EXAMPLE NO.1

Premise:

A is an **Italian citizen**.

He is married to a Romanian citizen, **B**, and they live together in Romania. He also has one son, **C**, who lives in Italy.

A has his domicile in Romania, and does not have a habitual residence in another state.

He has movable and immovable property in Italy and Romania.

He draws up a holographic will, written in his own handwriting, dated and signed. The will contains a fideicommissary disposition, by which A leaves his entire estate to his son, C, who is mentally incapacitated and is under guardianship (interdetto) and, upon the death of C, to the legal guardian of the latter. The will does not contain a disposition on the choice of law applicable to the succession.

Upon A's death, his son's guardian presents the will to the competent Italian authorities, in order to obtain the transfer of A's movable and immovable property located in Italy.

Concurrently, the wife B initiates the inheritance procedure before a civil law notary in Romania. Upon notification by the said Romanian notary, C's guardian informs him of the existence of the will, states his claims regarding the property in Romania and declares that the wife B should only be entitled to her reserved share, as she has been indirectly disinherited by the will.

A dies on the 1st of June 2011.

The following laws are applicable:

Italy: Law no.218/1995 - on the Italian International Private Law Act;

Romania: Law no.105/1992 - International Private Law Act;

According to the Italian law (218/1995):

Law applicable to succession: The Italian law (*connecting factor*: nationality - article 46);

Jurisdiction: The Italian courts are competent (*connecting factor*: nationality - article 50 para 1 letter a);

Exemption from Italian jurisdiction: immovable property located in another state - Romania (article 5);

Admissibility and substantial validity of the will: The Italian law, as *lex successionis*;

Formal validity of the will: determined according to either the Italian or the Romanian law. *Connecting factors*: *de cuius* is an Italian citizen - *lex patriae*; he had his domicile in Romania - *lex domicilii*, etc. - (article 48);

Solution: The Italian law is applicable - *lex successionis*; the Italian courts are competent; the will is valid; the wife B is disinherited but is entitled to her reserved share according to the Italian law; as per the actual acquirement of property rights over the various goods comprising the estate of the Deceased, the provisions of article 51 shall apply; the Italian courts shall not rule in matters relating to real estate in Romania.

According to the Romanian law (105/1992):

Law applicable to succession: The Romanian law for immovable property situated in Romania (*lex rei sitae*) and the Italian law for: (1) immovable property located in Italy (*lex rei sitae*) and (2) movable property (*lex patriae* - law of nationality) - article 66;

Jurisdiction: The Romanian courts are competent (*connecting factor*: domicile of the deceased/location of immovable property-exclusive competence, as per article 151 para 6 and 7);

Admissibility and substantial validity of the will: The law applicable to succession, according to point 1 above; there are different rules applicable in matters of capacity of drafting a will, but they are not relevant to this case;

Formal validity of the will: the will is valid as to form under both Romanian and Italian laws. All *Connecting factors* point to either one or the other of these laws, i.e.: *lex patriae*, *lex domicilii*, *lex loci actus*, *lex rei sitae*, *lex fori* (article 68);

Solution: The Romanian law will be applicable to immovable property in Romania, the Italian law to immovable property in Italy and to all movable property of the Deceased; qualification of goods as movable/immovable will be subjected to the applicable law; the Romanian courts have jurisdiction; the will is valid as to form, but *substantively invalid in matters relating to immovable property in Romania* (fideicommissary substitutions were forbidden under the previous Romanian civil code); as to the effects of the fideicommissary substitution where the Italian law applies, it is for the Romanian court to decide whether this disposition is contrary to public policy in private international law or not.

Practical approach: In order to avoid implicating the Romanian authorities regarding assets in Italy, the Italian heir will most likely obtain a decision regarding those assets from an Italian authority in accordance with the Italian law.

A dies on the 15th of June 2014.

The following laws are applicable:

Italy: Law no.218/1995 - on the Italian International Private Law;

Romania: Romanian civil code and Romanian civil procedure code;

According to the Italian law (218/1995):

Same solutions as previously presented.

