

DONATION: SHORT NOTES BETWEEN ITALIAN CIVIL LAW AND EU PRIVATE INTERNATIONAL LAW

DONAZIONE: BREVI NOTE TRA DIRITTO CIVILE ITALIANO E DIRITTO INTERNAZIONALE PRIVATO EUROPEO

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Abstract: The donation in p.i.l. is an old problem in particular for the characterization and the current situation in certain EU Member States. This article briefly analyzes the relationship between the donation with Rome I Regulation and the recent EU Regulation 650/2012. Finally the article focuses on the Italian legal system and describes the problem, elaborating on the different solutions that might be adopted.

Key words: Donation, Conflicts of law, Diritto Internazionale Privato, Applicable Law, Rome I Regulation, EU Regulation 650/2012.

Riassunto: La donazione nel diritto internazionale privato è un vecchio problema sia per la qualificazione dell' istituto che per l' attuale scenario in alcuni Stati europei. L' articolo si prefigge di analizzare brevemente la relazione che la donazione ha con il Regolamento Roma I e con il recente Regolamento 650/2012. Infine l' articolo si sofferma sull' ordinamento giuridico italiano descrivendo le problematiche sottese, cercando di elaborare differenti soluzioni che potrebbero essere adottate.

Parole chiave: Donazione, Conflicts of law, EU Private International Law, Legge applicabile, Regolamento Roma I, Regolamento 650/2012.

Summary: I. Introduction; II. Basic remarks on donation in modern law; III. Focus on Italian legal system; IV. Tentative conclusions.

I. Introduction

1. The interpreter's task gets more difficult when he has to classify legal institution that has different points of contact with several countries.¹ These difficulties increase when the interpreter, in particular the court, has to classify an institution whose legal nature is different in certain EU Member States. A typical example is represented by donation that in some countries is qualified as a contractual obligation and in others as a unilateral act.² Consider the case of English common law where the qualification of donation as "contractual obligation" is not accepted by the English doctrine.³ In fact it is not recognized as a type of contract, but as a mere gift that is by definition gratuitous and therefore the donee has no contractual right to demand anything from the donor. In other EU Member States, such as Italy or

* I would like to thank Professor Maria Chiara Vitucci for very helpful suggestions. All errors are of course only mine.

¹ E. VITTA, *Diritto internazionale privato*, III, Utet, Torino, 1975, p. 203.

² For more see further § II.

³ W. MORRISON, *Blackstone's Commentaries on the Laws of England*, Cavendish Publishing Limited, London, 2001, § 442.

Germany, the donation is classified as a contract. In the light of these considerations this particular issue has always been of interest to European academics.

2. As a consequence it is clear that the interpreter, who interfaces with a donation with points of contact with different Member States, should proceed to analyse some preliminary issues, such as: the nature of the donation for the State of reference, and then decide if it can be defined as a “contractual obligation”; finally if that donation also touches on the system of succession and if the object of the donation is an immovable property.

3. These preliminary assessments are indispensable in order to determine which p.i.l. rule to apply.⁴ In fact the EU regulations do not give a specific classification of donation, nor rule a definition of “contractual obligations”.⁵ The last one is a concept that is not present in any p.i.l. instrument and the single national definitions have some elements of difference⁶, with all the consequences that that entails. In fact the term “contractual obligations” or “*obbligazioni contrattuali*” has, respectively in English and Italian legal system, a different meaning from the term “*vertragliche Schuldverhältnisse*” present in German version of the Rome I. The English and Italian terms “obligation” or “*obbligazione*” only refer to a contractual duty whereas the German word “*Schuldverhältnisse*” has a broader meaning and describes an entire complex not only of duty but also of rights.⁷

4. In light of the issues above, the unique application of a definition of “contractual obligations” for each Member States seems not practicable with the result that the only possible procedure is an autonomous qualification⁸ of a contractual obligation.⁹

5. Therefore considering the lack of a uniform definition at European level of “contractual obligation” as well as “donation”, the interpreter, in order to identify the applicable law, will have to make a careful examination of the all the circumstances and decide whether that donation for the State of reference may be classified as a “contractual obligation”. As a consequence only in this last case will the Rome I (or Convention)¹⁰ apply; otherwise it will be necessary to assess to apply another p.i.l. rule.¹¹

⁴ G. RAMONDELLI, “Le donazioni nel diritto internazionale privato”, in P. Rescigno (ed.), “*Trattato breve delle successioni e donazioni*”, Cedam, Padova, 2010, p. 823 and *ivi* for more references on donation in Italian p.i.l.

