Domicile vs. Residence vs. Nationality: Their significance in the context of EU, English, Swiss and Italian succession law

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Connecting Factors

? Nationality

? Residence

? Domicile
Nationality is key connecting factor to identify the law applicable to succession.

- Principle of universality of succession:
  - The identified law governs all issues related to the estate...
  - Including real estate property located abroad.

- Possibility to elect for the law of the country of habitual residence by will.

- Italian citizenship is mainly based on *ius sanguinis*:
  - The offspring of (at least) one Italian national is Italian, irrespective of his/her birthplace.
  - The acquisition of Italian nationality is automatic and by operation of law.

- Other ways to acquire Italian nationality:
  - Long-time residence in Italy (typically 10 years).
  - Election if you are born in Italy from foreign parents.
  - Marriage to an Italian national (after 2 or 3 years).
  - Adoption by an Italian national.

- Italian law allows for multiple nationality, but Italian nationality prevails over the others in any event of conflict.

- Italian nationality must be waived expressly.

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A special case from the relics of history...

Nationality

- English succession law and IHT generally relies on domicile rather than nationality
- Nationality a relevant factor for deciding where a person domiciled
- Nationality is now relevant under the Brussels IV Regulation:
  - Art. 22(1): 'A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.'
    - A will is formally valid if executed according to law of testator’s domicile, nationality, or habitual residence, or the place where it is executed.

US/UK Double Tax Treaty for Estate Tax/IHT:
- Art 5(1)(b) - limitation of taxing rights of State where person not domiciled for Treaty purposes to real property/business property of a permanent establishment disapplied where person a national of the other State: HMRC take the point for UK nationals
Who is a national?

- ‘Nationality’ is not defined in the Brussels IV Regulation. Note that UK nationality comes in various forms:
  - British citizenship
  - British overseas citizenship
  - British national (overseas)
  - British overseas territories citizenship
  - British protected persons
  - British subjects
- Persons in all of the above categories may obtain a British passport, but the EU only considers those in the first category above (British citizens) to be UK nationals.

Domicile

- Domicile
  - The deceased’s domicile at date of death is the primary determining factor in English succession law relating to moveable property and for liability to UK inheritance tax:
    - The worldwide estate of a person who dies domiciled within the UK is liable to UK inheritance tax
    - Only the UK situs assets of a person who is not domiciled within the UK on death are liable to UK inheritance tax
    - Succession to moveables is governed by the law of the deceased’s domicile
  - Domicile relates to a jurisdiction, not to a nation state
  - Every person has one, and only one, domicile
  - Domicile is distinct from habitual residence
- Domicile is therefore distinct from concepts of residence and nationality as applied in many civil law jurisdictions.

Domicile in a State

- Countries with multiple States for domicile purposes
  - UK (England/Wales, Scotland, N Ireland) and the bits that aren’t (Channel Islands and Isle of Man)
  - USA
  - Canada
  - Australia
  - Switzerland (cantons)
  - India
  - Indonesia
Forms of Domicile

- Domicile of Origin
- Domicile of Dependency
- Domicile of Choice
- Deemed Domicile

Domicile of Origin

- In English law, everyone is born with a **domicile of origin**, determined by:
  - the domicile of the father at child’s birth, where a person is born legitimate;
  - the domicile of the mother, where a person is born illegitimate (or if the married father died before the birth).
- This domicile will stay with an individual throughout his or her life unless steps are taken/events occur to alter it.
- ‘sticky’

Domicile of Dependency

- Domicile of Dependency
  - Until the age of 16, a person’s domicile may change with the domicile of the relevant parent (called a **domicile of dependency**).
  - If a child’s parents divorce or separate, the child acquires the domicile of the mother if it lives with her and has no home with the father.
  - Married women - if married before 1 January 1974, acquired their husband’s domicile
Domicile of Choice

- Domicile of Choice
  - From the age of 16, a person may acquire a domicile of choice by being physically present in a jurisdiction with the intention of remaining permanently or indefinitely.
  - If a person
    - ceases to be physically present and
    - loses the intention to remain in a jurisdiction
      without acquiring a new domicile of choice, the domicile of origin is revived
  - Easier to lose domicile of choice than of origin

Deemed Domicile

- Deemed Domicile
  - Where an individual
    - has been domiciled in (any part of) the UK at any time within the last 3 years, or
    - has been resident in the UK for 17 out of the preceding 20 tax years,
  - he or she will be treated as if he or she were domiciled in the UK.
  - This rule applies for UK Inheritance tax purposes only.
**Domicile Election**

• From 2013/2014 a non-UK domiciled person can make an irrevocable election to be treated as UK domiciled for inheritance tax purposes:
  – The election can be back-dated to an effective date of up to 7 years before the election (but not to a date before 6 April 2013).
  – The election may be made by the surviving non-UK domiciled spouse/civil partner of a UK domiciled person within 2 years of the death to claim the full UK IHT spouse exemption.
  – The election ceases to have effect if person is non-resident for 4 successive tax years beginning after election made.

