

Conference Report - Property regimes of international couples and the law of succession

On the 9th and 10th of March 2017, the Academy of European Law (ERA) hosted the conference “Property regimes of international couples and the law of succession” in Trier, Germany. It gave an opportunity to more than 60 academics and practitioners of 24 different nationalities to discuss property aspects of marriage and registered partnerships at European level. The focus has been put on the two new additions to European family, i.e. the property regime Regulations (No 2016/1103 and 2016/1104) and their interplay with the already applicable Succession Regulation (No 650/2012).

This post by ***Amandine Faucon***, research fellow at the MPI Luxembourg, provides an overview of the presentations and the discussions held at the Conference.

Setting the scene

Enhanced cooperation in family matters: genesis of the Regulations - María Vilar Badia (EU Commission) explained that the aim of the Regulations was to complete the existing European family law framework. In that perspective, two texts were proposed to the European legislator in 2011 but were rejected, after four years of negotiations, by Poland and Hungary. The main obstacle was the indirect recognition of same-sex couples. Given the lack of necessary unanimity, the Council suggested adopting the already negotiated texts through the enhanced cooperation process. This approach was supported and six months later, in June 2016, the instruments were adopted by eighteen Member States.

A comprehensive set of EU rules on international family estate law - Prof. Dieter Martiny acknowledged the broad scope of EU Regulations, now covering almost all aspects of family life. He briefly presented each of these instruments as well as their material scope. Furthermore, he discussed the interplay of the new Regulations with the already applicable ones, especially with regard to characterization matters, since one act can raise questions that have to be solved under different texts (e.g.: donation). He then presented the recurrent features of

all existing instruments, e.g. the existence of party autonomy, and pointed out some issues such as the lack of common general provisions.

New rules on matrimonial property regimes

Jurisdiction in case of death or divorce and in all other cases - Prof. Costanza Honorati illustrated the characterisation issue notably with the concept of marriage and registered partnership. Regarding jurisdiction, she stated that the new Regulations fulfil classical private International law objectives by aiming at concentrating jurisdiction, through a reference to the forum successionis and the forum divortii, and at favoring the application of the lex fori by making a detour by the applicable law, in case it is a chosen one. For the rest, habitual residence and nationality are the main criteria.

Applicable law, its scope and effects in respect of third parties and which choices can be made? - Dr. Ian Summer first explained the difficulty of knowing which Regulation to apply through the example of a relationship being considered as a marriage in a country and a registered partnership in a second. He then criticized the exclusion of pension rights which are a significant part of patrimonial disputes. As regard to applicable law, he explained the main features of the new Regulations: unity, universality and a hierarchy of connecting factor in the absence of a choice of law. The latter, being the privileged factor, was particularly detailed notably as regard to the different choice possible and the formal conditions to be fulfilled. The effects of the law applicable with respect to third party were also addressed.

Special rules for property consequences of registered partnerships - María Vilar Badia laid out the differences existing between the Regulation on matrimonial property regime (No 2016/1103) and the Regulation on the property consequences of registered partnerships (No 2016/1104). The overall objective of the legislator was to have very similar text so that both types of relationships are treated equally. The differences are therefore rare and consist of additional safeguards to protect registered partners, as this status does not exist in every participating State.

Crossover: property regimes and succession law

Workshop: Making the right choice - party autonomy in property & succession law

Within the workshop the following case has been set as working hypothesis: An Italian and an Austrian got married in Belgium where they lived for six months before moving to Germany. The wife bought a holiday apartment in Antibes and received a flat in Italy. After a while, they separated and the wife moved back to Italy. The participants addressed the relevant questions of property regime, divorce, succession and maintenance. The concept of habitual residence and the application of party autonomy as a tool to achieve some coherence were particularly examined. The participants concluded that there is no unique answer to the case and that the final outcome largely depends on the will of the parties involved. It is, therefore, fundamental for practitioners to carefully provide legal advises to their clients.

Equalization of accrued gains and pension rights adjustment - Peter Junggeburth discussed the characterization problem regarding pension rights and its impact on the increase in the share of the succession or divorce. The presentation was given from the point of view of German inheritance and matrimonial property law but contemplated the impact of the questions raised in cross-border situations.

Planning cross-border successions

Options for drafting a last will under the EU Succession Regulation: first experiences - Dr. Julie Francastel first considered the general rule - the law of the last habitual residence of the deceased - and raised the issue of determining the habitual residence. She used the case of a retired person living part-time in Mallorca and part-time in Germany as an example. In that situation, choosing the law applicable can be advisable. She stressed the impact of such a choice on jurisdiction and added that a choice should be considered even if a situation does not bear cross-border elements at first sight. The formal conditions of the choice and the issue of succession contracts (that do not exist in every Member States) were also addressed.

European Certificate of Succession and the division of the estate - Dr. Jan-Ger Knot presented the European Certificate of Succession (hereafter ECS) and its objectives. He stressed that its operation in practice remains very unclear and leads to many difficulties for practitioners. It was also recalled that depending on the Member State, the authorities issuing the ECS can be a Notary or a Court. He then described the effects of the ECS and the different means to challenge it. The

problem of conflicting ECS was also addressed and in this respect the European Network of Registers of Wills Association has been introduced as a possible solution.

Paying inheritance tax twice? - Prof. Alain Steichen first gave an overview of the main reasons leading to double taxation: the location of the deceased, heirs and assets in Member States having different taxation systems. Given the increasing mobility of citizens and purchases abroad, the problem is expanding but there are no possibilities to force Member States to avoid double taxation. He presented the Model for treaties on double taxation on inheritance from the OECD (1982) and the EU recommendation (2011) favoring the taxation at the residence of the heir but their impact is limited. A common rule to be followed by every State should be imposed to avoid the problem.

Hands-on experience: Planning cross-border successions with a view to third states and offshore jurisdictions

EU and Switzerland - Tobias Somary first indicated that internationality is becoming normality and therefore stressed the importance of estate planning. In that regard, the law applicable to matrimonial property regime should be carefully considered, as it can significantly impact the size of the estate and its distribution at the dissolution of the matrimonial regime. He then turned to the inheritance question and stressed that according to the Succession Regulation the law of a non-member State, such as Switzerland, can be applied to the inheritance. He, therefore, advised to plan the succession carefully and gave some examples as an illustration of the possible difficulties.

UK before & after BREXIT and off-shore jurisdictions - Alex Ruffel explained that the UK is not part of the Succession Regulation and therefore applies its own private International law. She presented the related English provisions and illustrated them with practical examples. She then stressed out the present uncertainty as to whether the UK should be considered as a third State with regard to the application of Article 34 of the Succession Regulation (renvoi). This problem will vanish post-Brexit and is the only before/after difference regarding successions. Concerning off-shore jurisdictions, she explained that although most have a common law system, creating a trust or a company is advisable to avoid further complications.

The concluding remarks were presented by Prof. Dieter Martiny who noted the willingness of the EU to ease the life of European citizens but stressed that many uncertainties remain and lay in the hands of the European Court of Justice.