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O DIREITO INTERNACIONAL PRIVADO EUROPEU

ENTRE A HARMONIZAÇÃO E A FRAGMENTAÇÃO

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RENOI IN EUROPEAN PRIVATE INTERNATIONAL LAW: THE CASE OF THE SUCCESSION REGULATION

Luigi Fumagalli¹

1. Every time a foreign law is designated to govern a defined legal relationship, a question inevitably arises: is the foreign law to be applied only in its substantive part, or is the foreign system of private international law also relevant to identify the law governing that relationship? The answer given to that question is determined by the acceptance, or refusal, of the *renvoi* mechanism.² Such a question arises also with respect to the conflict-of-law rules contained in the Succession Regulation. The response is in Article 34,³ which addresses the complex issue of *renvoi* by setting particular rules.

It is well known that if the foreign law is to be applied only in its substantive part (as a result of a reference described, in the German terminology, as *Sachnormverweisung*, a scenario corresponding to the refusal of *renvoi*) no further issue arises. The court (of State A) hearing the case has to apply the substantive foreign law (of State B) to decide the dispute before it on its merits. In the second case, when *renvoi* is admitted as a result of a

¹ Full Professor (Professore Ordinario) of International Law at Law Faculty of the State University of Milan. This paper reproduces a presentation made by the Author at a Congress on EU Cross-Border Succession Law held in Milano on 4 March 2016 as a part of a project co-funded by the Civil Justice Programme of the European Union.

² The issue of *renvoi*, a classical problem of the conflict of laws, is examined in all textbooks of private international law, and has been made the subject of important doctrinal contributions. It is therefore not possible (and probably also improper) to summarize here the different theories which have been advanced, in more or less recent times, to explain the advantages and/or disadvantages of *renvoi*, or give the theoretical foundations for its admission or exclusion. Only for further references, see the recent important works of Gian Paolo Romano, *Le dilemme du renvoi en droit international privé: La thèse, l'antithèse et la recherche d'une synthèse* (Schultess 2015) 17; and of Angelo Davi, 'Le renvoi en droit international privé contemporain' (2012) 352 RCAD 9.

³ Article 34 (*Renvoi*): "1. The application of the law of any third State specified by this 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: (a) to the law of a Member State; or (b) to the law of another third State which would apply its own law. 2. 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."

“global reference” (*Gesamtverweisung*) to foreign law, including its private international law, the court (of State A) can be confronted with several different scenarios, arising when the foreign rules of private international law (of State B) do not confirm the application of the substantive law of the State to which they belong (State B). For instance, the rules of private international law (of State B) could designate the law of another State that, from the point of view of the State first referred to (State B), has to be applied to the disputed matter. This can be the law of a third State (State C); in this case, there is a “transmission” (*Weiterverweisung*, *renvoi au second degré*, *rinvio oltre*) to the third State (State C) for the identification of the substantive rules to govern the matter. Or it can be the law of the *forum* State (State A); in this case, there is a “remission” (*Rückverweisung*, *renvoi au premier degré*, *rinvio indietro*) to the *lex fori*, which will apply to the substance of the dispute.

The answer to the question whether any room is to be left to the foreign conflict-of-laws rules, and therefore to *renvoi* is normative in nature. And the form in which, or subject to which conditions, if any, *renvoi* can be admitted, is also normative. In other words, it follows the choice of the *forum* legislator (or of the courts’ case law), as to the way domestic law is to be coordinated with (and leaves room for the application of) a foreign law – a choice which is based on justifications offered by legal doctrine. This is why the attitude towards *renvoi* varies considerably from country to country, and, within the same country, from time to time.⁴ In addition, different forms of *renvoi* have been identified, in order to better satisfy the aims pursued in any given system. For instance, a “single” or “partial” *renvoi* is proposed in alternative to a “double” or “total” *renvoi*, or to *renvoi* as applied in the framework of the “foreign court theory”, depending on the possibility to follow the solutions proposed by the foreign

4 The point is underlined by Michael Bogdan, *Private International Law as a Component of the Law of the Forum. General Course* (Hague Academy of International Law 2012) 204. The evolution of the attitude of internal systems towards *renvoi* is well explained by the changes over the time in Italian private international law. While the original codification of 1865 (promoted by Pasquale Stanislao Mancini) did not contain any rule on the point (but the negative solution was asserted by authors on the basis of the general principles underlying the system, see Roberto Ago, *Teoria del diritto internazionale privato* (Cedam 1934) 239), Article 30 of the introductory provisions of the Civil Code of 1942 expressly excluded any possible relevance of the private international law rules set by the foreign governing law (Tito Ballarino, ‘Rinvio (diritto internazionale privato)’ (1989) 40 *Enciclopedia del diritto* 1005). Now, Article 13 of Law No 218 of 31 May 1995 makes provisions allowing the application, in specific cases, of the foreign conflict of law rules: on Article 13 of Law No. 218 cf Francesco Munari, ‘Art. 13’ in Stefania Bariatti (ed), ‘Legge 31 maggio 1995 n. 218. Riforma del sistema italiano di diritto internazionale privato. Commentario’ (1996) NLCC 1018; Paolo Picone, ‘Il rinvio nel diritto internazionale privato italiano’ in Paolo Picone, *Scritti di diritto internazionale privato* (Napoli 2003) 657.

private international rules to the exclusion of, or including, the foreign acceptance of *renvoi*.⁵

In essence, and in extremely general terms, the admission of *renvoi* is said to promote the coordination among systems, to contribute to an increased uniformity of decisions in different countries, and (in its “remission” form) to favour the application of the *lex fori*, irrespective in that case of any possible coordination. For instance, it is described to be absurd to apply a foreign law (of State B), on the basis of the *forum* (State A) private international law rules, in a situation in which the judge of that foreign State (State B) would not apply its law to govern the same disputed matter. On the other hand, voices against *renvoi* explain that it is not suited to apply when methods of coordination with a foreign system other than the “localization” process are adopted. This underlines the practical problems connected with applying foreign conflict-of-law rules (the risk of reciprocal references, or of a sequence of never ending transmissions, the need to take into account foreign law to apply the foreign conflict-of-law provisions, relevance of the foreign *ordre public*, etc.), and demonstrates that coordination between systems can hardly be achieved, anyway.⁶

2. The same problem faced by the domestic lawmakers was also before the European institutions, when the uniform instruments of private international law were adopted. In those situations, the choice made at the European level⁷ was to follow the solution identified by the Member States of the Eu-

5 For this distinction see Davi (n 1) 170. The “foreign court theory” is described by Cheshire, North and Fawcett, *Private International Law* (14th edn, OUP 2008) 61 as follows: “the foreign court theory (...) demands that an English judge, who is referred by his own law to the legal system of a foreign country, must apply whatever law a court in that foreign country would apply if it were seised of the matter. (...) Whatever he would do determines the decision of the English judge”. On such theory and the English decisions which recognized it, cf Edoardo Vitta, *Diritto internazionale privato. I Parte generale* (UTET 1972) 338.