**Domicile in Scotland**

• The same rules and concepts of domicile apply in Scotland and Northern Ireland as in England and Wales, except that in Scotland:
  – For children under 16 whose parents have different domiciles, the domicile of the child is that of the country with which the child has the closest ties “for the time being” (from May 2006).
  – Domicile for Scottish purposes may thus differ from that for English purposes
  – The rates and application of inheritance tax are the same in all parts of the UK and it is not currently proposed to introduce a separate form of IHT in Scotland.

• Certain forced heirship rights apply to Scottish domiciliaries:
  – **Relict’s right**: a surviving spouse/CP has a right to 1/3 of the deceased’s moveable estate, or 1/2 if there are no surviving children.
  – **Legitim**: children have the proportionate right to 1/3 of the moveable estate between them, or 1/2 if the deceased was a widow/widower.

**Domicilio**

• Place where an individual has established the main centre of his interests and affairs
• Underage children have their domicile in the residence of the family
• General domicile vs. special domiciles
  – **TAX DOMICILE**
Under Italian law, tax domicile is the connecting factor to establish if an individual is liable for tax on his worldwide income and assets in Italy (subject to double taxation treaties).

Italian residents for more than 183 days in each tax year have their deemed tax domicile in Italy, unless they can demonstrate:

- that they have not actually lived in Italy during this time;
- or that the centre of their business is elsewhere.

1966 Italy/UK Double Tax Treaty

**(Article III)**

(1) Where a person was at the time of his death domiciled in any part of the territory of one of the Contracting Parties, the situs of any property held for the purposes of Article 17 and of the credit to be allowed under Article 18 is determined exclusively in accordance with the rules in Article 26 of the present Convention.

Residence

- The place where an individual has his habitual place of abode
- each individual can have only one residence
- different from temporary place of living (e.g. off campus students; overseas workers; etc.)
- Family residence is chosen by the spouses: not necessarily the same place as theirs.
- Proof of residence is achieved by registering with the local Municipality (or AIRE for Italians residing abroad).
Residence vs. Habitual Residence

- Residence → domestic concept
- Habitual Residence → EU and international law concept
- Habitual Residence is the preferred connecting factor of most EU regulations on harmonization of law:
  - eg. Succession Regulation (Brussels IV) - art. 4

Habitual Residence

- Definition: the place where an individual has established his permanent or habitual centre of interests.
- The concept varies according to the context in which it arises
- Autonomous from any domestic meanings
- Established as a matter of fact on a case-by-case basis
  - harmonization role of CJEU precedents

Habitual Residence in Successions

- Whereas (23), Succession Regulation:
  [...] In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.
**Habitual residence**

- "Habitual residence" is generally not relevant in relation to UK succession or inheritance tax
  - An individual’s liability to UK inheritance tax is governed by his or her domicile or deemed domicile, rather than his or her residence.
  - But under Brussels IV (though UK has opted out) law of place of habitual residence applies on death to govern succession as a whole, if no election/closer connection
  - And concept of habitual residence is used in the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (incorporated into English law by Wills Act 1963):
    - A will is formally valid if executed according to law of testator’s domicile, nationality, or habitual residence, or the place where it is executed.

**Residence**

- Residence is relevant to the deemed domicile status and domicile election
- A statutory residence test applies to all tax years beginning from 6 April 2013:
  - This applies a complicated series of tests:
    - Certain conclusive tests relating to number of days’ presence, full time work outside the UK, and only/principal home in the UK; if these do not apply,
    - the number of days of physical presence in the UK in a particular tax year, and
    - the number of specified ‘UK ties’ (work, family, having accommodation available in the UK, number of days present in previous two tax years)

**Switzerland**

NB Guidance only!

**Domicile and residence**

- Swiss succession law is largely dependent on the deceased’s Wohnsitz or, most nearly, habitual residence (though translated as ‘domicile’ in French), defined in statute as the place where a person resides with the intention of settling.
- Objective test of whether residence is habitual: is it recognisable to third parties that a person has made his residence the centre of his life?
- May take effect immediately on arrival
- Only one habitual residence possible at a time
- May have no habitual residence but if so Swiss conflicts law will treat ordinary residence as habitual
• Universality principle:
  – if deceased has his Wohnsitz in Switzerland, and Swiss court has jurisdiction, Swiss succession law applies to entire estate including realty outside Switzerland
  – But Swiss court will not claim jurisdiction over foreign realty where foreign court claims exclusive jurisdiction

Nationality

• A non-Swiss national who dies when habitually resident for Swiss purposes in Switzerland may elect that the law of the country of his or her nationality should apply to his or her succession
  – Thus an English national habitually resident in Switzerland may elect so Swiss forced heirship rules would not apply to the estate including Swiss real property.
  – An English national habitually resident in England owning property in Switzerland cannot elect so Swiss forced heirship rules would still apply to the Swiss realty.
• A Swiss national habitually resident (Swiss definition) abroad may elect for Swiss law of the canton of origin to apply to his succession

Swiss forced heirship

• If children but no surviving spouse - ¾ estate to children
• If spouse and children - ¼ estate to spouse, ¾ to children
• If spouse only - half estate
• If spouse and parent(s) but no children - ½ to spouse and ¼ to parent(s)
• Half of estate to the parent(s) if no spouse or children
Thank you.

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