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UNDERSTANDING THE EU REGULATIONS 1103 AND 1104/2016 IN PRACTICE

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PRIVATE INTERNATIONAL SUCCESSION LAW CASE STUDY. AGREEMENTS AS TO SUCCESSION, PUBLIC POLICY AND PROTECTION OF FORCED HEIRS UNDER EU REGULATION NO 650/2012

Maria Cristina Gruppuso[1]

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Summary: I. Foreword. II. Case. III. Applicable law. IV. Concept of agreement as to succession. V. Public policy. VI. Protection of forced heirs.

Abstract: The work examines a cross-border succession case concerning agreements as to succession, showing the impact that EU Regulation 650/2012, which offers a definition of agreement as to succession (Article 3 (1) b) and indicates the criteria for identifying the law applicable to it (Article 25), has on States, such as Italy, that prohibit its stipulation. Once the case has been presented, it is necessary to take the perspective of the Italian judge called upon to settle the dispute. In this context, the main legal issues that may arise in the matter of agreements as to succession are discussed and resolved. After having determined the criteria for identifying the applicable law and after having clarified the concept of agreements as to succession, the Italian judge must deal with two extremely important questions: the eventual incompatibility with public policy and the value of the rules intended to protect forced heirs when it comes to the application of a foreign law admitting and regulating agreements as to succession.

I. FOREWORD

EU Regulation 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, with the aim of promoting succession by contract, offers a definition of agreement as to succession (Article 3 (1) b) and indicates the criteria for identifying the law applicable to it (Article 25).

This scope takes on particular importance in view of the different attitudes that national legal systems assume with regard to the agreements as to succession and produces a certain impact on the States that prohibit its stipulation.

Among such States is Italy. Pursuant to Article 458 of the Civil Code, entitled 'Prohibition of agreements as to succession', 'every agreement by which someone disposes of his succession'

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and 'every act by which someone is entitled to a right to a succession not yet open or by someone who renounces them' is null. The rule, read in conjunction with Article 457 of the Civil Code, shows that there are only two forms of succession admitted in the Italian legal system: intestate succession and testamentary succession, and it is consequently excluded that a contract can be a source of handover of the inheritance.

Even in the uniqueness of the prohibition, and from the literal content of the norm, we can derive the existence of three distinct types of agreements as to succession: so-called *istitutivi*, *dispositivi*, *rinunciativi*. These agreements present a common element of having as their object a succession not yet open, which means that the rights which are the subject of the legal transactions put in place are considered rights of a future succession.

Faced with a very complex reality, in which it is not always easy to discern between valid cases and cases falling within the legal prohibition – and, therefore, deemed null – the Italian case law states that in order for an agreement as to succession to be recognised as prohibited, it is necessary: a) that an agreement has been concluded before the opening of succession; b) that the subject matter of the agreement must be included in a future succession or is considered in the stipulation as part of a future succession; c) that the promisor has wished to provide for his own succession; d) that the acquirer of rights to succession has contracted or stipulated having the right to that succession; e) that the object of the agreement must transfer to the promisee *mortis causa*, that is, as an inheritance or legacy.[2]

In Germany, on the other hand, the conclusion of agreements as to succession is allowed and very widespread. § 1941, paragraph 1, BGB states that the person whose succession is concerned (*Erblasser*) in the agreement (*Ervbertrag*), by way of a *mortis causa* legal transaction, may establish one or more heirs (*Erbeinsetzung*), arrange legacies (*Vermächtnisse*) or impose charges (*Auflagen*). Paragraph 2, then, specifies that it is permitted to designate as heir or forced heir a counterparty or a third party. The agreement is binding and can only be terminated by mutual agreement by the parties who stipulated it (§ 2290 BGB).[3]

Not only this, but the German legal system allows the early renunciation of inheritance rights. §§ 2346 - 2352 BGB (*Erbverzicht*) recognise the possibility for relatives and the spouse to waive these rights by contract with the person whose succession is in question; in this way, the waiving party is excluded from the succession as though he were no longer alive at the time of the opening of the succession.

