Adapting rights in rem

Luxembourg

1 Which are the rights in rem that could arise from a succession under the law of this Member State?

Under Luxembourg law, there are no specific rights *in rem* that, within the meaning of the question, can '*arise*' from a succession. However, there are rights *in rem* that can be involved in a succession or, in other words, that can be *transferred* as a result of death.

These are as follows: ownership within the meaning of Article 544 *et seq.* of the Civil Code (*Code civil*) and easements or servitudes within the meaning of Article 637 *et seq.* of the same Code.

Ownership, as defined by Article 544 of the Civil Code, is the right to enjoy and dispose of property, provided that this is not used in a manner prohibited by law or regulation or that causes a disturbance exceeding normal neighbourhood annoyances disrupting the balance between equivalent rights. According to Article 546 of the Civil Code, ownership of property, whether movable or immovable, entitles the owner to everything produced by that property and to everything that is naturally or artificially associated with that property (right of accession). Under Article 711 of the Civil Code, ownership of property can be acquired and transferred by succession.

As regards **easements**, Article 637 of the Civil Code defines these as a burden imposed on one property for the use and benefit of a property belonging to another owner. Under Article 639 of the Civil Code, an easement can derive from the natural situation of the property (see Article 640 *et seq.* of the Civil Code), from obligations imposed by law (see Article 649 of the Civil Code), or from agreements between owners (see Article 686 *et seq.* of the Civil Code). As regards the last category of easements, owners can in principle establish the easements that they deem appropriate over their properties or in favour of their properties, provided, however, that the services established are not imposed on a person or in favour of a person, but only on land and for land, and provided that those services are not in any way contrary to public policy (Article 686, first paragraph, of the Civil Code). Under these rules, easements can be established for the use of buildings or land (Article 687, first paragraph). In addition, they can be continuous (continual use without need of human intervention, e.g. water pipes, sewers, views, etc.) or discontinuous (needing human intervention in order to be exercised, e.g. rights of way, drawing rights, etc.; see Article 688, first paragraph, of the Civil Code).

It should also be noted that easements can be apparent – those announced by external structures – or non-apparent – those for which there is no external sign of their existence (Article 691, first paragraph, of the Civil Code). Continuous and apparent easements can be acquired by deed or by possession over 30 years (Article 690 of the Civil Code), whereas continuous and non-apparent easements and discontinuous easements, whether apparent or non-apparent, can be established only by deed (Article 691, first paragraph, of the Civil Code). The easement lapses when the land to which it is due and the land by which it is due are held by the same person (Article 705 of the Civil Code).

For the sake of completeness, the following rights *in rem* should also be mentioned, with regard to which specific rules apply when the person who benefited from them in his/her lifetime dies.

Under Article 617 of the Civil Code, a **usufruct** lapses on the death by natural causes of the usufructuary and when the two capacities of usufructuary and owner are held by the same person. The second case occurs, *inter alia*, where the usufructuary obtains, as a result of death, ownership of the property over which he/she held a right of usufruct. The content of the usufruct is defined in Article 578 *et seq.* of the Civil Code as being the right to enjoy property that is owned by someone else, in the same way as the owner himself/herself, but with the usufructuary being responsible for preserving the substance of the property. A usufruct can be established by law or by the will of man, it can be straightforward, time-limited or subject to conditions, and it can cover any type of movable or immovable property.

Lastly, **rights *in rem*** involving **rights of use and habitation**, as defined in Article 625 *et seq.* of the Civil Code, lapse in the same way as the usufruct.

2 Are these rights in rem recorded in a register of rights in immovable or movable property and, if so, is such recording compulsory? In which register(s) are they recorded and what are the registration requirements and procedure?

