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# ADAPTATION OF *RIGHTS IN REM*

ELRN Workshop  
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## PRACTICAL PROBLEM

- A Dutch citizen, in his will, granted an *appartementsrecht* over a building in Coimbra, in favor of his 3 children. Having chosen the Dutch law as the law applicable to his succession, that is, the law of his nationality at the time of the choice, under art. 22.<sup>o</sup> of the European Succession Regulation (Regulation (EU) 650/2012), Mr. A passed away in January 2022 and his children, today, intend to register his right in Portugal.
- *Quid iuris?*

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- This is a case of an international succession, which involves different legal systems, the Portuguese and the Dutch legal system.
  - Dutch law is the *lex successionis* (article 22.º of the Regulation EU 650/2012) and it is the law that determines which right is granted to the beneficiaries (the *appartementsrecht*) .
  - However, it is the law applicable to property rights (in this case, the Portuguese law, where the building is located), which determines, for example, the nature and content of the rights *in rem* or the powers of the holders of the right in question.

## QUESTION

- What happens if the right constituted by the Dutch law is unknown to the Portuguese law?

# THE *APPARTEMENTSRECHT*

- An apartment right is a share in the property which was involved in a split up, and includes the exclusive right to use certain parts of the building that, according to their functional arrangement, are to be used as a separate private unit. (Book 5, article 106, n.º 4 of the Dutch Civil Code).
- In this way, the holders of this right are co-owners of the building, but have an right to use a part/unit of it.

# THE *APPARTEMENTSRECHT*

- The apartment owners have towards each other the duty to realize and preserve the construction, the layout of the building and of the relating land in accordance with the provisions of the notarial deed by which their apartment rights have been established. (5:108 of the Dutch Civil Code)
- The notarial deed by which the apartment rights are established must contain:
  - a description of the place where the building and related land is located;
  - a precise description of the parts of the building and related land that are to be used as separate private units;
  - the cadastral number and description of the different apartment rights, with indication of the apartment owner of each individual apartment right;
  - the internal arrangements applying to the apartment owners, which are registered in the public registers at the place where the notarial deed itself must be registered. ( 5:111 Dutch Civil Code)

# CONTENT OF THE INTERNAL ARRANGEMENTS

The internal arrangements must contain:

- a list of the debts and costs that are for account of all apartment owners;
- a regulation regarding the annual operations account, covering the preceding year and the contributions to be paid by the apartment owners;
- a regulation on the use, management and maintenance of the parts of the building that are intended to be used by the apartment owners jointly;
- the identification/determination of the persons responsible for insuring the building and the related land on behalf of the apartment owners;
- the establishment of an **Association of Owners** which has the aim to promote the common interests of the apartment owners, and its articles of association. (5:112 Dutch Civil Code)
- The internal arrangements may include as well a regulation for the use, management and maintenance of the individual parts which are intended to be used as separate private units (5:112, n.º4, Dutch Civil Code)

# THE *APPARTEMENTSRECHT*

- An apartment right can be transferred. ( 5:117 Dutch Civil Code)
- An apartment owner may, without approval of the other apartment owners, make physical changes to his own private unit, provided that he doesn't cause any harm to the other private units or common parts of the property involved in the split up.
- But he must notify the Association of Owners immediately of a physical change in his private unit. If the physical change leads to a modification of the insurance premium, then the difference is for his account and for account of his legal successors.( 5:119 Dutch Civil Code)



# THE ASSOCIATION OF OWNERS


- The Association of Owners is a legal person (5:124 Dutch Civil Code)
- The Association of Owners manages the community of property of the apartment owners, with exception of the parts that are intended to be used as separate units.
- The Association of Owners may, within the limits of its powers, represent the apartment owners in and out of court.
- The Association of Owners checks if the apartment owners observe the duties that are imposed by law and regulations and is entitled to start legal action to this end against them if one fails to observe such duties. (Article 5:126 Dutch Civil Code)

## ARTICLE 31.º OF THE EUROPEAN SUCCESSION REGULATION

- “When a person invokes a right in rem to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.”

# ARTICLE 31.º OF THE EUROPEAN SUCCESSION REGULATION

- Article 31.º of the European Succession Regulation determines that *rights in rem* granted by *the lex successionis* and unknown to the *lex rei sitae* must be adapted to the closest equivalent that the latter provides, establishing the criteria for determining equivalence between the institutes of each law.
- The criteria indicated are:
  - The aims of the right in rem;
  - The interests pursued by the specific right in rem;
  - The effects attached to it.

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- This requires a comparative approach between the figure granted to the beneficiary by the law governing the succession and the range/list of rights in rem allowed by the law applicable to the property rights which will always be characterized by a certain discretion.
  - In order to mitigate this uncertainty, some mechanisms have been proposed to facilitate the adaptation process.

- Mechanisms such as the European Land Registry Network, but also EULIS, CROBECO, EUFides or IMOLA II.
- This appears to be indicated by Recital 16 of Regulation (EU) 650/2012:
- “(...) For the purposes of determining the closest equivalent national right in rem, the authorities or competent persons of the State whose law applied to the succession may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law.”

# THE EU-ADAPT TOOL

- And also the EU-ADAPT project “Adaptation of rights *in rem* in cross-border successions within EU” that developed an IT tool that identifies the equivalent right *in rem* of the law of another Member State for the one granted by the law applicable to the succession.
- The user of this tool will only need to enter the law applicable to the succession, the real right granted to the beneficiary and the law that regulates property rights and the adaptation will be suggested.



## POSSIBLE SOLUTION

- Given the content of the *appartementsrecht* (and even though we can discuss it), we should propose the transposition to the Portuguese *condominium* (article 1414.º of the Portuguese Civil Code), as it is the closest equivalent right.
- The Portuguese *condominium* is the result of a combination between co-ownership (over the common parts) and individual ownership (over fractions of the building that constitute individual units).



Thank you!