6 For instance, the case is made of the foreign conflict-of-law rules containing a provision accepting the “remission” which is contemplated also in the *forum*. If the foreign system to which they belong is applicable and those rules initially point back to the *forum* State, the *forum* court would apply its domestic law, while the foreign court would apply the foreign law. In that situation, the *renvoi au premier degré* means that the *forum* State would apply its law notwithstanding the fact that its conflict-of-law rules initially designated a law which would be applied by the foreign judge; see the critical approach to *renvoi* of Franco Mosconi and Cristina Campiglio, *Diritto internazionale privato e processuale. I Parte generale e obbligazioni* (7th edn, UTET 2015) 245. This is why a different, global approach to *renvoi* is preferred: Angelo Davi, ‘Ancora sulle finalità (e sui due diversi modelli) del rinvio nel diritto internazionale privato contemporaneo’ 2014 RDI 1032, 1074. In the mentioned case, in fact, the application in the *forum* of the foreign conflict-of-laws system, including its provision on *renvoi*, would lead to the application of the foreign law, by reaching the purpose of uniformity of decisions, respecting the “logics” of the system.

7 In general terms on *renvoi* in the European private international law instruments cf Kurt Siehr, ‘Connecting Factors, Party Autonomy and Renvoi’ in Alberto Malatesta, Stefania Bariatti and Fausto

European Community, as it was called at that time, when they negotiated the Convention on the law applicable to contractual obligations, signed in Rome on 19 June 1980 (the “Rome Convention”). Article 15 of the Rome Convention contained an express “exclusion of *renvoi*” stating, “the application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law”.⁸ Consequently, *renvoi* was excluded as a rule in Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (the Rome I Regulation) at Article 20;⁹ in Regulation (EC) No. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (the Rome II Regulation) at Article 24;¹⁰ in Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (the Rome III Regulation) at Article 11;¹¹ and in Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, through reference, at Article 15, to the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations, which, in Article 12, excludes *renvoi*.¹² In other words, the choice to exclude *renvoi* was made to follow

Pocar (eds) *The External Dimension of EC Private International Law in Family and Succession Matters* (Cedam 2008) 251, 262; Hans J. Sonnenberger, ‘Grenzen der Verweisung durch europäisches internationales Privatrecht’ (2011) IPRax 325. The advisability of the adoption of specific techniques (such as *renvoi*) in the European instruments of private international law in order to overcome the difficulties in the coordination with the laws of third States was properly underlined by Paolo Picone, ‘Diritto internazionale privato comunitario e pluralità dei metodi di coordinamento tra ordinamenti’ in Paolo Picone (ed) *Diritto internazionale privato e diritto comunitario* (CEDAM 2004) 485, 516. The issue of *renvoi* is discussed also in the framework of the debate as to the possibility to identify a “general part” of the European private international law: Reiner Hausmann, ‘Le questioni generali nel diritto internazionale privato europeo’ (2015) RDIPP 499, 516; Jan von Hein, ‘Der Renvoi im europäischen Kollisionsrecht’ in Stefan Leible and Hannes Unberath (eds) *Brauchen wir eine Rom 0-Verordnung?: Überlegungen zu einem Allgemeinen Teil des europäischen IPR* (Sellier 2013) 341; Giesela Rühl and Jan von Hein, ‘Towards a European Code on Private International Law?’ (2015) 79 *RabelsZ* 701.

⁸ Ugo Villani, *La Convenzione di Roma sulla legge applicabile ai contratti* (2 edn, Cacucci 2000) 225; Antoine Kassiss, *Le nouveau droit international privé des contrats internationaux* (LGDJ 1993) 479.

⁹ Pietro Franzina, ‘Art. 20 (Esclusione del rinvio)’, in Francesco Salerno and Pietro Franzina (eds), ‘Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (« Roma I »)’ (2009) NLCC 903.

¹⁰ Fabrizio Marongiu Buonaiuti, *Le obbligazioni non contrattuali nel diritto internazionale privato* (Giuffrè 2013) 178; Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (OUP 2008) 137; Pietro Franzina, ‘Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali (« Roma II »)’ (2008) NLCC 977.

¹¹ Antonio Leandro, ‘Art. 11 (Esclusione del rinvio)’, in Pietro Franzina (ed), ‘Regolamento UE n. 1259/2010 del Consiglio del 20 dicembre 2010 relativo all’attuazione di una cooperazione rafforzata nel settore della legge applicabile al divorzio e alla separazione personale’ (2011) NLCC 1509.

¹² Andrea Bonomi, ‘The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations’ (2008) YPIL 333.

the solution adopted by the Member States when they entered into the international convention that formed the basis of the European harmonization of private international law. Such a choice, in addition, corresponded to the trend shown by international conventions regarding conflict of laws. These conventions tried, as far as possible, to localize the legal situation and to determine the country with which it is most closely connected. Therefore, it was perceived that the law specified by the conflict rules agreed to internationally should not be allowed to question this determination of place.¹³

The Succession Regulation follows a different pattern: a provision has been inserted, when its text was finally adopted,¹⁴ allowing the relevance, in specific cases and subject to some conditions, of the conflict-of-law rules of the law governing the succession. Even though it departs from the European traditional approach to *renvoi*, the solution retained by the Succession Regulation has a precedent in the Hague Convention on the law applicable to succession to the estates of deceased persons of 1 August 1989 (Hague Succession Convention).¹⁵ Thus, the solution offered by the Succession Regulation

¹³ In this sense, Mario Giuliano and Paul Lagarde, ‘Report on the Convention on the law applicable to contractual obligations’ [1980] OJ C282/37. Cf also Eugen D. Graue, ‘Rück- und Weiterverweisung (renvoi) in den Haager Abkommen: Grandeur et déclin du renvoi dans les Conventions de La Haye’ (1993) *RabelsZ* 26; Alfred E. von Overbeck, ‘Les questions générales du droit international privé à la lumière des codifications et projets récents. Cours général de droit international privé’ (1982) 176 *RCADI* 9, 127.

