STEP EUROPE CONFERENCE

Cross-border family succession issues
Conflict of laws & International probate

Practical approaches

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Panellists

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EUROPEAN SUCCESSION REGULATION (I)


• applicable to the succession of persons who died on or after 17 August 2015

• applicable in all EU Member States, except for the United Kingdom, Ireland and Denmark

• governs both testate and intestate successions. Creation of a new instrument: Certificate of Succession

• not applicable to revenue, customs and administrative matters
APPLICABLE LAW UNDER EU REGULATION (II)

- **basic principle:** the succession as a whole shall be governed by the law of the State where the deceased had his habitual residence at the time of death (Article 21)
- **succession as a whole:** both succession and administration of the estate; no distinction between movable and immovable property
- **universal application (Article 20):** any law specified by the Regulation shall be applied, regardless whether it is the law of a Member State or the law of a third State
- **for the application of the Regulation, the United Kingdom, Ireland and Denmark are regarded as third States**
APPLICABLE LAW UNDER EU REGULATION (II)

- **basic principle**: the succession as a whole:

- This principle recalls the 1994 UE Recommendation which urged the Member States to adopt more efficient rules in the field of succession procedures and more appropriate procedures for what concerns the transmission of the estate and assets through generations.

- **basic principle**: the succession as a whole: means a successful planning of the transmission of all assets, which is one of the main aim of the Regulation itself.
JURISDICTION UNDER EU REGULATION (III)

• **general rule** (Article 4): the courts of the Member State in which the deceased had his **habitual residence** at the time of death shall have jurisdiction to rule on the succession as a whole.

• **subsidiary jurisdiction** (Article 10, paragraph 1): in case the deceased had his last habitual residence in a third State, the courts of a Member State in which assets of the estate are located have jurisdiction to rule on the succession as a whole in so far as:
  a. the deceased had the **nationality of that Member State** at the time of death; or, failing that,
  b. the deceased had his **habitual residence in that Member State** in the **five years** period prior to the court procedure.

• in case no court in a Member State has jurisdiction based on the above, the courts of **the Member State in which assets of the estate are located** shall nevertheless have jurisdiction to rule on those assets.
JURISDICTION UNDER EU REGULATION (III)

- also in case of a **choice of law – professio iuris (nationality)**, as a general rule the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.

- the courts of the Member State which law was chosen have jurisdiction in case:
  a. a choice-of-court agreement was concluded by the parties concerned;
  b. the parties to the proceedings have expressly accepted the jurisdiction of the court seized;
  c. the court seized in the Member State where the deceased had his last habitual residence declined jurisdiction, considering the courts of the Member State which law was chosen better placed to rule on the particular succession.
THE CERTIFICATE OF SUCCESSION

• Implementation of the certificate in the Member States.

• Use of the Certificate instead of or together with the national certificates (if any).
MONACO SUCCESSION REGULATION (IV)

• Previously International Successions were essentially set out by case law.

• However the globalization and the 140 nationalities represented in Monaco (within an area of 2 km²) fully justified the adoption of a new regulation on private international law.

• Law n°1,448 of 28 June 2017 on Private International Law entered into force on 8 July 2017 and codified private international rules applying in Monaco.
MONACO SUCCESSION REGULATION (IV)

• Regarding Successions, the Code of Private International Law (CPIL) mainly took its inspiration from the EU Succession Regulation (Brussels IV): application of principle of unicity is the most important innovation.

• In the absence of transitional provisions, there is still an issue with the application of this law over time. We are expecting an important Court decision on this topic.

• The CPIL like EU Succession regulation is a civil regulation which does not rule the tax aspects of international successions.
APPLICABLE LAW UNDER MONACO REGULATION (V)

• **Principle:** One law applicable to the entire estate, i.e. to both succession and administration of the estate, and both movable and immovable assets.

  “The law of the State in the territory of which the deceased was domiciled at the time of the death” (*Article 56 CPIL*).

• **Professio juris:** A person may choose to designate, for the handling of her succession, the law of a State of which she is a national when the choice is made. (*Article 57 CPIL*)
JURISDICTION UNDER MONACO REGULATION (VI)

Monaco Courts have jurisdiction in succession cases (*Article 6, 4° CPIL*):

- when the deceased had his last domicile in Monaco:
  - A residence permit is a simple presumption of domicile (*Article 2 CPIL*);
  - The term of domicile has been chosen instead of habitual residency (EU Rules);

- when an immovable property is located in Monaco;

- when an heir or executor is domiciled in Monaco for claims made by third parties.
2. Is your jurisdiction still competent dealing with an estate if a citizen of your jurisdiction moves to another country?
Monaco:

Yes, if (Article 6, 4° CPIL):

- this citizen owns immovable property in Monaco,

- an heir or an executor domiciled in Monaco and third parties willing to submit an application against them;
3. Would your jurisdiction be competent dealing with an estate if the testator owns property in your jurisdiction?
Monaco:

Yes, Monegasque Court has jurisdiction if the testator owns property in Monaco:

«The Courts of the Principality shall have jurisdiction in matters of succession, where (...) an immovable property arising by way of succession is located there ». (Article 6, 4° CPIL)
4. Would you recommend a testator drafting a last will for real property located in your jurisdiction?

