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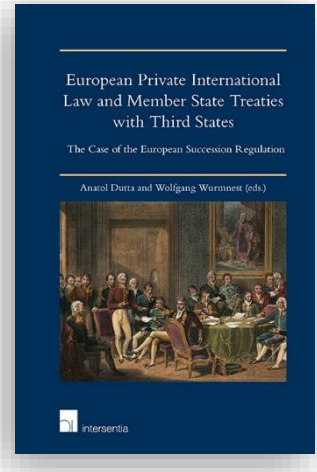

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LIST OF CONTRIBUTORS

Davor Babić
Prof. Dr., University of Zagreb, Croatia

Andrea Bonomi
Prof. Dr., University of Lausanne, Switzerland

Slavko Đorđević
Prof. Dr., University of Kragujevac, Serbia

Anatol Dutta
Prof. Dr., M. Jur. (Oxford), Ludwig Maximilians University of Munich, Germany

Stéphanie Francq
Prof. Dr., LL.M. (Berkeley), Catholic University of Louvain, Belgium

Pietro Franzina
Prof. Dr., University of Ferrara, Italy

Samuel Fulli-Lemaire
Dr., (now) Maître de conférences, Panthéon-Assas (Paris II) University, France

Biset Sena Güneş
LL.M. (London), University of Ankara Yıldırım Beyazıt, Turkey

Markku Helin
Prof. em. Dr., University of Turku, Finland

Tena Hoško
Assistant Prof. Dr., University of Zagreb, Croatia

Dirk Looschelders
Prof. Dr., University of Düsseldorf, Germany

Julie Mary
LL.M. (Vienna), Research Assistant, Lawyer, Catholic University of Louvain, Belgium

Zlatan Meškić
Prof. Dr., University of Zenica, Bosnia and Herzegovina

Magdalena Pfeiffer
Associate Prof. Dr., Charles University, Prague, Czech Republic

Walter Pintens
Prof. em. Dr., Catholic University of Leuven, Belgium

Claudia Rudolf
Associate Prof. Dr., University of Vienna, Austria

Wolfgang Wurmnest
Prof. Dr., LL.M. (Berkeley), University of Augsburg, Germany

Nadjma Yassari
PD Dr., LL.M. (SOAS), Max Planck Institute for Comparative and International Private Law, Hamburg, Germany

THE RELATIONS OF SWITZERLAND WITH EU MEMBER STATES

Andrea Bonomi

1. INTRODUCTION

Since the 19th century, Switzerland has established a net of bilateral treaties dealing with a number of private international law issues, with both European and non-European countries. Several of these instruments also cover international succession matters.

To begin with, a number of Swiss bilateral treaties regulate the reciprocal recognition and enforcement of decisions among the Contracting States. While an 1869 treaty with France was denounced in 1992 after the ratification of the 1988 Lugano Convention,[1] similar instruments are still applicable in the relationships with several other Member States of the EU.[2] Although these

[1] Convention of 15.06.1869, Recueil systématique du droit fédéral [Systematic Collection of Swiss Federal Law (henceforth referred to as 'RS')] 1848–1947, vol. 12, p. 315.

[2] Austria (Convention of 16.12.1960, RS 0.276.191.632); Belgium (Convention of 29.04.1959, RS 0.276.191.721); Germany (Convention of 02.11.1929, RS 0.276.191.361); Italy (Convention

treaties also cover decisions rendered in succession matters, they do not interfere with the European Succession Regulation (SR),[3] which governs only the mutual recognition and enforcement of decisions among the Member States.

Another group of bilateral instruments impose only some limited cooperation duties on a Contracting State's authorities whenever a citizen of the other Contracting State dies within their territory, such as the duties to inform the authorities of the national State[4] or to take conservation measures to protect the estate's assets.[5] As in the previous case, the European Regulation is not affected by these narrow cooperation mechanisms.

The only bilateral conventions that do interfere with the Succession Regulation are those that contain common rules on jurisdiction and/or the applicable law. While two treaties within this category are in force with third States (Iran and the United States of America),[6] two of them are applicable in relationships with Member States of the EU bound by the Succession Regulation, i.e. Greece (**Treaty 23**) and Italy (**Treaty 20**).

First in time and practical importance, the Convention between Italy and Switzerland of 22 July 1868[7] includes in its Article 17 rules specifically regulating the jurisdiction over disputes concerning the estate of a citizen of one Contracting State with a last domicile in the other Contracting State. These jurisdictional rules, based on the nationality of the deceased, have been interpreted by the courts of both countries as also implicitly including a choice-of-law rule.

By contrast, Article 10(3) of the Convention between Greece and Switzerland of 1 December 1927[8] contains only a choice-of-law rule, also based on the last nationality of the deceased.

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of 03.01.1933, RS 0.276.194.541); and Spain (Convention of 19.11.1896, RS 0.276.193.321). Switzerland is also bound by a treaty with Liechtenstein (RS 0.276.195.141). The texts of all these treaties are available at <https://www.admin.ch/gov/fr/accueil/droit-federal/recueil-systematique.html> accessed 08.04.2019, by entering the respective reference number.