¹⁴ The ‘Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession’ COM (2009) 154 final, adopted by the Commission, in fact, contained an exclusion of *renvoi* at its Article 26: cf Andrea Bonomi, ‘Prime considerazioni sulla proposta di regolamento sulle successioni’ (2010) RDIPP 875; Anatol Dutta, ‘Succession and Wills in the Conflict of Laws on the Eve of Europeanisation’ (2009) *RabelsZ* 547; Jonathan Harris, ‘The Proposed EU Regulation on Succession and Wills: Prospects and Challenges’ (2008) *Trust L. Int.* 181; Georges Khairallah, ‘La loi applicable à la succession’ in Georges Khairallah and Mariel Revillard (eds), *Perspectives du droit des successions européennes et internationales: etude de la proposition de règlement du 14 octobre 2010* (LGDJ 2010) 70; Silvia Marino, ‘La proposta di regolamento sulla cooperazione giudiziaria in materia di successioni’ (2010) RDI 463; Max Planck Institute for Comparative and International Private Law, ‘Comments on the European Commission’s Proposal for a Regulation of the European Parliament and the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession’ (2010) *RabelZ* 522, 656; Cyril Nourissat, ‘Le futur droit des successions internationales de l’Union européenne. A propos de la proposition de règlement du 14 octobre 2009’ (2010) *Defrénois* 394; Klaus Schurig, ‘Das internationale Erbrecht wird europäisch – Bemerkungen zur kommenden Europäischen Verordnung’ in *Festschrift für Ulrich Spellenberg* (Sellier 2010). Cf also the answers that a working group established by the Italian Consiglio Nazionale del Notariato (National Council of Notaries) gave to the questionnaire contained in the Commission’s Green Paper of 1 March 2005, COM(2005) 65 final: *Reponses au questionnaire en matière de successions et testaments* (Giuffrè 2006) 26, advocating the admission of *renvoi* in the upcoming European legislation.

¹⁵ François Boulanger, ‘Codifications nationales et convention de La Haye du 1er août 1989: l’improbable unification du droit international des successions’ in *Le droit international privé: esprit et méthodes: Mélanges en l’honneur de Paul Lagarde* (Daloz 2005) 155; David Hayton, ‘The Significance of the Hague Conventions on Trusts and on Succession: A Common Law Perspecti-

largely translates into the European system a rule which was discussed and approved at the international level, even though in a different institutional context. In fact, under Article 4 of the Hague Succession Convention, “if the law applicable according to Article 3 is that of a non Contracting State, and if the choice of law rules of that State designate, with respect to the whole or part of the succession, the law of another non-Contracting State which would apply its own law, the law of the latter State applies”. This solution, limiting *renvoi* to the case of an “accepted transmission” from one non-Contracting State to another non-Contracting State, is now part of the Succession Regulation, with some adjustments: additionally, in fact, the Succession Regulation allows *renvoi* by the non-Member State to the law of a Member State, be that the *forum* State (“remission” *stricto sensu*) or to the law of another Member State (*renvoi au second degré*, corresponding to a sort of “remission” *sui generis*).¹⁶

3. Article 34 of the Succession Regulation¹⁷ provides (at paragraph 1) for two distinct situations in which the law of a third State, designated by the conflict-of-law rules set by the Regulation, means the law in force

ve’ in *E Pluribus Unum. Liber Amicorum Georges A.L. Droz* (Nijhoff 1996) 121; Picone, ‘La legge applicabile alle successioni’, in *La riforma del diritto internazionale privato e i suoi riflessi sull’attività notarile. Atti del convegno di studi in onore di Mario Marano* (Giuffrè 1991) 72; Jeffrey Schoenblum, ‘Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents’ Estates’ (1991) 32 *Virginia J Int L* 83, 134; Eugene F. Scoles, ‘The Hague Convention on Succession’ (1994) *AJCL* 85; Alfred E. von Overbeck, ‘La Convention du 1er août 1989 sur la loi applicable aux successions pour cause de mort’ (1989) *Annuaire suisse de droit international* 138. Cf in addition Andrea Bonomi, ‘Conférence de La Haye et Union européenne – Synergies dans le domaine du droit des successions’ in *A Commitment to Private International Law: Essays in honour of Han van Loon* (Intersentia 2013) 69.

16 Such solution, indeed, is also made possible by the fact that in succession matters *renvoi* is rather commonly applied in the domestic systems of the Member States: cf Bonomi, ‘Successions internationales: conflits de lois et de juridictions’ (2011) 350 *RCADI* 138.

17 On such a provision, cf Andrea Bonomi and Patrick Wautelet, *Le droit européen des successions. Commentaire du Règlement n. 650/2012* (Bruylant 2013) 509; Andrea Bonomi, ‘Il regolamento europeo sulle successioni’ (2013) *RDIPP* 293; Angelo Davi and Alessandra Zanobetti, *Il nuovo diritto internazionale privato delle successioni* (Giappichelli 2104) 130; Javier Carrascosa Gonzales, *El reglamento sucesorio europeo 650/2012 de 4 de julio 2012: análisis crítico* (Comares 2014) 275; Domenico Damascelli, *Diritto internazionale privato delle successioni a causa di morte* (Giuffrè 2013) 74; Pietro Franzina and Antonio Leandro, ‘Il nuovo diritto internazionale privato delle successioni per causa di morte in Europa’ (2013) *NLCC* 275, 324; Georges Khairallah, ‘La détermination de la loi applicable à la succession’ in Georges Khairallah and Marie Revillard (eds.), *Droit européen des successions internationales: le règlement du 4 juillet 2012* (LGDJ 2013) 59; Paul Lagarde, ‘Les principes de base du nouveau règlement européen sur les successions’ (2012) *Revue critique* 693, 704; Paul Lagarde, in Bergquist and others (eds.), *Commentaire du règlement européen sur les successions* (Dalloz 2015) 149; Rui M. Moura Ramos, ‘Le nouveau droit international privé des successions de l’Union européenne. Premières Réflexions’ in Bernardo Cortese (ed) *Studi in onore di Laura Picchio Forlati* (Giappichelli 2014) 205, 224; Dennis Solomon, ‘Die Renaissance des Renvoi im Europäischen Internationalen Privatrecht’ in Ralf Michaels and Dennis Solomon (eds.), *Liber amicorum Klaus Schurig zum 70. Geburtstag* (Sellier 2012) 237; Felix M. Wilke, ‘Das internationale Erbrecht nach der neuen EU-Erbrechtsverordnung’ (2012) *RIW* 601.

in that State, including its rules of private international law, and subjects them to some exceptions.

The first situation is when those rules make *renvoi* in favour of the law of a Member State. The second is the situation in which the rules of private international law of the third State provide for *renvoi* in favour of the law of another third State, which would apply its own law. If those conditions are not satisfied, the law first designated by the Regulation applies only in its substantive part: the *Gesamtverweisung* produces in the circumstances the same effects as a *Sachnormverweisung*.