According to the Romanian Civil code:

Law applicable to succession: The Romanian law (*connecting factor*: The law of the last habitual residence) - article 2633; there is no more scission based on movable/immovable property;

Jurisdiction: The Romanian courts will be exclusively competent with respect to: (1) immovable property located in Romania; (2) property located in Romania, where the last domicile of the deceased was located in Romania - article 1079 para 1 and 2 of the Civil Procedure Code; the Romanian courts will also be competent where the last domicile of the deceased was in Romania, but shall not rule in matters referring to immovable property of the deceased located abroad - article 1080 para.1 point 6;

Admissibility and substantial validity of the will: Determined by the law applicable to succession, according to point 1 above - article 2636);

Formal validity of the will: the will is valid as to form under Romanian and Italian law. All *Connecting factors* mentioned by law 105/1992 are maintained under the Code, with the exception of “*lex domicilii*”, which is replaced by the law of the state of the habitual residence;

Solution: The Romanian law will be applicable to the succession as a whole, there is no more scission of *lex successionis* based on movable and immovable property; the Romanian courts will have exclusive jurisdiction over all assets located in Romania; the will is effective as to form and also as to substantive validity (the new Romanian Civil code allows fideicommissary substitution of first degree - article 994 of the Code); consequently, the wife B shall be disinherited, but entitled to her reserved share, as prescribed by the Romanian law, as *lex successionis*.

Practical approach: The application of the new Civil and Civil Procedure Codes is more beneficial to the Italian heir. However, there is still a lack of cohesion between the Italian and Romanian systems of law. Each determine their own law as applicable where no choice of law was made (on the basis of nationality and last habitual residence, respectively). However, both laws will lead to similar effects (there are certain differences, e.g. proportion of reserved share). It is still possible for the parties concerned to obtain decisions in Italy and Romania, for the assets located in each country.

- **A dies on the 15th of December 2015.**
- Both Italy and Romania shall apply the Regulation
- **Law applicable to succession:** The Romanian law (*connecting factor*: The law of the last habitual residence) - article 21 para 1. However, it may be disputed that the deceased was more closely connected to Italy, in which case the Italian law is applicable. For the scope of this example, the Romanian law shall be deemed applicable as *lex successionis*;
- **Jurisdiction:** The Romanian courts will be competent to rule on the succession as a whole - article 4;
- **Admissibility and substantial validity of the will:** Governed by the law that would have been applicable to the succession, had the De cujus died on the day of making the disposition - as per point 1 above, it can either be the Romanian law (law of the habitual residence at the time of the disposition) or the Italian law (law of the State to which he is manifestly more closely connected, if applicable) - article 24. Also, on a case by case basis, it can be discussed whether the will contains an implicit choice in favour of the Italian law. For the scope of this example, the Romanian law shall be deemed applicable as *lex successionis*;
- **Formal validity of the will:** the will is valid as to form - article 27;
- **Solution:** The Romanian law will be applicable to the succession as a whole; the Romanian courts will have jurisdiction - not based on the Civil procedure code, but according to article 4 of the Regulation; they shall also have jurisdiction to rule with regard to assets not located in Romania; the Romanian law will govern the admissibility and substantial validity of the will, as per article 24 (see point 3 above). The will is effective as to form and also as to substantive validity (the new Romanian Civil code allows fideicommissary substitution - article 994); consequently, the wife B shall be disinherited, but entitled to her reserved share as provided by the Romanian law as *lex successionis*; as the civil law notary is not a “court” in the interpretation of the Regulation, the parties may also agree to defer the matter to a notary, and draft an agreement according to the legal dispositions set out above, without being bound by the rules of jurisdiction - as per recital 29.

PRACTICAL EXAMPLE NO.2

- **Premise:**
- **A** is a Romanian citizen. He is a minor.
- He has his domicile in Romania, where he lives with his father and is enrolled in school, but spends his holidays in Italy with his mother and the rest of his family who all live there.
- He has movable property in Italy and Romania.
- When he turns 16, [*he obtains full capacity in respect of the exercise of his legal rights (capacità di agire) according to article 40 of the new Romanian civil code - only applicable after the entrance into force of the new Civil code on 01.10.2011*], and he decides to move back to Italy. While residing in Italy and still a minor, he drafts an international will, according to the procedures set out in the Convention providing a uniform law on the form of an international will, Washington, 1973. Romania is not part to this convention.
- At 22, he returns to live and work in Romania. He continues to reside in Romania until his death, at age 27.
- Will this testament be admissible and valid as to form and substance?

- **A dies on the 1st of June 2014.**
- The following laws are applicable:
- Italy: Law no.218/1995 - on the Italian International Private Law; The Italian civil code, as mentioned before, with the same effects stated therein;
- Romania: The Romanian civil code currently in force (as of 1 October 2011) .
- **Law applicable to succession:** The Romanian law (*connecting factor*: law of the last habitual residence - article 2633 of the Romanian Civil code) ;
- **Capacity to draw up a will:** The Romanian law as *lex successioneis* (*as per article 2636 letter g*), or as *lex patriae* - article 2572;
- **Formal validity of the will:** determined, according to the Romanian P.I.L., according to either the Italian or the Romanian law: *Connecting factors*: de *cujus* is a Romanian citizen, but the testament is drawn up in Italy, while he is a resident of that state, etc. - (article 2635 of the Civil code);
- **Solution:** The Romanian law is applicable as *lex patriae/successioneis* according to the international private law of both countries. The Romanian law will regulate the substantive validity of the will, including the capacity to draw up a will. **The will is valid as (1)** it abides by the form prescribed in the state where the disposition was made, i.e. Italy, although this form is not recognized by the Romanian law; **(2)** according to the Romanian law applicable to capacity, an emancipated minor (as per article 40 of the new Romanian civil code) of 16 years of age is entitled to dispose

