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Subject: Questions of Private International Law and Italian Law, about Matrimonial Regime and Successions – Dutch Citizens.

### **Question 1**

*A Dutch prenuptial agreement includes a choice of law for Dutch law. This means that Dutch civil law will apply with respect to the matrimonial property regime between the spouses. Does Italy accept this choice of law and will Italy respect the consequences of the prenuptial agreement for the estate of the first deceased spouse?*

### **Answer:**

Under Italian private international law, the matrimonial regime is regulated by the national law of the spouses, provided that they have the same citizenship. Italian private international law accepts the renvoi (art. 13), that will not apply when there is a choice of law. The spouses can choose the law which will apply respect to the matrimonial property (law of the citizenship or of the residence), wherever the property is (art. 30 of the statute n. 218/1995). The choice of law is valable if made in the form required by the law applicable to the regime.

Then, the choice of Dutch law, made by the spouses in their prenuptial agreement, is accepted by Italian law.

### **Question 2**

*The Dutch wills often include a choice of law for Dutch law. Does Italy accept this choice of law and will Italy respect the consequences of the will for the partition of the estate of the first deceased spouse?*

### **Answer:**

Under Italian private international law, the succession is regulated by the national law of the spouses; in their will, they can choose the law of the residence of the deceased person (art. 46 of the statute n. 218/1995).

Then, in our case, the succession of each spouse is regulated by Dutch law (national law of the deceased person), provided that that person will maintain Dutch citizenship until the date of the death. The content of the will, and the consequences of it, will be respected in Italy, provided that they are legal under Dutch law.

### **Question 3**

*In the last will of the husband the children are appointed as sole heirs but the wife has a right of usufruct with respect of a certain part of the of the estate (at the moment approximately 10 per cent of the whole estate). Does Italy accept such an arrangement or is the wife entitled to a minimum share of the estate?*

#### **Answer:**

Every matter about succession is regulated, in our case, by Dutch law, included the “necessary successions” of children and wife. Then, the wife has the only rights allowed by Dutch law, and the arrangement stated by the will is accepted in Italy, provided that it is legal under Dutch law.

### **Question 4**

*According to the will the usufructuror has a special right with respect to the property subject to the usufruct, being the right to invade the capital, to consume the usufruct property. This is a common stipulation in Dutch wills.*

- a. Will such a right to consume the usufruct property be acknowledged when it concerns usufruct property situated in Italy?*
- b. How will the usufruct property be regarded from an Italian inheritance tax perspective at the time of death of the husband? Does the right to consume the usufruct property influence the size of the acquisition by the wife for inheritance tax purposes?*

#### **Answer:**

Under Italian private international law, the “rights in rem” are regulated by *lex rei sitae* (art. 51 of the statute n. 218/1995). This means that as long as Italian goods (real estate or other goods like a bank account in Italy) are concerned, Italian civil code applies. The right to consume the usufruct property is not allowed in Italy.

Under Italian inheritance tax law, no tax has to be payed at the death of the usufructuror.

### **Question 5**

*If afterwards the wife dies, from a Dutch legal (and inheritance tax) perspective the children obtain full ownership of the remaining usufruct property.*

- a. From an Italian legal perspective will the children also become full legal owners of the usufruct property when the wife dies?*
- b. Do the children have to pay any Italian inheritance tax with respect to the usufruct property at the time of death of the wife, assuming the usufruct property is situated in Italy?*

#### **Answer:**

Under Italian law, at the death of the usufructuror the usufruct finishes; at that moment, the bare owner becomes automatically full owner. Only in the cadastral register the name of the usufructuror has to be cancelled, and very few registration costs have to be paid. No inheritance tax has to be payed.

### **Question 6**

*Both wills include a fidei commissum clause. The effect of this clause will be explained by way of the following example.*

*A has made up a will in which he leaves everything to B. But A has stipulated that whatever is left of his inheritance at the death of B will go to C. During his life time B has the right to use the property and to consume it. However B is not allowed to donate the property to somebody else and B cannot dispose of the inherited property in his last will. From a Dutch perspective upon the death of B the property concerned returns to the estate of A and from that estate of A it goes to C. The advantages of this stipulation are that (i) A can decide what happens to his property when B is no longer alive and (ii) the property going to C will be taxed according to the relationship between A and C and not according to the relationship between A and B.*

*For instance, if B and C are both children from A, the transfer of the property after the death of B will be taxed against the lowest parent-child rate and not the higher brother-sister rate. C can be a close relative of A but can also be a third party, a not related good friend or a charity.*

*In the wills of the clients the fidei commissum clause stipulates that whatever a child (B) inherits will go to the other children (C).*

*a. Will this fidei commissum clause be respected in Italy in the sense that the property concerned will not form part of the estate of B? Also when it concerns property situated in Italy?*

*b. How will the transfer of property from B to C be taxed for the inheritance tax in Italy upon the death of B? As an acquisition from the estate of B or as an acquisition from the estate of A?*

**Answer:**

The fidei commissum is not allowed by Italian civil code (art. 692). This means that when the property is situated in Italy it will remain part of the estate of the person who first acquired it. Obviously, that person can make a will and dispose about his succession; there is a second succession, and inheritance tax will be due by the persons who acquire the property afterwards when their acquisition exceeds the exemption threshold (in Italy, the inheritance tax has to be paid, when the heirs are the wife or the children, only over one million of euros of value). Also when the person who first acquired the property dies resident in Italy the fidei commissum will not be recognised. When no inheritance tax is due, and immovable property in Italy is left by a deceased person, a 3% registration right (for transcription in the land register, and in cadastral register) is due.

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