

Succession Regulation (650/2012) in Belgium : all's well that ends well?

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Introduction

- Succession Regulation:
 - Jurisdiction (artt. 4 ff)
 - Applicable law (artt. 20 ff)
 - Recognition / enforcement of foreign judgments /acts (artt. 39 ff)
 - Eur. Certificat of Succession (artt. 62 ff)

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Introduction

- Impact in Belgium?
 - Regulation much discussed in literature (Proposal and final text)
 - Subsidiarity test Nov. 2009 : only issue discussed = impact of Regulation on reserved share (Belgian Senate Nov 2009 : breach of subsidiarity because Regulation could be used to avoid mandatory reserved share and hence Regulation ventures in field of family law...)
 - Regulation only applicable starting in August 2015 – but estate planning community already active (art. 83)

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- What will Regulation change in Belgium?
 - 1°) *Prima facie* nothing new under the sun
 - 2°) Closer examination : what lies beneath the surface
 - 3°) Long term perspective : reasons to doubt?

I. *Prima facie* impact

- Succession Regulation : something new under the (Belgian) sun?
- At first sight, Belgium well prepared for Regulation:
 - Role of *habitual residence* (see art. 78 Belgian Code 2004) – contrast DE, IT, SP, etc.
 - Possibility to choose the law (see art. 79 Code) – contrast almost all MS

II. What lies beneath the surface...

- Closer examination : important change for Belgium!
- 1°) Law of Habitual Residence (HR) applies to *whole of estate* without exception (art. 21/23)
- Contrast with current situation : estate governed by law of the HR – except if immovable in other countries (*lex situs*) (art. 78 Code)
- Consequences? *e.g.* 'Belgian dentist' retired in sunny Spain but keeps a flat in Belgium
 - Difficult to anticipate
 - Estate difficult to manage
 - Importance of remedial techniques ('renvoi')

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II. What lies beneath the surface...

- Application of HR to whole estate : consequences for Belgian practice?
 - Easier to anticipate
 - Estate easier to manage
 - But... local real estate (dentist's flat) governed by foreign law (Spanish law!)

II. What lies beneath the surface...

- Rights *in rem* over local real estate governed by foreign law?
- Consequences for Belgian practice
 - Immediate difficulty – application of foreign (succession) law to real estate (or only *part* of it – deceased's share in flat)
 - Delayed difficulty - how to document transfer of ownership to heirs if immovable sold years later (*e.g.* flat in Brussels sold when Belgian dentist's wife dies 15 y. after husband)

II. What lies beneath the surface...

- 2°) Choice of law is possible (art. 22) – but with greater weight
- Current situation:
 - Choice of law (art.79 Code) but no guaranteed recognition in other MS
 - Choice of law may be displaced by forum shopping
 - Even if Belgian courts have jurisdiction : express reservation for mandatory reserved share

II. What lies beneath the surface...

- Choice of law under Regulation :
 - Guaranteed recognition in all other 'MS'
 - No impact of rules of jurisdiction
 - No express reservation for mandatory reserved share

II. What lies beneath the surface...

- Reserved share under Succession Regulation?
- Commission Proposal : art. 27 par. 2 : " the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum"

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II. What lies beneath the surface...

- Succession Regulation:
 - No provision dealing expressly with issue (see however Recital 50 : “The law [which governs] the admissibility and substantive validity of a disposition of property upon death... should be without prejudice to the rights of any person who, under the law applicable to the succession, has a right to a reserved share or another right of which he cannot be deprived by the person whose estate is involved”)
 - Only way out : public policy (art. 35) – unlikely that public policy could be used to limit chosen law (choice : only national law)

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III. What lies deep underwater...



- Regulation puts forward coherent package of conflict of laws rules
- Question : will it work?
- Some reasons to doubt – 'hidden' elements which could weaken European rules
- Focus on two issues 'within/outside' Regulation

III. What lies deep underwater...



- 1st example : position of surviving spouse
- Assets of couple : crucial significance in case of death (in civil law countries) → must first be sorted out before estate of deceased can be taken care of
- Art. 1 § 2 d Reg. : “questions relating to matrimonial property regimes ...” excluded out of Regulation

III. What lies deep underwater...



- Consequences?
- Need to define what is excluded – *e.g.*
 - Art. 1464 Belgian Civil Code? (provision in prenuptial agreement awarding all community assets to surviving spouse not regarded as a gift, except if children from previous marriage) – clear impact on succession, but linked to matrimonial property
 - § 1371 BGB? ('*Pauschalierte Zugewinnausgleich*') – if no marriage contract, surviving spouse awarded higher share of '*Ausgleich*'

III. What lies deep underwater...



- How to deal with excluded matters?
 - Recital 12 : “The authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, *take into account* the winding-up of the matrimonial property regime ... when determining the estate of the deceased and the respective shares of the beneficiaries”
 - Who decides?
 - _ Preliminary question for authorities dealing with succession
 - _ Other authorities

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III. What lies deep underwater...



- 2nd example : registration of real estate transfer
- Post succession situation : transfer of ownership to heirs
- If children of the dentist want to sell flat in Brussels : how can they justify their title to sell / how can sale be recorded?

III. What lies deep underwater...



- Use of ECS?
- ECS creates presumption that heirs/legatees "...have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate..." (art. 69 par. 2)

III. What lies deep underwater...



- 3rd parties are also protected by ECS
- Art. 69 par. 4 : If person mentioned in Certificate as heir/legatee etc. "... disposes of such property in favour of another person, that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person with authority to dispose of the property concerned..."

III. What lies deep underwater...



- ECS :
 - sufficient to conclude sales
 - Is ECS sufficient to record sales in registry?
- Requirements in relation to registration :
excluded out of scope of application
- See art. 1 § 2 I : “any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register”

III. What lies deep underwater...



- In principle, heirs must comply with registration requirements of local law
- Could Eur Succession Certificate be used to demonstrate title?
- Art. 69 par. 5 : ESC “shall constitute a valid *document* for the recording of succession property in the relevant register of a Member State, without prejudice to points (k) and (l) of Article 1(2)” → not a title, MS may require additional document

To sum up

- Regulation : impressive piece of legislation
- Reception in Belgium : no major difficulty (but changes needed to Belgian framework)
- Devil is in the detail – excluded matters could come back to haunt application of Regulation...

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