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Some observations on European Regulation No. 650

Roberto Barone

Civil law notary in Nichelino, Board member of Fondazione Italiana del Notariato
Scientific Coordinator of the Project

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UNIVERSITÀ DEGLI STUDI FIRENZE
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1. About the European Certificate of Succession (ECS)

A. Use of this certificate is optional. It could entail some problems because some States may prefer domestic instruments (such as the Act of notoriety or similar instruments under domestic law).

B. Its use is limited to cross-border successions, but it produces the effects laid down in Article 69 also in the Member State whose authorities issued it. It does not appear to be possible to issue an ECS purely for domestic successions. If this were the case, various effects would be produced including the so-called “reverse discrimination”, i.e. in a case of international succession, rights could be attributed to a citizen of a Member State that he would not have in his Country of origin (for example, in an international succession procedure which implements the ECS, an Italian heir would not be obliged to comply with provisions that he would have to observe if the succession were regulated by Italian law).

C. Can the CSE be used by an individual to obtain registration in a public register? According to paragraph 5 of Article 69 yes, but the condition of this Article not causing prejudice to Article 1 (2) letter k) and l) contradicts this possibility. This takes us back to the “relevant register” issue: where this does exist, it may probably be a register of successions (relevant to a succession) and not a real estate/property register. On the other hand, the legal transfer of real estate is regulated by the “lex rei sitae”.
In any case, the certificate has merely probatory and not negotiation content.

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2. Scope of the Regulation (1/2)

The Regulation does not cover some areas (see Article 1 – Scope) which, however, are often relevant to succession matters; suffice it to consider Family Law and the recognition of offspring; indeed, the offspring who have been recognized (especially through judicial acts) are, for all intents and purposes, heirs; another instance concerns the management of problems arising when a spouse dies while divorce procedures are under way).

Undoubtedly we need to take into account the two subsequent Regulations (on marriage and on registered partnerships (de-facto unions, civil unions, unmarried couples)) for the implications and interactions with succession. These two regulations – Regulation no 1103 of 24 June 2016 and Regulation 1104 of 24 June 2016 – will enter into force on 29 January 2019 (except for Articles 63 and 74 of both Regulations which instead will enter into force on 29 April 2018, and Article 65, 66 and 67 of both Regulations that entered into force on 29 July 2016).

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2. Scope of the Regulation (2/2)

However, being the outcome of enhanced cooperation, these regulations do not apply to all States but only to the Signatory States. This will create quite a few problems in the coordination of marriages and registered partnerships where succession matters are regulated by the law of a State which may be a State that has signed the two regulations or a State that has not signed them.

Also donations or other similar instruments, that do not fall within the scope of the Regulation, may actually be indirectly involved whenever the applicable law to successions indicated in the Regulation envisages them as succession assets given to an heir in advance.

Similar remarks may apply to trusts which often make provision for the attribution of assets to the heirs (or to others). If the Court of a Member State qualifies the trust as a succession institute, or, when the nature of the trust, in terms of how it works, makes it similar to a succession institute, it is self-evident that the Regulation shall apply also to the trust.

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3. Universal application of the Regulation (Article 20)

The conflict-of-laws rules among Member States are overruled by the rules of uniform law of the Regulation which, once the law applicable to the succession has been designated, submits all succession matters to that law. However, there is a difference depending on whether the "designated" law is that of a Member State or not.

In the first case, the application of the Regulation is simple: the law of the Member State where the assets are located shall apply without any reference to the conflict-of-laws rules (superseded by the Regulation). Instead, in the second case, the application of the law will not be so simple; indeed, if the law of that State, for instance, regulates succession to real estate through a renvoi to the law of the place, and the place is in a Member State, the law that applies, albeit partially, is different from the law designated in the Regulation.

In other terms, the first renvoi is followed by a second renvoi (e.g. a British subject who is the owner of a property in Florence chooses British law in his will. Under Article 20, the Regulation designates the British law; but British law on real estate designates the law of the place where the real estate is located, hence British law will apply to the succession except for the property in Florence which will be subject to Italian law. In addition, public policy problems may arise when the designated law contains provisions that go against international public policy.

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4. Main criterion for designation : residence of the deceased

However, an individual can opt for the law of the State of which he is a citizen at the time when making the choice, or of the State that he presumes will be his place of citizenship at the time of death (“professio iuris”). The substantial validity of the act of choice is regulated by the relevant law.
E.g. If an Italian citizen who has been living for many years in Austria wants his succession to be regulated by Italian law, he will have to make that choice in accordance with the form and manner requested by Italian law.

Regarding form, this choice may cause many more difficulties because it introduces institutes in Countries that do not accept institutes from other Countries (for instance Succession agreements). On the other hand, the Regulation often appears to prefer institutes that are valid in the Countries where they are used also for their application in Countries that do not allow them.

E.g.: a succession agreement is validly made in Germany between Rocco and his offspring; Rocco, an Italian or German citizen, returns to Italy which becomes his normal place of residence; he has not drawn up a will. After seven years of residence in Italy he dies; Italian law shall apply, but the succession agreement made in Germany is also fully valid even though such agreement is null and void under Italian law. We are witnessing the ‘importation and circulation’ of institutes among Member States.

The hope is that the Regulation may induce all Countries to adjust their rules so as to facilitate the uniform applicability of rules.

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5. Public policy (ordre public)

Public policy constitutes a barrier to the application of a rule of the State specified by the Regulation. The rule must be “openly incompatible” with the public policy of the forum dealing with the succession in order for it to be barred; hence the application of the barrier is exceptional. It is easy to reject public policy when the rule is openly against the fundamental principles of the Conventions that protect people’s rights, gender equality, non-discrimination on the basis of gender, religion, race, political affiliation.

Greater difficulties are run into whenever the application of a rule may lead in practice to discrimination (for instance on grounds of citizenship or residence). In accordance with the principle of complying with the testator’s will and with the principle of uniqueness of the succession, the barrier may at times be overcome by the application, by the judge, of a rule that fills the vacuum left by the elimination of the rule that violates public policy (e.g. when faced with a foreign law that attributes to a male heir twice the quota attributed to the female heir, the Court does not apply this rule and attributes to the female heir the same quota as that attributed to the male heir).

There are no doubts that public policy related issues are bound to grow as a result of migrations whereby citizens from a wide variety of countries with different legal orders (in particular Islamic law with all of its articulations) settle down in Member countries (especially Greece and Italy) further complicated by marriages or same-sex unions between these citizens and those of Member States.

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6. Circulation of acts and decisions

The Regulation envisages and provides for a simplified circulation of the abovementioned measures. Except for translation into the language of the Country of destination, the decisions are recognized without any special procedure being required (Article 39); similarly, public acts have simplified circulation. Of course reference is being made here to the decisions and acts envisaged by the Regulation, namely those concerning succession issues.

This rule, that in practice aims at creating a European legal space of freedom, security and justice, should be applied, divulged and imposed at all levels. People in the legal professions will very likely find it difficult to accept the new system. A dissemination function could be performed by networks, such as the European Notaries network, using IT systems to massively divulge the problems and solutions to pending cases provided by the Court of Justice of the European Union (CJEU).

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