

# The Interaction of Succession and Matrimonial Property Regimes from the Perspective of EU Regulations

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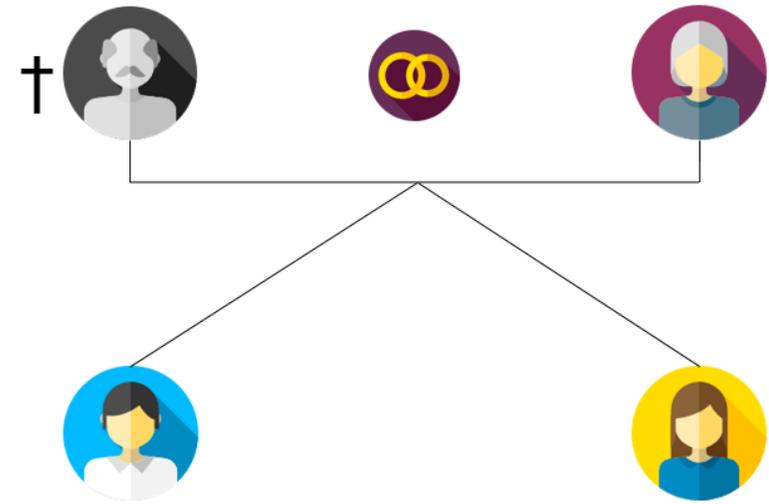
# INTRODUCTION

- Liquidation of the assets of the deceased depends on:
  - i. Matrimonial property law
  - ii. Succession law
- See presentation Jan Peter Schmidt:  
different models of coordinating matrimonial property law and succession law

↓  
within the same legal system

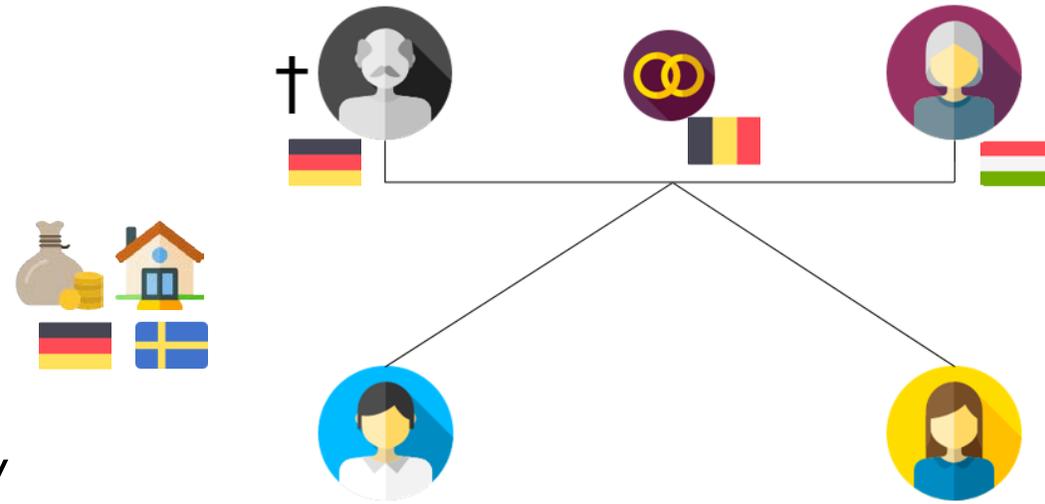


cross-border situations:  
coordination



# INTRODUCTION

- Cross-border situations: private international law
  - Which law is applicable?
  - Use of connecting factors, but these can be different for issues pertaining to succession law and issues pertaining to matrimonial property law
- Characterisation of issues as a matter of succession law or of as a matter of matrimonial property law
  - By national private international law
  - By EU Regulations





# EU REGULATIONS

- EU: harmonisation of private international succession law and of private international matrimonial property law
  - **Succession Regulation (SR)**: Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession
    - applies to the succession of persons who died on or after 17 August 2015
  - **Matrimonial Property Regulation (MPR)**: Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes
    - applies as from 29 January 2019
- Member States:
  - SR: all EU Member States, except for Denmark and the United Kingdom
  - MPR: enhanced cooperation → 18 EU Member States



# EU REGULATIONS

➤ Still no uniformity in connecting factors for applicable law...

## SR:

- Choice of law for the law of the nationality of the deceased (art. 22)
- General rule in absence of a choice of law: law of the last habitual residence of the deceased (art. 21, 1)

## MPR:

- Choice of law for the law of the habitual residence of a spouse; or for the law of the nationality of a spouse (art. 22, 1)
- General rule in absence of a choice of law: cascade (art. 26, 1)
  - (a) Law of the first common habitual residence;
  - (b) Law of the spouses' common nationality at the time of the conclusion of the marriage;
  - (c) Law with which the spouses jointly have the closest connection at the time of the conclusion of the marriage.