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[2] These are the criteria evoked by C. Giannattasio, *Delle successioni. Disposizioni generali-Successioni legittime* (Torino: Utet, 1959), 21 (which recalls the Supreme Court of 13 October 1958 no 3240, *Giustizia civile. Massimario,* 1157 (1958)) and frequently employed by the case law in the resolution of disputes: Supreme Court of 22 July 1971 no 2404, available at *www.foroplus.it*; Supreme Court of 9 July 1976 no 2619, *Repertorio Foro it*., II, item *Successione ereditaria*, 2909 (1976); Supreme Court, 16 February 1995 no 1683, *Giustizia civile.*, 1501 (1995); Court of Naples 30 June 2009, *Giurisprudenza di merito*, III, 3001 (2010); Supreme Court 15 July 2016 no 14566, *Rivista Notarile*, II, 974 (2016); Supreme Court 24 May 2021 no 14110, available at *www.dejure.it*; Court of Rome 1 July 2021 no 11383, available at *www.dejure.it*.

[3] A. Fusaro, 'Profili comparatistici dei contratti ereditari' *Rivista del Notariato*, 659 (2021); P. Kindler, 'Le successioni a causa di morte nel diritto tedesco: profili generali e successione nei beni produttivi' *Rivista di Diritto Civile*, 359, 364 (2015).

Pursuant to §§ 2276 and 2348 BGB, for the purposes of formal validity, the stipulation of the inheritance contract and waiving must take place by public deed, before a notary.[4]

With these mentioned differences between the two systems on the subject, we can then grasp the relevance of Regulation (EU) 650/2012. According to the regulatory provisions, in fact, an agreement as to succession is admissible if considered as such by the law of the State in which the deceased had his habitual residence at the time agreement was concluded or, where *optio legis* has been applied, by the law of his State of nationality – regardless of the admissibility of agreements as to succession under the law applicable to the entire succession.

Given this, it is still necessary to question the role played by public policy, bearing in mind that for this purpose it is necessary to place oneself in the perspective of so-called 'international' public policy (see paragraph V). In fact, the application of the law of another State that admits and regulates agreements as to succession must be measured against the public policy of the forum in which these are prohibited, in terms of compatibility or manifest incompatibilities. This requires a concrete evaluation, as will be seen, not only with reference to the contract-instrument, but also with regard to the content of the agreement that, sometimes, can result in the exclusion of forced heirs from succession.

The latter hypothesis requires us to extend the reflection to the value of the rules in place for the protection of forced heirs and, with particular reference to Italy, it seems appropriate to ask the following question: is the protection of forced heirs, as it is regulated, a fundamental and indispensable principle of the legal system?

II. CASE

Peter, a German citizen, a widower, with three children Albert, Markus and Karl, lives in Berlin.

In 2018, he met Laura, an Italian citizen, also a widow, with whom he began a relationship. Together they chose to move to Rome, the city where Laura lived. His children, on the other hand, remained in Berlin where, by then independent, they worked and lived.

In Rome, Peter bought an apartment to live in with Laura and started a small business activity.

In 2020, Peter, Laura and his sons Karl and Albert went to a notary in Rome. The parties, by mutual agreement, recalling the institutes of German law, declared that they wanted to enter into an agreement relating to the succession of Peter. Thus, in the agreement, where there are exact references to the provisions of the BGB, we read that Peter left the apartment to Laura, his business to Karl, and Albert waived his rights as forced heir.

A year later, Peter died in Rome. The succession opened and both Albert and Markus, believing to have rights as forced heirs, instituted a proceeding before the Italian judge.

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[4] R. Zimmermann, 'Compulsory Portion in Germany', in K.G.C. Reid, M. J De Waal and R. Zimmermann eds, *Mandatory Family Protection* (Oxford: Oxford University Press, 2020), 311-312; D. Achille, *Il divieto dei patti successori. Contributo allo studio dell'autonomia private nella successione futura* (Naples: Jovene Editore, 2012), 169; S. Delle Monache, 'Scenari attuali in materia di tutela dei legittimari' *Nuova Giurisprudenza Civile Commentata*, 59, 61 (2008).

