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The Law Applicable to Succession, Between Unity and Splitting of the Relevant Legal Regime

The Role of Renvoi

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Abstract

The author comments on a recent judgment by the *Corte di Cassazione (Sezioni Unite Civili)* touching upon particularly significant issues of private international law in matters of succession. A central issue in the judgment under review lies in the role of *renvoi* as an instrument of coordination between national conflict-of-laws systems. This is particularly critical in succession matters, in cases where the choice-of-law rules of the countries concerned are inspired by the opposite systems of unity rather than splitting of succession. Alongside *renvoi*, the judgment under review touches upon other important issues of private international law, such as characterization and the requirements for a valid *optio legis* by the deceased. As the author notes, while the case, due to temporal reasons, was decided pursuant to Italian private international law rules in matters of succession, comparable results would have probably been reached based on the choice-of-law rules embodied in the European Succession Regulation No. 650/2012.

Keywords

succession – applicable law – unity v. splitting of succession – *renvoi* – Italian Law No. 218/1995 – Wills Act 1837 – revocation of wills as a consequence of a subsequent marriage – characterization – *optio legis* by the deceased

1 Abstract of the Decision

Pursuant to Italian conflict-of-laws rules in succession matters, the succession of an English national, concerning in part immovable property located in Italy, shall be subject to the national law of the deceased, absent an express choice (*optio legis* or *professio juris*) by the deceased in favour of the law of his country of residence. In applying English law as the law applicable to succession, the *renvoi* made by English conflict-of-laws rules to the law of the country where the immovable property of the deceased is situated shall be accepted, as concerns succession in the immovable property located in Italy. Accordingly, two separate legal regimes shall apply to succession in either part of the estate of the deceased. As concerns the applicability of the English law rule contemplated by the Wills Act 1837, providing for the revocation of a will as a consequence of a subsequent marriage, such an issue shall be characterized, pursuant to Italian law as the *lex fori*, as pertaining to the law governing succession. Accordingly, the said rule of English law shall apply only as concerns succession in the moveable property of the deceased, while succession in his immovable property will be entirely governed by Italian law as the *lex rei sitae*.

2 Key Passages from the Ruling

(Paragraph 16.3) In transnational succession matters, in order to find the relevant conflict-of-laws rule, and particularly as concerns the preliminary characterization of the issue under consideration as falling under the law governing the succession, and accordingly to be settled pursuant to Article 46 of Italian Law No. 218 of 31 May 1995, the court shall apply the criteria of characterization provided by the Italian legal system, to which the conflict-of-laws rule in question belongs.

(Paragraph 16.4) Where the national law of the deceased, governing the succession pursuant to Article 46 of Italian Law No. 218 of 31 May 1995, subjects succession in the moveable property of the deceased to the law of his domicile and refers back to Italian law, as allowed under Article 13, paragraph 1, letter b, of the same Law No. 218 of 1995, as concerns succession in the immovable property forming part of the estate of the deceased, two separate successions shall open, in respect of distinct sets of assets, each subject to different rules concerning calling to the succession and transmission thereof. This means that different laws shall govern the validity and effectiveness of titles justifying succession (including, in the specific circumstances of this case, the prerequisites,

form and effects of a revocation of a will), the identification of the heirs, the amount of shares in the succession, issues of form in respect of acceptance and publicity, and shall afford protection to any legitimate heirs.

3 Comment

3.1 Preliminary Remarks

The judgment under review deals with some very important issues of private international law in matters of succession.¹ The case forming the subject of the judgment reveals the critical implications of the option between a unitary approach to succession from a conflict-of-laws perspective, whereby the same law shall apply to succession in respect of the entire estate of the deceased, and an approach based on a splitting of the succession, in such terms that the *lex successionis* will govern succession in the moveable property of the deceased, while succession in his or her immoveable property shall be subject to the *lex rei sitae*.²

In the circumstances of the case, the deceased, an English national, left some immoveable property located in Italy, alongside other moveable property. He

1 The present case-note was already in copy-edited text when a case-note by DAMASCELLI, “La Cassazione si esprime su qualificazione e rinvio in materia successoria: un’occasione persa per la messa a fuoco di due questioni generali del diritto internazionale privato”, in *Famiglia e diritto*, 2021(12), p. 11 ff., was published. It was accordingly not possible to take account thereof at the moment of writing.