⁵ L. FUMAGALLI, “La Convenzione di Roma e la Legge regolatrice delle donazioni”, in *Rivista di Diritto Internazionale Privato e Processuale*, 1993, p. 593.

⁶ M. WELLER, “Rome I art. 1”, in G.P. CALLIESS (ed.), “*Rome Regulations commentary on the European Rules of Conflict of Laws*”, Kluwer Law International, Alphen a/d Rijn, 2011, p. 39. The Author takes in consideration the example of the contract “into which one party is forced by law, as it is sometimes the case for suppliers of water or electricity”.

⁷ Some author has also approximated a modification of the German version with a more appropriate term such as “*vertragliche Pflichten*” or “*vertragliche Verbindlichkeiten*”. On this point A. J. BÉLOHLÁVEK, *Rome Convention, Rome I Regulation: commentary, new EU conflict-of-laws rules for contractual obligation*, Huntington, N.Y., Juris, 2010, II, pp. 103 - 104.

⁸ *Ibid.*

⁹ *Ibid.*, 107. In the absence of a general definition understood as an EU concept of contractual obligation, the Author held that this could be defined as “a relationship based upon the free expression of will of two or more parties which [...] an intersection of these expressions is required”. In different way see M. McPARLAND, *The Rome I Regulation on the law applicable to contractual obligations*, O.U.P., Oxford, 2015, p. 183. According to the Author “the interpretation of the concept of ‘contractual obligation’ will be shaped by the guidance given by the Court of Justice of the European Union, which has yet to come”.

¹⁰ It should be pointed out that the starting point here is not an analysis of the Rome Convention, which still applies today to any contracts dated prior to 17 December 2009 as well as contracts entered into with Denmark. In fact Article 1 (4) of Regulation makes a clear distinction between “Member States to the Regulation” and “Member States of the European Union”. This clarification is based on the circumstance that Denmark, the United Kingdom and Ireland, by virtue of the *opting out* and *opting in* schemes, agreed upon in the drafting of the Treaty of Amsterdam, may refrain from the automatic application of Community regulations. To date Ireland and the United Kingdom have *opted in*, therefore, only Denmark remains excluded, and has not yet expressed the intention to join the Rome I. It follows that the Danish courts will still continue to apply the criteria dictated by the Convention, at least until Denmark formally agrees to adhere to the Rome I. Therefore the territorial aspect, which has always played a very important role in private international law and has become a very ambiguous term, to date, with Denmark which has not adhered to the Rome I, could still cause several problems in terms of interpretation. In the same way in G. PASSARELLI, *The Protection of the European consumer in Private International Law. Some General Remarks*, in *Contratto e Impresa/Europa*, 2014, pp. 204-205.

¹¹ *Contra* G. BIAGIONI, “L’ ambito di applicazione del regolamento sulle successioni”, in P. FRANZINA – A. LEANDRO (eds.), *Il diritto internazionale privato europeo delle successioni mortis causa*, Giuffrè, Milano, 2013, p. 38. According to the Author “le donazioni anche quando avvengano per atto unilaterale sarebbero sempre disciplinate dal Regolamento «Bruxelles I» e dal Regolamento «Roma I»”.

II. Basic remark on donation in modern law

6. The preliminary draft of the Rome Convention, explicitly excluded the p.i.l. rules from applying¹² “*en matière [...] de donation*”¹³, but then did not mention the matter in the final text of the Convention and in the same way neither did Rome I.

7. As seen, the application of the said p.i.l. rule is subject to the nature of donation as a contractual obligation for the State of reference and the extraneousness of matrimonial relationship, wills and succession.¹⁴ In fact the donation is qualified as a contract in some EU national legal system, as Italy (artt. 769 - 809 *Codice civile*), France (art. 894 *Code civil*) and Germany (§516 – 534 BGB), in others as in the case of Scotland has the nature of unilateral act.