Paragraph 2 of Article 34, then, specifies some exceptions, which exclude that *renvoi* takes place, even if the conditions mentioned at paragraph 1 are met. This happens with respect to the laws referred to in multiple Articles: in Article 21(2) (allowing for the exceptional application of the law most closely connected to the deceased, *in lieu* of the law of the last habitual residence); in Article 22 (on the choice of law to govern the succession); in Article 27 (containing a provision on the law applicable to formal validity of dispositions of property upon death made in writing); in Article 28 point (b) (designating a law to govern the formal validity of declarations of acceptance or of waiver of the succession); and in Article 30 (giving relevance to special rules imposing restrictions concerning or affecting the succession in respect of certain assets). With respect to all these provisions, the law designated by them applies only in its substantive part, with no relevance given to its conflict-of-law rules.

The fact that an issue of *renvoi* is contemplated only when the law of a third State is designated by the conflict-of-law rules contained in the Succession Regulation is not, *per se*, a restriction. It follows the unification of private international law in succession matters achieved through the Regulation and the principle of their universal application. In fact, any law specified by the Regulation is applied whether or not it is the law of a Member State (Article 20). Therefore, the Regulation’s conflict-of-laws provisions can point to the law of a Member State or of a non-Member State without distinctions. However, when the law designated is that of a Member State, *renvoi* cannot take place because, in principle, that Member State applies the same conflict-of-law rules (contained in the Regulation) applicable in the former State – and therefore its substantive law, as made applicable by the Regulation. A conflict of systems can occur only if the reference is to a State which does not share the same rules. As a result, those Member States of the European

Union in which the Succession Regulation does not apply (the United Kingdom, Ireland, and Denmark) shall be treated, for the purposes of Article 34, as “third States”. For instance, Danish conflict-of-law rules would be applied to verify whether they refer to a Member State or to a third State accepting the *renvoi*. A “transmission” by the private international law of a third State to English law leads to the application of English law in the *forum*, only if English law accepts the *renvoi*.

A different and indirect limit, however, can be identified for the operation of the *renvoi* provision set in the Regulation, a limit which follows the peculiarities of the rules of private international law that it contains. Those rules are, in fact, combined with provisions on jurisdiction and are devised so as to ensure that the authority dealing with the succession applies, in most situations, its own law.¹⁸ Under the Regulation, indeed, the deceased’s last habitual residence is at the same time the main ground of jurisdiction (Article 4) and the primary connecting factor for the identification of the law which applies to the succession (Article 21(1) of the Regulation). In other words, disputes regarding a succession are, in principle, to be decided by the court of the deceased’s last habitual residence, applying its own law. In such situations, obviously, no issue of *renvoi* arises, since that question can be posed only when a court in a Member State (identified by the Regulation) has to apply, if the rules of the Regulation so provide, a law other than that of the *forum*, and more specifically the law of a third State.

This may happen, indeed, only in limited situations, and chiefly so when jurisdiction is not grounded on the habitual residence of the deceased at the time of the death (Article 4). Rather, jurisdiction may be grounded on the “subsidiary” factor of the existence of assets in the *forum*, if the conditions mentioned at Article 10 are met, on the basis of the deceased’s nationality at the time of death, or of his previous habitual residence, provided that, in the latter case, at the time the court is seised a period of not more than five years has elapsed since that habitual residence changed: in such circumstances, the court of the nationality at the time of death or of the former habitual residence of the deceased may be called to apply the law of a third State in which the deceased had his last habitual residence, according to Article 21 of the Regulation.¹⁹ In the same way, jurisdiction may be exercised on the basis

¹⁸ The point will be further underlined below, at § 6.

¹⁹ See also the rule set forth at Article 10.2: where no court in a Member State has jurisdiction pursuant to the other provisions of Article 10 (mentioned in the text), the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those

of a “sufficient connection” in the exceptional circumstances mentioned at Article 11 of the Regulation (*forum necessitatis*).²⁰

Conversely, the same can happen in those situations in which the court of the habitual residence (hearing a case under Article 4) is bound to apply a law other than its own. For instance, when the court must apply the law of a former, habitual residence, if it has to rule on the admissibility and substantive validity of dispositions of property upon death pursuant to Article 24(1) of the Succession Regulation, or if the court must decide the admissibility, substantive validity, and binding effects of agreements as to succession (Article 25(1) and (2) of the Regulation). In all those situations, the reference to the law of a third State may trigger, before the court of a Member State having jurisdiction under the Regulation, the application of the *renvoi* mechanism contemplated by Article 34.

4. As mentioned, Article 34(1) provides for *renvoi*, in an initial group of cases, when the conflict-of-law provisions of the law designated by the Regulation point to the law of a Member State.

This provision, indeed, covers two distinct situations. The first occurs when the law pointed to is the law of the *forum*. In this case, a proper *renvoi au premier degré* is contemplated. The second situation covers the reference to the law of another Member State. In this case, a *renvoi au second degré* is allowed, even though it can also be seen as a *sui generis* form of remission from the law of a third State (*i.e.*, from a State in which the Regulation does not apply) to the law of a Member State (*i.e.*, to a State in which the Regulation applies).

The acceptance of *renvoi* back to the law of the *forum* State follows a traditional pattern, which dates back to the famous *Forgo* case.²¹ Indeed, in every jurisdiction making provisions in favour of *renvoi*, this is admitted, at

assets. In such case, in other words, the presence of assets is a sufficient ground for jurisdiction, even though limited to those assets: consequently, there is a possibility of *renvoi* from the law of the habitual residence to another law, if the conditions set by Article 34 are satisfied.

²⁰ Another opportunity is offered by Article 13, conferring jurisdiction on the court of the Member State of habitual residence of the person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy, or of a reserved share, or a declaration designed to limit his liability in respect of the liabilities under the succession; such a court has jurisdiction to receive said declarations where, under the law of that Member State, they may be made before a court. In that case, however, those declarations would produce the effects they have under the (foreign) law governing the succession, identified, if the case, through the *renvoi* mechanism.