3 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 04.07.2012 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 [2012] OJ L201/107.

4 See the treaties with Austria (1875, Art. 8, RS 0.142.111.631), Greece (1927, RS 0.142.113.721), Italy (1868, Art. 17(1) and (2), RS 0.142.114.541), Portugal (1883, Art. VIII, RS 0.191.116.541), and Romania (1880, Art. VIII, RS 0.191.116.631).

5 See the treaties with Japan (1911, Art. 5, RS 0.142.114.631), Portugal (1883, Art. VIII, RS 0.191.116.541) and Romania (1880, Art. VIII, RS 0.191.116.631).

6 Treaty between Switzerland and the United States of America of 25.11.1855 (Art. VI, RS 0.142.113.361); Treaty between Switzerland and the Persian Empire of 25.04.1934 (Art. 8, RS 0.142.114.362).

7 *Convention d'établissement et consulaire entre la Suisse et l'Italie* (Establishment and Consular Treaty between Switzerland and Italy), 22.07.1868, RS 0.142.114.541.

8 *Convention d'établissement et de protection juridique entre la Suisse et la Grèce* (Treaty on Establishment and Legal Protection between Switzerland and Greece), 01.12.1927, RS 0.142.113.721.

In both cases, the treaty provisions interfere with the provisions of the European Regulation and, since they involve a third State, they take precedence over the uniform rules, as stated under Article 75(1) SR.

In the first part of this contribution, the focus will be mainly on the treaty with Italy, which has given rise to a rich and interesting body of case law (section 2). The last part will include some brief remarks on the treaty with Greece, which raises partly similar issues but whose practical impact has been so far much less significant (section 3).

2. ARTICLE 17 OF THE 1868 TREATY BETWEEN ITALY AND SWITZERLAND

2.1. ARTICLE 17 AS A FORERUNNER OF INTERNATIONAL COOPERATION IN CIVIL MATTERS

2.1.1. An Original Jurisdictional Provision

Article 17 of the 1868 Convention between Italy and Switzerland of 22 July 1868 (**Treaty 20**)[9] is a notable attempt to coordinate the exercise of judicial power in inheritance disputes between the two Contracting States. Conferring jurisdiction to the courts of the deceased's national country, it prevents in an effective way positive conflicts and parallel proceedings.

This provision is even more remarkable when one considers that it was established at a time when legislation in the area of private international law was taking its very first steps.[10] A set of codified conflict-of-laws rules had been included only three years before in the first Italian Civil Code of 1865:[11] seen from a comparative perspective, this was one of the very first examples of codification in this area of law. In Switzerland, the first legislative act in this field would be adopted only in 1891; it was initially designed to govern inter-cantonal relationships and was made applicable to international situations only by analogy.[12]

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9 In this contribution, the content of Art. 17 of the 1868 Convention will not be described in detail: see instead the very accurate presentation in the Italian contribution to this book drafted by P. Franzina p. 176 et seq. The purpose here is mainly to discuss, from a Swiss perspective, the present utility of that provision and to propose possible ways forward.

10 See also T. Ballarino and I. Pretelli, 'Una disciplina ultracentenaria delle successioni' [2014] *Rivista ticinese di diritto* 889, 893 et seq.

11 *Codice civile del Regno d'Italia*, of 02.04.1865, *Disposizioni sulla pubblicazione, interpretazione ed applicazione delle leggi in generale*, Art. 6 to 12. This first codification would then be replaced by that included in the preliminary provisions of the Civil Code of 1942 and then by the Private International Law Act of 31.05.1995.

12 *Bundesgesetz vom 25. Juni 1891 betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter*, BS 2 737. According to its Art. 32, the provisions of this act were also

International cooperation in civil matters was even less developed. The Hague Conference would only be created 25 years later, in 1893, on the initiative of the well-known jurisconsult T. M. C. Asser. The first multilateral treaty devoted to issues of international succession would be elaborated, under the auspices of the Conference, only in 1961.[13]

The approach taken by Article 17 is also original. Contrary to the rules on international succession that can be found in some other bilateral treaties signed by Switzerland,[14] Article 17 is drafted as a jurisdictional provision, without any express reference to the law applicable to succession. This is noteworthy, when one considers that none of the multilateral treaties elaborated by the Hague Conference in the area of succession ever included jurisdictional rules on inheritance disputes.[15] The European Regulation was the first multilateral instrument aiming to achieve the unification of jurisdictional rules in the field of succession.

The jurisdictional criterion used in Article 17 is the last nationality of the deceased. This solution clearly reflects the basic philosophy that was then prevailing in Italy. The Italian choice-of-law codification of 1865, as that of 1942, was largely influenced by the nationality principle, as propounded by Pasquale Stanislao Mancini. According to Article 8 of the preliminary provisions of the 1865 Civil Code, succession upon death was governed by the national law of the deceased at the time of death, whatever the nature and the location of the assets.[16]

Besides its theoretical underpinnings, the nationality principle reflected important policy goals. In a period of massive emigration of Italians towards both European and extra-European countries, the use of nationality as a connecting factor – for both jurisdiction and choice of law – ensured access to Italian courts as well as the application of Italian law. In the area of succession, it allowed the heirs of Italian emigrants, in particular those who had remained in Italy, to have

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applicable by analogy to foreigners having their residence in Switzerland. This act would later be replaced by the Private International Law Act of 18.12.1987, RS 291.