8. The unilateral act¹⁵ can be qualified as contract and identifying the characteristic performer in this type of contract is certainly a less complex task for the interpreter than doing so in bilateral contracts.¹⁶ Indeed in reference to the Scottish legal system the task of identifying the applicable law is more complex. In fact where the donation is qualified as a unilateral act “in that only one party is actively involved in the promissory or donative act”¹⁷, it is important to point out that the interpreter in the delicate task of identifying the applicable law must consider that “in Scotland, the idea of unilateral denotes that is the number of parties required to constitute an obligation, so a contract can never be unilateral given that all contracts require the cooperation of two parties at least in order to be constituted”.¹⁸ The consequence is that in the case of donation with contact points with Scotland the provisions of the Rome I (Convention) could not apply.

9. Instead in EU Member States like France, Germany or Italy the contractual nature of the donation is uncontested, therefore as a general rule it should not cast doubt on the application of the rules of p.i.l. to the contractual obligations. Therefore, in absence of parties choice¹⁹ governs the party

¹² L. FUMAGALLI, “La Convenzione di Roma e la Legge regolatrice delle donazioni”, (5), p. 591.

¹³ See Giuliano – Lagarde, “Rapport concernant l’avant-projet de convention sur la loi applicable aux obligations contractuelles et non-contractuelles”, in *Rivista di diritto internazionale privato e processuale*, 1973, p. 208.

¹⁴ In reference to the Rome Convention see L. GATT, “Art. 1 della Convenzione sulla legge applicabile alle obbligazioni contrattuali del 19 giugno 1980”, in C.M. BIANCA – A. GIARDINA (eds.), *Nuove Leggi Civili Commentate*, 1995, p. 920 and in reference to Rome I Regulation see G. BIAGIONI, “Art. 1, in Commentario al Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (“Roma I””, in *Nuove leggi civili commentate*, 2009, p. 567.

¹⁵ F. SBORDONE, *Contratti Internazionali e Lex Mercatoria*, E.S.I., Napoli, 2008, p. 78. According to the Author “*Sollecita maggiori dubbi e riflessioni la prospettata inclusione nella disciplina di conflitto di cui al Regolamento Roma I delle obbligazioni derivanti da negozi unilaterali. In linea di principio, per un negozio unilaterale con elementi di estraneità fonte di obbligazioni non si potrebbe ricorrere alla disciplina di conflitto disposta dal Re.cit., poiché obbligazione di fonte non contrattuale; tant’è che la legge italiana di riforma del diritto internazionale privato (l. n. 218/1995) include nel Capo XI, dedicato alle obbligazioni non contrattuali, un articolo specifico per la fattispecie della promessa unilaterale (art. 58); per cui la promessa unilaterale, quale tipica e più frequente manifestazione di negozio unilaterale, è regolata dalla legge dello Stato in cui viene manifestata). Ciò premesso, sembrerebbe confermarsi l’idea per la quale qualsiasi manifestazione unilaterale di volontà idonea a produrre effetti giuridici regolativi degli interessi del dichiarante andrebbe piuttosto ricompresa in quest’ultima specifica disciplina di conflitto (art. 58, l. n. 218/1995). Giova, però, osservare che la varietà e la consistenza del fenomeno – tali da porre in alcune circostanze il negozio unilaterale addirittura in posizione di fungibilità con il contratto – potrebbero consigliare il ricorso alle norme di conflitto di cui al Regolamento Roma I”.*

¹⁶ C. S. A. OKOLI - G. O. ARISHE, “The Operation of the escape clauses in the Rome Convention, Rome I Regulation and Rome II Regulation”, in *Journal of Private International Law*, 2012, p. 516. In jurisprudence see Queen’s Bench Division (Commercial Court) 20 July 2005 case *Ark Therapeutics plc v. True North Capital Ltd.*

¹⁷ H. MACQUEEN / M. HOGG, “Donation in Scots Law”, in *Juridical Review*, 2012, p. 3.

¹⁸ M. A. HOGG, “Promise and Donation in Louisiana and Comparative Law”, in *Tulane European & Civil Law Forum*, 2011, p. 176.

