Matrimonial property regime: an Anglo-Italian case law

By Maria Grazia Antoci Posted December 13, 2018 In Tax

Two and a half million properties in the EU belong to people not residing in the State in which the property itself is located.

The acquisition of a property abroad by married individuals could mean a property regime applies which is not the regime in force in their country of origin (if any).

The family property regime is the default rule that applies to govern family property in cases where no choice of property regime (property issues in the context of family relationships) is made by the spouses.

The private international law rules (PIL) of each country assesses, in cross-border matters, what is the law applicable to the property regime of spouses. The connecting factors might differ from country to country, leading to potential conflict of laws.

Example

An English married woman purchases a house in Italy. First, the applicability of the statutory Italian matrimonial property regime of community of property should be assessed.

Community of property, under Italian law, means that each spouse automatically owns 50% of an equitable share of the property acquired during the marriage regardless of the fact that the property is registered in the name of one spouse only, as legal owner. Properties received by donations, inheritance or legacy or properties purchased by income of the spouse’s personal property are excluded from the community of property.

The spouses might choose the separation of goods regime at the time in which the marriage is celebrated or afterwards.

English people tend not to pay enough attention to such rules as in England and Wales there is no "matrimonial property regime" as understood in civil law countries (i.e. there are no proprietary consequences flowing from the fact of marriage at all. Each property being owned as acquired by contract, acquisition, or otherwise). The lack of property regime is balanced by the discretionary power given to the judge in the redistribution of assets among the spouses in case of divorce.

What is the law applicable to the patrimonial regime of spouses affecting the acquisition of the real property in Italy?

The Italian PIL rules in force (up to the 28th of January 2019) are provided by law no. 218/1995 pursuant to which the "matrimonial property regime" is governed by the national law of the spouses if they are nationals of the same country. Should the spouses have different nationalities (or more than one nationalities in common), the applicable law is that of the State where their matrimonial life has been mainly based.

In the example above, both spouses are British nationals and are most closely connected to England. Their matrimonial domicile is in England.

Therefore, under law no. 218/1995, English law would apply to their matrimonial property regime including the acquisition of the property in Italy.

The reference made to the English law is not limited to the substantive law but also includes the English PIL rules.

Should the English PIL rules make a *renvoi* back to Italian law as the property is located in Italy (*lex situs*) then, such *renvoi* would be accepted by the Italian law (law no. 218/1995) and the Italian **community of property regime** (i.e. the Italian legal matrimonial property regime) would be applicable to the acquisition of the Italian property.

Legal Precedent

The assessment of the English PIL rules on matrimonial property regime is not easy as the relevant precedents seem to lead to diverse solutions. The earliest precedent is **Welch v Tennent [1891] AC 639,** a decision of the House of Lords on an appeal from Scotland. It was held that while the rights of the spouses as regards movable property must be regulated by the law of matrimonial domicile, their rights in relation to heritable estate are governed by the law of the place where the real property is situate (*lex rei sitae*).

However, pursuant to **De Nichols v. Curlier (1900 AC 21) and De Nichols (N2) (199 Ch 410) (subsequent case)** the matrimonial property is governed by the law of matrimonial domicile, regardless of any subsequent change of residence or of domicile (in application of the principle of immutability) and regardless of the nature of the property (movable and immovable). As pointed out in Dicey & Morris, the Welch v. Tennant decision is an appeal from Scotland and, therefore, it should not formally be binding on the English Courts. The academic discussions on this matter have reached consensus that the opinion embodied in De Nichols should be preferred as the precedent set by Welch v. Tennent would lead to a fragmented situation where each asset owned in different countries would be subject to different regimes. The law of the matrimonial domicile at the time of marriage is considered to be an appropriate system because it is most likely to be the system the spouses would expect to apply to the purchase of any property including the properties located abroad.

Application to example

The law governing the matrimonial property of our English couple would be the English law for both the Italian PIL (Law 218/1995), as being the law of their common nationality, and the English PIL (De Nichols), as being the law of matrimonial domicile.

Third party protection

While the *lex domicilii matrimonii* should apply as between husband and wife, in disputes between the spouses and third parties (e.g. creditors) the third party interest should be protected. If the third parties do not know and could not know which is the law of matrimonial domicile, they must apply the *lex sit*us to determine the matrimonial property regime of the spouses, with regard to both movables and immovables. Similar provisions to protect the interest of third parties are provided by the Italian law. 218/1995.

Developments

On 29 January 2019 the Italian PIL on property regime will be superseded by the application of the two EU Regulations of 24 June 2016 on matters of matrimonial (Council Regulation (EU) 2016/1103) and registered partnership (Council Regulation (EU) 2016/1104) property regimes (bounding 18 EU Members States [1]). The law designated as applicable by the EU Regulations shall be applicable even if it is not the law of a Member State (Universal application). One single law shall be applicable to all assets (principle of Unity of Applicable Law) regardless of their location and nature (movable and immovable).

In the absence of a choice of law the Regulation (UE) 2016/1103 provides uniform connecting factors, in hierarchical order, to determine the applicable law to matrimonial property regime:

1st) the first common habitual residence;

2nd) the spouses'common nationality;

3rd) the closest connection.

If the spouses have more than one common nationality, the second connecting factor does not apply.

The matrimonial property consequences are, therefore, primarily connected to the first habitual residence of the couple pursuant to the immutability rule and, therefore, the patrimonial regime will not be affected by the change of habitual residence.

Application to Example

Should our case fall within the application of the Regulation (UE) 2016/1103, English law would be considered as applicable to the matrimonial property regime of the spouses as the English couple had their first common habitual residence in England. The concept of first habitual residence is probably close to the common law concept of matrimonial domicile.

Also under the Regulation (UE) 2016/1103 the couple cannot invoke the law applicable to their property regime in a dispute with a third party unless the third party knew or should have known the law applicable to the property regime. If the third party did not know or could not have known the applicable law, the law applicable to the transaction or the law of the country where immoveable property is located will apply.

This article was co-written by Maria Grazia Antoci and Daniele Muritano for Legal4Italy

[1] *These are: Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. The rest will continue to apply their respective national rules*

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