13 Hague Convention of 05.10.1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

14 Art. VI of the Convention between Switzerland and the United States of America and Art. 8 of the Convention between Switzerland and the Persian Empire, above n. 6; Art. 10 of the Treaty between Switzerland and Greece, below section 3. Art. 5 of the Convention between Switzerland and France of 15.06.1869, denounced in 1992, above n. 1, did follow a jurisdictional approach like the 1868 Treaty; however, it imposed the application of the *lex situs* for immovable property.

15 Besides the 1961 Convention, above n. 13, we refer to the Hague Convention of 02.10.1973 concerning the International Administration of the Estates of Deceased Persons and the Hague Convention of 01.08.1989 on the Law Applicable to the Succession of Deceased Persons.

16 The applicability of the national law of the deceased was then reaffirmed in Art. 23 of the preliminary provisions to the 1942 Civil Code and, subject to a choice of law by the deceased, in Art. 46(1) of the Italian PIL Act of 1995.

access to Italian courts and, indirectly, to benefit from the application of Italian law on succession.

It is an easy guess that Article 17(3) of the Convention reflected the wishes of the Italian government. However, the provisions of the treaty are based on reciprocity (see Article 17(4)), which means that Swiss courts also have jurisdiction over inheritance disputes concerning the succession of a Swiss citizen who died with their last domicile in Italy.

2.1.2. An Unwritten Choice-of-Law Rule?

Although conceived as a jurisdictional rule, Article 17 of the Convention has come, over the years, to be interpreted as including an implicit choice-of-law rule, also based on the last nationality of the deceased.

This interpretation *praeter legem* was developed by the Swiss courts in a long series of decisions.[17] Although the reasons behind this solution are not clearly stated in the relevant rulings, they are understandable. Under Article 17(4) of the Convention, Swiss courts have jurisdiction to rule over the succession of a Swiss citizen with last domicile in Italy. In this case, Swiss choice-of-law rules would generally lead to the application of the law of the country of the last domicile. However, Swiss courts would take into account a *renvoi* ('*Rückverweisung*') resulting from the foreign choice-of-law rules.[18] This used to be the case, at the time of the relevant decisions, in the relationship with Italy. Indeed, under the then applicable Italian rules of private international law, the succession was governed by the national law of the deceased.[19] Swiss courts would accept this reference back and therefore finally apply Swiss law to the succession of a Swiss citizen domiciled in Italy. Dispensing with this complex reasoning, Swiss courts simply held that Article 17 of the Convention included an unwritten choice-of-law rule providing for the application of Swiss law as the last national law of the deceased.

For Italian courts, the question was, for a long time, devoid of practical importance. Certainly, the application of Italian law to the estate of Italian

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17 ATF 43 II 213, pp. 218–219; ATF 91 II 457, pp. 460–461; ATF 91 III 19, p. 24; ATF 98 II 88, p. 92; ATF 99 II 246, p. 252; ATF 136 III 461, p. 464; ATF 138 III 354, p. 356. See also H. Chenevard, *Le régime civil des successions dans les rapports italo-suisses*, Payot, Lausanne 1985, p. 28 et seq.; A. Bucher, in A. Bucher (ed.) *Commentaire Romand – LDIP/CL*, Helbing Lichtenhahn, Basel 2011, Art. 86–96 No. 12; T. Wüstemann and L. Marolda Martinez, 'Der schweizerisch-italienische Erbfall' [2011] *successio* 62, 66; T. Ballarino and I. Pretelli, above n. 10, 901 et seq.

18 This was already the case under Art. 28(2) of the 1891 Act (see above n. 12): see A. F. Schnitzer, *Handbuch des Internationalen Privatrechts*, vol. II, 3rd ed., Verlag für Recht und Gesellschaft, Basel 1950, p. 460 et seq. The same solution results now, even more clearly, from Art. 91(1) of the 1987 Swiss PIL Act.

19 See above n. 16.

citizens was one of the reasons why Italy insisted on conferring jurisdiction to the Italian courts.[20] However, this result was granted in any event by the Italian choice-of-law rules.[21] Therefore, it was not necessary to read a choice-of-law rule into the Convention.

2.2. ARTICLE 17 AS AN OUTDATED PROVISION

Notwithstanding its initial merits, Article 17 of the 1868 Convention (**Treaty 20**) has grown outdated over the years. Several reasons can be named for this ageing process.

2.2.1. Sociological Factors

It should be first noted that, although the number of Italians living in Switzerland continues to grow,[22] the sociological reality of the Italian community has evolved.

On one hand, an important segment of the Italians living in Switzerland (probably around one-fifth of them) is now constituted by descendants of emigrants of the second or third generation (called in Switzerland '*secondos*'). These individuals were born and grew up in Switzerland, and, for the majority of them, never had a domicile in Italy. This component of the Italian community in Switzerland will, for natural reasons, become increasingly important in the future.