What about movable property?
We recommend to all our clients to draft a last will with the assistance of qualified lawyers in each jurisdiction where their assets are located:

- specifically if their assets are located all around the world;
- no matter whether they have movable or immovable assets;
- and to check if their national law would be a better choice (professio juris).

We also recommend to our clients to seek fresh advice and amend their will as soon as they change their habitual residence/domicile.
Movable / Immovable property
Monaco

Before the entry in force of the CPIL, the principle applied by case law was the principle of scission:

- National law of the deceased for movable assets,
- Law of situation of the real estate for immovable assets.

Since the CPIL came into force, one unique law is applicable to the whole estate.

Real estates only make difference concerning jurisdiction issues.
5. **How has Brussels IV influenced or changed the estate planning in your jurisdiction?**
Brussels IV and Monaco

Monaco as a third State:

The preliminary works of the Parliament on the CPIL refers to EU rules and states that Monaco wants to adopt a homogeneous and modern regulation on Private International Law which can comply with international society and still respect Monaco particularities.

✓ As mentioned previously, due to the globalization and the diversity of nationalities represented in the Principality, Monaco has adopted the CPIL in 2017,

✓ Influence of Brussels IV:
  - the end of the inheritance system of scission,
  - the Professio juris.
Brussels IV and Monaco

The main difference between the CPIL and Brussels IV is Article 63§2 CPIL related to the reserved portion:

«It [the law governing the succession as a whole] shall not deprive an heir of the reserved share afforded to him/her by the law of the State of which the deceased was a national at the time of death,

nor apply to the reserved share to the succession of a person who, at the time of death, was a national of a State whose law does not recognize this regime. »
6. What happens in your jurisdiction if a person
(a) resident in your jurisdiction
(b) holding property in your jurisdiction passes away intestate?
In case a Monaco resident holding property in the Principality passes away intestate:

✓ The resident card is a presumption of domicile in Monaco,

✓ Unless someone proves his/her domicile was somewhere else:
  
  o the estate opens in Monaco (Article 83 of the Civil Code),
  
  o the law of the last domicile applies to the whole estate, i.e. Monegasque law (Article 56 CPIL),

✓ Monaco could also have jurisdiction if the presumption was efficiently discussed since there is a real estate in Monaco, but in such case Monaco Court would apply the law of the last domicile.
7. How do you approach a situation in which a foreign national moves to your jurisdiction with a structure (trust/foundation/SCI)?
SCI

Shares of SCI are considered as movable assets. Therefore, no specific change need to be implemented in the estate planning of a foreigner moving to Monaco with such a structure.
Trust:
Monaco has signed the Hague Convention on Trusts. So, a trust created in accordance with the law chosen by the settlor shall be recognized in Monaco and shall produce therein its effects (Articles 11 of the Hague Convention of 1 July 1985 & 100 CPIL).

Following Article 11 of the Hague Convention, « such recognition shall imply, as a minimum, that the trust property constitutes a separate fund (…) ».

But:
Following Article 65 of the CPIL, the proper law of a trust does not affect the determination of the applicable law to the succession of the settlor.
Foundations

Following Monegasque statutes i.e. Law n° 56 of 29 January 1922 on Foundations, Foundations must meet a need of general interest and pursue a purpose consistent with public policy, morality or national security.

Monaco doesn’t know Private Family Foundations.

Our feeling is that Foundations could be treated like Trusts by Monaco Courts, meaning they are governed by their own law and are excluded from the succession.
However clawback claims might arise if:

- Monaco law applies AND National law of the deceased knows forced heirship rights (Article 63-2 CPIL) AND forced heirship rules have been breached by the property transfer of assets to the Foundation,

- National law of the deceased applies and provides forced heirship rules that have been breached by the property transfer of assets to the Foundation.
Real property held in a structure

8. Would your jurisdiction still be competent if real property (and/or movable property) situated in your jurisdiction was held in a structure (if possible)?
Real property held in a structure
Monaco

Monaco:

Our feeling is that Monaco could keep jurisdiction if a real property was held in a structure based on the combination of this 2 paragraphs of article 6 CPIL:

- Article 6, 4 CPIL: «the Courts of the Principality shall have jurisdiction in matters of succession, where an immovable property arising by way of succession is located there».

