

Wills and succession documents

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Wills are especially exposed, because they are often drafted by the testator himself and interpreted after his death, when he can no longer explain them. An Italian resident who owns an account in Lugano and a house in Ticino may write a holographic will in Italian using the vocabulary of Italian law: *legittima*, *quota disponibile*, *legato*, *erede*, *esecutore testamentario*. Most of these terms have Swiss counterparts with similar meaning, as the *testamento olografo*, the *erede* and the *legato* exist in both orders. The difficulties begin with institutions that only one order knows. An Italian testator cannot validly conclude a contract of succession under Italian law, while a Swiss testator may. Because Italian law has no counterpart to the Swiss *certificato ereditario* under Art. 559 CC, an Italian heir needs time to understand why a Lugano bank asks for one. Conversely, a Swiss heir in Italy will be asked for the *dichiarazione di successione* filed with the tax authority and, where applicable, the acceptance of the inheritance (*accettazione dell'eredità*), possibly with the benefit of inventory.¹

Another trap lies in the appointment of an executor. The Swiss *esecutore testamentario* (Art. 517 f. CC) has extensive powers to administer and divide the estate. The Italian *esecutore testamentario* (Art. 700 ff. c.c.) has a more limited role. His possession of the estate may not last more than one year from the declaration of acceptance, unless the court extends it by at most one further year, and in Italian practice is often replaced by agreements among the heirs.² A testator who appoints a Ticinese lawyer as *esecutore testamentario* for an estate that includes Italian assets should be told that the powers of that person in Italy depend on Italian law. A Lugano bank that receives the instruction of an executor appointed under Italian law must examine whether that person can act under the law applicable to the succession and under the bank's own rules.

1 Powers of attorney

Powers of attorney are the documents most frequently carried across the border. They are used to sign corporate resolutions, to sell real estate, to operate bank accounts and to represent clients before authorities. The terminological risk lies in the word *procura*, discussed above, and in the scope of the power. An Italian *procura generale* drafted by a Milan notary confers authority for acts of ordinary administration and, if it says so, for acts of extraordinary administration. Under Swiss law the effects of agency follow from Art. 32 CO, and the scope of an agent's authority depends on the content of the authorization (Art. 33(2) CO). Certain acts, such as the alienation or encumbrance of land, require a special authority under Art. 396(3) CO. A special authority to stand surety must even satisfy the same form as the suretyship itself (Art. 493(6) CO), which for a natural person usually means a public deed.³

A practical rule follows. A power of attorney intended for use in both countries should list the acts it covers expressly, should state the governing law of the authorization and should be executed in a form recognized in both. For acts that require a public deed, such as the sale of land in Ticino or the transfer of shares in an Italian Srl, the power itself often requires a notarial form. Banks in Lugano usually require their own power of attorney forms for account operations, regardless of any general notarial power. They do so because they cannot assess every foreign form and because their general terms reserve the right to rely only on their own documents.

2 Notes

1. CC, Art. 559 (certificato ereditario); Codice civile, Art. 459 ff. and 484 ff.; Decreto legislativo 31 ottobre 1990, n. 346. ↩
2. CC, Art. 517–518. Codice civile, Art. 703(3): the executor's possession of the estate "non può durare più di un anno dalla dichiarazione di accettazione", unless the court extends it for no more than one further year, Brocardi.it, "Art. 703 Codice civile – Funzioni dell'esecutore testamentario", <https://www.brocardi.it/codice-civile/libro-secondo/titolo-iii/capo-vii/art703.html>. ↩

3. CO, Art. 33(2) ("Ove la facoltà sia conferita da un negozio giuridico, la sua estensione è determinata dal contenuto dello stesso"), Italian text at https://www.fedlex.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/27/317_321_377/20250101/it/html/fedlex-data-admin-ch-eli-cc-27-317_321_377-20250101-it-html-3.html; Art. 396(3) CO (special authority to alienate or encumber land), <https://www.droit-bilingue.ch/fr-it/2/22/220-396-581.html>; Art. 493(6) CO (special authority to stand surety subject to the form of the suretyship), <https://www.droit-bilingue.ch/fr-it/2/22/220-493-708.html>; Art. 216(1) CO (public deed for contracts for the sale of land), <https://www.droit-bilingue.ch/en-it/2/22/220-216-230.html>. ↩

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