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Cross-border successions: the Italian perspective

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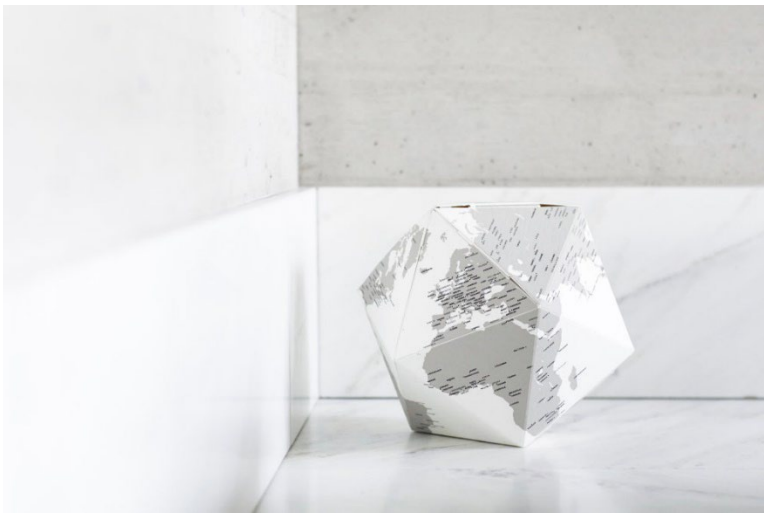
In a context where global mobility and asset relocation are constantly trending, cross-border successions together with the related technicalities have become increasingly important.
The adoption of the European Regulation No. 650/2012 provides for a uniform criterion to ensure the identification of the relevant succession governing law. However, the internal civil and tax law rules, such as the Italian tax exemption for mortis causa transfers of enterprises and shareholdings, should not be overlooked.

The European Regulation No. 650/2012 brought with it a great change in the regulation of cross-border successions. It was principally intended to resolve succession disputes caused by the large volume of migration between different states - in particular between European states - providing a uniform criterion for identifying the relevant succession governing law.



As per this Regulation, Italian succession law may apply to a cross-border succession in case the deceased (whatever nationality it was) had his habitual residence in Italy at the time of death; the Regulation also recognizes that a testator may derogate to such principle, selecting by will his national law as the law governing his succession (even if it was the law of a non-European state).
The application to a succession of the law of any non - European states specified in the Regulation means the application of all rules of the law in force in that State, including the rules of private international law. Therefore, if the rules of private international law of this non – European State envisage a "renvoi" to the application of the law of a member state (or the law of a third state) which would apply its own law to succession, such a renvoi should be accepted for the reasons of the international compatibility.
This frequently occurs in case the law applicable to a succession under the Regulation is the English law. As an example, we can consider the case of a UK citizen, owner of a property located in Italy and habitually resident in Italy, who has left a will expressly choosing English law as the law applicable to the entire succession.

Should the testator die in Italy, as per the Regulation the law applicable to the succession would be English law (as a consequence of the express choice made by the testator in his will); however, as English law provides that the succession of properties shall be governed by the law of the State in which such property is located, in such a case the transfer of the Italian property to the heirs shall be compliant with Italian succession law (which, unlike English law, provides inter alia reserved shares in favour of the spouse, descendants and, in some cases, ascendants of the testator).

As far as taxes are concerned, Italian tax law provides for inheritance and gift taxes ("IHT"), which generally apply on transfer of assets and rights as a result of death, gift or other gratuitous transactions. In case the deceased (or donor) was tax resident in Italy at the time of death (or when the gift was made), IHT would apply on all assets, wherever located. On the other hand, in case of non-Italian resident deceased (or donor), IHT would apply on Italian situs assets only.

Whilst transfers in favor of a spouse (or civil partner) and direct descendants or direct ancestors are generally subject to IHT at the rate of 4% on the value exceeding a Euro 1,000,000 allowance, a specific exemption from IHT is granted where the object of such transfer consists of going concerns or shareholdings (quotas or shares) of companies.

Such exemption requires certain specific conditions. The exemption is granted if the beneficiaries acquire or integrate the controlling rights (i.e., the majority of voting rights in the ordinary shareholders' meeting) in the inherited company and expressly undertake to maintain such controlling rights for at least 5 years.

It is indeed debatable whether individuals are required to meet such conditions to benefit from the IHT exemption also in the scenario where the transfer relates to shareholdings in a non-Italian resident company.

In a renown reply to a juridical consultation launched in 2011 by the Italian Association of chartered accountants, the Italian tax authorities stated that the conditions required by the law to benefit from the exemption at hand shall be fulfilled irrespective on whether the transferred shareholding is in a non-Italian resident company.

Interestingly enough, the same position has incidentally been adopted by the Italian Constitutional Court (decision dated June 23, 2020), and more recently reiterated by the Italian tax authorities in a reply to tax ruling no. 185 of 1 February 2023. In their reply, the authorities remarked that the exemption under comment is applicable to transfers of shareholdings in non-Italian companies as long as the conditions set forth by the law for Italian companies are met.

In addition to all the above, the provisions set forth in the Conventions for the avoidance of double taxation with respect to inheritance (and gift) taxes entered into by Italy shall also be duly factored in. To date, Italy has a small-scale network of conventions - composed of a total of 7 treaties, entered into with Denmark, France, Greece, Israel, Sweden, the USA and the UK - of which only one covers gift taxes in addition to inheritance taxes.