



International - succession, marriage / divorce and real estate

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Do you know what law governs you? Are you or your family connected with more than one country? In the age of free communication and widespread travel, it is easy to forget that the laws of a foreign country or the laws of more than one country might be governing some part of your personal and business affairs. You choose where to live, where to travel and where to carry out your business transactions so why not choose the law that governs your affairs? LG in Monaco and London has a team of international lawyers ready to take care of your marriage, real estate and succession planning issues throughout Europe, regardless of your connection with Monaco.

What is a cross-border issue?

A cross-border issue is an issue with a foreign element, however minor.

Are you:

- residing or considering residing in a foreign country?
- married to or considering marrying someone from another country?

Do you:

- have an adopted, illegitimate or step child from another country?

- mind if a foreign country is to decide what happens to your property, when you die, against your wishes?
- own property or assets in another country?

If you can answer yes to any of the above then you have a cross-border issue which LG can help you plan.

Why are cross-border issues relevant to you?

Cross-border issues will decide your future whenever there are foreign element questions regarding your marriage, your children, your property and subsequently your succession affairs. You will need to know which personal law governs your life or how laws can change or co-exist from time to time and there are 4 universal criteria to ascertain this law:

1. Domicile being your habitual residence or permanent home.
2. Nationality being your political status.
3. Residence being your physical presence in a country.
4. *Situs* of the assets themselves.

The above criteria are used differently by countries to decide your personal law. We set out below how 7 jurisdictions deal with the three main issues of succession, marriage and real estate.

The following is to be distinguished from any tax considerations. In many circumstances, and to the confusion of many, the applicable law will not necessarily be one and the same as the taxing law or jurisdiction. Tax issues are invariably dealt with by tax treaties or

conventions; foreign law issues (known as private international law or conflicts of law) are invariably not dealt with by any treaty although a range of Hague conventions are responsible for bringing some order to the chaos.

Succession

Who is entitled to your assets when you die?

The table below gives an idea of how differently each country deals with the distribution of assets.

	Austria	England / Wales	France	Germany	Italy	Spain	Sweden
Succession is based on the law of:	N	D	HR	N	N	N	N
Forced heirship rules	Yes	No*	Yes	Yes	Yes	Yes	Yes
D = Domicile HR = Habitual Residence N = Nationality							
(but Scotland does have forced heirship rules)*							

You may not be aware that the difference between succession based on the law of domicile, or succession based on nationality or habitual residence can have a strong impact on your assets and affect who becomes entitled to them. In addition, many countries stipulate that certain assets must be left to offspring or others and without effective estate planning the law of that country may decide what should become of your assets even if your will states the contrary.

"Claw Back"

Did you know that in many circumstances a gift, properly and correctly made, may be undone ("clawed-back") by your heirs on your death to satisfy their own legal rights? Consider how this may devastate your donee especially where your donee may be a spouse, a trust or a charity for example.

Did you know that in some countries (e.g. Italy) your spouse is a "reserved heir" and is entitled to a share in your estate, whereas in other countries (e.g. Monaco) only those in your direct blood line (or adopted children) are reserved heirs?

Marriage/divorce

Your marriage regime is the set of rules governing the assets you and your spouse own and is of consequence on divorce and on death. In the absence of a contractual regime certain countries will impute a system of "community of property" (or some variation on community) whilst others will impute a system of "separation of goods".

Universal community of property means that all property belongs jointly to the spouses whereas separation of goods means that each spouse retains ownership of his/her own assets. A marriage regime may be affected by cross-border issues such as transferring assets to other jurisdictions during the marriage, having children, or moving to another country. It is important to ensure that you are actually subjected to the marriage regime that you think you are.

For example you may know that Spanish law is based on community of property but parts of Spain have a marriage regime based on the separation of property. Italian law also has further complications since the marriage regime is regulated by the national law of the husband at the time the marriage was celebrated.

On a divorce the effect of a marriage regime (whether imputed by law or chosen by contract) can have vastly different effects from country to country. For example, in England and Wales a divorce judge may choose to ignore completely the effects of a marriage regime; in France or Germany he may apply it rigidly.