In the Grand Duchy, there is an 'immovable property register', i.e. mortgage offices (*bureaux de la conservation des hypothèques*) where, in accordance with Article 1 of the amended Law of 25 September 1905 on the registration of rights in immovable property (*loi modifiée sur la transcription des droits réels immobiliers du 25 septembre 1905*), all deeds for lifetime transactions which transfer immovable property rights other than preferential payment rights and mortgages, whether gratuitous or for consideration, are registered. This registration of such deeds is mandatory in the sense that it makes the rights in question binding on third parties (see Article 11 of the aforementioned Law). According to Luxembourg case-law, the term 'rights in immovable property' used in Article 1 of said Law also includes property easements (Diekirch District Court (*Tribunal d'arrondissement*), 17 February 1937).

It should also be noted that only court decisions, authentic instruments and administrative acts are accepted for the purpose of registration.

In the case of *succession*, rights *in rem* referred to in point 1 that may form part of an estate are transferred in accordance with the Civil Code.

More specifically, according to Article 724, first and second paragraphs, of the Civil Code, all the deceased's property is transferred to his/her legal heirs simply as a result of the succession being opened. Those heirs can exercise the rights and actions of the deceased upon the latter's death.

In the case referred to in Article 1004 of the Civil Code concerning the sole legatee – i.e. the person to whom the testator gives, through a testamentary disposition, all the property that he/she leaves on death (see Article 1003 of the Civil Code) – the latter must ask the heirs to whom a proportion of the estate is reserved under the forced heirship law to deliver the property included in the will. Under Article 1005 of the Civil Code, the sole legatee will have enjoyment of the property included in the will as from the date of death if the delivery request is made within a year of that date. Otherwise, such enjoyment will commence only on the date of the court application or on the date when delivery is voluntarily granted. Where, on the death of the testator, there are no heirs to whom a proportion of the property is reserved by law, the sole legatee will automatically obtain the property on the testator's death, without having to request delivery (Article 1006 of the Civil Code). Lastly, in the case referred to in Article 1006 of the Civil Code, if the will is holographic or sealed, the sole legatee must have possession granted to him/her by an order of the presiding judge of the court of first instance (*tribunal de première instance*) for the district in which the succession is opened.

If one or more immovable properties are included in the succession, a transfer following death is required, which will be carried out based on the declaration of succession to be submitted by the heirs to the Land Registration and Estates Department (*administration de l'enregistrement et des domaines*). The latter

then submits a copy of the declaration to the Land Registry and Topography Office (*administration du cadastre et de la topographie*) (see the end of Article 10 of the amended Law of 25 July 2002 reorganising the Land Registry and Topography Office (*loi modifiée du 25 juillet 2002 portant réorganisation de l'administration du cadastre et de la topographie*)).

3 Which effects are linked to the registration of the rights in rem?

Please see the answer to the previous question.

4 Are there specific rules and procedures in place for the adaptation of a right in rem to which a person is entitled under the law applicable to the successions in case the law of the Member State in which the right is invoked does not know such right in rem?

Yes. There are provisions in the Law of 14 June 2015 implementing 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 and amending (a) the amended Law of 25 September 1905 on the registration of rights in immovable property and (b) the New Code of Civil Procedure (*loi du 14 juin 2015 relative à la mise en application du règlement (UE) n° 650/2012 du Parlement européen et du Conseil du 4 juillet 2012 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions, et l'acceptation et l'exécution des actes authentiques en matière de successions et à la création d'un certificat successoral européen et modifiant a) la loi modifiée du 25 septembre 1905 sur la transcription des droits réels immobiliers et b) le Nouveau Code de procédure civile*).

Article 1 of this Law provides as follows: 'Pursuant to 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, notaries appointed by Grand Ducal order shall be competent to carry out the adaptation of rights in immovable property referred to in Article 31 of said Regulation. The adaptation referred to in the first paragraph shall be carried out no later than the date when the property covered by the right *in rem* referred to in Article 31 of 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 is transferred *inter vivos* gratuitously or for consideration'.

Furthermore, said Law amends Article 1, second paragraph, of the amended Law of 25 September 1905 on the registration of rights in immovable property by adding notarial acts that adapt rights in foreign immovable property to the acts transferring rights in immovable property specified therein, which must be registered with the mortgage office for the district in which the property is situated.

Last update: 04/12/2018