On the other hand, a significant number of Italians with domicile in Switzerland acquire Swiss nationality. Thanks to another agreement with Italy,[23] they can do so without renouncing their Italian nationality. The tendency towards naturalization will probably grow, following recent legislative reforms facilitating the acquisition of Swiss nationality by descendants of immigrants of the third generation.[24]

In this context, Article 17(3) of the Convention appears outdated for several reasons.

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20 In one of its rare rulings on the 1868 Convention, the Italian *Corte di cassazione* noted, in a *dictum*, that a parallel between jurisdiction and applicable law was the goal of the Convention: Cass., 31.07.1867, No. 2038, *Riv. dir. int. priv. proc.* 1968, p. 174.

21 See above n. 16.

22 See, for instance, L. Monnat, 'Les Italiens reviennent s'installer en Suisse', in the newspaper *24Heures* of 17.05.2016, available at <https://www.24heures.ch/suisse/italiens-reviennent-s-installer-suisse/story/30217834> accessed 08.04.2019.

23 *Notenaustausch vom 24. April/1. Mai 1998 zwischen der Schweiz und Italien zur Erleichterung des Erwerbs des Doppelbürgerrechts*, RS 0.141.145.4.

24 *Bundesbeschluss über die erleichterte Einbürgerung von Personen der dritten Ausländergeneration of 30 June 2016*, BBl. [*Bundesblatt*] 2016 7581. The Swiss voters accepted this text in a referendum on 12.02.2017 with a majority of more than 60%.

According to a widely held opinion, the treaty provision is not applicable when the deceased held both Italian and Swiss nationality.[25] This conclusion corresponds to the judicial interpretation of an analogous provision included in the 1869 Consular Convention between Switzerland and France.[26] In the case of dual nationality, a plain application of Article 17 would confer jurisdiction to both Italian and Swiss courts, thus failing to meet its purpose. In the alternative, it would be necessary to establish which nationality is more effective, but the treaty fails to provide any indication in that respect.

Although this is not entirely clear yet, Article 17(3) is probably also inapplicable to the succession of an Italian who never had his/her domicile in Italy.[27] A literal reading seems to exclude its application in this case because that provision confers jurisdiction to the court of the place where the deceased had his/her last domicile in Italy before leaving the country. Considerations based on proximity and predictability support this interpretation: not only are Italian courts very poorly placed to rule on the succession of a person who never had his/her domicile in Italy, but their jurisdiction would probably be, in such a case, very surprising for the parties concerned.

As a result of these limitations, the succession of both dual nationals and descendants of immigrants normally fall outside the scope of the treaty provision. Accordingly, these cases must be dealt with under the private international law rules applicable in Italy and Switzerland. This not only reduces the practical importance of Article 17, but also leads to uncertainty and inconsistencies in the treatment of Italian citizens living in Switzerland.

Certainly, Article 17(3) continues to apply to the succession of Italians who immigrated to Switzerland from Italy (or after having lived a part of their life in Italy), provided that they did not acquire Swiss nationality. However, even in such cases, the application of the treaty provision produces unconvincing results when the close family members of the deceased were born in Switzerland ('*secondos*') and/or had acquired Swiss nationality. Why should the heirs of a person domiciled in Switzerland be denied access to Swiss courts despite their also being (and always having been) Swiss residents and even where they hold Swiss nationality? Of course, this question is even more legitimate where the assets (or the most important part of them, usually savings and the family home) are located in Switzerland and were acquired with the income of a Swiss professional activity.

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25 See B. Dutoit et al., *Répertoire de droit international privé suisse*, vol. III, Helbing Lichtenhahn, Bern 1986, p. 125; F.-H. Hool, *Les effets de la double nationalité en droit suisse*, Editions du Griffon, Neuchâtel 1949, pp. 63 and 83; H. Chenevard, above n. 17, p. 40 et seq. For a more detailed analysis, see the report by P. Franzina, in this book, above n. 9.

26 ATF 81 II 495, p. 499.

27 T. Ballarino and I. Pretelli, above n. 10, p. 897 et seq.

In these scenarios, the exclusive jurisdiction of Italian courts and the application of Italian law are surprising and, normally, rather inconvenient for the parties.

2.2.2. Radical Changes in the Private International Law Rules on International Succession Applicable in Italy

A second, even more significant reason for the obsolescence of Article 17 is the spectacular changes that the rules on international succession have gone through in Italy, first with the Private International Law (PIL) Act of 1995 and, more recently, with the European Succession Regulation.

The 1995 PIL Act was still largely based on the nationality principle. Thus, in matters of succession, the law applicable was, in principle, that of the deceased's last nationality (Article 46(1)). At the same time, the Act also introduced, for the first time, the right of the testator to opt for submitting the succession to the law of his/her habitual residence (Article 46(2)). By admitting a choice of law in the field of succession ('*professio iuris*'), Italian law was, historically, one of the first European legislations to join the traditional Swiss approach favouring party autonomy.[28] However, party autonomy was still restricted in Italy because the choice of a foreign law could in no case deprive the heirs of an Italian testator of the reserved share granted to them by Italian law, provided that they had their residence in Italy at the moment of death (Article 46(2)).