2 See, concerning the fundamental distinction between the two approaches and the option clearly made in favor of unity of the succession under 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, OJ L 201/107, 27 July 2012 (hereinafter the European Succession Regulation), among others, DAMASCELLI, *Diritto internazionale privato delle successioni a causa di morte*, Milano, 2013, p. 44 ff.; DAVÌ and ZANOBETTI, “Il nuovo diritto internazionale privato delle successioni nell’Unione europea”, *Cuadernos de derecho transnacional*, 2013(2), p. 5 ff., p. 23 ff.; ID., *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014, p. 7 ff.; FRANZINA, “Ragioni, valori e collocazione sistematica della disciplina internazionalprivatistica europea delle successioni mortis causa”, in FRANZINA and LEANDRO (eds.), *Il diritto internazionale private europeo delle successioni mortis causa*, Milano, 2013, p. 1 ff., p. 8 ff.; LAGARDE, “Introduction”, in BERGQUIST et al., *Commentaire du règlement européen sur les successions*, Paris, 2015, p. 1 ff., p. 22 ff.; BONOMI, “Introduction”, in BONOMI and WAUTELET, *Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012*, 2nd ed., Bruxelles, 2016, p. 27 ff., p. 43 ff.; DAVÌ, “Introduction”, in CALVO CARAVACA, DAVÌ and MANSEL (eds.), *The EU Succession Regulation. A Commentary*, Cambridge, 2016, p. 3 ff., p. 37 ff.; ID., *Introduzione al regolamento europeo sulle successioni*, Napoli, 2019, p. 5 ff., p. 62 ff.

had made provision in respect of his property by a will, formed in England, whereby he had designated his sons as his heirs, while granting a bequest in favor of the woman with whom he subsequently got married. The widow sued the sons of the deceased before the *Tribunale di Milano*, claiming that the will ought to be considered as revoked, pursuant to the rules of the Wills Act 1837, providing for the revocation of wills as a consequence of a subsequent marriage of the testator.³ The widow claimed that the said rule applied in respect of the entire succession, since Article 46 of Italian Law No. 218 of 31 May 1995, providing for the reform of the Italian system of private international law,⁴ subjects the entire succession of the deceased to his or her national law at the time of death, absent a choice by the deceased (so-called *optio legis* or *professio juris*) in favor of the law of his or her country of residence, something which was not material in the case. Instead, the widow claimed before the *Corte di Cassazione* that the choice by the deceased to travel to England in order to have his will made there amounted to an implied choice of English law as applicable to the entire succession. As a consequence of the supposed revocation of the will, she claimed that the rules of English law concerning succession in the absence of a will (*ab intestato*) should apply, in such terms that the entire moveable property of the deceased should be attributed to her. At the same time, she claimed she would also be entitled to one third of his immovable property located in Italy, based on the Italian rules concerning succession *ab intestato*. The latter rules would apply as a consequence of the *renvoi* made by the English conflict-of-laws rules to the law of the country where the immovable property of the deceased is located, as concerns succession in respect of such property. The sons of the deceased, conversely, claimed that Italian law applied in respect of the entire succession, and, accordingly, the question of the effectiveness of the will had to be solved pursuant to that law, and not to English law. The *Tribunale di Milano* in a judgment of 20 April 2009 allowed the claim of the widow, declaring that the will made by the deceased was to be considered as revoked pursuant to the said rule of English law and granting to the widow the entire personal moveable property of the deceased, plus one third of his immovable property located in Italy. In respect of the latter property, the court materially assigned it to the sons, while granting to the widow a balance of more than EUR two million.⁵ The judgment of the *Tribunale di Milano* was

3 Wills Act 1837, 1837 Chapter 26 7 Will 4 and 1 Vict, Section 18.

4 Law of 31 May 1995, No. 218, *Riforma del sistema italiano di diritto internazionale privato*, Gazzetta ufficiale No. 128, 3 June 1995.

5 As reported in the judgment under review: *Corte di Cassazione (Sezioni Unite Civili), PJ v. PRC and BO*, 5 February 2021, No. 2867, para. 3.

appealed by both the sons and the widow before the *Corte d'Appello di Milano*, which rejected the appeal, confirming the judgment of the lower court, but for the ruling on costs.⁶ The judgment of the appellate court was then appealed in point of law before the *Corte di Cassazione* and, by order No. 18/2020 of 3 January 2020, the *Seconda Sezione civile* of the court deferred it to the *Sezioni Unite Civili* of the same court, in consideration of the special importance of the issues of principle raised by the case.

