Protection of Forced Heirs and International Public Policy



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Protection of Forced Heirs and International Public Policy: A Comparative Analysis of Germany and Italy in Light of the Bundesgerichtshof Judgment of 29 June 2022

1. The German Approach

The Bundesgerichtshof (Federal Court of Justice), in its judgment of 29 June 2022, affirmed the following legal principle: the protection of mandatory heirs pertains to German public policy and, consequently, pursuant to Article 35 of EU Regulation No. 650/2012, it is possible to disregard the *lex successionis* designated under Article 22 of the same Regulation whenever its application does not concretely guarantee mandatory heirs a level of protection at least equivalent to that ensured by German inheritance law.

In the case at hand, the testator, originally from the United Kingdom, but habitually resident in Germany, by will dated 13 March 2015, designated English law as the law applicable to his succession and, as permitted under that law, disposed of his entire estate in favour of a third party, thereby excluding his adopted son. The latter lodged an application with the Regional Court of Cologne seeking information on the existence and scope of his father's estate, asserting the rights granted to him under paragraphs 2303, 2314, 1754 and 1755 BGB. The court seized dismissed the application, but, on the claimant's appeal, the Higher Regional Court of Cologne, by judgment of 22 April 2021, setting aside the contested decision, ordered the appointed heir to draw up an inventory of the estate assets. The testamentary heir then appealed to the Federal Court of Justice, seeking the full dismissal of the claim.

The Federal Court of Justice, having preliminarily confirmed, on the basis of Articles 22 and 83 of Regulation (EU) No. 650/2012, the validity of the *professio iuris* contained in the will, even though the will predated 17 August 2015, the date on which the Regulation became applicable, examined the compatibility of English succession law with German public policy. On the one hand, the 1975 Inheritance Act does not provide a forced share for descendants as such, regardless of their economic circumstances, but it merely allows the judge, at his discretion, to grant financially needy descendants a monetary provision against the testator's will, provided that the latter was resident in England or Wales at the time of death. On the other hand, paragraph 2303 BGB guarantees to the descendant a forced share amounting to half the value of the share to which he would be entitled in intestate succession, regardless of any assessment of the heir's financial situation; paragraph 2314 BGB grants an excluded mandatory heir the right to obtain information from the testamentary heir regarding the estate and to request the preparation of an inventory, the costs of which are borne by the estate. The Federal Court of Justice held that the provisions of the Inheritance Act contradict German inheritance law, which enjoys constitutional protection under Articles 6 and 14 of the Grundgesetz. These provisions reflect the principle that children's participation in the estate of their parents is a necessary consequence of their familial bond and an expression of family solidarity, therefore, descendants must always be guaranteed a share of the deceased's estate, regardless of their financial circumstances.

The Federal Court of Justice further referred to the reasoning of the Federal Constitutional Court in its judgment of 19 April 2005, which characterized the right of mandatory heirs to their forced share as an inalienable fundamental right, intended to ensure the continuation of the ideal and economic bond between the family's assets and its members. Participation of the descendant in the ascendant's estate is thus viewed as an expression of the reciprocal moral and material assistance obligations that underpin family life and which, pursuant to Articles 6 and 14 GG, constitute a constitutionally relevant limit to testamentary freedom. Having established that mandatory succession enjoys constitutional protection, the Court examined whether a violation of the rights granted to mandatory heirs under German law constitutes a breach of German public order and, to this end, it identified three different doctrinal approaches.

A first view holds that, even where the *lex successionis* does not provide forced

shares, German law cannot apply, because the protection of mandatory heirs does not fall within the German notion of *ordre public*, and therefore Article 35 of Regulation (EU) No. 650/2012 cannot be invoked to set aside the *lex causae*. An intermediate position states that, although the protection of mandatory heirs may in principle be linked to the fundamental principles forming part of the German *ordre public*, no concrete public order issue arises when, as in the present case, only economically self-sufficient mandatory heirs are left without protection. The prevailing view, followed by the judgment under comment, instead, holds that German public order is violated whenever the law applicable to the succession does not provide mandatory heirs with a level of protection at least equivalent to that offered by German law and, consequently, leads – on a case-by-case assessment – to an outcome incompatible with Articles 6 and 14 GG.

On the basis of these arguments, the Federal Court of Justice concluded that, in the present case, English succession law conflicts with German public policy, to the extent that the possibility of obtaining a monetary provision only where the mandatory heir is in situations of financial need – which, moreover, was inapplicable in the case at hand, given that the de cuius was resident and domiciled in Germany – is considered incompatible with the forced share guaranteed to descendants under German law. The Federal Court of Justice, therefore, applied Article 35 EuErbVO (Regulation EU No. 650/2012), which provides that "the application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum." The violation of public policy entails the non-application of the foreign rule. However, to ensure minimal interference between *lex causae* and *lex fori*, any resulting gap must, where possible, be filled by reference to the *lex causae* itself and, only where this is not possible, should be applied the *lex fori* instead. In this case, since English law does not guarantee the mandatory heir a forced share meeting the requirements of Articles 6 and 14 GG, the Federal Court of Justice deemed it necessary to apply German succession law.

Finally, the Federal Court of Justice supports its conclusion by stating that is precisely from Regulation (EU) No. 650/2012 that it can be inferred that provisions on forced heirship pertain to public policy. Indeed, according to the German judges, given that Article 22 allows parties to choose the law of the State of their nationality as the law governing their succession, one of the functions of

Article 35 is precisely to protect mandatory heirs who may be disadvantaged by the chosen law, thereby preventing the *professio iuris* from being used to frustrate the expectations of those entitled to a forced share.

