

Matrimonial Property and Succession Law under EU Private international law : a happy marriage?

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I. Starting point – a basic situation

- Michael and Anja, two German citizens live in Lyon (France) with their 2 children since 1991
- In 2016, Michael dies unexpectedly
- How to deal with his succession? Law of his *habitual residence* → French law (art. 21 Succ. Reg.)
- Before taking care of the estate, need to find out what is *in* the estate : any assets shared with Anja by reason of marriage? If yes, how will they be divided?

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I. Starting point – a basic situation

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- *Preliminary issue* - needs to be solved before the estate can be taken care of → which part of the estate awarded to the surviving spouse on account of the marriage?
- Matrimonial status of Michael and Anja? No choice of law by the spouses →
 - France : *French* law (Art. 7(2) 1978 Hague Matrimonial Property Convention)
 - Germany : *German* law (§ 15(1) EGBGB)

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II. Coexistence succession and matrimonial property

Difficulties – 1st level

- *Practical* difficulties : having to solve two issues in parallel - with possibly two different governing laws
- Nothing new under the sun → *dépeçage*
- Possibly also *piecemeal litigation* : if there is a dispute (not often), not guaranteed that one court has jurisdiction over the *whole* matter

II. Coexistence succession and matrimonial property

Difficulties – 2nd level

- Co-existence of two different questions can also lead (possibly) to incoherent solutions, if different laws applicable to two issues → surviving spouse benefits from advantages of both laws (or is excluded from advantages of two systems)
- *E.g.* 2 Belgian spouses living in Germany:
 - Matrimonial property : Belgian law → no application of § 1371-1 BGB
 - Succession : German law → no application of art. 745 *bis* Belgian Civil Code (surviving spouse entitled to usufruct of entire estate)

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II. Coexistence succession and matrimonial property

Difficulties – 3rd level

- Characterization issues – 'where do I put this?'
- Many ***borderline*** situations, which are not easy to characterize, and could possibly belong to the two categories

II. Coexistence succession and matrimonial property

Difficulties – 3rd level

- *e.g. 'avantages matrimoniaux'* art. 1525 French Civil Code :
 - Marriage contract – spouses agree that:
 - *universal community* of assets
 - and unequal share of community (or even full allotment) awarded to surviving spouse
 - Not treated as gift (and neutral fiscal regime)
 - Only reservation : heirs of predeceased spouse may challenge it partially
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III. The outlook under EU Private international law

An improvement...

- How does EU PIL address/solve these issues? Two Regulations adopted/will be adopted
- 1st reaction : EU intervention is an improvement
- EU package largely based on same model
 - care taken to harmonize two Regulations
 - *prima facie* less room for discordance
- In addition, *intrinsic value* of harmonization : in all (participating) EU Member States, identical conflict of laws rules → greatly ease practitioner's task and facilitates planning

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III. The outlook under EU PIL

But not a perfect solution

– 1st - ECS

- 2nd reaction : not all difficulties solved
- 1) Until we have MP Regulation... What is status of matrimonial property in ECS?
- Application for ECS must include “an indication of whether the deceased had entered into a marriage contract...” (art. 65 par. 3 j Succ. Reg)
- Certificat should include “...information concerning a marriage contract entered into by the deceased ... and information concerning the matrimonial property regime” (art. 68 I)

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III. The outlook under EU PIL

But not a perfect solution

- 1st - ECS

- What is the value of such information in ECS?
- Art. 69 par. 2 : presumption of accuracy of elements "... which have been established under the law applicable to the succession or under any other law applicable to specific elements"
- Does this also apply to information on matrimonial property?

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III. The outlook under EU PIL

But not a perfect solution

- 1st - ECS

- *E.g.* Italian couple living in France – marriage contract with universal joint assets and allotment of joint assets to surviving spouse
- Husband owns immovable in Italy – he passes away
- French notary establishes ECS – rights of surviving spouse based on application of French law (for succession *and* matrimonial property)
- Reaction in Italy? Under Italian pil, matrimonial property governed by Italian law (art. 30 Act 218/1995) – Italian law does not allow unequal allocation of matrimonial property (art. 194 IT CC)
- In that case, no European duty to recognize the information in the ECS → ECS is therefore *giant with feet of clay*!

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III. The outlook under EU PIL

But not a perfect solution

– 2nd - Delineation

- 2) Delineation - where does it fit?
- Each Regulation has its own scope of application
 - Succession : exclusion of “questions relating to matrimonial property regimes...” (art. 1 par. 2 d)
 - Matrimonial Property : exclusion of “the succession to the estate of a deceased spouse...” (art. 1-3)

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III. The outlook under EU PIL

But not a perfect solution

- 2nd - Delineation

- Additional information in the Recitals
- *e.g.* Recital 11 Preamble MP Reg. : “For the purposes of this Regulation, the term 'matrimonial property regime' should be interpreted autonomously and should encompass not only rules from which the spouses may not derogate but also any optional rules to which the spouses may agree in accordance with the applicable law, as well as any default rules of the applicable law. It includes not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any property relationships, between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof”.

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III. The outlook under EU PIL

But not a perfect solution

- 2nd - Delineation

- Definition of scope of application not sufficient to provide answers for delicate borderline situations
- No certainty under Regulations on borderline situations – *e.g.* 'Pauschalierte Zugewinnausgleich' : succession or matrimonial property?
- *Caveat* : difficulties also exist today – no agreement in German/European practice on characterization of *Zugewinnsauegleich*

III. The outlook under EU PIL

But not a perfect solution

– 3rd - Coordination

- Coordination between two Regulations – one court and one law?
- A) Jurisdiction ? Not much problem for jurisdiction - MP Regulation guarantees coordination
- See art. 3 MP Reg. : court having jurisdiction under Succession Regulation “... shall (...) have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case”

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III. The outlook under EU PIL

But not a perfect solution

– 3rd - Coordination

- B) Applicable law – distinction between choice and default rule
- 1) Choice - coordination is possible thanks to choice possibility under 2 Regulations
However, differences remain:
 - Art. 16 Draft MP Reg. : choice for law of habitual residence or nationality of one or two (future) spouses
 - Art. 22 Succession Reg. : choice for national law only

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III. The outlook under EU PIL

But not a perfect solution

– 3rd - Coordination

- No problem if a choice for the law of the common nationality - *e.g.* Henk and Ingrid live in France and make a choice for Dutch law
- If spouses do not share the same nationality : choice cannot guarantee that *one* law applies
- Solutions?
 - Engineering : *one* spouse makes a choice and material arrangements made in conformity with all laws
 - Joint will by spouses – choice under Art. 25-3 for the law of the nationality of one of the spouses

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III. The outlook under EU PIL

But not a perfect solution

- 3rd - Coordination

- 2) If no choice : much more difficult to coordinate because the two Regulations have chosen *opposite* directions
 - Succession : *last* habitual residence (art 21)
 - Matrimonial property (art. 20a) - spouses' *first* common habitual residence after their marriage
- Difficulties will apply particularly if spouses migrated some time after their marriage - *e.g.* two Moroccan citizens living in Morocco after their marriage for 10 years and then settling in France

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III. The outlook under EU PIL

But not a perfect solution

– 3rd - Coordination

- Failure of the EU? Caveats
 - To some extent – other possibilities existed (choosing law of the *last* habitual residence of the spouses for mp)
 - Twin Regulations will however already go some way in easing out situation – less variety with Regulations than with national conflict of laws rules
 - Perfect coordination is not possible, simply because two different fields and policy choices may be different
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IV. By way of conclusion

- What if diverging laws on twin issues?
- 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”

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