In particular, the two children affirmed that the stipulated agreement as to succession was not admissible under Italian law — applicable to the agreement as the law of the State in which the deceased had his habitual residence on the day the agreement was concluded.

Again, even if the agreement was admissible under German law, the waiver of the rights of forced heir does not fall under the notion of agreement as to succession in Article 3(1) b), so the eligibility of the waiver should be evaluated in the light of the law applicable to the entire succession, namely Italian law.

In any case, in the perspective of the brothers as plaintiffs, the pact is in violation of public policy and the rules for the protection of forced heirs.

III. APPLICABLE LAW

The first question that the Italian judge must address in a logical-legal order, after having positively verified the jurisdiction, concerns the applicable law.[5] It is necessary to determine whether the law governing the agreement as to succession is the Italian law pursuant to Article 25(1) or the German law chosen pursuant to Article 25(3).

Art 21(1) of EU Regulation 650/2012, in accordance with the principle of proximity, states that the law applicable to the entire succession is that of the State in which the deceased had his habitual residence at time of death.

The Regulation does not provide a definition of habitual residence, but merely dictates some indications – Recitals 23 and 24 – about the evaluations to be made for its determination. Given that the habitual residence has an autonomous meaning with respect to the person's premises known in national law, it is stated that it must be identified as the place where the interests, affairs and social and affective relationships of the person are stable. More precisely, the habituality of residence can be derived from two elements: the first, objective element, relating to the length of time of a person's stay in the territory of the State; the second, subjective element, concerning the person's intention to establish permanently in that State the centre of his life and business interests. [6] In essence, the evaluations made with respect to this criterion must necessarily take into account the concrete case and the particularities of the story.

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[5] One of the guidelines by which the European legislator has pursued simplification in the management of international successions is the coincidence between *forum* and *ius*, as the habitual residence of the deceased at the time of death is the qualification for general jurisdiction and an objective link criterion. This coincidence may fail in the case of *professio iuris*, even if interested parties can remedy it *ex post* through the mechanisms provided for by the Regulation. For an introduction to EU Regulation 650/2012, see: I. Kunda, S. Winkler and T. Pertot, 'Jurisdiction and Applicable Law in Succession Matters', in M.J. Cazorla Gonzalez, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property Relations of Cross Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 99-131.

[6] I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Naples: Edizioni Scientifiche Italiane, 2017), 75; I. Riva, 'Il quadro normativo introdotto dal Regolamento UE n 650/2012 sulle successioni transfrontaliere', in Ead ed, *Famiglie trasfrontaliere: regimi patrimoniali e successori* (Turin: University of Turin, 2021), 127-128; D. Damascelli, *Diritto internazionale privato delle successioni a causa di morte* (Milan: Giuffrè, 2013), 50-51.

In accordance with the autonomy of will, Article 22, through the so-called *professio iuris*, whether expressed or tacit, allows for a derogation from the connection criterion, attributing to a subject the right to choose as the law regulating the succession that of the State of which he is a citizen at the time of choice or death.

Now, the case in question is an agreement as to succession for which the Regulation, under the applicable law, provides an *ad hoc* provision, namely Article 25. The said Article identifies the applicable law with regard to the admissibility, the substantive validity, and the binding effects between the parties, including the conditions for dissolution, of the agreement as to succession having as a subject the succession of a single person (Article 25(1)) or of several persons (Article 25(2)).

In particular, pursuant to Article 25(1), the law applicable to the covenant (*lex pacti*) is the law that would have been applicable to the succession if the deceased had died on the day of the conclusion of the covenant: therefore, the law of the State in which he, at that time, had his habitual residence (compare Article 21(1)).

Article 25(3) allows the parties, in both cases referred to in paragraphs 1 and 2, for all aspects, to exercise the *optio legis* in favour of the law that the person – or one of the persons whose inheritance is in question – could have chosen pursuant to Article 22 of the Regulation.