- Article 6,1° CPIL: «the Courts of the Principality shall also have jurisdiction, irrespective of the defendant’s domicile in matters relating to rights in rem in immovable property, tenancies of immovable property and rights in companies owning an immovable property, where the immovable property is situated in the Principality.»

But there is no case law at this point.
Case Study

A French national residing in the US (which state?) has significant assets including real estate in the US, Mexico, France and the Cayman Islands. He desires to leave his assets in trust for his US resident children and deprive his children from a previous marriage.

1. Can the properties in the US, Mexico, France and the Cayman Islands be transferred to a trust?

2. Would it be preferable not to transfer the property to a trust but to deal with it by drafting a last will and testament in your jurisdiction?

3. Does his move to Mexico change anything to the estate planning done in any of the other jurisdictions?
Case Study

Court proceeding
Trial procedures
Capacity?
According to recent developments in the filed of Succession rules the Italian Parliament is asked to introduce new rules:

• The introduction of the **agreements on succession**, which are not valid at the moment but they could be recognised in case the choice of law is towards a jurisdiction in which the agreements are valid.

• The “legitimate share” to be considered as a credit of the total amount of the assets and estate and not more as a percentage of the whole.

• Introduction of the prenuptial agreements (reflects on the future treatments in case of decease).
Case Study under Monegasque perspectives

An Italian national residing in Monaco has significant assets including real estate in the US, Mexico, Monaco and the Cayman Islands. He desires to leave his assets in an US trust for his US resident children and deprive his children from a previous marriage.

1. Can the properties in the US, Mexico, Monaco and the Cayman Islands be transferred to a trust?

2. Would it be preferable not to transfer the property to a trust but to deal with it by drafting a last will and testament in your jurisdiction?

3. Does his move to Mexico change anything to the estate planning done in any of the other jurisdictions?
Case Study under Monegasque perspectives

1. Can the properties in the US, Mexico, Monaco and the Cayman Islands be transferred to a trust?

✓ Yes a Monegasque resident can transfer the property of immovable assets to a trust (Article 98 CPIL) but the proper law of the trust does not affect the determination of the applicable law to the succession (Article 65 CPIL).

✓ However the testator’s children from a previous relationship could bring a clawback claim in Monaco Court after the testator’s death, since both Monaco and Italian laws know forced heirship rights.
2. Would it be preferable not to transfer the property to a trust but to deal with it by drafting a last will and testament in your jurisdiction?

✓ We consider that the drafting of a testament will not change anything in this case since the forced heirship rights may still open to a clawback claim,

✓ The solution would be different if the testator is an US citizen.
3. Does his move to Mexico change anything to the estate planning done in any of the other jurisdictions?

✓ Yes the move of the testator to another country could change the law applicable to the estate: law of the last domicile.

✓ But Monaco Court still have jurisdiction since an immovable property is located in Monaco (Article 6 4°CPIL);

✓ And even if Mexican law is most favourable to the testator on forced heirship rules, application of article 63.2 of CPIL can still give a possibility of a clawback claim in relation to the Monaco real estate (exclusively).
Christine Pasquier-Ciulla, Partner

- Christine Pasquier Ciulla is a founding member of the firm and the head of the firm’s Private Client team. She is one of the few Avocats-Défenseurs in Monaco – and one of the most experienced practitioners of the Principality.

- She is an internationally recognised practitioner with over 30 years of experience as a lawyer and 15 in family law, trusts and estates law and private international law with a nexus with Monaco.

- She advises and represents private individuals (HNWI and UHNWI) of all nationalities on personal law, private international law, trusts and estate-related matters, as well as any related criminal law matters with a nexus to Monaco.

- Her experience spans the whole spectrum of transactional and litigation work for private individuals and includes prenuptial agreements, changes to matrimonial regimes, separations, national and international divorces, post-divorce liquidation procedures for jointly owned property, wills, national and international successions, adoptions, all relating matters to children including recognition of parentage, names, child abduction and more generally the application of the Hague Convention on minors and international letters rogatory. She also deals with matters relating to the legal protection of adults and the application in Monaco of protection measures ordered by foreign Courts.

- She has co-authored and published a number of articles and is regularly invited to speak at international conferences on her area of expertise.

- She is a TEP member of STEP and part of the Monaco Branch Committee.
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