¹⁹ Party autonomy is one of the most important principles in private international law and, as known, the parties, in a national or more frequently in an international contract, are free to choose whichever law they want especially when the contract has connections with more countries. About the party autonomy see M.J. BONELL, *Le regole oggettive del commercio internazionale. Clausole tipiche e condizioni generali* Giuffrè, Milano, 1976, pp. 261 ss.; G. DE NOVA, “Pluralità di fonti e tipi contrattuali nel commercio internazionale”, in U. DRAETTA / C. VACCÀ (eds.), *Fonti e tipi del contratto internazionale*, EGEA, Milano, 1991 p.

autonomy, the applicable law to the donation will be identified by starting the connecting factors of Article 4 (2) or (1 - c)²⁰ in the case of a donation of immovable property.²¹

10. However learned editors have suggested²² that the donation has the closest connection²³ with the country where the donor, that is the party obligated to carry out the characteristic performance,²⁴ has its habitual residence²⁵ at time of conclusion of the donation.²⁶ Nevertheless this cannot be considered a standard rule. In fact if the donation is made conditionally²⁷, it is necessary for the interpreter to localize carefully what is the characteristic performance of the donee or the donor and then apply the law of habitual residence of the characteristic performer.

11. Such a case could be one in which a wealthy Italian donor makes the donation of a small house in a small town in Germany to his young Ukrainian housekeeper (donee) with the obligation to assist his three children for a lifetime. In this particular case it appears equitable to consider that the “non-monetary performance”²⁸ (*Nicht-Geldleistung*) is that of the donee and the donor is not the person obliged to make the characteristic performance. Therefore in this circumstance the applicable law will be that of the habitual residence of the donee.

12. In the above example, the object of the donation is an immovable property, as a consequence in this case the interpreter could also apply the hard-and-fast rule of art. 4.1 (c) of the Rome I where the connection factor is one of the *lex rei sitae*,²⁹ so that as a consequence a law not close to the contract will be applied.

13. In light of these considerations it is clear that the interpreter in the task of identifying the law applicable to the donation must consider carefully all the circumstances at stake in order to apply the most equitable law.

2 ss.; H. Hoyer, “Der Anwendungsbereich des Einheitlichen Wiener Kaufrechts”, in H. Hoyer – W. Posch (eds.) *Das Einheitliche Wiener Kaufrecht. Neues Recht für den Internationalen Warenkauf*, Orac, Wien, 1992, p. 41; S. RODOTÀ, “Aspettando un codice?”, in *Rivista critica del diritto privato*, 1998, p. 6; R. PLENDER / M. WILDERSPIN, *The European Contracts Convention. The Rome Convention on the Choice of Law for Contracts*, Sweet & Maxwell, London, 2001, pp. 4 ss..

²⁰ F. FERRARI – J. A. BISCHOFF, *Article 4*, in F. Ferrari (ed.) *Rome I Regulation. Pocket commentary* Sellier, Munich, 2014, p. 144.

²¹ Instead will be applied Article 4 (1) of the Convention if the donation is prior to December 17, 2009. For more see *supra* (10).

²² DICEY & MORRIS, *The conflict of laws*, 15th ed. (L. Collins ed.), Sweet&Maxwell, London, 2012, no. 33-008, 1884; A. J. BÉLOHLÁVEK, *Rome Convention, Rome I Regulation*, (7), p. 244; L. FUMAGALLI, “La Convenzione di Roma e la legge regolatrice delle donazioni”, (5), p. 591.

²³ L.F. KUYVEN, “Convention de Rome du 19 juin 1980 sur la loi applicable aux obligations contractuelles - Article 4 (5) sur la loi applicable à défaut de choix - Note sur la décision de la Cour de cassation (France) du 19 décembre 2006”, in *Uniform Law Review*, 2007, p. 382; P. VOLKEN, “How Common are the General Principles of Private International Law? America and Europe Compared”, in *Yearbook of Private International Law*, 1999, pp. 85 ss.

