International successions: Overview of Regulation 650/2012

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Plan

- 1) The Regulation: general principles

- 2) Application of the Regulation: illustrations
I. Regulation 650/2012: general principles

- Regulation on Successions (650/2012)
  - Came into force: 16 August 2012 (Art. 84)
  - Application: successions opened on and after 17 August 2015 (Art. 83)
  → Until then: *current* law remains pertinent
I. Regulation 650/2012: general principles

- In the meantime: application of national/international rules of private international law:
  - National PIL
    - NL: Boek 10 NBW
    - BE: CODIP (Art. 77-84)
    - DE: §§ 25-26 EGBGB...
  - International conventions:
    - The Hague 1961 Convention (form of wills)
    - Other conventions (e.g.: Nachlaßabkommen DE-TU 1929)
I. Regulation 650/2012: general principles

• Impact of Regulation 650/2012 from now to 17 August 2015?
  – None if the succession is opened before 17 August 2015...
  – If the succession is opened on or after 17 August 2015: application of the Regulation in its entirety, even to deeds/situations established before
I. Regulation 650/2012: general principles

- example: Belgian national residing in Spain where he has been enjoying his peaceful retirement since 2010, but keeps a property in Belgium
- 2013: gift of the bare ownership of the Belgian property, for the benefit of his nephew
- How is the gift accounted for at the time of succession?
- *Inheritance law* determines any obligation to account for and restore gifts (Art. 80 § 1)-10) CODIP / Art. 23 par. 2 let. i Reg.)
I. Regulation 650/2012: general principles

• Inheritance law
  – Death in April 2014: no application of the Regulation → inheritance of real estate governed by Belgian law
    • If settlement in Belgium: law of the location of the property (Art. 78 CODIP)
    • If settlement in Spain: law of the location of the property by reference to the deceased’s national law (Art. 9-8 Civil Code ES)
  – Death in Sept. 2015: application of the Regulation → inheritance governed by Spanish law (deceased’s habitual residence – Art. 21)
I. Regulation 650/2012: general principles

• → Need for a command of Regulation 650/2012 in order to *anticipate* its application to future successions (but prepared today...)
I. Regulation 650/2012: general principles

• Regulation 650/2012?
  – Civil approach (no fiscal component)
  – No unification of inheritance law
  – Coordination approach: rules of private international law:
    • Applicable law
    • Competence (jurisdictions and notaries)
    • Circulation - cooperation (e.g.: European Certificate of Succession)
I. Regulation 650/2012: general principles

• Basic principles of the Regulation:
  – Competence: habitual residence (Art. 4)
  – Succession governed by a single law – no splitting up
  – Which law?
    • Law of habitual residence (Art. 21)
    • Or law chosen by the deceased (Art. 22)
  – Very broad area covered - application of inheritance law to all inheritance matters (devolution/transfer of assets/settlement-partition)
II. Regulation 650/2012 in practice: illustrations

• **Scenario 1**: Mr Durant, a Belgian national living in Belgium, owns a second home in France

• Alternative: a Dutch/German/Luxembourg national who owns a second home in a southern country - Italy, Spain, France, etc.

• Which law(s) for inheritance?
## II. Regulation 650/2012 in practice: illustrations

<table>
<thead>
<tr>
<th>Country</th>
<th>Unity/ split</th>
<th>Main connecting factor</th>
<th>Secondary connecting factor</th>
<th>Renvoi?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BE/ FR</strong></td>
<td>Split (Art. 78 CODIP – Art. 3 Civ. Code FR)</td>
<td>Habitual residence/domicile</td>
<td>Location of property</td>
<td>Yes - property (BE) / if unity (FR)</td>
</tr>
<tr>
<td><strong>NL</strong></td>
<td>Unity (The Hague Conv. 1989)</td>
<td>Habitual residence (if nationality or HR 5 years)</td>
<td>Nationality</td>
<td>No</td>
</tr>
<tr>
<td><strong>DE</strong></td>
<td>Unity (§ 25-1 EGBGB)</td>
<td>Nationality</td>
<td>/</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>LU</strong></td>
<td>Split (Art. 3 par. 3 Civ. Code)</td>
<td>Domicile</td>
<td>Location of property</td>
<td>Yes</td>
</tr>
</tbody>
</table>
II. Regulation 650/2012 in practice: illustrations

