

# Is a Deed of Variation enforceable in Italy?

By [Maria Grazia Antoci](#) Posted [October 11, 2017](#) In [Probate](#)

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Civil lawyers who come across a Deed of Variation (“DoV”) in the UK concerning an estate including property outside the UK, are often faced with not-easy-to-answer-questions:

- what is a DoV?
- Is a DoV valid and enforceable outside the UK?
- What are the tax consequences of a DoV outside the UK?



## The case

A British national dies intestate in England, place of their last residence and domicile (under the common law meaning of “domicile”).

The beneficiaries of the deceased’s estate (“original” beneficiaries) execute a DoV re-directing their own shares in the estate in favour of other persons (the DoV’s beneficiaries).

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The deceased's estate comprises immovable and movable properties in the UK and immovable property in Italy. The DoV concerns all the interests in the estate; therefore, it includes the Italian property.

The Italian authorities are requested to enforce in Italy the DoV variation executed in England transferring the interest in the Italian private holiday home into the name of the DoV's beneficiaries.

Can the DoV be regarded as a valid instrument to transfer the deceased's interest in the Italian property into the beneficiaries' names? What is the tax treatment in Italy of the DoV?

## Law governing the succession

The first issue to address concerns the law applicable to the deceased's succession, as it might (or might not) have a relevant impact on the validity and effectiveness in Italy of the DoV executed in England.

On the basis of the information received we know that:

- the deceased was a British national (no double nationality);

- the deceased was domiciled in England;
- among the territories constituting the UK, the deceased was most closely connected to England;
- the deceased did not leave any will and, therefore, died intestate;
- the deceased died before 17 August 2015.

Under the Italian private international law rules in force at the time of death (i.e. before the EU Succession Regulation no. 650/2012 became applicable), the law of nationality governed the succession of a deceased person. Therefore, English law should have applied to the deceased's succession.

However, the renvoi made by Italian private international law to the English law included the English private international law rules ( i.e. conflict laws).

Under English private international law rules the succession of a deceased person is governed by different laws:

- the succession of immovable assets is governed by the *lex rei sitae* (i.e. the law of the place in which the immovable properties are situated respectively);
- the succession of movable assets is governed by the law of the domicile.

Therefore, under English private international law rules, the succession of a deceased person might be governed by different laws ("scissionist" system), depending on where the deceased's place of domicile is and where the real property owned by the deceased is situated.

As the deceased was domiciled in England, English law should apply to the deceased's succession regarding both movables as well as immovable property situated in England. Instead, Italian law should apply to the deceased's succession of the "Italian" real property.

In other words, English law makes a renvoi back to Italian law in respect of the succession to the house situated in Italy. Italian private international law (article 13 of law 31 May 1995, no. 218, in force at the time of death) accepts such renvoi back.

The solution would have been the same if the deceased had passed away on or after 17 August 2015 (date from which the EU Regulation no. 650/2012 has become fully applicable). Actually, the habitual residence of the deceased was in England. Therefore, English law would apply to the deceased's succession under the EU Regulation no. 650/2012 (Brussels IV) which is now applicable in Italy. However, as the renvoi made by Italian private international law (i.e. Brussels IV) to the English law includes the English international private law rules (under article 34 of Brussel IV) – and as it is commonly accepted that the UK is not to be considered as a member State for the purposes of Brussels IV -, the Italian succession law would apply to the Italian real property.

Before examining whether the DoV is or is not valid under the Italian succession law, it is useful to give a concise overview about the use of DoV, to determine if it falls within the scope of the succession law.

## What is a Deed of Variation?

The DoV is an instrument often used in UK to re-direct the distribution of an estate of a deceased person.

The beneficiary of an estate can, executing a DoV, transfer to another person (the beneficiary of the DOV) some or all of the interests inherited. This transfer is usually made by means of a gift or a settlement of a claim. Alternatively, the interest could be sold or even exchanged with another beneficiary's interest.

A DoV can be executed while the estate is under administration or once the administration is completed, when assets have already been transferred to the original beneficiary but must be concluded within two years of the deceased's death for UK Inheritance Tax (IHT) benefits to apply.

A DoV might be executed for various reasons, for example, in order to save IHT or to settle a possible claim by some eligible person who has not been given adequate financial provision.

The meaning and scope of a DoV might be easily misunderstood, especially by civil lawyers. No matter what wording/language is used, the DoV, is not an instrument that allows the original beneficiary to vary someone's Will or amend the intestacy rules; it does not change the rules applying to the devolution of assets upon death. It is simply recording a gift by the original beneficiary which is deemed for IHT to be effected by the deceased.

Furthermore, the DoV is different from the disclaiming of a beneficiary's interest in the estate, as the beneficiary who disclaims an inheritance does not have any control over who will receive the disclaimed interest in his place. Instead, to execute a DoV, the original beneficiary must have an interest in the estate received by means of a Will or under the terms of intestacy rules, and choose a replacement beneficiary(ies).

