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Cross-Border Succession Issues: A Comparison of Common Law and Italian Legal Systems

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Introduction

As a dual qualified solicitor practising in England and in Italy, I am often asked to advise on inheritance cases that involve cross-border succession aspects. The legislative framework governing succession can differ greatly from a national and international perspective.

This topic is becoming more and more common given the global society we now live in and the rapid increase in the movement of people throughout the world. Europe's increasing focus on international succession triggered the European states' governments – except for the UK, Denmark and Ireland – to regulate the varying rules under EU Regulation 650/12 (Brussels IV).

Scission and unitary principles

In general, in common law systems, the so-called "scission" principle applies to successions, whereby succession rules differ depending on the type of assets in inheritance and the succession of an estate is subject to the law of the country where the property is located whilst movable assets are subject to the law of residence of the deceased.

Italy on the other hand follows the European rules set out in Regulation (EU) no. 650/12 (Brussels IV), and adopts the unitary principle, which is concerned with the residence of the deceased and not the type of assets comprising the estate. The law therefore governs the whole state of the deceased, applying both the rules concerning general jurisdiction where the deceased had his habitual residence at the time of death and the general rules of being connected with a particular State (respectively Articles 4 and 21 of Regulation 650/12).

The meaning of "habitual residence" is open to interpretation and essentially comes from the wish of an individual to be resident in a certain country on a habitual basis. That intention to stay habitually a specific State can be demonstrated by a series of data such as opening a bank account, taking out mid to long term loans, requesting an immigration visa or even citizenship in that country.

In order to correctly identify the differences between civil law and common law systems, we must first focus on the means of disposing of an estate.

Means of disposal

The inheritance mechanism under the common law system does not include the concept of succession, which is, conversely, a central part of the civil law system and does not even acknowledge the legal concept of heir, from the civil law inheritance system.

It follows that there does not exist a mechanism whereby we have a full successor, as in *universum ius.* Beneficiaries of an inheritance in common law countries receive the estate once the relevant debts have been paid off, which either an administrator or an executor will have completed, for both testate and intestate estates.

In order to make a comparison with civil law systems, we could argue that in common law countries, succession comes about via a "specific title" via designated "legatees", a figure contemplated by civil law to distinguish between full succession or specific succession, which means the inheritance is limited to the assets or titles received, in respect of which such legatee shall not be held liable beyond their legal power.

In order to compare common law and Italian laws governing succession, demand is increasing for legal assistance in relation to a succession where the deceased had been living in a common law country (hence the scission principle applies) whose estate also included property in Italy and a will drafted in accordance with the laws of their country of citizenship, which does not make reference, for example, to the spouse or children as beneficiaries.

Provided that a will in Italy satisfies validity requirements, which is to be assessed in view of the guidance provided by the criteria set out in article 27 of Regulation 650/12, the question of the correct governing law also comes up in relation to the succession of the property in Italy.

This takes us to an interesting case study, which allows us to examine the issues more in detail.

Case study

Mr Smith, who is resident in London, is a widower and has a son who lives in New York. He dies bequeathing his estate to his butler pursuant to a UK will. The estate includes bank

accounts in England and a house in Capri, Italy.

In accordance with European Regulation 650/12, the governing law should be the system of the country where the deceased was habitually resident prior to death; hence in this case the laws of England & Wales apply to the entire succession of the deceased's estate.

However, as mentioned above, the UK did not adhere to the aforementioned Regulation, and so the principles established by conflict of laws apply in this case: the succession of the property in Italy would thus be subject to the laws of the state in which the land is situated, hence the laws of Italy. In particular, as the governing law with respect to the property in Capri, Italian law would apply to the entire succession of the deceased's estate, from the voluntary disposition of an estate upon death, to the incapacity to dispose of or receive property through succession, through to the appointment of individuals to administer an estate, the interpretation of wills and invalid instructions included in the disposition of an estate, as well as the formal validity of a will – further to Article 27 of Regulation 650/12 – and the acceptance or refusal of an inheritance, succession rights and declarations of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration in accordance with Article 28 of Regulation 650/12.