3.2 *The Characterization of the Revocation of a Will as a Consequence of a Subsequent Marriage as an Issue Pertaining to Succession Rather than Matrimonial Property Matters*

In their judgment, the *Corte di Cassazione (Sezioni Unite Civili)* had to address a series of significant issues, the first one in a logical order consisting of the characterization of the issue raised by the widow of the deceased concerning the alleged revocation of the will made by the deceased as a consequence of his subsequent marriage as an issue pertaining to succession, and accordingly to be settled pursuant to the *lex successionis*, rather than as an issue related to matrimonial property, and accordingly subject to the relevant law.⁷ The question revolved around the rule embodied under Article 15 of the said Italian Law No. 218/1995 providing for the reform of the Italian system of private international law, whereby in the application of foreign law designated by the relevant conflict-of-laws rules the same criteria of interpretation and temporal application of that law shall be followed.⁸ It was questioned whether the said rule implied also that the preliminary process of characterization of the issue to be decided had to take place pursuant to that law. The *Corte di Cassazione* disposed of the issue rather straightforwardly, arguing that, in a case to be decided pursuant to Italian conflict-of-laws rules and not on the basis of an international convention or European Union (“EU”) legal act bearing uniform rules of private international law,⁹ the process of characterization relates to the application of the Italian conflict-of-laws rules. Accordingly, these shall be

6 *Ibid.*, para. 4.

7 *Ibid.*, paras. 2 and 9.

8 See with regard to the said rule, among others, CARBONE, “Articolo 15”, *Rivista di diritto internazionale privato e processuale*, 1995, p. 974 ff.; BOSCHIERO, “Art. 15”, in BARIATTI (ed.), *Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato. Commentario, Le nuove leggi civili commentate*, Padova, 1996, p. 1043 ff.

9 See, on the need to apply autonomous criteria for the purposes of characterization in respect of EU legal acts bearing uniform rules of private international law, BARIATTI, “Qualificazione e interpretazione nel diritto internazionale privato comunitario: prime riflessioni”, *Rivista di diritto internazionale privato e processuale*, 2006, p. 361 ff.

interpreted pursuant to the criteria of Italian law, to which they belong.¹⁰ In so deciding, the court adhered to the generally prevailing view in favour of characterization *lege fori*, as the sole likely to ensure consistency of characterization of a given issue from the perspective of the legal system of the forum, irrespective of the law found as applicable based on the conflict-of-laws rule relied upon as a consequence of the process of characterization itself.¹¹ With regard to the concrete circumstances of the case before the court, while pursuant to English law the question as to whether a will shall be considered as revoked as a consequence of a subsequent marriage of the testator, as provided under the Wills Act 1837, was reported as pertaining to the domain of the property consequences of marriage, pursuant to Italian law such an issue shall be considered as pertaining to the domain of succession.¹² In fact, on a proper construction, the effects deriving from the rule in question are not likely to affect the regime applicable to the spouses' property during marriage, being instead deemed to affect the succession in the testator's property after his or her death.

Incidentally, it shall be noted that the case *ratione temporis* fell outside the scope of application of EU Regulation No. 650/2012 in matters of succession, whose conflict-of-laws rules would have otherwise applied before Italian courts despite the United Kingdom ("UK") not having opted in at the stage of the adoption of the act. The application of the conflict-of-laws rules embodied in the Regulation by courts belonging to Member States bound by it in cases presenting relevant connections with the UK has not been affected by Brexit either, in consideration of the universal application of the rules embodied in the Regulation as concerns the applicable law.¹³ In any event, it shall be noted that a corresponding solution in terms of characterization of the issue under consideration would have been likely to apply pursuant to the said Regulation. In fact, Article 23 of the European Succession Regulation sets out in very broad

¹⁰ *Pj v. PRC and BO*, *cit. supra* note 5, para. 9.

¹¹ See generally, among others, CANSACCHI, *Scelta e adattamento delle norme straniere richiamate*, Torino, 1939, p. 26 ff.; QUADRI, "Analyse critique du problème des qualifications", in *Al Qanoun wal Bqtisad*, Le Caire, 1953, repr. in ID., *Scritti giuridici*, Vol. II – *Diritto internazionale privato*, Milano, 1988, p. 469 ff.; VITTA, *Diritto internazionale privato*, Torino, 1972, Vol. I, p. 302 ff.; BALLARINO, *Diritto internazionale privato*, 3rd ed., Padova, 1999, p. 236 ff.; MOSCONI and CAMPIGLIO, *Diritto internazionale privato e processuale. Parte generale e obbligazioni*, 9th ed., Milano, 2020, p. 239 ff.

¹² *Pj v. PRC and BO*, *cit. supra* note 5, para. 9.