²⁴ About the characteristic performance see H. U. JESSURUN D’OLIVEIRA, “Characteristic Obligation in the draft EEC Obligation Convention”, in *American Journal and Comparative Law*, 1977, pp. 303 ss.; F. VISCHER, “The Principle of the typical performance in International contracts and the draft Convention”, in K.LIPSTEIN (ed), *Harmonization of Private International Law by the E.E.C.*, (University London, 1978), pp. 25 ss.; M. MAGAGNI, *La prestazione caratteristica nella Convenzione di Roma del 19 maggio 1980*, Giuffrè, Milano, 1989, pp. 118 - 428; U. VILLANI, “Aspetti problematici della prestazione caratteristica”, in *Rivista di diritto internazionale privato e processuale*, 1993, pp. 514 ss.; M. VIRGÓS SORIANO, “La ley aplicable a los contratos internacionales: la regla de los vinculos estrechos y la presuncion basada en la prestacion caracteristica del contrato”, in *Estudios juridicos en homenaje al professor Aurelio Menéndez*, Civitas, Madrid, 1996, pp. 5289 ss.

²⁵ On this point with reference to Italian case law see Tribunale Venezia 28 febbraio 2003 in (2004) *Rivista di diritto internazionale privato e processuale*, pp. 272 ss.

²⁶ L. FUMAGALLI, “La Convenzione di Roma e la Legge regolatrice delle donazioni”, (5), p. 599.

²⁷ This type of donation is in force in Italian and German legal (525 BGB) systems.

²⁸ J. HILL, “Choice of law in contract under the Rome Convention: the approach of the UK Courts”, in *International Comparative Law Quarterly*, 2004, p. 334. The Author mentioned the Scottish case *William Grant & Sons International Ltd vs. Marie Brizard Espana SA*, [1998].

²⁹ G.P. CALLIENS, *Rome Regulations Commentary on the European rules of the conflict of laws*, Kluwer Law International, Alphen a/d Rijn, 2011, p. 92.

III. Focus on Italian legal system

14. Given that in some Member States, such as Italy, the donation is a contract³⁰, it should be noted that the interpreter may still in some circumstances not apply the rules of p.i.l. on the contractual obligations³¹ to a donation. This can happen for example when the court does not consider the gift as a donation because it lacks the subjective requirements (*animus donandi*) and objective requirements (enrichment of a part and impoverishment of another)³², or in other circumstances. This is a case of those donations that are not derived from the contract or of those that are included in the field of family law and inheritance.³³

15. Certainly the “*donazione obnuziale*”³⁴ according to some Authors³⁵ are not included within the scope of the Rome I (Convention), regulated by art. 785 *Codice civile*, i.e. the agreement between future spouses for purposes of governing the financial positions subsequent to marriage.³⁶ The reasons underlying the exclusion of this type of donation are twofold: firstly it can be assessed as a unilateral act (art. 1334 *Codice civile*) with the result that the effects are dependent on the celebration of the marriage³⁷; secondly the close relationship that this donation has with the marriage certificate and as such not the target application of the Rome I (Convention). Indeed other authors³⁸, divide the “*donazione obnuziale*” into two subcategories, one framed as an agreement between future spouses and the other established by a third party in favor of one or both spouses and as such as a simple donation and subject to discipline referred to in Rome I (Convention).

16. The exclusion operates also with reference to the “*donazioni tra coniugi*”³⁹ which, following the repeal of Article 781 c.c.⁴⁰, may take the form of “*donazioni indirette*”.⁴¹ This is when acts between spouses produce the economic effects of a donation, although they are not donations from a legal point of view.

17. Finally also “*mortis causa*” donations, permitted by the laws of some Member States but not by the Italian law⁴², stay out of the scope of the Rome I (Convention)⁴³ because they aim to deal with the

³⁰ According to Art. 769 *Codice civile* “A gift is a contract by which, in the spirit of liberality, one party enriches the other, disposing of one of his rights in the other’s favor or assuming an obligation toward him”. The translation is made by S. BELTRAMO, *The Italian Civil Code*, Thomson Reuters, 2012, pp. 169 – 170.

³¹ G. LAURINI, “I limiti di applicabilità della Convenzione”, in *Rivista del Notariato*, 1983, pp. 56 ss.

³² M. VELLANO, “La donazione nel diritto internazionale privato”, in G. BONILINI (ed.) *Trattato di diritto delle successioni e donazioni*, Giuffrè, Milano, 2009, pp. 1285 – 1286.