According to Regulation 650/12 therefore, under its conflict of laws provisions, it is possible for the laws of a third country to apply to determine questions of title, such as the UK. In that case, private international law provisions of the said country must be heeded and if they include reference to the laws of a member State (in this case, Italy), then such referral must be accepted for the sake of international consistency. It is an evident exception from the above-mentioned principle of renvoi governed by Article 34 of Regulation 650/12. In particular, according to that Article, when conflict of law rules make a renvoi to the law of any third State, consideration must be given to the rules of private international law in that State, when they make reference to the laws of a country whose laws grant the said country jurisdiction over the matter.

It follows that the Italian laws governing succession would apply to the inheritance of the property in Capri. In particular, the forced heirship system in Italy would apply, hence involving the deceased's immediate family (spouse, children and descendants). Although there was a UK will, it is nonetheless necessary to apply Italian succession rules, regardless of the fact that the UK system (albeit for a few exceptions) – under the Inheritance (Provision for Family and Dependants) Act 1975 – does not automatically protect the deceased's close family members.

As such, provided that all law requirements are satisfied, Mr Smith's son could take action against any reduction of his claim to the estate in order to apply the succession rights afforded to him by law at the time of the succession of his father's estate.

Forced heirship

In terms of forced heirship, the following case is of particular interest.

Mrs Alice, an Italian citizen habitually resident in London and married with two children (both of whom were resident in Sydney, Australia), passed away leaving an Italian will, which left all her estate to just her husband.

Mrs Alice had a brother who lives in Paris, to whom she did not want to leave any property or assets. Her estate includes bank accounts in Italy, a property in Florence and one in Liverpool. Her Italian will expressly provides that her brother must not inherit any of her estate and opts for Italian law to be the governing law, in accordance with Article 22 of EU Regulation 650/12, which affords individuals the right to choose as the governing law for their inheritance the laws of the country where they had citizenship at the time of their death. That choice of governing law must be made expressly by way of a disposition of property upon death or be discernible from the clauses of the said disposition, and the substantial validity of the deed whereby the choice of governing law was made is governed by the chosen law.

Given that Mrs Alice opted for the law of the country where she was a citizen – Italy – to govern her succession, and the substantial validity of the will to be assessed, also in this case, in light of the criteria set forth by Article 27 of Regulation 650/12, she wanted to confirm the general application of the law linked to her citizenship.

From an Italian law perspective, Italian law will govern the entire succession for Mrs Alice, in accordance with what is known as the "unitary" principle in inheritances regulated at European level by Regulation EU 650/12.

On the one hand, although there is no conflict of law issue with respect to the bank accounts or the Italian property – which are subject to Italian law for both the UK and the Italian systems – the UK system would govern the property in Liverpool and it would be necessary to make recourse to the English courts to obtain a grant of representation. As such, there will be a conflict of law regarding the property in Liverpool, which cannot be resolved in the current circumstances because the UK does not implement EU Regulation 650/12.

Mrs Alice's children have formally been excluded from inheriting her estate as she wanted to leave everything to her husband. That exclusion consisted in the testator failing to make reference in the will to all lawful heirs (the surviving spouse, children and descendants, ancestors), so everyone according to the cases subject to Italian law have a right to the

estate of the deceased.

The protection of the inheritance of Mrs Alice's children provided for by the Italian Civil Code (Article 536 et seq.), shall allow them – provided that all the statutory requirements are satisfied – to act against the provisions of the will that prevent their inheritance of the estate and to obtain the portion of such estate that they are entitled upon the distribution of their mother's estate.

The situation is somewhat different in terms of the protection of the inheritance rights of Mrs Alice's brother, who as we saw above, was expressly excluded from her will. Given that he does not fall within the relatives of the deceased who are entitled to a portion of the estate under Italian law, who have the option of pursuing action against unfavourable will provisions blocking their inheritance due under Italian law, he will not have any right to make an inheritance claim against his sister's estate.

One option he could pursue in terms of the estate in the UK – the flat in Liverpool – as well as her children, would be to start an action before the English courts pursuant to the Inheritance (Provision for Family and Dependants) Act 1975, provided that they satisfy the requirements set forth by the law for lodging that kind of claim.

Difference in systems

In continental law, the system affording inheritance protection to the close family of the deceased stems from French law, which was based on family co-ownership. In England on the other hand, the legal system was based on the exclusive ownership of the King of all land, as had been conquered, which could then be used by tenants. Initially, therefore, inheritance upon death in a concession relationship was regulated by laws, until the Statute of Wills 1540, which introduced the system of determining inheritance rights via wills.