¹³ In fact, pursuant to its Art. 20 the rules contained in the Regulation concerning the applicable law are of universal application. See, among others, BONOMI, "Article 20", in BONOMI and WAUTELET, *cit. supra* note 2, p. 302 ff.; CALVO CARAVACA, "Article 20", in CALVO CARAVACA, DAVÌ and MANSEL (eds.), *cit. supra* note 2, p. 291 ff., p. 295 ff.

terms the material scope of application of the *lex successionis* as designated pursuant to the Regulation, consistently with the underlying option in favour of unity of the succession from a private international law perspective.¹⁴

3.3 *The Role of Renvoi in Coordinating Succession Laws Inspired by Different Principles: Unity v. Splitting of Succession*

Characterization is not the sole general issue of private international law touched upon in the judgment under review. The case forming the subject of the judgment called into question *renvoi* as well. This is due, as noted already, to the involvement of two national conflict-of-laws systems, the Italian and the English ones, inspired by opposite principles as concerns succession matters. In fact, on the one hand the Italian system of private international law, as embodied in Law No. 218 of 31 May 1995, not less than the earlier rules contained in the preliminary provisions of the Italian Civil Code of 1942 and even previously in the preliminary provisions of the earlier Civil Code of 1865,¹⁵ is inspired by the principle of unity of the succession, as it is currently also the case under the European Succession Regulation No. 650/2012. On the other hand, the English system is inspired by the opposite principle of the splitting of the succession.¹⁶

It is in cases like that forming the subject of the judgment under review that *renvoi* plays a vital role in coordinating national systems of private international law, by allowing the courts of the country where the immovable property of the deceased is located to apply their own law as concerns succession in that property, notwithstanding the fact that the law applicable to the succession pursuant to their own conflict-of-laws rules would have been a foreign law.¹⁷ In fact, while Article 46(1) of the said Law No. 218/1995 providing for the reform of the Italian system of private international law subjects succession, absent an *optio legis* by the deceased, to his or her national law, Article 13(1) of

14 See generally BONOMI, "Article 23", in BONOMI and WAUTELET, *cit. supra* note 2, p. 363 ff., p. 373 ff.; CASTELLANOS RUIZ, "Article 23", in CALVO CARAVACA, DAVÌ and MANSEL (eds.), *cit. supra* note 2, p. 351 ff., p. 355 ff.

15 See Art. 23 ("*Disposizioni sulla legge in generale*") of Royal Decree of 16 March 1942, No. 262, *Approvazione del testo del codice civile*, Gazzetta ufficiale No. 79, 4 April 1942; Art. 8 ("*Disposizioni sulla pubblicazione, interpretazione ed applicazione delle leggi in generale*") of Law of 2 April 1865, No. 2215, *Autorizzazione a pubblicare il Codice civile*. See *PJ v. PRC and BO*, *cit. supra* note 5, para. 10.

16 See *PJ v. PRC and BO*, *cit. supra* note 5, para. 13.

17 See, with regard to the function of coordination between national systems of private international law discharged by *renvoi* and to its special relevance in the interplay between systems inspired by unity and by splitting in matters of succession, DAVÌ, "Le renvoi en droit international privé contemporain", *RCADI*, Vol. 352, 2012, p. 25 ff., p. 471 ff.

the same Law admits in general terms the operation of *renvoi* by the conflict-of-laws rules of the law deemed as applicable pursuant to the Italian rules of private international law, when such *renvoi* is directed either to a further foreign law accepting it, i.e. providing under its own conflict-of-laws rules for the application of its own law, or back to the law of the forum.¹⁸ Indeed, English conflict-of-laws rules, in subjecting succession in the immovable property of the deceased in the present case to Italian law as the law of the country where that property is situated, apparently make a *renvoi* back to Italian law in the sense meant under Article 13(1)(b) of the Italian statute on private international law.¹⁹

In this respect, it is worth noting that the *Sezioni unite civili* did not embark on a more thorough examination of the issue as to whether the English conflict-of-laws system, considered as a whole, actually meant to refer back to Italian law the regulation of succession in the immovable property of the deceased located in Italy. The *Sezioni unite*, in fact, completely overlooked the question as to whether the *renvoi* allegedly made by English law to Italian law pursuant to Article 13(1)(b) of the Italian statute was to be meant as a single *renvoi* rather than as a double *renvoi*. Pursuant to the latter conception of *renvoi*, prevailing most notably under English law pursuant to the so-called foreign court theory applied by English courts especially in succession matters,²⁰ in order to establish the occurrence of *renvoi* the court shall take into account not only the relevant conflict-of-laws rule belonging to the foreign system of private international law, but also the solution retained by that system as concerns *renvoi*. Had the latter path been followed by the *Sezioni unite*, as would have been more consonant with the underlying aim pursued by *renvoi* as a means of