- **A dies on the 1st of June 2016.**
- The following laws are applicable: the Regulation
- **Law applicable to succession:** The Romanian law (*connecting factor*: *last habitual residence* - art.21);
- **Capacity to draw up a will** - the Italian law (*connecting factor*: *habitual residence at the time of making the disposition*-art.24) ;
- **Formal validity of the will:** determined according to either the Italian or the Romanian law: *connecting factors* - art.27);
- **Solution:** The Romanian law is applicable to the succession, as law of the last residence of the *de cuius*. The will, however, is governed as to its substantive validity by the law of the habitual residence at the time of the disposition - i.e. the Italian law (unless the *De cuius* was manifestly more closely connected to Romania). The Italian law shall also govern the capacity to make a disposition of property upon death. The Italian law does not deem the testament as valid, for reason of incapacity of the testator (the testator was a minor, the emancipation does not affect the interdiction for minors to dispose of their assets through wills, according to the Italian law). No choice of law was made, explicitly or implicitly, so as to select the Romanian law as the law applicable to the admissibility/substantive validity of the will. The fact that the will is not valid under Italian law cannot, by itself, be construed as an “implicit” choice of law by the testator, in favour of the law of his nationality. However, it may be interpreted that, at the time of the drafting of the will, the testator was manifestly more closely connected to Romania, in which case the Romanian law would be applicable and the will would be valid. The testament is valid, according to form.
- e of his estate.

La legge applicabile alla successione

Art. 21, n. 2, reg.

(c.d. clausola di eccezione)

Tale norma:

- **Presuppone l'esistenza in un dato Stato della residenza abituale del defunto** (come si ricava, oltre che dal suo letterale tenore, dalla circostanza che quest'ultimo criterio funge sempre da titolo di giurisdizione generale).
- **Opererà in casi rari**, perché l'applicazione della legge ivi contemplata è disposta «in via eccezionale», solo quando risulti chiaramente «dal complesso delle circostanze del caso concreto» il fatto che, al momento della morte, il *de cuius* aveva legami manifestamente più stretti con uno Stato diverso da quello della residenza abituale.
- **Conduce a una svalutazione dell'elemento soggettivo** nella ricostruzione della residenza abituale, perché:
 - solo la valutazione dell'atteggiamento psicologico del defunto può condurre a ritenere che egli avesse legami più stretti con uno Stato diverso da quello della residenza abituale;
 - la presa in considerazione di tale atteggiamento è consentita solo in presenza dei caratteri sopra evidenziati e, pertanto, assai di rado.

La legge applicabile alla successione

Art. 34 reg.

(Rinvio)

Nel caso in cui le norme di conflitto uniformi richiamino la legge di uno Stato terzo, si deve tenere conto del modo di disporre del diritto internazionale privato di tale Stato quando esso rinvii:

- alla legge di uno Stato membro;
- alla legge di un ulteriore Stato terzo che, in base al proprio sistema conflittuale, si ritenga a sua volta competente a regolare la fattispecie.

La legge applicabile alla successione

Art. 34 reg.

(Rinvio)

Innanzitutto, il rinvio opererà quando:

- in uno Stato terzo che adotta, quale criterio di collegamento in materia ereditaria, la cittadinanza del defunto al momento della morte, si apra la successione di uno straniero colà abitualmente residente.

Precisamente, in tal caso, il rinvio si verificherà:

- 1) indefettibilmente ove il defunto fosse cittadino di uno Stato membro;
- 2) nonché, ove fosse cittadino di un ulteriore Stato terzo, a condizione che anche il diritto internazionale privato di tale ultimo Stato dichiarati applicabile alla successione la *lex patriae*.

La legge applicabile alla successione

Art. 34 reg.
(Rinvio)

Inoltre, il rinvio può determinare una **scissione dello statuto successorio**, cioè l'applicazione di leggi diverse ai beni che compongono il patrimonio ereditario.

Precisamente, ciò si verifica quando l'ordinamento dello Stato terzo impieghi più criteri di collegamento in relazione alla diversa natura dei beni ereditari:

- 1) sottoponendo, come tipicamente fanno i sistemi di *common law*, la successione nei beni immobili alla *lex rei sitae* e la successione nei beni mobili alla legge dell'ultimo domicilio del defunto), ovvero
- 2) dichiarando applicabile *tout court* la legge del luogo di situazione dei beni (come dispone l'art. 2400 dell'*Apéndice del Título final* del c.c. uruguayano

La legge applicabile alla successione

Art. 34 reg.