²¹ On this case cf the classical study of Hans Lewald, ‘La théorie du renvoi’ (1929) 29 RCADI 537.

least in its “remission” form.²² Several justifications can be offered in support of this solution, both in general terms and with reference to the peculiarities of the Succession Regulation. The main point is that it allows the achievement of one of the main purposes of the Regulation, which is the unification of *forum* and *ius*. In fact, as a result of the *renvoi au premier degree*, the court of competent jurisdiction will decide on the merits of the dispute by applying its domestic law: for instance, the court exercising jurisdiction on the basis of nationality (under Article 10) may be put in the position to apply the national law of the deceased on the basis of a “remission” from the law of the last habitual residence. This solution facilitates a smoother adjudication, as it broadens the possibility to decide on the basis of the law which is the easiest for the court to apply, and therefore adds a guaranty that the rule of law will be observed. In addition, it applies in a situation in which, at least initially (and without considering the relevance of a possible *renvoi*), the courts of the *forum* (State A) and the law of the third State first referred to (State B) did not want to apply their own law, since their private international law rules pointed to the law of the other. In this situation, it is submitted that, failing a possible coordination between the two States, there is no reason to “force” the application of the law of the third State (State B) in a case in which the court does not want to apply it. In the choice between two courts declining the applicability of their own law, the proper solution is the application of the law of the *forum* (State A). At the same time, this solution appears to cover the situations in which the third State (State B) follows the “foreign court theory”, and directs its judges to apply the law of the State designated by its private international law rules (of State A) in the same way as the court of that State would do, including applying the conflict-of-laws rules there in force and the *renvoi* principle therein admitted. This means that the foreign court (of State B), pointing to State A and its reference to State B, but taking into account also the acceptance of remission (back to State A) included in the private international law of that State, would apply the law of State A. In the same way, the acceptance of remission suits the situation in which the private international law of the third State (State B) points back to the law of the *forum* State (State A) only in its substantive provisions, without allowing *renvoi*. In that situation, both the law of the *forum* (as a result of remission) and the foreign law (on the basis of the *Sachnormverweisung* therein contemplated) would lead to the application of the law of the *forum*.

²² Davi (n 1) 137.

The acceptance of transmission to the law of another Member State (in which the Regulation applies) (State M) follows a different purpose. In fact, it is not based on a coordination reached between two foreign laws: the law of the Member State referred to (State M) does not need to “accept” *renvoi* in order to be applicable. Therefore, it would be applied in the *forum* State (State A), even if a court of that State (State M) would not apply it in the same case. Under such point of view, therefore, no distinction can be drawn between a remission to the *forum* State and a transmission to another Member State. The fact that the two States apply the same conflict-of-laws provisions (those set by the Regulation) is sufficient to justify the application of the law of the Member State referred to by the private international law provisions of the third State. Such a rule is linked to the perception of the European Union as a single territory composed of Member States in which the Regulation applies.²³ The rule appears to pursue the aim of broadening the possibility for the laws of the Member States to apply and to follow a sort of principle of “equivalence” between the laws of the Member States and their sharing of common values.²⁴

The second case in which *renvoi* is allowed by Article 34(1) of the Regulation is when the private international law rules of the third State point to the law of another third State which would apply its own law (*renvoi au second degree*, in its “accepted” form). In this situation, the original designation of the governing law made by the Succession Regulation yields to the coordination reached by two, non-Member States when each State would apply the law of the second, non-Member State. The international uniformity of decisions is therefore better served by the admission of *renvoi*.

A question which is open for debate in that situation is whether a sequence of transmissions is to be allowed up to a point in which coordination is achieved between two non-Member States. In such a scenario, the Regulation (as applied in the *forum*) would designate a first, non-Member State, which would then refer to a second, non-Member State, that would in turn point to a third, non-Member State, and so on until the moment when two, consecutive, non-Member States in the chain agree on the law

²³ Cf Stefania Bariatti and Étienne Pataut, ‘Codification et théorie générale du droit international privé’ in Marc Fallon and others (eds), *Quelle architecture pour un code européen de droit international privé* (Peter Lang 2011) 337, 359.

²⁴ In that regard, for instance, Bonomi and Wautelet (n 15) 516 underline that the application of a law of another Member State limits the possibility of being faced with the application of foreign laws inconsistent with public policy principles of the forum.

that State applies. If a chain of transmissions is allowed, this final law would have to be applied in the *forum*.²⁵

In my opinion, the wording of the rule is contrary to that solution.²⁶ If a chain of transmissions takes place, it is because the second, non-Member State does not apply its own law, but points to a third, non-Member State. In that situation, the condition stipulated at point (b) of Article 34(1) would not be satisfied, resulting in the application of the law of the State designated by the Regulation, but would not include its private international law rules.²⁷ In other words, the law first referred to by the Regulation should apply only in its substantive provisions.²⁸

5. The exceptions to the application of *renvoi* are listed at paragraph 2 of Article 34; when a condition therein mentioned is met, the reference by the Regulation to the foreign law does not include its private international law rules.

The first of these exceptions concerns the case, contemplated by Article 21(2) of the Regulation, in which it is clear, from all the relevant circumstances, that, at the time of the death, the deceased was manifestly more closely connected with a State other than the State of his habitual residence. In that situation, the law applicable to the succession would be the law of that other State, and not the law of the deceased's last habitual residence.²⁹

This provision, in other words, contains a clause to the general rule creating an exception and is intended to apply the "principle of proximity" to identify the law governing the succession. The general rule is based on a connecting factor (the deceased's last habitual residence) which is fixed, even

25 The same would happen if, at a certain point, a transmission to the law of a Member State takes place. In that situation, the law of the Member State should be applied. The question is whether this transmission is to be accepted (and the law of that Member State applied in the *forum*), even if it is not a result of a reference by the private international law rules of the non-Member State referred to first in time. It is submitted that the solution should be the same as in the situation mentioned in the text.

26 Advocated by important authors: cf Davi and Zanobetti (n 15) 167.

27 Javier Carrascosa Gonzales (n 15) 278.

28 Another complex situation is mentioned by Domenico Damascelli (n 15) 75. It may arise in the event the private international law of the State of last habitual residence subjects the succession to the law of the last nationality and the deceased had, at the time of death, more than one nationalities. It is my submission that in such a case the solutions offered by the private international law of the State of last habitual residence is to be followed to choose which national law is to be preferred (through provisions comparable to Article 18 of Law No. 218), and therefore verify on the basis of the national law so chosen whether the deceased had the nationality of a third State which accepts the transmission or of another Member State.

29 Solomon (n 15) 256 criticizes, however, this exception to *renvoi* by indicating some unwarranted consequences it would produce in some specific cases.

if its determination involves an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of the death; this determination should reveal a close and effective connection with the State concerned. That notwithstanding, Article 21(2) contains an exception that allows the court to apply a different law if this law proves to be manifestly more connected to the deceased in the specific case. This exception satisfies the need, underlying the Succession Regulation, to meet the requirements of a "private international law justice",³⁰ by applying the "better law", determined on the basis of the most significant connecting factors in the specific case.