Following this legislative reform, Swiss courts were confronted with the question of whether an Italian citizen having his/her habitual residence in Switzerland could submit the succession to Swiss law. The Swiss Federal Court was thus forced to adapt its interpretation of the 1868 Convention. In a first ruling in 2010,[29] it held that it would be regrettable if 'a more than one century-old treaty' prevented the choice of the law applicable to the succession, while both the Swiss and the Italian private international law system allowed it.[30] Therefore, party autonomy had to prevail over the 1868 Convention, and the succession had to be governed, in the particular case, by the Swiss law chosen by the deceased.

It was not clear, from this first decision, whether the application of Swiss law was based on the admission of a 'reference back' ('*renvoi*', '*Rückverweisung*')

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28 The *professio iuris* is traditionally permitted in Switzerland. It was already provided for by Art. 22(2) of the 1891 Act (see above n. 12) and is now regulated in Arts. 87(2) and 90(2) of the 1987 PIL Act.

29 ATF 136 III 461, p. 465.

30 *Ibid*., p. 465: '*[s]arebbe […] insoddisfacente che, in un caso come quello in esame, la legge applicabile secondo il diritto internazionale privato vigente sia in Italia che in Svizzera […] venga accantonata in forza di un trattato ultra-centenario*'. With similar language, see A. Bonomi, 'La loi applicable aux successions dans le nouveau droit international privé italien et ses implications dans les relations italo-suisses' [1996] *RSDIE/SZIER* 503.

resulting from Article 46(2) of the Italian PIL Act[31] or on an autonomous rule. However, this was clarified in a second ruling in 2012,[32] where the Federal Court held that the validity and effects of the choice of law did not depend on Article 46(2) of the Italian Act but should be recognized irrespective of that provision. It follows that the choice of Swiss law is not subject to the limits provided for under the Italian Act to protect forced heirs.

This approach is remarkable because it implies a clear departure from the traditional reading of Article 17. While the admission of *renvoi* would have been a sort of compromise between the application of Italian law based on the 1868 Convention and the fact that the *professio iuris* had become possible in Italy after the 1995 law reform, the second ruling of the Federal Court clearly invites lower courts to allow an exception from the unwritten choice-of-law rule it used to read into the Convention. Implicitly, this means that the treaty does not necessarily impose the application of the national law of the deceased.

As shown by these decisions of the Swiss Federal Court, the Italian Act of 1995 had a not negligible impact on the interpretation of the 1868 Convention. This might be difficult to justify, in theory, under the rules on treaty interpretation.[33] Nevertheless, the new case law of the Swiss Federal Court should be approved because it is well adapted to the new legislative framework. *A fortiori*, courts should now take into account the entry into force of the European Regulation, which produces much more significant changes in the Italian legal system than the 1995 law reform.

On one hand, the Regulation not only allows for party autonomy in a much more liberal way than the 1995 Italian Act (i.e. without any specific protection for forced heirs, Article 22 SR), but also brings about a 'Copernican revolution' with respect to the traditional Italian approach: nationality as the main connecting factor has now been replaced by the last habitual residence of the deceased (Article 21(1) SR).

On the other hand, the Regulation not only determines the law applicable to the succession but also regulates the jurisdiction of the courts. Here also, the last habitual residence becomes the main criterion, while nationality can only be relevant on a subsidiary basis.

These changes are particularly relevant in the relationships between Italy and Switzerland. As a matter of fact, the solutions provided for in the Regulation are very similar to those that are traditionally followed in Switzerland: under

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31 In other terms, Italian law – applicable by virtue of the unwritten choice-of-law rules of the 1868 Convention – would 'refer back' to Swiss law by admitting the deceased's choice of the law of the habitual residence.

32 ATF 138 III 354, p. 356.

33 See P. Franzina, in his contribution on Italy, in this book, rightly pointing out that 'the changes in the private international law legislation of Italy and Switzerland can hardly be regarded as a justification for a change in substance of the Convention'.

the Swiss PIL Act, both jurisdiction and applicable law essentially depend on the last domicile of the deceased,[34] a criterion that is very close to the last habitual residence.[35]

Accordingly, if the 1868 Convention were not in force, the European Regulation, on one hand, and the Swiss PIL rules, on the other, would now lead to converging results. In the case of an Italian with last habitual residence and last domicile in Switzerland, Swiss courts would have jurisdiction and would normally apply Swiss law (Articles 86(1) and 90(1) of the PIL Act). In this case, Italian courts would have jurisdiction only if assets were situated in Italy (Article 10 SR), but, even then, they would also apply Swiss law (Article 21(1) SR). Italian law would become applicable, under both systems, only if the deceased had opted for it (Article 90(2) Swiss PIL Act, Article 22 SR). The situation is similar (although reversed) in the case of a Swiss citizen domiciled in Italy.