³³ G. RAMONDELLI, *Le donazioni nel diritto internazionale privato*, (4), p. 831.

³⁴ In English “Gift in contemplation of marriage” according to the translation of S. BELTRAMO, (30), p. 173.

³⁵ E. VITTA (1), pp. 203 ss.; G. ZICCARDI CAPALDO, “La donazione *propter nuntias* e la sua disciplina nel diritto internazionale privato italiano”, in *Rivista di diritto internazionale privato e processuale*, 1973, p. 601 ss.

³⁶ O. LOMBARDI, Art. 785, in G. PERLINGIERI (ed.) *Codice civile annotato con la dottrina e la giurisprudenza*, E.S.I., Napoli, 2010, pp. 815 ss.

³⁷ *Ex multis* A. TORRENTE, “La donazione”, in U. CARNEVALI /A. MORA (eds.), *Trattato di diritto civile e commerciale*, Giuffrè, Milano, 2006, pp. 197 ss.; L. GATT, *La liberalità*, II, Utet, Torino, 2012, p. 43 footnote n. 80.

³⁸ L. GATT, “Art. 1 della Convenzione sulla legge applicabile alle obbligazioni contrattuali del 19 giugno 1980”, (14), p. 922.

³⁹ Unofficial English “donations between spouses”.

⁴⁰ Repealed with the Constitutional Court ruling. June 27, 1973 n. 91 because was declared unconstitutional.

⁴¹ Governed by art. 809 *Codice civile* that can be qualified as other acts of liberality.

⁴² In reference to circumstance in Italian p.i.l. national regulation see N. BOSCHIERO, “Riforma del sistema italiano del sistema di diritto internazionale privato, sub Art. 56 Donazioni”, in *Rivista di Diritto Internazionale Privato e Processuale*, 1995, p. 1171.

⁴³ M. VELLANO, “La donazione nel diritto internazionale privato”, in G. BONILINI (ed.) *Trattato di diritto delle successioni e donazioni*, Giuffrè, Milano, 2009, p. 1295. According to the Author the opinion of whole Italian legal doctrine is that this type of donation must be excluded by the application of Rome I (Convention). In the same way with several reservations A. BONOMI, “Successions internationales: conflits de lois et de jurisdictions”, in *Recueil des cours*, 2010, pp.284 ss.; J. RE, “Sui requisiti di forma delle donazioni nel diritto internazionale privato”, in *Famiglia e diritto*, 2013, p. 469.

allocation of goods in view of death.⁴⁴ Indeed some Italian doctrine⁴⁵ raised an objection, pointing out that the donations subject to the premature death of the donor have legal nature of *atto inter vivos*, with the result that the Rome I (Convention) will be applied; otherwise the EU Regulation 650/2012⁴⁶ will be applied. As a consequence the rules on succession and not Rome I (Convention), are applied in those Member States where the donation “*mortis causa*” is described as a juridical act connected to the succession.⁴⁷

18. Finally, a brief mention deserves to be made to the “*patto di famiglia*”.⁴⁸ This not only to the various parties involved for various reasons and the strong connection with the “donation”⁴⁹ but also for the implications for the agreements as to succession.⁵⁰ In fact these issues may give rise to many doubts of interpretation in the enforcement of p.i.l. rule.

19. According to some academics the “*patto di famiglia*” is “*il nuovo contratto tipico a forma solenne con il quale un imprenditore trasferisce, con effetto immediato, senza ricevere alcun corrispettivo, in tutto o in parte la propria azienda [...] ad uno o più discendenti*”.⁵¹ Although it has strong implications and interference with inheritance matters, some academics⁵² believes that the “*patto di famiglia*” should be included in the application of the Rome I for its contractual nature. This interpretation is shared not only because the “*patto di famiglia*” is by definition a contract but also because the EU

⁴⁴ A. BONOMI, “Donazione (diritto internazionale privato)”, in *Enciclopedia diritto aggiornamento*, Giuffrè, Milano, 1998, pp. 307 ss.; L. FUMAGALLI, “La Convenzione di Roma e la Legge regolatrice delle donazioni”, (5), p. 595.

⁴⁵ *Ex multis* G. RAMONDELLI, “Le donazioni nel diritto internazionale privato”, (4), p. 842.