The substance of the disposition is, therefore, a transfer made by the original beneficiary, who attributes their interest to the DoV's beneficiary. By means of a DoV, a transfer of value occurs for IHT purposes and a disposal of assets for CGT purposes. However, if certain conditions are met, the transfer can be treated (for tax purposes) as having been made by the deceased rather than the beneficiary, consequently avoiding a charge to IHT and CGT on the beneficiary's gift.

This deeming effect for IHT and CGT purposes is, therefore, one of the main reasons to execute a DoV. Through such instrument, provided the DoV is executed within two years of the deceased's death, the original beneficiary can make a gift to another person free of charges to IHT and CGT (that may otherwise arise in relation to lifetime gifts by that beneficiary).

Therefore, under the English law the DoV is a transfer from the original beneficiary to another person and it is an instrument which falls outside the scope of the law of succession. In brief, it is a legal instrument that, by operation of law, allows for tax relief. Accordingly, the laws governing the succession of the deceased (in this case English law and Italian law) shall not have any impact on the validity and enforcement of the DoV in Italy.

## Validity and enforcement of the Deed of Variation in Italy

Both formal and material (substantial) validity of the DoV must be considered.

As to the formal validity, under article 11 of Regulation (EU) no. 593/2008 (Rome I), a DoV executed in England, if the persons are in the same country at the time of its conclusion, is formally valid if it satisfies the formal requirements of the law which governs it in substance under the Regulation itself or of the law of the country where it is concluded (i.e. England).

However, as the registration of property into the Italian Land Registry is governed by the Italian law, and the document transferring the title is the English DoV, the Land Registry need an authenticated and translated copy (with the Apostille attached) of it.

Moreover, under article 9, par. 2, of Rome I, the overriding mandatory provisions of the law of the forum will be applicable. Therefore, the transferring of an immovable asset by means of a DoV, valid as to the form, might be not valid as to the substance. In this case as the DoV shall be deposited (under article 106, no. 4, of Law 16 February 1913, no. 89), into the archive of an Italian notary, the person who shall appear before the notary to execute the deposit can complete the deed making it compliant to the Italian mandatory provisions of the law (for example the mandatory provisions concerning the transferring of immovables).

Under the Italian law, as well as under the English law, the DoV can be considered, as to the substance, as a gift or a settlement agreement, or an exchange of interests or a sale, depending on the case. Therefore, in our opinion, the transfer of interest is validly made by the DoV and it can be enforced in Italy.

As a result of the above analysis, the DoV is not an instrument which is part of the English succession law, so to suggest the DoV is not enforceable in Italy seems to be incorrect.

## Taxation of the Deed of Variation in Italy

Once admitted that the DoV is enforceable in Italy, we have to address the taxation scenario.

As the DoV is not an instrument that allows a person to vary someone's will or amend the intestacy rules and it does not change the rules applying to the devolution of assets upon death, the Italian Inheritance Tax (if any) shall be applicable to the "original" beneficiary of the bequest. English taxation rules applicable as a result of a DoV shall not have any effect on Italian taxation rules.

As the DoV enforced in Italy concerns the transfer of an Italian immovable, the taxation shall depend on its substance. For instance, if it were a gift, the Inheritance Tax (if any) shall be applicable, if it were a sale or a settlement, the Registration Tax (amounting to 9% on the value of the immovable) shall be applicable.

Finally, we shall consider the Convention to avoid double taxation existing between Italy and United Kingdom (concluded in London the 15 February 1966).

The issue to be addressed is the following: can the Italian Inheritance Tax paid in Italy by the "original" beneficiary be credited in the UK against UK IHT?

To answer to this question we need to consider the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Italian Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Duties on the Estates of Deceased Persons,. In particular, article VI of the above Convention provides that

*“where one Contracting Party imposes duty on any property which is not situated in its territory but is situated in the territory of the other Contracting Party, the former Party shall allow against so much of its duty (as otherwise computed) as is attributable to that property a credit (not exceeding the amount of the duty so attributable) equal to so much of the duty imposed in the territory of the other Contracting Party as is attributable to such property. For the purposes of this Article, the amount of the duty of a Contracting Party attributable to any property shall be ascertained after taking into account any credit, allowance or relief, or any remission or reduction of duty other than in respect of duty payable in the territory of the other Contracting Party”.*

Pursuant to the above Convention it seems that the Inheritance tax paid in Italy should be credited in UK on the basis of the objective fact that such tax is attributable to the Italian property which is part of the estate, no matter who is the subject charged with such tax.

## Conclusion

On the basis of the above arguments, in our opinion, we can confirm that a DoV executed in UK would be valid and enforceable in Italy for its substance while its tax treatments will follow the Italian rules for the Italian property and this tax issue should be taken into account by UK solicitors when dealing with estates and DoV comprising Italian assets.

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

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