In the present case, the agreement entered into is aimed at regulating Peter's succession. Thus, the brothers as plaintiffs argued that the admissibility of the covenant had to be assessed according to the law of the State in which the deceased had his habitual residence at the time of the conclusion of the agreement.

In fact, Peter, at the time of signing the agreement, was residing in Rome, Italy. There he had established his business and that was the place of his interests: work and family life.

The central point, however, is the following: the agreement results in a choice in favour of German law, Peter's citizenship law. The parties expressed to the notary the will to agree according to the institutes of German law; in the agreement, in fact, there are precise references to the provisions of the BGB.

As anticipated in the introduction, §§ 1941 and 2274 BGB govern the inheritance contract (*Erbvertrag*), by which the stipulator can establish heirs, dispose of legacies and impose burdens. It was also said that unlike Italian law, in Germany it is permitted to waive – before the opening of the succession – the rights that may exist with a future succession. In this sense, §§ 2346 - 2352 BGB allow the spouse and relatives to enter into a contract with the one whose succession is in question in order to waive their rights or the reserved share. The waiver by one or more descendants, in fact, represents one of the succession planning tools generally used to allow the generational transfer of the company into the hands of the descendant that the entrepreneur considers capable and suitable for the continuation of the activity.[7]

The judge must take this into account, since the choice of law, pursuant to Article 22(2) of the Regulation, 'shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition', and Recital 39 clarifies that 'A choice of law could be regarded as demonstrated by a disposition

[7] R. Zimmermann, 'Compulsory Portion in Germany', in K.G.C. Reid, M. J De Waal and R. Zimmermann eds, *Mandatory Family Protection* (Oxford: Oxford University Press, 2020), 311-312.

of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law'.

Moreover, as it emerges, the parties exercise an *optio legis* by mutual agreement, just as the prevailing opinion considers that it should happen when the choice of applicable law concerns the agreement as to succession.[8]

IV. CONCEPT OF AGREEMENT AS TO SUCCESSION

The second legal question concerns the breadth of the notion of an agreement as to succession. One of the plaintiffs, Albert, who had renounced his rights as a forced heir, stated that in reality the renunciation did not fall within the notion of an agreement as to succession referred to in Article 3(1)(b) of the Regulation. Following this approach, it would derive that the *lex pacti ex* Article 25(3) should not be applied to it, but Italian law which – pursuant to Articles 21(1) and 23(2)(e) – regulates the succession as a whole and, therefore, also 'the conditions and effects (...) of renouncing the inheritance or legacy. Now, given that the Italian legal system does not allow early renunciation, the conclusion should be in the sense that Albert's renunciation of his rights as a forced heir is void.

The cited Article 3(1)(b) states that for the purposes of the Regulation, agreement as to succession means: 'an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement'.

The notion in question is very broad and attracts different institutes governed by the laws of the Member States. For the Italian judge, as regards the present case, there is an interpretative question concerning the breadth of this definition with respect to the wording of Article 458 of the Civil Code, entitled 'Prohibition of agreements as to succession'. Precisely, the provision of the Code identifies three types of pacts: so-called *istitutivi*, that is, the agreements through which a subject establishes an heir or has a legacy in favour of the counterparty or a third party; so-called *dispositivi*, *inter vivos* acts, by means of which a subject has the rights which he expects to acquire under the succession of another person; so-called *rinunciativi,* through which a person renounces a future inheritance.

Now, about the definition in Article 3(1) (b), there are two opposing reconstructions. According to the restrictive orientation, only the agreements as to succession so-called

[8] D. Damascelli, *Diritto internazionale privato delle successioni a causa di morte* (Milan: Giuffrè, 2013), 98; J. Re, *Pianificazione successoria e diritto internazionale privato* (Milan-Padova: Wolters Kluwer-Cedam, 2020), 248; A Bonomi, 'Patto successorio (Art 25)', in A. Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni: commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015* (Milan: Giuffrè, 2015), 347; 347; J. Rodríguez Rodrigo, 'Article 25: Agreements as to Succession', in A.L. Calvo Caravaca, A. Davì et al eds, *The EU Succession Regulation. A Commentary* (Cambridge: Cambridge University Press, 2016), 388; B. Barel, 'La disciplina dei patti successori', in P. Franzina et A. Leandro eds, *Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013), 128-129, which provides arguments starting from Article 83(4) on the subject of transitional provisions.