In that case, the admission of *renvoi* is held to be inconsistent with the achievement of "private international law justice", which is directly sought through the direct (and "better") localization of the succession, operated by the court hearing the dispute, on a case by case basis. This approach does not tolerate derogations caused by the private international law rules in force in the State where the succession is "localized", which might point to a different law on the basis of less significant connecting factors. Disregard of the foreign private international law rules serves, therefore, the purpose of "protecting" the effectivity of the solution identified by the court pursuant to Article 21(2) of the Regulation;³¹ "proximity" prevails over "uniformity".

The Regulation, indeed, provides for other rules in which the existence of a "close connection" is to be evaluated by the court in order to identify the law it must apply to specific aspects of the succession. This may happen, for instance, with respect to agreements as to the succession of several persons, under Article 25(2).³² In fact, such agreements are admissible only if they are admissible under all the laws which, according to the Regulation, would have governed the succession of all persons involved, if they had died

30 Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (9th edn, CH Beck 2004) 131; Paul Lagarde "Le principe de proximité dans le droit international privé contemporain. Cours général de droit international privé" (1986) 196 RCADI 25. It is however to be remarked that in the Italian system, failing a specific exception, *renvoi* applies pursuant to Article 13 of Law No 218, even with respect to those rules (for instance, Article 29) which give relevance to the "closest connection" principle.

31 It is however submitted that, in the evaluation of the "force" of the link between the deceased and the law other than that of his last habitual residence, the court should also consider the conflict-of-law rules in force in that system in order to verify whether, from its point of view, such system sees itself as so closely connected to the deceased as to claim application. In that framework, the consideration of the foreign private international law rules serves a different purpose and does not lead to the application of a different law, but is intended only to confirm whether the exception contemplated in Article 21(2) has to be applied.

32 Another comparable situation is offered by Article 36 with respect to States having more than one legal system, when no foreign, internal, conflict-of-law provisions exist to determine the relevant territorial unit whose rules of law have to be applied. Once this territorial unit is found, on the basis of the closest connection with the deceased, its private international law provisions have to be applied, if the conditions mentioned at Article 34 are satisfied.

on the day on which the agreement was concluded. The same agreements, when admissible, are governed, as to their substantive validity and their binding effects between the parties, by the law, among those governing their admissibility, with which they have the closest connection. However, the express limitation, in Article 34(2), to the case contemplated in Article 21(2) for the exclusion of *renvoi* does not allow the extension of the exception therein contemplated to the case of Article 25(2). Actually, there is no reason to exclude the application of the private international law rules of the law designated by Article 25(2) of the Regulation to govern the validity of the agreement concerning more than one person. A different solution in that respect would be inconsistent with the general approach allowing in principle, in the situations mentioned by Article 34(1) of the Regulation, the relevance of the conflict of law provisions of the law designated to govern the succession, and would be at odds with the solution offered in the parallel situation concerning the agreements relating to the succession of only one person, object of Article 25(1) of the Regulation, in which *renvoi* undoubtedly applies.

The second exception to the admission of *renvoi* concerns the case in which a choice has been made by a person to govern his succession, in accordance with Article 22 of the Regulation, replacing the law of his last habitual residence with the law of the State whose nationality he possesses at the time of making the choice or at the time of death. In a such situation, corresponding to the exceptions to *renvoi* commonly contemplated by domestic legislation or international conventions,³³ a fair (not rebuttable) presumption is made that the decedent intended to apply only the substantive rules of that law, and not the private international law provisions which may be in force in the foreign system.³⁴ The succession, therefore, is governed in its entirety by the law chosen by the subject in question, and not by another law. Actually, the effect of *renvoi*, be that a transmission or a remission, leading to the application of a different law would contradict the choice of the subject in question, that, had he so wished, would have directly chosen the law of the third State, or of the *forum*. Indeed, the application of a foreign law on the basis of the choice of the party (or parties) does not correspond entirely to

33 See, for instance, Article 13(2)(a) of Italian law No. 218. The same conclusion was indirectly affirmed in the Hague Succession Convention, which at Article 4 allows *renvoi* only from the law applicable on the basis of “objective” criteria (Article 3) and not from the law chosen by the person in question (Article 5). Cf Patrizia De Cesari, *Autonomia della volontà e legge regolatrice delle successioni* (CEDAM 2001) 214.

34 In any case, the express rule set by Article 34(2) does not allow a choice in favour of the private international law rules of the State of nationality by the person in question.

the traditional method of “localization” of a matter on the basis of “neutral” connecting factors. Considerations of substantive law are part of the choice, which cannot therefore be considered only as “one” of the possible connecting factors and given the same footing and the same meaning as the others. In addition, allowing the consideration of a foreign, private international law system would indirectly allow a choice of law beyond the limits indicated by Article 22. In other words, this consideration would lead to the indirect option in favour of a law other than that of the nationality of the decedent.

As mentioned, *renvoi* is excluded when a choice has been made by a person to govern his succession pursuant to Article 22. The express reference in Article 34(2) to that provision raises the question whether *renvoi* is to be admitted in the other cases in which, under the Regulation, a choice of law is possible. More specifically, the issue regards Articles 25(2) and 25(3) and the possibility they give respectively to the party disposing of his property upon death, and to the parties entering into an agreement as to the succession, to choose the law that the person or the persons in question could have chosen “in accordance with Article 22 on the conditions set out therein” to govern admissibility and substantive validity of the disposition or of the agreement. The solution extending the exclusion of *renvoi* from the law chosen appears to be dictated by the express reference, included in Articles 25(2) and 25(3), to Article 22 and its conditions of application, which encompass the exclusion of *renvoi*.³⁵

The third exception to the application of the private international law rules of the third State regards the determination of the law applicable to the formal validity of dispositions of property upon death made in writing, as governed by Article 27 of the Regulation. Article 27 is a provision which refers to a number of different laws³⁶ to be coordinated on the basis of

35 Anatol Dutta, ‘Das neue internationale Erbrecht der Europäischen Union – Eine erste Lektüre der Erbrechtsverordnung’ (2013) *Zeitschrift für das gesamte Familienrecht* 12.