However, the newly created convergence between the two systems is disturbed by Article 17 of the Convention, which is still based on the nationality principle and therefore leads to opposite results.[36]

While this runs counter to the policy choices made in the two countries involved, it can also be quite confusing for the individuals involved. Thus, if an Italian with last domicile in Switzerland intends to draft his/her dispositions upon death, he/she might mistakenly assume, based on both the PIL Act and the European Regulation, that the succession will be regulated by Swiss law. If the testator is not informed of the existence of the 1868 Convention (and of its interpretation by the courts), he/she will neither anticipate that Italian law is applicable nor that this might be changed through a *professio iuris* in favour of Swiss law. This might lead to unexpected and unfortunate results: the dispositions upon death might prove invalid in whole or in part or be subject to claw back because of a violation of forced heirship rights.

While this is more likely to happen to laymen when they draft a holographic testament without a lawyer's assistance, legal practice shows that even professionals sometimes ignore the existence and the effects of the 1868 Convention.

It should also be stressed that the solutions enshrined by Swiss law and by the European Regulation, based on the last domicile and habitual residence, are more convincing than those of the 1868 Convention, in particular in the cases we have discussed above.[37]

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34 See Arts. 86(1) and 90(1) of the Swiss PIL Act.

35 See A. Bonomi, 'Le Règlement européen sur les successions et son impact pour la Suisse' [2014] II *Semaine judiciaire* 391, 403 et seq.

36 See also T. Ballarino and I. Pretelli, above n. 10, p. 918.

37 See above section 2.1.

2.2.3. No Compelling Reasons to Ensure the Application of National Law

There is also a third reason why Article 17 of the Convention is now outdated. As mentioned above, the nationality principle was traditionally perceived in Italy as a tool for the protection of Italian citizens living abroad. This concern was linked to the traditional conviction that the succession of Italian citizens should mandatorily be submitted to certain specific rules of Italian succession law, such as those prohibiting agreements as to succession ('*patti successori*'), mutual wills ('*testamenti congiuntivi*') and succession by substitution ('*sostituzione fideicommissaria*') and also those protecting forced heirs ('*legittima*').

However, the application of these rules in cases involving an international succession is no longer regarded as so crucial as it used to be.

With the entry into force of the Succession Regulation, it is now clear that an agreement as to succession concluded by an Italian citizen in conformity with the law of his/her habitual residence at the time of the execution of the agreement must be recognized in Italy, notwithstanding the prohibition of '*patti successori*' under Italian law (Article 25 SR). The same is also true for mutual wills based on an agreement between the testators (Article 3(1)(b) SR). The prohibition of 'succession by substitution' is also obsolete, at least since the entry into force in Italy of the Hague Trust Convention of 1985, and it can certainly no longer be considered as belonging to Italian public policy. As for the rules on forced heirship, while they were still protected against the choice of a foreign law by Article 46(2) of the 1995 Act, an Italian testator can now easily circumvent these rules by moving his/her habitual residence abroad; indeed, the Italian *Corte di cassazione* has ruled that they do not belong to Italian public policy.[38] In any case, the application of Swiss law is not problematic in this respect because it ensures a broad protection to the spouse and the children of the deceased.

In this context, there clearly is no need to ensure the application of Italian law to Italian citizens domiciled in Switzerland. That being so, there is also no compelling reason to impose on them the jurisdiction of Italian courts.

Of course, this is also true from a Swiss perspective. Under the Swiss PIL Act, subject to a *professio iuris* (Article 87(2)), Swiss courts normally do not have jurisdiction to rule on the estate of Swiss citizens domiciled abroad, unless the foreign authorities do not deal with such estate (Article 87(1)). It follows that even under the national private international law rules, the application of Swiss law is not granted in such situations.

[38] Cass., 24.06.1996, No. 5832, *Riv. dir. int. priv. proc.* 2000, 784.

2.3. WHAT IS NEXT?

In the light of the previous considerations, what is the future of Article 17 of the 1868 Convention (**Treaty 20**)?

A first immediate consequence of the developments mentioned above should be a change in the current judicial interpretation of Article 17 so as to include an implicit conflict rule. The time has come for the courts to clearly recognize that the Convention does not cover choice-of-law issues and does not impose any obligation as to the law applicable to the succession. This already follows from the literal wording of that provision, and it was also implicitly confirmed by the 2010 and 2012 rulings of the Swiss Federal Court.[39] When Italy introduced a limited party autonomy in international succession, the Swiss highest court had no hesitation in recognizing the *professio iuris* notwithstanding the silence of the treaty rule. Now that the old Italian rules on international succession have been entirely replaced by the European Regulation, courts should accept all the consequences and recognize that the traditional reading of the Convention cannot be maintained. This also corresponds to the opinion expressed by other Swiss authors.[40]

However, one also has to recognize that this more literal interpretation of Article 17, although certainly better than the one presently followed, also entails some problems.

On one hand, this reading of the treaty provisions will end the parallel between jurisdiction and applicable law. Accordingly, Italian courts, having jurisdiction over the succession of an Italian citizen domiciled in Switzerland under Article 17(3) of the Convention, will from now on have to apply the law of the last habitual residence as prescribed by Article 21(1) of the Succession Regulation: as a rule, and in the absence of a choice of Italian law, they will thus have to apply Swiss succession law. Reciprocally, Swiss courts will have to apply Italian law to the succession of a Swiss citizen domiciled in Italy, as prescribed by Article 91(1) of the Swiss PIL Act. This can be cumbersome in terms of time and cost.