18 See, concerning the rule on *renvoi* embodied in Art. 13 of Law No. 218 of 31 May 1995, providing for the reform of the Italian system of private international law, among others, *de iure condendo*, advocating the solution of a partial acceptance of *renvoi* which eventually made its way into the final text of the law as adopted, DAVÌ, “Le questioni generali del diritto internazionale privato nel progetto di riforma”, RDI, 1990, p. 556 ff., p. 603 ff.; PICONE, “I metodi di coordinamento tra ordinamenti nel progetto di riforma del diritto internazionale privato italiano”, RDI, 1990, p. 639 ff., p. 653 ff.; *de lege lata*, MOSCONI, “Articolo 13”, Rivista di diritto internazionale privato e processuale, 1995, p. 956 ff.; MUNARI, “Art. 13”, in BARIATTI (ed.), *cit. supra* note 8, p. 1018 ff.; PICONE, “La teoria generale del diritto internazionale privato nella legge italiana di riforma della materia”, RDI, 1996, p. 289 ff., p. 309 ff.; DAVÌ, *cit. supra* note 17, p. 163 ff.

19 See *PJ v. PRC and BO*, *cit. supra* note 5, para. 12, third and fourth sentences.

20 The foreign court theory notoriously finds its roots in a famous judgment by the Prerogative Court of Canterbury in *Collier v. Rivaz* [1841] 2 *Curteis* 859, and was further developed in the later cases of *In Re Ross*, *Ross v. Waterfield* [1930] 1 Ch. 377, and *In Re Askew, Marjoribanks v. Askew* [1930] 2 Ch. 259. See DAVÌ, *cit. supra* note 17, p. 152 ff.; ID. and ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, *cit. supra* note 2, p. 157 f.

achieving coordination between different conflict-of-laws systems,²¹ then the opposite solution would have probably been reached, in such terms as to consider that no *renvoi* actually took place in the case at hand. In fact, pursuant to the double *renvoi* solution, the English private international law system, while referring succession in the immovable property of the deceased to the law of the country, Italy, where that property is situated, would have at the same time taken into account the *renvoi* made in turn by Italian law to English law as governing the entire succession of the deceased.²²

Incidentally, it is worth noting that a similar issue would have arisen, in a case such as that forming the subject of the judgment under review, pursuant to the European Succession Regulation as currently in force. In fact, mention being made that the general connecting factor adopted by the Regulation absent a *professio juris* by the deceased lies in his or her habitual residence,²³ and not nationality as provided for by the Italian statute,²⁴ still Article 34 of the Regulation, following to some extent the model set out by Italian law, admits *renvoi* by the law of a third country – as the UK now is, and as it has virtually been from the beginning in respect of the Regulation, as a Member State not bound by it²⁵ – to the law of a Member State subject to the Regulation, or to

21 See, extensively, upholding the solution of double *renvoi* as likely to contribute at the highest degree to the objective of coordination between national systems of private international law, DAVÌ, *cit. supra* note 17, p. 166 ff.

22 See further, concerning the controversial question as to whether the legislative solution embodied under Article 13 of the Italian statute on private international law of 1995 shall be considered as following the model of the double *renvoi* rather than the opposite one of the single *renvoi*, to be meant as not taking into account the position of the foreign conflict-of-laws system as concerns *renvoi*, in the first sense, DAVÌ, *cit. supra* note 17, p. 163 ff.; in the opposite sense, MOSCONI, “Articolo 13”, *cit. supra* note 18, p. 959; PICONE, *cit. supra* note 18, p. 310; conceding instead that the rule might be open to different interpretations, MUNARI, “Art. 13”, *cit. supra* note 18, p. 102; BOSCHIERO, *Appunti sulla riforma del sistema italiano di diritto internazionale privato*, Torino, 1996, p. 180 ff., p. 184 ff.; VENTURI, “Sul c.d. rinvio *in favorem* nel sistema italiano di diritto internazionale privato”, *Rivista di diritto internazionale privato e processuale*, 1999, p. 525 ff., p. 531, note 18; more favourably to the first assumption, CAMPIGLIO, “Versatilità e ambiguità del meccanismo del rinvio”, *Rivista di diritto internazionale privato e processuale*, 2010, p. 367 ff., p. 382.

23 Regulation (EU) 650/2012, Art. 21. See, among others, BONOMI, “Article 21”, in BONOMI and WAUTELET, *cit. supra* note 2, p. 307 ff.; CALVO CARAVACA, “Article 21”, in CALVO CARAVACA, DAVÌ and MANSEL (eds.), *cit. supra* note 2, p. 298 ff.