- Regulation?
- Principle: habitual residence (Art. 21)
- Advantages?
  - *Single* law for the entire inheritance (no split)
  - Rule common to all the MS (except DK/UK/IRL)
  - No *renvoi* (unless it is a third State)
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- **Scenario 2:** Mr and Mrs Janssens, Belgian pensioners, reside 6 months a year in Tarragona (ES) and 6 months a year in Lier (BE)
- In Lier, social relations are still intense (children, grandchildren, friends, etc.)
- In Tarragona, involvement in local life – Mr works as a voluntary guide and at the Santa Tecla festival
- Mr and Mrs Janssens wonder which law is applicable to their succession
II. Regulation 650/2012 in practice: illustrations

- Principle: application of the law of the deceased’s last habitual residence
- Mr and Mrs Janssen’s habitual residence?
- No definition
- Preamble: whereas 23 → “a close and stable connection with the State concerned”
II. Regulation 650/2012 in practice: illustrations

• Principles for the determination of the habitual residence?
  – Overall approach - “overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death…” (whereas 23)
  – Single habitual residence
  – Tax domicile – not a decisive indication
II. Regulation 650/2012 in practice: illustrations

• What is Mr and Mrs Janssen’s habitual residence?
• Whereas 24: if the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them → if the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment
II. Regulation 650/2012 in practice: illustrations

• In many cases, no difficulty in locating the habitual residence—e.g.:
  – Nederbelg/French in Belgium: habitual residence in Belgium even if he keeps part of assets, activities and family connections with State of origin
  – 'Polish plumber' who lives 10 months a year in France: expatriate for professional reasons who keeps a close and stable connection in his State of origin in which family life and centre of interests were located (whereas 24)
II. Regulation 650/2012 in practice: illustrations

- Difficulties in locating the habitual residence: quite real but limited to certain circumstances

- E.g.: frontier worker BE-DE:
  - Work, children’s school, social contacts, etc.: DE
  - Physical residence ('dormitory'): BE

- Solution for difficult circumstances → Choice of law (infra)
II. Regulation 650/2012 in practice: illustrations

- **Scenario 3**: Mr Jean-Pierre Frieden, a Luxembourg national expatriated in Morocco where he has been living with his wife for 13 years, consults you
- Mr Frieden still feels himself to be a Luxemburger, but only connection with his native country is a securities account managed by Lxbg banking institution
- Mr Frieden retains two children (daughter and son) from a previous marriage
- Which law will govern his succession?
II. Regulation 650/2012 in practice: illustrations

• Application of the Regulation even though a non-European succession and applicable law of a third State?
• Yes: Regulation not limited to European successions alone
• ‘Universal’ application of the Regulation (Art. 20) → even if it leads to the application of law of third State (consequence: no residual room for the application of national private international law)
II. Regulation 650/2012 in practice: illustrations

- Jurisdiction of EU authorities to rule on the succession?
- Art. 10: competence if presence of assets of the estate and other conditions
- Luxembourg: jurisdiction for the succession as a whole since the deceased possesses the nationality of the forum (Art. 10 par. 1-a)
II. Regulation 650/2012 in practice: illustrations

- Law applicable according to Regulation? Application of the law of habitual residence (Art. 21) → law of *Morocco*
- Law of Morocco?
  - Succession status of the surviving spouse under Moroccan law not very favourable if the deceased leaves descendants: 1/8th of the assets (Art. 344 Personal Status Code)
  - Difficulty between descendants: privileged status of the descendant of male gender (Art. 351(1) Code)
II. Regulation 650/2012 in practice: illustrations