Below are some examples of how various countries address the issues:

	Austria	England/ Wales	France	Germany	Italy	Spain
Marriage Regime imputed by law in the absence of a contract	SG	None, save that a foreign court may regard SG as equivalent	CP (limited)	CP (limited) on divorce; SG otherwise	CP (limited)	CP (differs from province to province)
Are pre-nuptial contracts valid?	Yes*	No (at least they are not binding on a court on divorce)	Yes*	Yes*	No - only matrimonial agreements regulating economic status of the family	Yes*
Are contracts fully respected on divorce? *	Yes	No (although Courts are starting to respect these)	Yes, subject to powers to give maintenance and lump sums	Yes	Agreement is valid if rules observed	Yes, if certain rules followed

CP = Community Property (whether universal or limited)

* unless they are against public policy and do not involve custody of the children. Also most of the contracts will have to fulfil certain conditions, formal and material, to be valid

Pre nuptial agreements

Even where the pre-nuptial contract is valid, most countries will have a system that requires a notary to receive the parties to the contract which will probably need to be in the form of a deed. Italy, for example also requires the contract to be registered with the act of marriage. You should also verify whether such a contract can be varied during the marriage and the formalities for such a variation.

Particular complications arise where one country's courts are to apply the effects of the regime of another country on divorce. Greater value may be given where the parties show, for example, that they were separately represented, gave full disclosure of mutual assets on marriage and that there was clearly no undue influence.

Note that a marriage regime (whether legal or contractual) may either grant very great rights to your spouse or deprive him/her of them, probably therefore to the respective disadvantage or benefit of your children.

Children

Can you see yourself currently or potentially in any part of the following scenario?

X (English national*) and Y (Swedish national) divorce in England where they reside. X takes the children to live in France and marries Z (Spanish national) who has 2 children from a previous marriage and an illegitimate child from a former Italian partner. Y starts proceedings in the English courts for contact. X starts proceedings in the French courts for custody of her children. Z has not seen his illegitimate child for many years and does not want him to receive anything under automatic succession laws.

If you did see yourself in any part of the scenario then consider which law applies to each situation. Have you made adequate investigation to ensure you do not lose any contact with your children or stepchildren?

(* There is of course no English "nationality": nationality is British however the laws relevant to British citizens are such that, for these purposes, they break down differently into the laws of England and Wales, the laws of Scotland and the laws of Northern Ireland. In determining what is meant by "national" law it may therefore become relevant to decide which of the above laws apply where British citizens are involved. Similar issues apply as between US States and Canadian Provinces).

Real estate / immovables

Property is divided into the categories of movables and immovables in order to determine jurisdiction and the applicable law. Devolution of immovables is governed by the law of *situs* in EU countries although this is not always the case on succession. However, the applicable law of immovables varies from country to country.

If a French person living in France dies leaving a house in Sweden, France will say that Swedish law applies in determining how the property will devolve. However, when we look at Swedish law it says in this case that French law will apply (because Sweden's own rule is to apply national law even in respect of Swedish real estate). The Swedish property of the French person will therefore devolve according to French domestic law.

It is not possible simply to state that the reverse situation would lead to Swedish law applying. In fact a French property of a Swedish person living in Sweden will also devolve according to French law!

The following table shows how different countries generally approach which law governs a person's immovable assets although great care must be taken to understand how exceptions, public policy rules and *renvoi* rules apply from case to case:

	Austria	England/Wales	France	Germany	Italy	Spain	Sweden
Immovables	N	S	S	N	N	N	N

S = law of Situs or place where the asset is held physically

N = law of Nationality

N.B. The foregoing deals with devolution of immovables on death. Note that only *situs* and nationality appear to affect how immovables devolve: domicile or habitual residence have no immediate bearing on the issue. But, beware, because where the national law is to apply, that national law may contain a rule which dictates that the law of last domicile will apply, even in respect of an immovable and this may lead to the situation whereby the law of the *situs* of an immovable will apply after all.

Conclusion

Cross-border citizens create cross-border issues that are not always evident at first sight.

The key points to remember are:

- Be aware of cross-border and potential cross-border issues, especially when marrying a foreign citizen, moving abroad or buying assets abroad.
- Consider whether these cross-border issues affect you or might potentially affect you.
- Plan your cross-border affairs.
- Be 100% in control of the laws affecting you.
- Be conscious that civil law countries (i.e. all those on our list other than England and Wales) may give great value to a marriage regime and limit your powers to make an effective will unless you take action.
- Take care that lifetime gifts which you have properly made are not going to be undone on your death.

How can we help?

Our office has existed in the Principality since 1979. We are the only English based international law firm in the Principality. Between our Monaco, Dubai, Moscow and London offices we have the strength and depth to offer a full legal service to both local and international clients. We aim to advise our clients in an efficient and cost effective manner and with a particular emphasis on commerciality and confidentiality.

We speak a number of languages including English, French and Icelandic. We have a client base which includes entrepreneurs, entertainers, financial or banking services companies, fund managers, trust companies, sporting personalities and international families from many jurisdictions.

Beyond its London, Dubai, Moscow and Monaco offices LG has strong relationships with law firms throughout the US, Asia and around the world. These relationships enable us to advise comprehensively on any matters with an international dimension.

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