24 Law No. 218 of 31 May 1995, Art. 46, para. 1.

25 See the Preamble to Regulation (EU) 650/2012, Recital 82. See also, discussing the indirect effects of the Regulation for the UK despite its decision not to opt in, at a stage when its withdrawal from the EU was not yet envisaged, CRAWFORD and CARRUTHERS, “Speculation on the Operation of Succession Regulation 650/2012: Tales of the Unexpected”, *European Review of Private Law*, 2014, p. 847 ff.

the law of another third State which would apply its own law, without at the same time specifying whether account shall be taken of the solution followed concerning *renvoi* by the third country whose law is made applicable pursuant to the Regulation.²⁶ The reason justifying the choice made by the European legislator to admit *renvoi* only in case the law of a third country is called to apply may be considered as sufficiently self-evident, considering that as among Member States bound by the Succession Regulation the conflict-of-laws rules to be relied upon are virtually those contained in the Regulation itself, which, having universal application, replace entirely, within the scope of application of the Regulation, the national private international law rules of the Member States,²⁷ excluding therefore any room for the operation of *renvoi*, which inherently presupposes an interplay between different conflict-of-laws rules.

3.4 *The Revocation of a Will as a Question to Be Decided Pursuant to the Law Governing Succession in Respect of Either Part of the Estate of the Deceased, Where Splitting Applies*

The admissibility of *renvoi* by the English conflict-of-laws rules to Italian law as concerns succession in the immoveable property of the deceased located in Italy having been considered as sufficiently plain, overlooking the point just noted concerning the double rather than single nature of *renvoi*, also in the earlier judgments of the lower courts in the case under consideration,²⁸ the point of which the *Corte di Cassazione* had been seized in the appeal before it consisted of deciding whether, having assumed that Italian law was called on to regulate succession in the immoveable property of the deceased located in Italy, the application of Italian law in respect of succession in that property affected also the assessment concerning the alleged revocation of the will made by the deceased as a consequence of his subsequent marriage. As noted, the *Tribunale di Milano* at first instance and, accordingly, the *Corte d'Appello di Milano* in confirming its judgment on appeal, had assumed that the latter issue was to be governed by English law in respect of the entire succession, as if Italian law was called on to regulate just the devolution of succession in the immoveable property located in Italy, and not also the question of title to the succession in that property, which would allegedly have remained within

26 See, upholding the view that the rule on *renvoi* embodied in Art. 34 of Regulation (EU) No. 650/2012 shall be considered as inspired by the double *renvoi* solution, DAVÌ, *cit. supra* note 17, p. 342 ff.; ID., "Article 34", in CALVO CARAVACA, DAVÌ and MANSEL (eds.), *cit. supra* note 2, p. 469 ff., p. 491 ff.; DAVÌ and ZANOBETTI, *Il nuovo diritto internazionale privato europeo*, *cit. supra* note 2, p. 130 ff., p. 154 ff.

27 See BONOMI, *cit. supra* note 13, p. 302 ff.; CALVO CARAVACA, *cit. supra* note 13, p. 292 ff.

28 As reported in *PJ v. PRC and BO*, *cit. supra* note 5, para. 3.

the purview of English law as the law governing the remaining part of the succession.²⁹

As the *Corte di Cassazione* found, coherently with its assumption that English law actually referred back to Italian law the regulation of succession in the immoveable property of the deceased located in Italy, the splitting of the succession presupposes that the estate of the deceased is divided into two, or more, separate sets of assets, respectively composed of the moveable property of the deceased, succession in which shall be subject to the law of his last domicile or nationality, and of his or her immoveable property, succession in which shall be subject to the law, or the laws, of the country, or the countries, where such property is situated.³⁰ Accordingly, assuming that succession in the immoveable property of the deceased is subject to a law other than that regulating succession in the remaining part of his estate, a decision in the sense that the law governing succession just in the latter part of the estate should regulate a question affecting title to succession in respect of the entire estate of the deceased implies an unacceptable anticipation of the application of the substantive rule of English law providing for the revocation of wills, in such terms as to make it likely to defeat the *renvoi* allegedly made to Italian law by English conflict-of-laws rules.³¹

Trying to adapt once more the *dictum* of the *Corte di Cassazione* on this point to the current scenario governed, in Italy and in the other Member States subject to its application, by the European Succession Regulation, it shall be noted that whereas the Regulation has clearly opted in favour of the principle of unity of succession, in those cases where, through *renvoi* from the law of a third country, a splitting of the succession might still take place such as, allegedly, in the case under consideration,³² then it would appear that each of the laws called on to regulate succession in either part of the estate of the deceased would apply in respect of any issue concerning succession in that part of the estate, including questions of title such as that revolving around the supposed revocation of a will, according to the comprehensive scope which, as we have noted already, the Regulation affords to the *lex successionis*.³³

29 *Ibid.*

30 *Ibid.*, para. 15.

31 *Ibid.*, para. 16.