- Renvoi?
  - In principle renvoi excluded
  - Exception if inheritance law is that of a third State \textit{and} PIL of the third State refers to a law of a MS (Art. 34-1-a)

- In casu: Art. 18 of the Dahir of 12.08.1913 on the civil condition of foreigners in Morocco – hereditary devolution is governed by the law of the State of which the deceased possessed the \textit{nationality} $\rightarrow$ renvoi to Luxembourg law
II. Regulation 650/2012 in practice: illustrations

- **Scenario 4**: a French national, who has been residing in Belgium for 5 years, appears before a Belgian notary and wishes to draw up a will bequeathing the largest disposable portion to a deserving nephew, who resides in France.

- It is not ruled out that one day the said French national might wish to settle in France again or elsewhere, even if no such concrete intention is manifest at the present time.
II. Regulation 650/2012 in practice: illustrations

- Wills and Testaments and dispositions upon death?
- Principle: application of inheritance law (Art. 23 par. 2 h: inheritance law governs “the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death...”)
II. Regulation 650/2012 in practice: illustrations

- Difficulty: inheritance law = deceased’s habitual residence “at the time of his death” (Art. 21 par. 1 in fine)
- Habitual residence can be moved between the time of the dispositions upon death and death
II. Regulation 650/2012 in practice: illustrations

- Solution? Choice of law!
- Regulation allows choice of law by the (future) deceased (Art. 22)
- Choice of law makes it possible to fix the law applicable to the succession
- Strict limits:
  - Choice of a law (uniqueness)
  - Choice solely in favour of national law (*comp.* art. 79 CODIP)
II. Regulation 650/2012 in practice: illustrations

• Several hypotheses in which choice of law is useful:
  – Doubt about habitual residence (de cujus’mobility)
  – Foreigner settled in Belgium (e.g.: Briton settled in Belgium – choice of English law – will adapted to the testator’s ‘judicial culture’)
  – Belgian settled abroad
II. Regulation 650/2012 in practice: illustrations

- Choice of law clause?
- “I declare that, pursuant to Art. 22 of the Regulation on successions 650/2012, my succession will be governed by Belgian law. I possess Belgian nationality on the day of this declaration”
II. Regulation 650/2012 in practice: illustrations

• **Scenario 5**: Two German spouses reside in Eupen.
  They drew up a joint will when they were living in Germany ("Berlin" will: the will stipulates that the surviving spouse inherits the entire estate, with each spouse appointing the other as sole legatee, and that the children will inherit only at the second death).

• Wife owner of a property in Germany
II. Regulation 650/2012 in practice: illustrations

• On the death of the 1st spouse: what is the validity of the *joint* will?
  
  – Will subject to Belgian law (Art. 21/23 Regulation)
  
  – *Formal* validity of a will under the Regulation? Reference to The Hague Conv. (Art. 75 § 1 al. 2)
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• Difficulty: neither Regulation nor The Hague Convention give an opinion on the *lawfulness* (admissibility) of the joint will – diversity of approaches:
  – Belgium: no case law; Belgian doctrine: *substantive* definition in the majority → inheritance law (acceptable under regulation?)
  – France: Supreme Court 2013: matter of the lawfulness of a joint will is a *procedural* and not a substantive matter
II. Regulation 650/2012 in practice: illustrations

• Conclusion:
  – Deceased’s estate governed by Belgian law
  – Fate of the joint will is uncertain – possible questioning:
    • Either the joint will is lawful and subject to Belgian law
    • Or public policy is taken into consideration if will of a unilateral nature (Art. 968 Civil Code)
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- Solution: choice of law – choice of German law
Conclusion

• Do not wait for 17 August 2015
• Regulation may simplify international planning/estate settlement
• Prepare best practices:
  – Model of choice of law clause
  – Model of ECS
  – Co-ordination of deeds