

CASE STUDY FROM THE PERSPECTIVE OF BELGIAN LAW

A. FAMILY LAW

1. Belgian legislation on marriage: withdrawal of the requirement for a difference in sex by the law of 13 February 2003 as a fundamental requirement for marriage (Article 143 Civil Code)

2. Belgian rules on conflict of laws (based on the hypothesis that the marriage took place after 1 October 2004 and that the Code of Private International Law [PIL] applies)
 - a. Law applicable to the formation of the marriage (Article 46 of the Code of PIL)
 - i. basic conditions: referral to the national law of each spouse: Dutch law allows the marriage of persons of the same sex (Article 30 Burgerlijk Wetboek)
 - ii. Article 46 of the Code of PIL rules out the national law if it prohibits the marriage of persons of the same sex, providing there is a connecting factor with a State (nationality or habitual residence) which allows this marriage.
 - b. Law applicable to the effects of the marriage (Article 48 Code of PIL):
 - i. the common habitual residence of the spouses (residence in the same country in separate places is sufficient)
 - ii. if there is no common residence in the same State, application of the common national law
 - iii. failing this, secondary application of Belgian law
 - iv. definition of the effects of the marriage by Article 48(2) of the Code of PIL
 - v. specific connecting factor for the family home (Article 48(3) Code of PIL): the law of the place where the property is situated
 - c. Matrimonial property regimes:
 - i. Choice of applicable law (Article 49 Code of PIL):
 1. option between:

- a. the law of the State where the spouses will fix their habitual residence for the first time following the marriage
 - b. the law of the State of the habitual residence or nationality of one of the spouses at the time of choice
 2. validity of this choice, providing it respects the form prescribed by the law applicable to the matrimonial property regime at the time of the choice or the law of the State in which the choice was made and that it is in writing (Article 52 Code of PIL)
 - ii. Applicable law in the absence of a choice following a scale of connecting factors (Article 51 of Code of PIL):
 1. application of the law of the habitual residence of the spouses after the marriage
 2. failing this, application of the law of the common nationality at the time of marriage
 3. failing this, application of the law of the country where the marriage is celebrated
- d. Divorce law (Article 55 Code of PIL):
 - i. Scale of connecting factors: the law of the State
 1. of habitual residence of both spouses
 2. failing this, of the last common habitual residence, provided that one of the spouses still lives in this State
 3. failing this, of the common nationality
 4. when none of these conditions is fulfilled: secondary application of Belgian law
 - ii. Possibility of limited choice by the spouses of the law applicable to the divorce:
 1. the law of the State of the common nationality
 2. Belgian law
 - iii. Area of applicable law (Article 56 Code of PIL): no single law on the effects of divorce. The law designated by Article 55 does not govern

the effects of the dissolution of matrimonial ties, which are each governed by their own law, thus for example maintenance obligations between ex-spouses by Articles 74 et seq. of the Code of PIL.

B. SUCCESSION LAW

1. Belgian legislation on the property consequences of marriage

- a. Reserved portion of the inheritance rights of the surviving spouse: abstract reserved portion and actual reserved portion (Article 915a Civil Code)
- b. Inheritance rights in legal succession (745a to 745g Civil Code):
 - i. if there are descendants: usufruct of all the estate
 - ii. if there are other potential heirs: full ownership of the share of the predeceased in the common estate and usufruct of the deceased's own estate
 - iii. absence of potential heirs: full ownership of the whole estate
- c. Extensions and restrictions of inheritance rights:
 - i. extensions: contractual institution or will (limit of the reserved portion to the descendants' ownership without usufruct)
 - ii. restrictions: withdrawal or limitation of the inheritance rights in the presence of children from a previous union by marriage contract or amending act (Article 1388 (2) Civil Code) (limit of actual reserved portion)
 - iii. in the event of divorce proceedings:
 1. Article 914a (3) Civil Code: total disinheritance when four conditions are fulfilled: de facto separation for over six months, request for separate residences, will disinheriting the spouse and life together not resumed
 2. Article 1287 (3) of the Judicial Code: obligation to settle the outcome of legal and reserved portion inheritance rights in prior agreements in case of death during the divorce proceedings by mutual consent

2. Rules on conflict of laws in Belgium

- a. Law applicable to the succession (Article 78 Code of PIL):

- i. Movable property part: law of the last habitual residence of the deceased
 - ii. Immovable property part: law of the situation of the property
- b. Choice of law applicable to the succession (Article 79 Code of PIL):
 - i. Limited choice between the law of the nationality or residence of the author, either upon death or when the choice is made
 - ii. Form: "a declaration in the form of testamentary arrangements"
 - iii. Limits: the choice must lead to the application of a single law and cannot affect the reserved portion guaranteed by the applicable law in virtue of Article 78 Code of PIL.