2. The Italian Approach

The decision under examination makes it possible to compare the approach followed by the German Federal Court of Justice with the approach followed by the Italian Supreme Court and to highlight the relative nature of the notion of international public policy.

The possibility of tracing the protection of forced heirs back to the notion of international public policy has assumed particular relevance with the adoption of EU Regulation No. 650/2012 (I. Riva, Certificato successorio europeo. Tutele e vicende acquisitive, Napoli, 2017, 51 ss). Indeed, unlike Article 46 (2) of Law No. 218/1995, which excluded that a *professio iuris* made by an Italian testator in favour of the State of residence could prejudice the rights of forced heirs residing in Italy, Regulation No. 650/2012 does not provide that the rules on forced heirship constitute a limit to the applicability in Italy of a foreign law that does not provide for any protection of forced heirs or provides for a less favourable protection than the one offered under Italian law.

Consequently, only if Articles 536 et seq. of the Italian Civil Code are regarded as a fundamental and non-waivable principle of the Italian legal order (G. Perlingieri, G. Zarra, Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale, Napoli, 2019; V. Barba, L'ordine pubblico internazionale, in Rass. dir. civ., 2018, 403 ss) and, therefore, are brought within the notion of international public policy, will it be possible to exclude, pursuant to Article 35 of Regulation (EU) No. 650/2012, the application in Italy of a foreign law that violates the rights that Italian law reserves to forced heirs. Since in Italy forced heirship does not enjoy constitutional protection, the resolution of the issue at hand requires, preliminarily, clarification as to whether the principles referable to international public policy may also be derived from provisions of ordinary legislation.

The notion of international public policy, in the Italian legal order, has undergone significant evolution: originally it was held that this limit was respected and, consequently, that the foreign law was applicable in Italy, only where, in relation

to the same institution, it was compatible with Italian ordinary legislation (Cass., 5 dicembre 1969, n. 3881; Cass., 14 aprile 1980, n. 2414; Cass., 13 marzo 1984, n. 1680). Subsequently, as a result of the influence of supranational law, it began to be affirmed that international public policy corresponded to the fundamental values expressed by the Constitution and by international and supranational sources (Cass., 15 giugno 2017, n. 14878.). The most recent approach of the Court of Cassation is placed in an intermediate position between the two theses just mentioned, affirming that the notion of international public policy is derived from the Constitution, from international and supranational sources, but also from provisions of ordinary legislation, provided that they express fundamental values of the legal order (Cass., sez. un., 8 maggio 2019, n. 12193).

Having clarified, therefore, that ordinary legislation may also contribute to shaping the notion of international public policy, the point is to understand, as already anticipated, whether the codified rules concerning forced heirship implement a non-waivable principle expressing a value that identifies the Italian legal order.

Italian case-law, in numerous decisions (Cass., 30 giugno 2014, n. 14811; Cass., 24 giugno 1996, n. 5832; App. Milano, 4 dicembre 1992; Trib. Termini Imerese, 15 luglio 1965), contrary to what was maintained by the Bundesgerichtshof in the previously examined judgment, has affirmed that the protection of forced heirs does not pertain to international public policy since, although the protection of forced heirs is safeguarded by mandatory internal rules, its limitation does not entail a restriction of an inviolable human right. This is also argued in light of the fact that forced heirship, as stated, does not enjoy constitutional protection, neither with reference to Article 42 (4) nor with reference to Article 29 of the Constitution, with the consequence that the ordinary legislator could even abolish it. Consequently, in the Italian legal order, foreign rules providing a level of protection of forced heirs lower than the one guaranteed by Italian law may be applied (M.C. Gruppuso, Ordine pubblico e diritto delle successioni. Spunti in tema di divieto di discriminazione basata sul sesso, in Fenomeni migratori, famiglie cross border e questioni di diritto successorio. Una prospettiva di genere., I. Riva (ed.), Napoli, 2024, 256).

This solution, unlike the German one, is consistent with the approach of the Strasbourg Court which, with reference to forced heirship, has affirmed that it does not find protection under Article 8 ECHR, given the absence of any general

and unconditional right of children to inherit a share of their parents' assets (ECtHR, 15 February 2024, Colombier v. France), nor under Article 1 of the First Additional Protocol, since where the law applicable to the succession does not provide any protection of the rights of forced heirs, they are neither holders of an "existing" property right nor of a "legitimate expectation" (ECtHR, 15 February 2024, Jarre v. France), and consequently do not fall within the scope of protection guaranteed by that provision.

Even if the inclusion of forced heirship within the concept of international public policy has been excluded, a conflict between the latter and the law applicable to the succession may nonetheless arise where the foreign succession law violates other fundamental principles of the Italian legal order. Thus, for example, pursuant to Article 35 of Regulation (EU) No. 650/2012, a foreign law that infringes the principle of non-discrimination – which, also in light of recital No. 58 of Regulation (EU) No. 650/2012, is almost unanimously regarded as falling within the notion of international public policy – may in no case be applied in Italy (M.M. Francisetti Brolin, Divieto di discriminazione, autonomia testamentaria e vicende mortis causa. Riflessioni preliminari, in Fenomeni migratori, famiglie cross border e questioni di diritto successorio. Una prospettiva di genere., I. Riva (ed.), Napoli, 2024, 325 observes a potential paradox in this context).