On the other hand, Article 17 will continue to confer jurisdiction to the courts of the national country of the deceased, a result which is often at odds with the needs for proximity and predictability for the parties involved.

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39 See above n. 29 and 32.

40 See already A. Bucher, above n. 17, Art. 86–96 No. 12: '… *il semble légitime de déduire des réformes législatives survenues en Suisse et en Italie qu'il n'y a plus d'entente en matière de droit applicable, si bien que l'art. 17 al. 3 et 4 doit être confiné dorénavant à son texte, limité à la compétence*'. *Contra*: T. Ballarino and I. Pretelli, above n. 10, p. 919, who consider that the traditional solution should be maintained for the sake of uniformity: however, as mentioned before, uniformity can also be achieved today (and in a more consistent and satisfactory way) by applying the converging solutions provided now by the national systems of the two States concerned.

These shortcomings directly follow from the provision of Article 17 itself and cannot be adjusted by way of interpretation. Instead, they call for a modification of, or the withdrawal from, the treaty.

A Swiss or Italian withdrawal from the treaty could be envisaged as a solution of last resort, but it is certainly not the best way forward. On one hand, while Article 17 is outdated, there probably is an interest in preserving some of the other provisions of the 1868 Convention. On the other hand, even Article 17 still has some value since – as mentioned at the very beginning of this contribution – it prevents positive conflicts and parallel proceedings.

While the proximity between the European Regulation and Swiss PIL very much reduces, with respect to the applicable law, the risk of positive conflicts between Italy and Switzerland, these could still arise, notably, when Swiss authorities hold that the deceased's last domicile was in Switzerland, whereas Italian courts consider that the last habitual residence was in Italy. In such a case, the courts of both countries would entertain jurisdiction and they would both apply their own national law on the merits.

The probability of parallel proceedings is higher still because of the rules of subsidiary jurisdiction included in Article 10 of the European Regulation. When the deceased had his/her last domicile in a non-Member State, and if the estate includes assets located in the national State of the deceased, Article 10(1)(a) SR confers general (all-inclusive) jurisdiction to the latter State's courts. This very broad jurisdictional grant gives way to parallel proceedings in the third State of the last domicile and in the Member State of the deceased's nationality.

Parallel proceedings are always a waste of time and money; they are also a source of uncertainty and can create obstacles to the recognition and enforcement of decisions. This is true even when the courts of the two countries concerned will, in the end, apply the same law on the merits, as would frequently be the case in Switzerland and Italy under the ordinary choice-of-law rules of, respectively, the Swiss PIL Act and the European Regulation.

One should consider that, in both scenarios that we have just described, the rules on *lis pendens* and related actions included in the Regulation (Articles 17 and 18) are of no assistance because they are applicable only between Member States bound by the Regulation. As for the *lis pendens* rules included in the 1933 Convention between Italy and Switzerland, they will provide relief only under specific circumstances.[41]

The renegotiation of Article 17 can be the opportunity to tackle these problems and thus ensure a better coordination between Italian and Swiss courts. A revised treaty provision should ideally be based on the priority

[41] Art. 7 of the Convention of 03.01.1933 (see above n. 2) is subject to the condition that the court first seized has jurisdiction under Art. 2 of the same treaty. This will not always be the case in the scenarios we have sketched.

of the courts of the deceased's last habitual residence (or last domicile), and these courts should apply their own law, subject to a *professio iuris*. This would reflect the already prevailing solutions under both the Swiss PIL Act and the European Regulation. Moreover, in order to prevent parallel proceedings, Italy should be willing to restrict the application of Article 10 SR only to exceptional cases (e.g. when the Swiss authorities at the place of the last habitual residence of the deceased do not take the necessary measures).[42] Finally, a *lis pendens* rule should be added to the agreement in order to reduce the risk of positive conflicts and parallel proceedings.

Such a new treaty scheme would promote legal certainty for both Italian citizens living in Switzerland and Swiss citizens living in Italy, while respecting the fundamental policy choices now reflected in the national private international law systems of the States concerned.

Of course, to renegotiate the 1868 Convention, Italy would have to be authorized by the European Union, which is now exclusively competent to negotiate and enter into treaty relations with third States in the areas covered by the Succession Regulation.

3. ARTICLE 10 OF THE 1927 TREATY BETWEEN GREECE AND SWITZERLAND

Contrary to the treaty with Italy, the 1927 Convention between Greece and Switzerland (**Treaty 23**) includes an express choice-of-law rule. Under Article 10(3) of this treaty, when a Greek or Swiss citizen dies having his/her last domicile in the other Contracting State, the law of the country of his/her nationality is applicable to the whole of the estate, but only in so far as it concerns the determination of legal heirs and their portions or forced heirship rights ('*réserve*').[43]

At the time when it was negotiated, this provision was a compromise between Swiss PIL (which was based on domicile) and Greek PIL (which followed the national law but had not yet adopted, at that time, the unitary approach).[44]

The reference to national law is limited to the specific issues expressly mentioned in Article 10(3) (legal heirs and forced heirship).[45] All other aspects

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42 This corresponds to what is provided in Switzerland: under Art. 87(1) of the PIL Act, Swiss authorities only have jurisdiction to rule on the estate of a Swiss citizen domiciled abroad 'to the extent that the foreign authorities do not deal with such estate'.