36 More specifically, reference is made to the laws (i) of the State in which the disposition was made or another agreement as to succession concluded; (ii) of the State whose nationality the testator, or at least one of the persons whose succession is concerned by an agreement as to succession, possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death; (iii) of the State in which the testator, or at least one of the persons whose succession is concerned by an agreement as to succession, had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death; (iv) of the State in which the testator, or at least one of the persons whose succession is concerned by an agreement as to succession, had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; (v) or, in so far as immovable property is concerned, of the State in which that property is located. Such a rule corresponds broadly to the provisions of the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. At Article 1, the Convention refers to the application of an “internal” law, thus excluding

the “*favor validitatis*” principle; it is sufficient for the written disposition of property upon death to comply with the provisions as to the form of one of those laws in order to be valid. Indeed, the exclusion from the scope of application of *renvoi* of the rules on form is rather common.³⁷ The non admission of *renvoi* is in that regard justified by the need to protect the wide range of laws, considered to be significantly connected to the succession, in light of which the formal validity of the disposition is to be assessed. *renvoi* may lead to the reduction of the number of laws to be considered, or even to exclude any possible role for the mechanism contemplated by the rule on form, if in the end one single law (for instance the law of the *forum*) is pointed to by all the foreign private international law systems. At the same time, the non admission of *renvoi* excludes the relevance of any other law, in addition to those specifically mentioned. This additional law, considered to be less significantly connected to the case than those specifically mentioned, cannot apply, even if it leads to the validity of the disposition of property. The *favor validitatis* is not an absolute value, to be sought by applying any possible laws, even those lacking any plausible connection to the case, but applying only those within the range of the laws identified in Article 27 of the Regulation.

The fourth exception to the admission of *renvoi* regards Article 28(b) of the Regulation. Under Article 28, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designated to limit the liability of the person making the declaration, is valid as to form where it meets some requirements. These requirements originate from 2 sources: (a) the law applicable to the succession pursuant to Article 21 or Article 22; or (b) the law of the State in which the person making the declaration has his habitual residence. In other words, Article 28 contains alternative connecting factors, to be applied with a view to a substantive result: the formal validity of a declaration covered by that provision. In such a framework, the exclusion of *renvoi* with respect to the law designated by the second connecting factor (habitual residence of the person making the declaration) only³⁸ is intended to guarantee the possibility for the person making the declaration to rely on the substantive law of the place when he lives, to the

in any given system the application of the foreign private international law provisions.

³⁷ See for instance Article 13(2) (b) of Law No. 218.

³⁸ With regard to the law applicable to the succession pursuant to Article 21 or Article 22, made relevant under Article 28(a), the question whether its conflict-of-laws provisions have to be taken into account also for evaluating the formal validity of the declarations mentioned in Article 28 is to be answered keeping in mind the solution to be adopted regarding that law in general. Indeed, the purpose of the rule is to consider those declarations under the law governing the succession, whether identified through *renvoi* or not.

advantage of legal certainty. In addition, it prevents (i) an excessive broadening of the range of laws possibly relevant for the evaluation to be conducted under Article 28, or (ii) its exclusion, which would be the consequence of the reference by the conflict of law rules of the State of the habitual residence of the person making the declaration to the law governing the succession, already relevant under Article 28(a) of the Regulation.

The final exclusion of *renvoi* concerns the law identified by Article 30 of the Regulation. Under that provision, where the law of the State in which certain immovable property, certain enterprises, or other special categories of assets are located contains special rules which, for economic, family, or social considerations, impose restrictions concerning or affecting the succession in respect to those assets, those special rules apply to the succession. These special rules apply so long are applicable under the law of that State, irrespective of the law applicable to the succession. As a result, their application excludes, by definition, *renvoi* to another law. In addition, this exception to the application of the law governing the succession as a whole requires a strict interpretation in order to remain compatible with the general objectives of the Regulation (including the unity between *forum* and *ius*). Therefore, the conflict-of-law rules of the State where those assets are located are not relevant.

No further exception appears to be allowed, even if its admission would seem consistent with some features of the Regulation. This may happen as a result of the peculiarities of some connecting factors, which give relevance to a “temporal” element. For instance, Article 24(1) refers to the law of the habitual residence of the person making a disposition of property upon death at the time the disposition is made. In the same way Article 25(1) points to the law of the habitual residence of a person at the time he enters into an agreement regarding his succession. The conflict-of-law rules of the law so determined (as in force at the time the disposition was made or the agreement was entered into) may refer to the law of the habitual residence at the moment of the death. Such a law must be applied if the conditions indicated by Article 34 are met, even though they reduce to nothing the distinction inserted in the Regulation in order to avoid the adverse consequences on dispositions already made deriving from a transfer of the habitual residence.

In the same way, *renvoi* should not be excluded even if, as a result of its operation, the succession, which under the Regulation would be

governed as a whole by one single law (Article 23),³⁹ irrespective of the location of the assets comprised in it, would be governed by a plurality of applicable laws. A plurality of laws may be relevant, for different categories of assets, because of the law of the third State initially designated by the Regulation. Indeed, several States admit a principle of scission: the succession is governed by a given law (identified on the basis of a “personal” connecting factor: nationality, domicile, residence) with respect to movables; and the succession is governed by one or more other laws (pointed to on the basis of an “objective” principle: the situation of the assets) for immovables.⁴⁰ With the result that, at the death, a plurality of successions are opened, with each succession governed by a different law.

The result, even if it creates some complex issues for those States not used to applying the principle,⁴¹ does not lead to the exclusion of *renvoi* which produced it.⁴² Actually, the Regulation itself contemplates situations in which more than one law may apply to the same succession, with respect to different assets (Article 30). In addition, a person may make dispositions concerning a part of his property, which would lead to the application of a specific law to govern the validity of that disposition (under Article 24), with respect to the assets disposed of, which might be different from the law governing the entirety of the succession or other dispositions, made in a period subsequent to the transfer of the habitual residence.⁴³ The concurrent application of several laws, because of the interplay between connecting factors or because of *renvoi*, is therefore not inconsistent with the Regulation.

6. The Regulation confirms that the solution to the problem of *renvoi* is “normative” in nature, even though such a solution follows the methods for coordinating domestic law with foreign law. For instance, as proved by

39 The principle is confirmed by Article 22(1), which allows the possibility to choose the law to govern the succession “as a whole”.

40 On this possibility see Domenico Damascelli, ‘I criteri di collegamento impiegati dal regolamento n. 659/2012 per la designazione della legge regolatrice delle successioni per causa di morte’ in Pietro Franzina e Antonio Leandro (eds), *Il diritto internazionale privato europeo delle successioni mortis causa* (Giuffrè 2103) 87, 96; Atle Grahl-Madsen, ‘Conflict between the principle of unitary succession and the system of scission’ (1979) 28 ICLQ 598.

41 For an attempt to summarize them, see Luigi Fumagalli, ‘Rinvio e unità della successione nel nuovo diritto internazionale privato italiano’ (1997) RDIPP 829. Cf in addition Alegria Borrás, ‘L’approche du renvoi dans un système d’unité de la succession’, in *Mélanges en l’honneur de Mariel Revillard: Liber amicorum* (Defrénois 2007) 23.