istitutivi [9] fall under the notion of the Regulation by virtue of the literal fact of the forecast. According to an extensive orientation, however, as the only matter relevant is the existence of an agreement on a future succession as a common denominator for the cases referred to in Article 3(1)(b), the so-called *dispositivi* and *rinunciativi* agreements must also be brought under the notion under consideration.[10] This second interpretation was the subject of clarification: according to the prevailing approach in the doctrine, in fact, the central point of the regulatory notion of an agreement as to succession consists of the necessity that the person whose succession is concerned participates in the agreement.[11]

Now, in the present case, the judge will take into account the fact that Albert's waiver fits into the multilateral transaction in which Peter, the one whose succession is concerned, participated. Thus, unlike Albert's view, the renunciation is governed by the *lex pacti*, namely by German law, pursuant to Article 25(3): it is therefore valid.

V. PUBLIC POLICY

A further legal question, in the light of the provisions of Article 35 of the Regulation, concerns the compatibility with the public policy of the forum of a law that admits agreements as to succession.

Public policy, as a general clause, has content whose determination cannot ignore the application to a concrete case and whose results vary in relation to the different systems and the historical periods of reference. Precisely, the expression 'international public policy' indicates a set of fundamental principles expressing the identification values of the legal order of a State. Thus, the judge, evaluating according to reasonableness, must verify if there are one

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[9] D. Damascelli, n 6 above, 92. Thus, the author specifies, the definition includes the *contract to make a will* used in *common law* systems or *l'institution contractuelle* of French law.

[10] Cf A. Bonomi and P. Wautelet, 'Definizioni (Art 3)', in A. Bonomi and Fr. Wautelet, *Il regolamento europeo sulle successioni: commentario al Reg UE 650/2012 in vigore dal 17 agosto 2015* (Milan: Giuffrè, 2015), 93-94; M. Weller, 'Article 3: Definitions', in A.L. Calvo Caravaca, A. Davì et al. eds, *The EU Succession Regulation: A Commentary* (Cambridge: Cambridge University Press, 2016), 117; I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Naples: Edizioni Scientifiche Italiane, 2017), 32, which gives two sets of reasons: *in primis*, 'it would not be easy to describe in another way, with a single summary formula', the variety of cases integrating agreements as to succession; secondly, with a view to promoting succession planning tools alternative to the will, the disposing and waiving agreements have a certain importance, especially if we consider that 'the various figures often intertwine and connect for the creation of a final result in accordance with the interests of the parties'.

[11] It follows that only disposing and waiving legal transactions in which the person whose succession is concerned does not intervene are excluded from the notion in question. Cf B. Barel, 'La disciplina dei patti successori', in P. Franzina et A. Leandro eds, *Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013), 113-114; J. Rodríguez Rodrigo, 'Article 25: Agreements as to Succession', in A.L. Calvo Caravaca, A. Davì et al eds, *The EU Succession Regulation. A Commentary* (Cambridge: Cambridge University Press, 2016), 381-382; P. Kindler, 'La legge applicabile ai patti successori nel Regolamento (UE) n 650/2012' *Rivista di diritto internazionale privato e processuale*, 12, 15-16 (2017); E. Calò, 'Dalla legge italiana al regolamento europeo', in E. Calò, M.T. Battista and D. Muritano, *Le successioni nel diritto internazionale privato dell'Unione Europea. Regolamento (UE) n 650/2012 del 4 luglio 2012. Lineamenti e casi pratici* (Naples: Edizione Scientifiche Italiane, 2019), 110; J. *Re, Pianificazione successoria e diritto internazionale privato* (Milan-Padua: Wolters Kluwer-Cedam, 2020), 214-216.