(Rinvio)

Ai sensi dell'art. 34, n. 2, reg, «il rinvio non opera» nel caso in cui la *lex successionis* sia individuata per il tramite dell'art. 21, n. 2, reg.

La legge applicabile alla successione

Art. 22 reg.

(Scelta di legge)

L'art. 22 reg. concede al *de cuius* la facoltà di scegliere, quale *lex successionis*, in luogo della legge della residenza abituale al momento della morte, la legge dello Stato di cui egli possiede la cittadinanza, al momento della scelta o al momento della morte.

La legge applicabile alla successione

Art. 22 reg.

(Scelta di legge)

In caso di cittadinanza plurima è consentito al disponente di scegliere la legge nazionale che preferisce (v. *art. 22, n. 1, comma 2, reg.*). Ciò comporta il rischio di rendere applicabili alla successione leggi che con la stessa non hanno alcun contatto, ma presenta il vantaggio pratico di evitare all'interprete le difficoltà connesse all'individuazione dei criteri idonei a determinare la prevalenza di una cittadinanza sull'altra e di favorire la certezza del diritto.

La legge applicabile alla successione

Art. 22 reg.
(Scelta di legge)

L'art. 22 reg. consente di scegliere, quale legge regolatrice della successione, **unicamente la legge nazionale.**

In particolare, è **esclusa** la possibilità di scegliere:

- la legge della **residenza abituale del defunto al momento della morte;**
- la legge della **residenza abituale del defunto al momento della scelta;**
- la legge di **situazione di beni determinati;**
- la legge regolatrice dei **rapporti patrimoniali con il coniuge.**

La legge applicabile alla successione

Art. 22 reg.
(Scelta di legge)

Art. 22, n. 2, reg.: la *professio iuris* deve rivestire la forma di una disposizione *mortis causa*.

Art. 22, n. 4, reg.: è possibile procedere alla modifica o alla revoca di tale designazione in tutte le forme «previste per la modifica o la revoca di una disposizione a causa di morte».

La legge applicabile alla successione

Art. 22 reg.
(Scelta di legge)

L'*optio legis* può essere:

- **espressa:** non sono necessarie formule sacramentali, qualsiasi espressione lessicale essendo ammessa, purché indichi in modo sufficientemente chiaro la volontà del disponente;
- **tacita**, cioè «risultare dalle clausole» della disposizione che la contiene: possibili indici della volontà del *de cuius* di esercitare la scelta di legge possono trarsi dal riferimento che egli abbia fatto a norme o istituti giuridici propri di un determinato ordinamento, mentre si è dell'avviso che, isolatamente considerato, non assume rilievo determinante l'impiego della lingua nazionale nella confezione della disposizione.

La legge applicabile alla successione

Art. 22 reg.
(Scelta di legge)

Art. 22, n. 3, reg.: la validità sostanziale «dell'atto con cui è stata fatta la scelta di legge» è rimessa alla medesima legge scelta.

Richiamando quanto disposto dall'*art. 26 reg.*, devono ritenersi assoggettate a quest'ultima legge: la capacità di rendere la *professio iuris*, l'ammissibilità della rappresentanza e i vizi della volontà del disponente.

La legge applicabile alla successione

Art. 22 reg.

(Scelta di legge)

Art. 34 , n. 2, reg.: il rinvio «non opera con riferimento alle leggi indicate all'articolo 22» reg..

Ciò non toglie che, onde evitare di applicare la legge scelta anche oltre i limiti spaziali dalla medesima disposti, anche in caso di *professio iuris*, debba essere tenuto in considerazione il contenuto del diritto internazionale privato di tale legge.

La legge applicabile alla successione

Art. 22 reg.

(Scelta di legge)

Diritto transitorio

Art. 83, n. 2, reg.: è salva la validità della scelta di legge che soddisfi «le condizioni» di cui al Capo III del Regolamento o sia valida «in applicazione delle norme di diritto internazionale privato vigenti al momento della scelta di legge nello Stato in cui il defunto aveva la residenza abituale o in uno qualsiasi degli Stati di cui possedeva la cittadinanza».

Art. 83, n. 4, reg.: pone una presunzione circa la sussistenza di un'opzione in favore della legge che il defunto avrebbe potuto scegliere a norma del Regolamento e in conformità alla quale abbia confezionato, anteriormente al 17 agosto 2015, le proprie disposizioni *mortis causa*.

La legge applicabile alla successione

Grazie per l'attenzione.