43 On this provision see: B. Dutoit et al., above n. 25, p. 152 et seq.; A. Bucher, above n. 17, Art. 86–96, No. 15; O. Gaillard, 'Les relations entre la Grèce et la Suisse en matière successorale: la Convention d'établissement et de protection juridique du 1er décembre 1927' [2016] *RSDIE/SZIER* 53.

44 B. Dutoit et al. (see above n. 25), p. 152 et seq.; O. Gaillard, above n. 43, 59.

45 ATF 94 II 5, p. 11.

of the succession (e.g. the validity of wills[46] and succession agreements) are governed by the law designated by the ordinary choice-of-law rules of the two countries, i.e. in Switzerland by the law of the last domicile (Article 90(1) of the Swiss PIL Act) and in Greece by the law of the last habitual residence (Article 21(1) of the European Regulation). This will normally lead to a 'functional scission', i.e. to two different laws being applied to distinct aspects of the succession.[47]

However, the deceased can prevent the split by submitting the whole of the estate to his/her national law. In the past, the admissibility of the *professio juris* in a case governed by the treaty was recognized (in an *obiter dictum*) by the Swiss Federal Court.[48] This must be true *a fortiori* today as the *professio juris* is also possible now from a Greek perspective under Article 22 of the Succession Regulation. However, the Swiss Federal Court did not have the opportunity to clarify whether a Greek citizen domiciled in Switzerland can submit his/her succession to Swiss law by a *professio juris* and thus derogate from the treaty provision.[49]

Since the entry into force of the European Regulation, the treaty provision is outdated for the same reasons that we have stated with respect to Article 17 of the Convention between Italy and Switzerland (**Treaty 20**). In particular, in the absence of a *professio juris*, the connecting factor of the last nationality has now been given up in Greece as in the other Member States of the European Union. We see no reason why certain aspects of the succession of a Greek citizen domiciled in Switzerland and of a Swiss citizen domiciled in Greece should still be governed by the national law of the deceased, in derogation from the general choice-of-law rules applicable to all other international succession.

The reference to the deceased's national law is also an unnecessary source of complexity for the authorities in charge of the administration of the estate or as regards disputes between heirs. Indeed, contrary to the 1868 Convention between Italy and Switzerland (**Treaty 20**), the treaty with Greece (**Treaty 23**) does not affect jurisdiction, which continues to be governed by the ordinary rules in force in the two countries. As a consequence, the authorities of the deceased's last domicile or habitual residence, which are normally competent in Switzerland under Article 86 of the Swiss PIL Act and in Greece under Article 4 of the European Regulation, have to apply a foreign law (that of the nationality) to several important aspects of the succession. Besides the practical difficulties, this might even lead, in certain cases, to the application of foreign rules based on Muslim law, which may well be incompatible with Swiss public policy.[50]

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46 Ibid.

47 O. Gaillard, above n. 43, 61 et seq.

48 Ibid.

49 For a more detailed analysis of this question, see O. Gaillard, above n. 43, p. 75 et seq.

50 Muslim law is still applied in family and succession law in certain areas of Greece (Thrace) to members of the Turkish minority: see O. Gaillard, 'Les droits successions musulmans et leur

For all of these reasons, we think that Article 10 of the 1927 Convention should instead be deleted.[51] However, as mentioned in relation to the treaty with Italy, the renegotiation of the Convention between Switzerland and Greece might help in developing more innovative solutions.

4. CONCLUSION

As the previous analysis has shown, the solutions provided in the bilateral treaties concluded by Switzerland with both Italy (**Treaty 20**) and Greece (**Treaty 23**) are now outdated, in particular since the entry into force of the European Succession Regulation.

Although denunciation of these treaties could offer an easier solution, renegotiation would probably represent a more interesting option in order to improve the coordination between the legal systems of the countries involved and enhance legal certainty for individuals.

Another more ambitious approach would be to try to develop a broader treaty scheme also involving all other Member States bound by the Regulation, and possibly other third States. Indeed, the same risks of positive conflicts and parallel proceedings that have been noted between Italy and Switzerland also arise on a broader scale. Therefore, the treaty regulation tentatively sketched in this contribution[52] could also be suited to the relationships between Member States and third States at large. Of course, if such a broad approach is envisaged, it would have to be negotiated by the European Union itself, ideally under the auspices of the Hague Conference of Private International Law.

application par le juge suisse', in F. Bernard, E. Mcgregor and D. Vallée-Grisel (eds.), *Etudes en l'honneur de Tristan Zimmermann*, Schulthess, Geneva/Zurich 2017, p. 86. On the incompatibility of certain Muslim succession law rules with Swiss public policy based on discrimination, see ATF 143 III 51.

51 The same conclusion is reached by O. Gaillard, above n. 43, p. 77.

52 See above section 2.3.