or more principles considered essential and absolutely mandatory for a legal order and that hinder the application of the law of another State.[12]

In the proposed case, the Italian judge is asked to assess whether the application of German law, which provides for and governs agreements as to succession, can be considered 'manifestly'[13] incompatible with the fundamental principles which express the identifying values of the Italian legal system. The evaluation, in reality, must take into account two profiles: public policy as a limit with respect to the instrument, that is to say, the agreement as to succession; public policy as a limit with respect to the content of such agreement (see paragraph V).[14]

On this point, the dominant opinion is that the prohibition *ex* Article 458 of the Civil Code on regulating succession by means of a contract can be considered a rule of internal public policy, but not an 'international' public policy rule (in the sense specified above).[15]

This statement stems from different assumptions: first, the *favor* granted to the agreement as to succession by the Regulation must be highlighted which, in Recital (49), explicitly states the objective of facilitating the acceptance in the Member States of the inheritance rights acquired as a result of an agreement as to succession; secondly, Article 35 would end up being exploited for the purpose of preventing the application of Article 25;[16] thirdly, the reasons laid at the foundation of the Civil Code prohibition are very doubtful[17]

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[12] G. Perlingeri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), *passim*. The work metaphorically refers to public policy as a 'drawbridge' placed at the entrance of an 'ideal castle' represented by the legal system of the State in which enforcement is sought. Moreover, the principles, rules and obligations of international and supranational origin cannot fail to be taken into account. On this point, see: I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Naples: Edizioni Scientifiche Italiane, 2017), , 34; V. Putortì, 'Successione *ex contractu* e ordine pubblico del foro *ex* art 35 Regolamento UE 650/2012' *Le Corti Fiorentine. Rivista di diritto e procedura civile, 3, 11 (2016);* S. Deplano, 'Applicable Law to Succession and European Public Policy', in J. Kramberger Škerl, L. Ruggeri and F.G. Viterbo eds, *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper* (Camerino: University of Camerino, 2019), 51.

[13] According to V. Barba, *I patti successori e il divieto di disposizione della delazione* (Naples: Edizioni Scientifiche Italiane, 2015), 217, the adverb must be understood as 'perceptible *ictu oculi*'; the clause, therefore, must be interpreted restrictively according to D. Mauritano, 'Casi pratici in tema di successioni internazionali', in E. Calò, M.T. Battista and D. Muritano, *Le successioni nel diritto internazionale privato dell'Unione Europea. Regolamento (UE) n 650/2012 del 4 luglio 2012. Lineamenti e casi pratici* (Naples: Edizioni Scientifiche Italiane, 2019). On this point, reference is also made to the considerations made in M.C. Gruppuso, 'Article 37: Grounds of Non-recognition', in L. Ruggeri and R. Garetto eds, *European Family Property Relations Article by Article Commentary on EU Regulations 1103 and 1104/2016* (Naples: Edizioni Scientifiche Italiane, 2021), 341-342.

[14] Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Naples: Edizioni Scientifiche Italiane, 2017), , 35.

[15] B. Barel, 'La disciplina dei patti successori', in P. Franzina et A. *Leandro eds, Il diritto internazionale privato europeo delle successioni mortis causa* (Milan: Giuffrè, 2013), 137, G. Perlingeri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), 187-199; A. Fusaro, 'Profili comparatistici dei contratti ereditari' *Rivista del Notariato*, 659 (2021), , 670.

[16] A. Fusaro, n 3 above, 670; A. Barel, n 8 above, 136.

[17] The justifying reasons for the establishing agreement are traditionally traced in the need to protect the testator's freedom to dispose and in the essential revocability of the provisions *mortis causa* (Cf C. Giannattasio, *Delle successioni. Disposizioni generali-Successioni legittime* (Torino: Utet, 1959), 20; G. Grosso and A. Burdese, 'Le successioni. Parte generale', in F. Vassalli ed, *Trattato Diritto Civile* (Turin: Utet, 1977),12, I, 93; B. Toti,

so much so that, for some time now, there have been more and more pressing demands for reform.[18]

Therefore, the plaintiffs' claim must be rejected, as in the present case there is no manifest incompatibility with the public policy of the forum.