⁴⁶ 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. This Regulation shall apply to the succession of persons who die on or after 17 August 2015. On this EU Regulation see *ex multis* T. BALLARINO, “Il nuovo regolamento europeo sulle successioni”, in *Rivista di diritto internazionale*, 2013, pp. 116 ss.; A. BONOMI, “Il regolamento europeo sulle successioni”, in *Rivista di diritto internazionale privato e processuale*, 2013, pp. 249 ss.; P. FRANZINA, “Ragioni, valori e collazione sistematica della disciplina internazionalprivatistica europea delle successioni mortis causa”, in P. FRANZINA / A. LEANDRO (eds.), *Il diritto internazionale privato europeo delle successioni mortis causa*, Giuffrè, Milano, 2013, p. 3. P. LAGARDE, “Les principes de base du nouveau règlement européen sur les successions”, in *Reveu critique*, 2012, pp. 691 ss.

⁴⁷ G. BIAGIONI, “L’Ambito di applicazione del regolamento sulle successioni”, in P. FRANZINA – A. LEANDRO (eds.), (11), p. 39; J.G. MILLER, *International Aspects of Succession*, Ashgate/Dartmouth, London, 2000, p. 47, according to which “the *mortis causa* donation should be classified as an *inter vivos* transfer for the purpose of traditional conflict rules”.

⁴⁸ This juridical act was introduced in Italy with the Law n. 55 14.2.2006 and regulated by art- 768-*bis* ss. According to S. BELTRAMO, (30), p. 768, this legal institution is translated as “Family Pact”.

⁴⁹ S. DELLE MONACHE, “Spunti ricostruttivi e qualche spigolatura in tema di patti di famiglia”, in *Rivista del Notariato*, 2006, pp. 899 ss.; A. MERLO, *Il patto di famiglia*, in CNN notizie, February 14 2006, p. 4; C. CACCAVALE, “Appunti per uno studio sul patto di famiglia: profili strutturali e funzionali della fattispecie”, in *Notariato*, 2006, p. 304. *Contra* G. PERLINGIERI, “Il patto di famiglia tra bilanciamento dei principi e valutazione comparativa degli interessi”, in *Rassegna di Diritto Civile*, 2008, p.152 ss. According to the Author “*Il patto di famiglia non può essere considerato come una donazione, sia pure modale, perché il profilo di liberalità, pur caratterizzante, non risolve né esaurisce la funzione del negozio*”.

⁵⁰ This is a “*atto a titolo gratuito*” that can’t be qualified as “*patto successorio*”. On this topic see *ex multis* F. PADOVINI, “Fenomeno successorio e strumenti di programmazione alternativi al testamento”, in *Rivista notarile*, 2008, pp. 1007 ss.; F. GERBO, “Il patto di famiglia: problemi dommatici. Loro riflessi redazionali”, in *Rivista notarile*, 2007, pp. 1269 ss.; F. GAZZONI, “Appunti e spunti in tema di patto di famiglia”, in *Giustizia civile*, 2006, p. 217 ss.

⁵¹ N. DI MAURO/V. VERDICCHIO, “Comment to art. 768-*bis* c.c.”, in E. MINERVINI (ed.), *Il Patto di famiglia, Commentario alla legge 14 febbraio 2006 n. 55*, Giuffrè, Milano, 2006, p. 23 - 24. On the same point see U. LA PORTA, “Il patto di famiglia. Struttura e profili causali del nuovo istituto tra trasmissione dei beni di impresa e determinazione anticipata della successione”, in U. LA PORTA (ed.), *Il Patto di famiglia*, Giappichelli, Torino, 2007, p. 4. According to the Author “*è un contratto mediante il quale l’imprenditore individuale ovvero titolare di partecipazioni sociali, eletto il discendente ritenuto maggiormente idoneo alla prosecuzione della gestione del patrimonio familiare, assegna a costui i beni anzidetti*”.