In any event, the legal protection granted under the Inheritance (Provision for Family and Dependants) Act 1975 is based on principles different from Italian inheritance provisions. In terms of the English system, in light of the absolute freedom to make a will under the system, it was only with the Inheritance (Family Provisions) Act – which subsequently became the Inheritance (Provision for Family and Dependants) Act 1975 – and the Matrimonial Causes Act 1965, that the Chancery Division of the High Court was given the power to amend the provisions of wills as well as intestate estates, at the application of dependants. Unlike with "legitimate heirs" under Italian law, on the one hand the English system, rather than reducing inheritances, acts directly and exclusively on the net assets comprising the deceased's estate. On the other hand, it does not determine in advance a set portion of the estate to be inherited, as that depends on the portion decided upon by the relevant Judge on the basis of the evidence submitted by a dependant in their application.

Role of executors and trustees

Another important aspect for consideration is the role played by executors and trustees in common law wills.

As we touched on above, one of the consequences of the lack of the figure of heir is that the estate's debts have to be liquidated by other subjects, who are the administrator (for intestate estates) or an executor, where a valid will has been executed.

Common law systems do not distinguish between an executor and a trustee, mainly because the position of executor is substantially entirely the same as that of trustee. They have power over the assets comprising an estate and are tasked with paying off whatever debts encumber on such an estate, after which have to determine the allocation of the deceased's estate to the successors. From a technical perspective, they receive the assets from the executor, not – as with civil law systems – from the deceased. An executor holds a fiduciary position, as does a trustee, and laws often treat both such figures as if they were one, single position.

This is connected with the topic in discussion here, in terms of the progress made under civil law systems concerning the executor of a trust, whereby the testator appoints a trustee and tasks the same with a series of actions in favour of all the beneficiaries. It may take a number of years for all such actions to be completed, and the process is different from the system whereby a testator disposes of his/her estate via an executor.

At this stage we need to closely examine the difference between executor under common law and an executor under Italian law.

Unlike a common law executor, an executor under Italian law does not have ownership rights over an estate and cannot keep possession of an estate for more than two years. Conversely, the Italian executor is granted the power by the testator to dispose of assets, to pay off debts, to divide property and is essentially a fiduciary figure pursuant to Article 710 of the Italian Civil Code.

In practice, it is common to assist clients who have executed a will in the UK but own property in Italy and it is necessary to use the executor and trustee formula to determine the relevant inheritances. Under Italian inheritance rules, the appointment of an executor and a trustee is interpreted by the Italian tax authorities as setting up a trust, rather than what the testator wanted, i.e. the mere appointment of an executor for the will, even though they use the names taken from the English system of *executor* and *trustee*.

The issue of the correct interpretation of the role of executor and trustee is not just a theoretical one, as it triggers important and, at times the opposite, practical repercussions. Indeed, in cases where a property in Italy inherited under an English will is then disposed of, the executor and the trustee are summoned to oversee the process required under Italian law for inherited property, which means an application has to be filed with an Italian judge and authorised by the latter pursuant to Article 703 of the Italian Civil Code and Article 747 of the Civil Procedure Code.

In following the above approach however, we are led to the incorrect interpretation of the provisions set out under an English will and rightly so – given that English law does not provide for court authorisation and given the legal doctrine of *locus rei sitae* – the natural consequence of that interpretation will be the declaration of the lack of power to authorise such sale by the Italian judge, whose powers indeed do not include authorising a sale in favour of an executor and a trustee, given that the latter owns the property, not just possesses it.

Conclusion

To conclude, applying Italian law, the appointment of an executor and a trustee, at least with respect to property in Italy, is not entirely consistent with what the role of an executor is in Italy. Often the right solution is to "skip" registering the title of a property with the Property Office in that capacity, considering directly the beneficiary heir as owner of all effects, especially when the inheritance to the beneficiary is made from the residuary estate.

The above demonstrates that the interpretation of applicable laws in different countries and the resolution of resulting conflicts form an inevitable part of a lawyer's scope of instructions when assisting on cross-border transactions.

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