VI. PROTECTION OF FORCED HEIRS

As anticipated, Article 25 of EU Regulation 650/2012 identifies the law governing the agreement as to succession in terms of admissibility, substantial validity and binding effects between the parties.

Pursuant to the combined provisions of Article 21(1) and Article 23(2) h), the law of the State in which the deceased had his habitual residence at the time of death regulates, on the other hand, the entire succession and, precisely, also 'the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs'. With this in mind, the Italian Civil Code, in Article 536, identifies the persons in favour of whom the law reserves a share of inheritance or other rights in the succession: the spouse (or the person in the registered union), the children, and, in the absence of the latter, the ascendants.

It is necessary to understand whether the two children as plaintiffs have the right to obtain the protection that the Italian legal system offers to forced heirs. To this end, a separate reasoning must be followed for each of the two.

Albert had given up his rights as a forced heir. As seen, the waiver is governed by the *lex pacti*, namely by German law, for different profiles, including that of 'binding effects between the parties'.

'La nullità del testamento esecutivo del patto successorio' *Rivista del Notariato*, 9, 17 (1985); M.V. De Giorgi, *I patti sulle successioni future* (Naples: Jovene, 1976), 2, 60; A. Palazzo, 'Le successioni. Introduzione al diritto successorio. Istituti comuni alle categorie successorie. Successione legale', in G. Iudica and P. Zatti eds, *Trattato di diritto Privato* (Milan: Giuffrè, 2nd ed., 2000), I, 212; M. Calogero, 'Disposizioni generali sulle successioni. Art 456-461', in P. Schlesinger and D. Busnelli, *Il Codice Civile: Commentary* (Milan): Giuffrè, 2006), 110; F.P. Traisci, *Il divieto dei patti successori nella prospettiva di un diritto europeo delle successioni* (Naples-Rome: Edizioni Scientifiche Italiane, 2014), 54; C.M. Bianca, *Le successioni* (Milan: Giuffrè, 5a ed, 2015), 31). For the disposing and waiving of agreements, the reasons vary from the desire to avert the so-called *votum captandae mortis* (C. Gangi, *La successione testamentaria*, (Milan: Giuffrè, 2nd ed, 1952), 40), to the desire to preserve 'prodigal and inexperienced' subjects in order to prevent them from squandering the substances they could receive as an inheritance or legacy (A. Palazzo, 'Le successioni. Introduzione al diritto successorio. Istituti comuni alle categorie successorie. Successione legale', in G. Iudica and P. Zatti eds, *Trattato di diritto Privato* (Milan: Giuffrè, 2nd ed, 2000), I, 213; L. Ferri, 'Successioni in generale. Art. 456-511', in A. Scialoja and G. Branca eds, *Commentario del Codice civile* (Bologna-Rome: Zanichelli - Soc ed del Foro italiano, 1964), 86), and finally to the protection of forced heirs (M. Ieva, 'Appunti per un'ipotesi di revisione del divieto dei patti successori' Rivista del Notariato, 1, 2 (2018); Id, 'Art. 458 – Divieto di patti successori', in V. Cuffaro and F. Delfini eds, Delle Successioni, in E. Gabrielli ed, *Commentario del Codice civile* (Turin: Utet, 2009), 32; C. Cicero, 'Il divieto del patto successorio' *Rivista del Notariato,* 699, 705 (2018); S. Lo Iacono, *Ambulatoria est voluntas defuncti? Ricerche sui 'Patti successori' istitutivi* (Milan: Giuffrè, 2019), 28, 105).

[18] On the progressive weakening of the prohibition for all, see 'Il quadro normativo introdotto dal Regolamento UE n 650/2012 sulle successioni transfrontaliere', in *Ead ed, Famiglie trasfrontaliere: regimi patrimoniali e successori* (Turin: University of Turin, 2021), 134.