42 On the point cf Andrea Bonomi and Patrick Wautelet (n 15) 523, underlining that the text of Article 34 of the Regulation leaves little room for a different interpretation.

43 The same result (scission of the succession) is produced by the operation of some provisions on jurisdiction, under which the courts of a Member State have jurisdiction limited to the assets in the *forum* (Article 10(2) of the Regulation) or can decide to limit its exercise, excluding assets located in a third State (Article 12).

the exceptions contemplated by Article 34, *renvoi* in its traditional form is accepted with favour mainly when a purely localizing approach is adopted to determine the governing law.

In that framework, the EU decision to allow *renvoi* in an instrument of private international law appears to be a coherent consequence of the approach taken with respect to international successions. *renvoi*, in fact, cannot be read in isolation. Its effects cannot be viewed only in connection with the rules of the Regulation on the law applicable to a succession. It is not a purely technical instrument producing the substitution of a connecting factor with another, in search for better “private international law justice” or for the sake of coordination between systems as a value in itself. The provisions allowing *renvoi*, in the form they do, must be read in conjunction with the rules on jurisdiction and the circulation of judgments (but only within the European Union) set by the Regulation. Indeed, it is not only by chance (or to fill a regulatory gap to cover a matter excluded from the scope of application of other instruments) that the EU adopted a comprehensive instrument, covering all traditional aspects of private international law. On the contrary, the EU instrument offers a comprehensive approach to the regulation of a succession with an international dimension, in which all components (rules on jurisdiction, governing law, and recognition of judgments) play a coordinated role.

The Regulation, in fact, puts an emphasis on the rules on jurisdiction (significantly set out before the provisions on the governing law are determined), and adopts the deceased’s last habitual residence as the main connecting factor for the purposes of determining both jurisdiction and the applicable law. As a result, and as a matter of principle, the scope of the exercise of domestic jurisdiction and of the application of internal law tends to coincide. The court of a Member State having jurisdiction will apply its domestic law to rule on a succession; on the other hand, if the court does not have jurisdiction (even on the basis of a generic “sufficient connection”) its internal law does not apply to that succession. Only in exceptional cases will the law of a Member State be made applicable by the Regulation before a court of a different Member State. Those situations in which a court has jurisdiction and is called to apply a different law (or even a law of a third country, if the relevant connecting factor so dictates) will be limited.

The application of the law of another Member State, however, does not create any problem. As a result of the Regulation, the relations, in the integrated area, between the courts of the Member States, which apply

the same conflict-of-law rules and render decisions eligible for nearly unrestricted circulation, appear to be shaped as relations between courts exercising the same jurisdictional function, allocated on the basis of uniform criteria. Therefore, coordination of jurisdictions implies coordination between governing laws, achieved through (when the unity between *forum* and *ius* is broken) *renvoi*.

On the other hand, when there is a reference to the law of a third State, the importance of the “foreign” connection is to be underlined and *renvoi* comes into play to achieve indirectly the substantive coordination, with other Member States or with the third States that could not be otherwise obtained. “Remission” to the law of a Member State restores either the unity of the *forum* (defined widely with reference to the entire system of courts of the Member States in which the Regulation applies) and *ius* (adding to the free movement of decisions within the European Union). “Accepted transmission” to the law of another third State assures respect to the coordination reached by non-Member States and in that regard helps the recognition in third countries of the judgments rendered by the courts of the Member States.⁴⁴ The traditional difficulties that *renvoi* implies⁴⁵ are a price worth paying to achieve that result.

⁴⁴ It is to be noted that Article 12 of the Regulation offers an important instrument of indirect coordination with the jurisdiction of third States: if the matter is so foreign, a court of a Member State may decide not to exercise jurisdiction over one or more assets, if it may be expected that a decision in respect of those assets would not be recognized in the third State. In other words, and again, the coordination between different laws is reached at the jurisdictional level.

⁴⁵ The admission of *renvoi*, even though it produces benefits in terms of coordination between systems, involves difficulties in its operation, which are far from settled. Questions, in fact, are to be answered, when it comes to the application of foreign conflict-of-law rules: how is the foreign system to be interpreted and set in motion? If the general principle to be followed commands the application of the foreign, private international law rules in the same way as a court sitting in the foreign state would do, questions can be asked, for instance, about the role of foreign, public policy, or of the foreign, mandatory provisions having an international character, which may claim application (in the foreign State) in derogation of the conflict-of-law rules. These questions may however be easily answered by recognizing that in such case the foreign rules operate in a different State and therefore there is no reason to apply exceptions to the operation of the private international law rules that are justified only in a foreign context and to protect foreign policies (unless the Regulation provides otherwise: see Article 30 with respect to foreign mandatory rules regarding specific categories of assets). A more difficult practical problem concerns the interpretation of the foreign categories, which are used to define the scope of application of the foreign conflict of law rules: on this issue see Sara Tonolo, *Il rinvio di qualificazione nei conflitti di legge* (Giuffrè, 2003). If foreign concepts are to be used (as indeed they are), for instance, a question, that in the *forum* could pertain to succession, may regard family matters abroad, and therefore fall in the scope of application of a specific rule on family matters. A deeper examination of those issues, as pertaining to *renvoi* in general, goes beyond the limits of a commentary on the Succession Regulation.

OS PARÂMETROS PARA A LOCALIZAÇÃO DA RESIDÊNCIA HABITUAL DO FALECIDO NO REGULAMENTO EUROPEU SOBRE SUCESSÕES

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INTRODUÇÃO

As novas competências da União Europeia para legislar sobre direito internacional privado e processual civil internacional encontram embaçamento legal no título V do Tratado sobre o Funcionamento da União Europeia (TFUE), dedicado ao “Espaço de liberdade, segurança e justiça”, em particular no art. 81, segundo o qual a União, fundada nos princípios do reconhecimento recíproco das decisões judiciais e extrajudiciais, desenvolve uma cooperação judiciária em matéria civil que possua implicações transnacionais, podendo incluir a adoção de medidas destinadas a aproximar as disposições legislativas e regulamentares dos Estados membros.

A crescente regulamentação do direito internacional privado pelas instituições da União Europeia engloba também o campo do direito pessoal, de família e sucessório, evidenciando a tendência ao abandono do recurso ao critério de conexão da nacionalidade em favor daquele da residência habitual do indivíduo enquanto critério politicamente integrador.

Além da marginalização do critério de conexão da nacionalidade, a introdução da autonomia privada nos regulamentos europeus em matéria de relações pessoais e familiares revoluciona a teoria do “direito

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