The EU Succession Regulation:
The Law Applicable to the Succession – An Overview

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The law applicable to the succession:
the main features of the Regulation

- Unitary approach
  - No distinction between movable and immovable property
- Law of the last habitual residence
  - Subject to an escape clause and to renvoi
- Choice of the national law of the deceased
  - For the whole of the estate / No other choice is allowed
- Broad scope of the applicable law
  - No distinction between succession law and the administration of the estate
- Special rules
  - For wills and other dispositions upon death
  - For the appointment and the powers of an administrator of the estate
The Law applicable in the Absence of Choice

• Last habitual residence of the deceased (Art. 21(1))
  – Absence of a definition
    • « Centre of interests » (ECJ case law, recital 23)
    • Overall assessment (ECJ case law, recital 23)
  – Difficult determination of the habitual residence in specific situations
    • Change of residence (ECJ case law)
    • Multiple residence (recital 24)
      – Priority of personal/family interests over professional interests (recital 24)
      – Role of the deceased’s intention (ECJ)
      – Role of the location of assets (recital 24)
      – Role of the deceased’s nationality (recital 24, ECJ)
    • Absence of an habitual residence (recital 24) ?

• Escape clause (Art. 21(2))
  – Exceptional character, manifestly closest connection (recital 25)
  – Factor of unpredictability or of a greater predictability?
  – Situations:
    • Death after a recent change of the habitual residence (recital 25)
    • Envisaged change of the habitual residence (e.g. imminent return to the country of origin)
The Law applicable in the Absence of Choice

• Renvoi
  – Scope of application
    • Exclusion in the case of application of the escape clause and in the case of choice by the deceased (Art. 34(2))
    • Most important case: last habitual residence in a non Member State (jurisdiction based on Art. 10 and 11)
  – Two situations
    • Referral to the law of the forum or to the law of another Member State (Art. 34(1)(a))
    • Referral to the law of a non Member State, if that law is applicable under its own criteria (Art. 34(1)(b))
– Advantages and drawbacks
  • Application of domestic law (or the law of another Member State), uniformity
  • Complexity, unpredictability
  • Possible scission of the estate (contrary to legislative and case law precedents in some Member States)

The Law applicable in the Absence of Choice

• Renvoi and unity of the succession
  – Belgian PIL Code of 2004, Art. 78(2)

« La succession immobilière est régie par le droit de l'Etat sur le territoire duquel l'immeuble est situé. Toutefois, si le droit étranger conduit à l'application du droit de l'Etat sur le territoire duquel le défunt avait sa résidence habituelle au moment de son décès, le droit de cet Etat est applicable. »
« Succession over immovable property is governed by the law of the State on the territory of which the property is situated. However, if foreign law leads to the application of the of the State on the territory of which the deceased had his/her habitual residence at the moment of death, the law of that State is applicable. »

– Spanish case law
  • Tribunal supremo, 15.11.1996, Lowenthal; 21.5.1999, Denney; 23 septembre 2002, François Marie James W.

– French case law
  • Cass. 21.3.2000, Ballestero; 20.6.2006, Wildenstein; 11.2.2009, Riley
The Choice of the Applicable Law

• Choice of the national law of the would-be deceased
  – Multiple nationalities (art. 22 par. 1)
    • Without any test of effectivity or closest connection
  – Nationality at the time of choice or at the time of death (art. 22 par. 1)
    • A change of nationality has no impact / a future change of nationality can be anticipated

• Exclusion of other options
  – No choice of the law of the habitual residence at the time of the choice
  – No choice of the lex situs (= no voluntary scission)
  – No choice of the law applicable to matrimonial property
    • Broader options for spouses (Matrimonial Property Proposal of 2011)

The Choice of the Applicable Law

• Matrimonial Property Proposal 2011
  Article 16 - Choice of applicable law
  « The spouses or future spouses may choose the law applicable to their matrimonial property regime, as long as it is one of the following laws: (a) the law of the State of the habitual common residence of the spouses or future spouses, or (b) the law of the State of habitual residence of one of the spouses at the time this choice is made, or (c) the law of the State of which one of the spouses or future spouses is a national at the time this choice is made. »
The Choice of the Applicable Law

• The application of the chosen law
  – Exclusion of renvoi (Art. 34(2))
  – Other domestic law limitations?
    • E.g. domicile of the deceased in England for the purpose of requesting a family provision
  – Choice of the law of a non-unified legal system
    • Use of the domestic conflict rules for internal conflicts (Arts. 36(1) and 37)
    • In the absence of such rules, principle of the closest connection (Art. 36(2)(b) and 37)

The Choice of the Applicable Law

• No specific protection for family members (forced heirship)
• Other mechanisms?
  – Invalidity of an abusive or fraudulent choice?
    • Recital 26: « Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as fraude à la loi in the context of private international law. »
    • Purposeful acquisition of a State’s nationality?
    • Choice of a nationality which is not effective? (ECJ, Hadadi case, C-168/08)
  – Public policy?
    • Discrimination based on religion or gender
    • Total absence of protection for close family members
    • What about mechanisms based on judicial discretion (like the English « family provision »)?
The Choice of the Applicable Law

- Modality of the choice
  - Included in a disposition of property upon death (will or succession agreement)
  - Formal validity of the disposition (Art. 27 or 1961 Hague Convention)
  - Tacit choice
    - Reference to rules or legal concepts typical of the chosen law (e.g. the creation of a testamentary trust)
    - Other indications? (e.g. disposition established in a purely domestic situation)

- Other issues relating to the validity of the choice
  - Substantive validity, in particular valid consent (Art. 22(3): chosen law)
  - Capacity (chosen law? cf. Art. 26(a))

- Modification or revocation of the choice
  - Voluntary modification or revocation
    - Formal validity (Art. 22(4) in connection with Art. 27)
  - What about revocation by operation of the law (e.g. in the case of a subsequent marriage)?
The Scope of the Applicable Law

- Unitary approach (Art. 23)

- All succession law issues
  - Intestate succession
  - Voluntary succession (subject to specific rules for dispositions upon death)
  - Forced heirship rights (inclusive clawback)

- The administration of the estate
  - Transfer of the property to the heirs and legatees; powers of heirs, executors and administrators; liability for debts
    - Even in the case of choice of law (art. 22)
    - Even if an administrator has been appointed pursuant to mandatory rules of the law of the forum (cf. art. 29, in particular 29(2))

Dispositions upon death

- Special rules for the substantive validity (Art. 24-26)
  - Application of the law, which would have been applicable to the succession at the time of the disposition (« hypothetical succession law »)
  - Choice of the applicable law
    - Partial choice (only for the admissibility and the substantive validity of the disposition)
  - Mutual wills and bilateral succession agreements
    - Cumulative application of the laws, which would have been applicable to the successions of the would-be deceased at the time of the agreement
    - Choice of the national law of one of the would-be deceaseds

- Special rules for the formal validity (Art. 27)
  - Extension of the alternative connections provided by the 1961 Hague Convention
Dispositions upon death

- Scope of the special rules
  - Dispositions of property upon death
    - Wills, mutual wills and succession agreements
    - Distinction between joint wills and mutual wills (Art. 3(1)(b) and (c))
    - Exclusion of trusts and other « will substitutes » (art. 1(2)(g) and (j))
  - Only for admissibility, substantial validity, and irrevocability of the disposition
    - Not all other succession law issues (such as forced heirship rights and clawback)
    - Not the administration of the estate
    - What about the content and the effects of dispositions upon death?

Thank you for your attention!

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