Now, if the forced heir were allowed to free himself from the agreement and invoke Italian law, as it is more favourable, there would be two consequences: the first, that of depriving Article 25 of usefulness;[19] the second, disregard of the objective of certainty and stability of succession planning that through Recital 7 the Regulation tends to pursue (in fact, it reads: 'In the European area of justice, citizens must be able to organise their succession in advance').

In addition, it should be taken into account that the protection is lost due to a choice of renunciation consciously manifested by the forced heir before the notary.

Even if, then, doubt arises as to the violation of public policy in terms of the content of the agreement, the extremes for the application of Article 35 cannot be seen, since the protection of forced heirs, as regulated in our legal system, and having regard to today's socio-economic context, cannot be considered a principle of international public policy.[20]

For these reasons, Albert will not be able to claim the reserved share that the Italian legal system reserves for the children of the deceased.[21]

On the other hand, the position of Markus, who did not participate in the agreement, is different. He cannot be subject to the *lex pacti*. Therefore, he will find protection under the law governing succession, in the application of Articles 21(1) and 23(2) (h).

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[19] The Proposal for a Regulation, in Article 18 (4) - now Article 25 - was without prejudice to the rights of the forced heirs who remained unrelated to the agreement. According to the doctrine, this specification, later removed, became superfluous in the final text, in which one goes so far as to state that the *lex pacti* regulates the binding effects 'between the parties'.

[20] For further information, see I Riva, Certificato successorio europeo. Tutele e vicende acquisitive (Naples: Edizioni Scientifiche Italiane, 2017), 45 and A. Bonomi and P. Wautelet, 'Definizioni (Art 3)', in A. Bonomi and Fr. Wautelet, Il regolamento europeo sulle successioni: commentario al Reg UE 650/2012 in vigore dal 17 agosto 2015 (Milan: Giuffrè, 2015), 470-478. On the applicability of foreign law that admits the validity of an agreement as to succession and excludes the protection of forced heirs or provides for one that does not correspond to that of domestic law, see V. Barba, I patti successori e il divieto di disposizione della delazione (Naples: Edizioni Scientiche Italiane, 2015), , 207, which recalls the Supreme Court of 24 June 1996 no 5832. For case law, see the Supreme Court 30 June 2014 no 14811, available at https://pa.leggiditalia.it.

Not even in the present case can there be discrimination, as the *lex pacti* does not provide for a discriminatory order of succession on the basis of sex, religion or grounds of affiliation, nor does it assign rights differentiated according to these criteria. On the point, see I. Riva, *Certificato*, n 6 above, 52.

[21] This is the prevailing opinion: A. Bonomi, 'Patto successorio (Art 25)', in A. Bonomi and P. Wautelet eds, Il regolamento europeo sulle successioni: commentario al Reg. UE 650/2012 in vigore dal 17 agosto 2015 (Milan: Giuffrè, 2015), 338-340; B. Barel, 'La disciplina dei patti successori', in P. Franzina et A. Leandro eds, Il diritto internazionale privato europeo delle successioni mortis causa (Milan: Giuffrè, 2013), 133; E. Calò, 'Dalla legge italiana al regolamento europeo', in E. Calò, M.T. Battista and D. Muritano, Le succesisoni nel diritto internazionle privato dell'Unione Europea. Regolamento (UE) n 650/2012 del 4 luglio 2012. Lineamenti e casi pratici (Naples: Edizione Scientifiche Italiane, 2019), 111; indirectly also P. Kindler, 'La legge applicabile ai patti successori nel Regolamento (UE) n 650/2012' Rivista di diritto internazionale privato e processuale, 12, 15-16 (2017), 20. For the sake of completeness, account must also be taken of the contrary opinion of D. Damascelli, Diritto internazionale privato delle successioni a causa di morte (Milan: Giuffrè, 2013), , 96-97: leveraging Recital (50) and regardless of participation in the agreement as to succession, according to the author, forced heirs cannot be deprived of the rights recognised by the *lex successionis*, also in consideration of the restrictive interpretation of Article 3(1)(b) which, always in the author's opinion, does not include agreements with which the rights that may lie in a succession that is not yet open are renounced.