➤ ... but at least there is a harmonised scope, interpreted by the CJEU

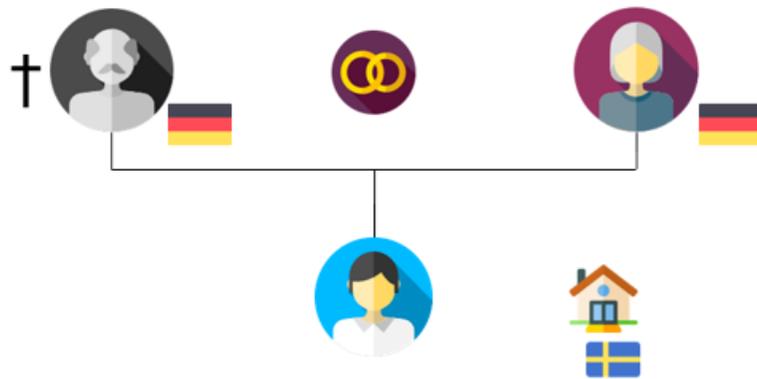
# CHARACTERISATION

- § 1371(1) BGB: 'Zugewinnausgleich'
- 'Avantages matrimoniaux'

# CHARACTERISATION - § 1371(1) BGB

- BGH 13/05/2015: matter of matrimonial property law
- CJEU 1/03/2018, C-558/16, *Mahnkopf*

- Facts:

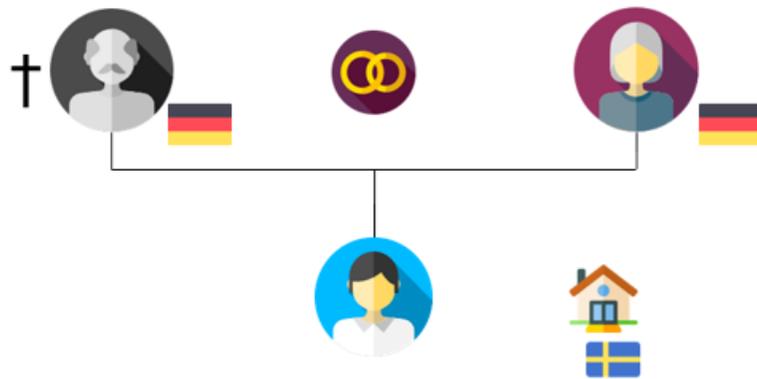


- Ms Mahnkopf applies for the issue of a [European Certificate of Succession](#), designating her and her son as coheirs, for the purpose of registration of their right of ownership of the property in Sweden

# CHARACTERISATION - § 1371(1) BGB

- BGH 13/05/2015: matter of matrimonial property law
- CJEU 1/03/2018, C-558/16, *Mahnkopf*

- Facts:



- Ms Mahnkopf applies for the issue of a [European Certificate of Succession](#), designating her and her son as coheirs, for the purpose of registration of their right of ownership of the property in Sweden
- German court refuses because half of the share is based on matrimonial property law (§ 1371 BGB)

# CHARACTERISATION - § 1371(1) BGB

- BGH 13/05/2015: matter of matrimonial property law
- CJEU 1/03/2018, C-558/16, *Mahnkopf*
  - CJEU judgment: *matter of succession law*

➤ **Purpose of § 1371(1) BGB:**

‘Paragraph 1371(1) of the BGB concerns not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate.

Accordingly, that provision does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs.’

- ***Effet utile* of the European Certificate of Succession:** achievement of the objectives of the Certificate would be impeded considerably if it did not include full information relating to the surviving spouse’s rights regarding the estate.

# CHARACTERISATION - § 1371(1) BGB

- BGH 13/05/2015: matter of matrimonial property law
- CJEU 1/03/2018, C-558/16, *Mahnkopf*
  - Criticism: CJEU misunderstands the purpose of §1371(1) BGB + *effet utile* of the Certificate is a pragmatic argument, not a substantive one

# CHARACTERISATION - 'AVANTAGES MATRIMONIAUX'

- Concept from Romanic legal systems (e.g. French and Belgian law)
- Benefits that a (surviving) spouse derives from a marital agreement
  - Extended community, e.g. universal community of property
  - Unequal division of community property, e.g. 60/40 or 100/0 
  - Take an asset before the division, with or without compensation, e.g. family home 
- Considered marital benefits, not donations
  - Excluded from the children's reserved share!
  - Protection of children from a previous relationship

# CHARACTERISATION - 'AVANTAGES MATRIMONIAUX'

- **Mahnkopf**: provisions which have as main purpose the determination of the share of the estate of the surviving spouse, and not the allocation of assets or liquidation of the matrimonial property regime, are matters of succession law
- **Qualification of 'avantages matrimoniaux'**:
  - Extended community, e.g. universal community of property
    - matrimonial property law
  - Unequal division of community property, e.g. 60/40 or 100/0 
    - succession law
  - Take an asset before the division, with or without compensation, e.g. family home 
    - with compensation: matrimonial property law
    - without compensation: succession law