⁵² M. VELLANO, “La donazione nel diritto internazionale privato”, in G. BONILINI (ed.) *Trattato di diritto delle successioni e donazioni*, Giuffrè, Milano, 2009, p. 1309; D. DAMASCELLI, Il “patto di famiglia” nel diritto internazionale privato, in *Rivista di diritto internazionale privato e processuale*, 2007, p. 619 ss. According to the Author this juridical act is a contract that is not inserted in the legal aspects of successions. *Contra* G. BIAGIONI, “Art. 1, in Commentario al Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (“Roma I””, (14), p. 568; F. VISMARA, “Patti successori nel Regolamento (UE) n. 650/2012 e patti di famiglia: un’ interferenza possibile?”, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 811. According to the Author: “*il patto di famiglia può rilevare ai fini del regolamento n. 650/2012 o nell’ ipotesi in cui venga qualificato come accordo con finalità di divisione*”.

lawmakers within the next EU Regulation 650/2012 governing succession, not encompassing⁵³ it which cannot be qualified as an agreement as to succession⁵⁴ in its scope.

IV. Tentative conclusions

20. On the basis of the above considerations, it is clear that the court could have difficulty in to identify the applicable law when it is faced with a donation that has points of contact with various countries. This is not only because this juridical act, as seen, has a different characterization in the Member States but also because the rules of EU p.i.l. do not allow a clear and simple identification of the applicable law as well as of the term “contractual obligations”. However it requires some more attention, and in particular whether that donation can also fall under Rome I or should apply other p.i.l. rules.

21. These problems are magnified by the fact that the “escape clause” of Article 4 (3) of the Rome I can be applied only in particular circumstances. Therefore the interpreter discretionary power is limited in the task to identify the most equitable law. Hence the critical analysis of the strict criteria adopted by the framers of EU lawmakers on rules of p.i.l. subject to contractual obligations.

In fact the rigid and inflexible escape clause characterized by a “manifestly”⁵⁵ closest connection with another country, limits the discretionary power of the interpreter. The word “manifestly”, in the opinion of BEAUMONT / McELEVY, means “obvious”⁵⁶ or in the opinion of CALVO CARAVACA / CARRASCOSA GONZÁLEZ, when there is “*a vinculaciòn purament formal, nominal, fugaz, anecdòtica y aparente*”.⁵⁷ In a few words the “escape clause” can be applied when the circumstances are clear or evident to the eyes of the interpreter. Therefore in a case such as the example above⁵⁸ where there is a donation and the connection is not obvious and the circumstances are unclear then, in absence of parties choice, the interpreter’s task is obstructed by rigid rules.

22. In conclusion a flexible “escape clause” could guarantee more discretionary power to the court and at the same time to the application of the most equitable law that is closely connected to the contract. Therefore the need for flexible p.i.l. rules⁵⁹ and the importance of the rule of the interpreter in the task of identifying the applicable law, emerge particularly when the court is faced with a legal institution as donation that has a different legal nature in the Member States and where is important also to identify the more appropriate p.i.l. instrument in order to apply the most equitable law.

⁵³ EU Regulation 650/2012 art. 1. 2 (g) “The following shall be excluded from the scope of this Regulation: property rights, interests and assets created or transferred otherwise than by succession”. Art. 1.2.(h) “questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members”.

⁵⁴ According to E. MINERVINI, “Comment to art. 458 c.c.”, (51), pp. 16 and 19 the “patto di famiglia” is neither a “*patto successorio istitutivo*” nor “*un patto successorio dispositivo o rinunziativo*”. On the same way see also F. GAZZONI, (50), p. 217.

⁵⁵ By some Authors defined as “key change” see P. R. BEAUMONT - P.E. McELEVY, *Private International Law*, Thomson Reuters, Edinburg, 2011, p. 480.

⁵⁶ *Ibid.*

⁵⁷ A. L. CALVO CARAVACA – J. CARRASCOSA GONZÁLEZ, *Derecho Internacional privado*, Comares, Granada, 2014, p. 863.

⁵⁸ See the above mentioned example in § II.

⁵⁹ “F. SCHWIND, *Problems of codification of Private International Law, in International and Comparative Law Quarterly*, 1968, p. 434. According to the Author: “In p.i.l. flexibility seems to be of preponderant importance. In fact is important that provisions are kept sufficiently flexible”; G. PASSARELLI, *The Voluntary assignment of receivables in private international law, in Studi sull’ integrazione europea*, 2014, p. 336.