32 As envisaged by DAVÌ, *cit. supra* note 17, p. 347 ff.; ID., *cit. supra* note 26, p. 488 ff. See also, contemplating a comparable effect of *renvoi* pursuant to Art. 13 of the Italian law, PICONE, "La teoria generale del diritto internazionale privato nella legge italiana di riforma della materia", *cit. supra* note 18, p. 312 ff.

33 See CASTELLANOS RUIZ, *cit. supra* note 14, p. 353 ff.

3.5 *The Requirements for an Optio Legis Pursuant to Italian Conflict-of-Laws Rules in Matters of Succession*

The *Corte di Cassazione* (*Sezioni Unite Civili*) have also ventured, in an *obiter dictum* of the judgment under review, on the requirements for a valid *optio legis* by the deceased pursuant to Article 46(2) of Italian Law No. 218 of 1995. This in consideration of the fact that the widow had raised such an issue before them, without having actually raised it at the earlier stages of the proceedings before the lower courts, something which made such a novel issue procedurally inadmissible.³⁴ Apparently, the widow claimed that an *optio legis* had been made by the deceased in favour of English law in order to ensure the application of that law to the entire succession, and virtually in order to prevent the prospective operation of *renvoi* to Italian law by the English conflict-of-laws rules in respect of succession in the immoveable property of the deceased located in Italy. In fact, pursuant to Article 13(2) of the Italian statute on private international law, *renvoi* shall not apply, among other cases, where the applicable law has been designated pursuant to the interested parties' choice – i.e. in matters of succession, the deceased's choice – essentially in order not to frustrate that choice, assuming that this concerned the substantive rules of the chosen law and not its conflict-of-laws rules.³⁵

As the *Corte di Cassazione* correctly held, had the issue in question been timely raised, the requirements for an *optio legis* by the deceased pursuant to Article 46(2) of the Italian statute were nonetheless not met in the circumstances of the case. First, since the rule in question admits a choice by the deceased just in favour of the law of the country where he or she is residing at the moment when the choice is made, and the choice is deprived of effect in case the deceased is no longer residing there at the time of death.³⁶ Apparently, the deceased was a resident of Italy at the moment of the supposed choice, since it appears he travelled to London in 1997 expressly in order to make his will there,³⁷ while English law was his national law, which would have applied

34 See *PJ v. PRC and BO*, *cit. supra* note 5, para. 11.

35 See, concerning this exception to the operation of *renvoi* as contemplated under Art. 13 of the Italian statute, MOSCONI, *cit. supra* note 18, p. 957; MUNARI, *cit. supra* note 18, p. 1028 ff.; PICONE, "La teoria generale del diritto internazionale privato nella legge italiana di riforma della materia", *cit. supra* note 18, p. 322 ff.

36 See, concerning the corresponding rule embodied in Art. 44, para. 2, of the legislative draft then turned into Art. 46, para. 2, of the law as adopted, PICONE, "La legge applicabile alle successioni", in COMITATO NOTARILE REGIONALE DELLA CAMPANIA (ed.), *La riforma del diritto internazionale privato e i suoi riflessi sull'attività notarile*, Milano, 1991, p. 57 ff., repr. in PICONE, *La riforma del diritto internazionale privato*, Padova, 1998, p. 55 ff., p. 73 ff.

37 See *PJ v. PRC and BO*, *cit. supra* note 5, para. 11.

based on the general rule embodied under Article 46(1) of the same statute, being accordingly a choice in favour of the same law as would have applied in the absence of a choice entirely pointless. Second, the rule in question specifies that such a choice shall be made expressly in a declaration in the form of a disposition of property upon death, and it appears that in the circumstances of the case no such declaration had been made by the deceased in his will, while, as the court correctly argued, such a stringent requirement cannot be held as satisfied based on the pure fact of the deceased's having chosen to travel to England in order to have his will made there. In fact, as the court correctly noted, such a decision by the deceased is material only as concerns the law applicable to the form of the will, and does not *per se* affect the issue of the law applicable to the substance of the succession.³⁸

Once more, while the latter issue was considered by the *Corte di Cassazione* based on the Italian rules of private international law as applicable to the case under consideration, it appears appropriate to note that a similar result would have probably been reached pursuant to the rules contained in the European Succession Regulation No. 650/2012. In fact, departing from the general rule whereby, differently from the solution provided for by Italian law, the law of the country of the habitual residence of the deceased at the time of death shall apply, Article 22 of the Regulation admits an *optio legis* or *professio juris* by the deceased in favor of his national law at the time of choice or at the time of death.³⁹ Still, the requirements posed by the Regulation in terms of form that such a choice shall satisfy would hardly be met in the circumstances of the case under consideration. In this respect, it shall be noted that those requirements are broader than those contemplated under Article 46(2) of the Italian statute, in that, alongside an express declaration made in the form of a disposition of property upon death, Article 22(2) of the Regulation admits that such a choice may be demonstrated by the terms of the disposition of property itself. Nonetheless, the pure fact of the deceased's having chosen to make his will in the country of which he is a national would not of itself be sufficient for that purpose, unless, from the terms of the disposition, any material element may be detected, such as a reference to a legal institution provided for under the

38 *Ibid.*, para. 11(2).

39 See DAVÌ and ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, cit. *supra* note 2, p. 55 ff. and p. 59 ff.; BONOMI, "Article 22", in BONOMI and WAUTELET, cit. *supra* note 2, p. 321 ff., p. 331 ff.; CASTELLANOS RUIZ, "Article 22", in CALVO CARAVACA, DAVÌ and MANSEL (eds.), cit. *supra* note 2, p. 323 ff., p. 331 ff.; GRIECO, *Il ruolo dell'autonomia della volontà nel diritto internazionale privato delle successioni transfrontaliere*, Milano, 2019, p. 145 ff.

law in question, in such terms as to reveal a clear intent by the deceased to subject succession to his national law.⁴⁰

Should, instead, the requirements for a valid *professio juris* pursuant to Article 22 of the European Succession Regulation be met, Article 34(2) of the Regulation would, not differently from Article 13(2) of the Italian statute, exclude the operation of *renvoi* in such a case,⁴¹ so that, in the remaining circumstances of the case under consideration, English law as the national law of the deceased would apply also as concerns succession in the immovable property of the deceased located in Italy.

6.6 *Concluding Remarks*

The judgment under review has touched upon a series of important issues, revealing the intricacies inherent in transnational succession cases. These are particularly critical when they involve both EU Member States, which are now subject to the European Succession Regulation and accordingly are bound by the same private international law rules in matters of succession, and third countries, which are not bound by comparable rules. The case of the UK appears particularly critical, having the country been until quite recently a Member State – though not bound from the very beginning by the Regulation in question – with which many EU nationals from other Member States, including Italy, have been entertaining close relationships. Accordingly, cases litigated before Italian courts, as well as before the courts of other Member States, concerning the succession of UK nationals or of persons presenting material connections with that country are likely to prove comparably frequent.

Regretfully, international conventions in this field also are of little avail. As the *Corte di Cassazione* noted incidentally, the Hague Convention of 1989 on the law applicable to succession to the estates of deceased persons is not in force, and most likely will never be, having just been signed by four States, two of which are EU Member States now bound by the European Succession Regulation, and the only one having ratified it, the Netherlands, denounced it pending the entry into force of the Regulation. In concrete terms, whereas the European Succession Regulation does not affect, pursuant to its Article 75, the

40 See the Preamble to Regulation (EU) No. 650/2012, Recital 39; see also DAVÌ and ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, *cit. supra* note 2, p. 68 ff.; BONOMI, *cit. supra* note 39, p. 343 ff.; CASTELLANOS RUIZ, *cit. supra* note 39, p. 345 ff. and p. 348 ff.; GRIECO, *cit. supra* note 39, p. 165 ff. and p. 171 ff.

41 See BONOMI, “Article 34”, BONOMI and WAUTELET, *cit. supra* note 2, p. 571 ff.; DAVÌ, *cit. supra* note 26, p. 482; DAVÌ and ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, *cit. supra* note 2, p. 142 ff.; LAGARDE, “Article 34”, in BERGQUIST et al., *cit. supra* note 2, p. 149 ff., p. 153.

existing international conventions to which one or more Member States are parties at the time of its adoption, the only international convention concerning private international law in succession matters to have received a significant number of ratifications is the Hague Convention of 1961 on the conflicts of laws relating to the form of testamentary dispositions.⁴² That convention, to which a significant number of third countries, including the UK, are parties, while not all EU Member States are, has nonetheless a rather narrow scope, and, accordingly, would not help solve on a broader scale the conflicts between systems of private international law in succession matters revealed by cases such as that having formed the subject of the judgment under review. Nor is it likely that the UK, not having opted in at the stage of the adoption of the European Succession Regulation at a time when the country was still an EU Member State, would now be eager to embark on negotiations with the EU with a view to agreeing on common private international law rules in succession matters, which could hardly depart in meaningful terms from the lines set out in the Regulation.

42 As noted by ZANOBETTI, "Article 75", in CALVO CARAVACA, DAVÌ and MANSEL (eds.), *cit. supra* note 2, p. 831 ff., p. 832 ff.; see also BONOMI, "Article 75", in BONOMI and WAUTELET, *cit. supra* note 2, p. 937 ff., p. 939 ff.