Clawback Law in the Context of Succession

Jayne Holliday

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2020

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Holliday, Jayne, author.

Title: Clawback law in the context of succession / Jayne Holliday.

Description: Oxford ; New York : Hart, 2020. | Series: Studies in private international law | Based on author's thesis (doctoral - University of Aberdeen, 2018). | Includes bibliographical references and index.

Identifiers: LCCN 2019051097 (print) | LCCN 2019051098 (ebook) | ISBN 9781509932320 (hardback) | ISBN 9781509932337 (Epub)

Subjects: LCSH: Conflict of laws—Inheritance and succession. | Conflict of laws—Gifts. | Revocation.

Classification: LCC K7230 .H65 2020 (print) | LCC K7230 (ebook) | DDC 346.05/2—dc23

LC record available at https://lccn.loc.gov/2019051097

LC ebook record available at https://lccn.loc.gov/2019051098

ISBN: HB: 978-1-50993-232-0
ePDF: 978-1-50993-234-4
ePub: 978-1-50993-233-7

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

1

Introduction

I. Background and Context

The private international law of succession is inherently complicated.[1] The reason for the complexity is in part due to the historical and cultural diversity among substantive laws, which has led to differing legal traditions characterising succession law in different ways. Some legal traditions see it as having characteristics associated with property law, whereas other legal traditions see it as inherently connected to family law.[2] The fact that family law draws heavily from cultural, religious and social values and the reality that these values differ widely between countries and play a major part in the development of legal policy, contribute to the legal diversity in this area of law.[3] Without the unification of private international law rules, legal diversity in succession law can not only cause practical difficulties for international testators to predict which law is applicable to deal with their succession or aspects of their succession, but can also cause problems for those dealing with an estate when faced with conflicting rules governing aspects of the succession.[4]

From a practical perspective, with the number of people choosing to relocate to other countries ever increasing[5] and the consequent number of people owning and investing in property in multiple countries rising accordingly, the possibility

[1] Walter Pintens, 'Need and Opportunity of Convergence in European Succession Laws' in M Anderson and E Arroyo i Amayuelas (eds), *The Law of Succession: Testamentary Freedom* (Europa Law Publishing, 2011) 6 and 28; 'persons are therefore faced with considerable difficulties in asserting their rights with regard to an international succession' SEC(2009) 410 of 14 October 2009 1.2: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2009)0154_/com_com(2009)0154_en.pdf (accessed 7 June 2019).

[2] Anderson and Amayuelas, ibid, v.

[3] ibid.

[4] Summary of the Impact Assessment SEC(2009) 411 final 2.1 of 14 October 2009, http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014722%202009%20ADD%202 (accessed 7 June 2019).

[5] Free movement of people within the EU is a fundamental principle of the EU see the Treaty on the Functioning of the European Union; M Benton and M Petrovic, 'How free is free movement? Dynamics and drivers of mobility within the European Union' (2013) Migration Policy Institute Europe. Figures for free movement of EU nationals suggest that it is likely that intra EU mobility will continue to grow but that the financial crash in 2007 changed the direction of flow from east to west to south to north. There are approximately 1.22 million UK citizens currently living elsewhere in the EU: see Oliver Hawkins, Migration Statistics, House of Commons Library, 2 December 2016. The impact of Brexit on movement is as yet unknown.

of complex and, by connection, costly, cross-border succession cases is a cause for concern.[6] Finding ways to encourage and create legal certainty in cross-border estate planning, before the problems emerge, would go some way to addressing the legitimate expectations of the relevant parties.

A. The Succession Regime in Private International Law

The progressive unification of private international law – the approach taken by the Hague Conference on Private International Law – allows for the preservation of cultural and historical diversity within the substantive law.[7] When the intention is to create a treaty which is acceptable from a global perspective, starting from a position of respect for cultural differences seems sensible. In order to determine the most appropriate private international law rule that will be acceptable to different legal traditions, it is necessary for those involved with the unification of private international law, whether at a regional level such as for the European Union or at the international level at the Hague Conference, to question the real nature of the issue so that they are able to put forward solutions that are both practical and fair. Knowledge of the private international law rules of relevant countries is by itself not always sufficient to answer these questions. Countries can be slow to amend their private international law rules or the rules can be vague on the point to be addressed, providing the drafter with nothing clear to work with. When attempting to find a truly international solution to determining the applicable law to an issue it requires a deep understanding of the substantive laws in each country in order to create private international law rules which are both pragmatic and fair to the relevant parties.

The Hague Conference has in the past attempted to unify private international law, in the area of succession, with varying degrees of success. The 1961 Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions is

[6] The increase in movement of people and the impact on succession laws was put forward as a reason for the development of the 1989 Hague Convention, see Donovan WM Waters, *Explanatory Report to the Convention on the law applicable to succession to the estates of deceased persons* (1988) 19 available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=2959&dtid=3 (accessed 14 June 2019). Paul Beaumont and Peter McEleavy, *Anton's Private International Law*, 3rd edn (W Green/SULI, 2011) para 24.01; SEC(2009) 410 of 14 October 2009, 1.2: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2009)0154_/com_com(2009)0154_en.pdf (accessed 7 June 2019); SEC(2009) 411 final of 14 October 2009, 2.2: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014722%202009%20ADD%202 (accessed 7 June 2019). Note that the figures within the Impact Assessment document are estimates due to lack of relevant statistics. It was estimated that the total value of cross-border estates within the EU in 2009 was €123.3 billion with the legal fees amounting on average to 3% of this figure; M Benton and M Petrovic 'How free is free movement? Dynamics and drivers of mobility within the European Union' (2013) Migration Policy Institute Europe, Table 1. In 2011 the number of mobile EU nationals within the EU was 12,805,000.

[7] Art 1 of the Statute of the Hague Conference on Private International Law (entry into force 15 July 1955) see: https://www.hcch.net/en/instruments/conventions/full-text/?cid=29 (accessed 7 June 2019).

regarded as a success,[8] whereas the 1989 Hague Convention on the Applicable Law to the Succession to the Estate of Deceased Persons, whilst being considered a success by those negotiating it, has yet to be ratified by a single country – if we ignore the Netherlands ratifying it in 2008 but then denouncing their ratification in 2015 to coincide with the EU Succession Regulation coming into force.[9] In light of the failure of the 1989 Convention, which was attempting to unify the applicable law to the whole of the succession, the aim of this book is to produce a bespoke and achievable framework for a problematic but much smaller area of law.

At a regional level, the European Union's recent and ambitious Succession Regulation – a regulation that was strongly influenced by the rules within the 1989 Hague Convention – does bring some coherence for intra-EU succession, but it is biased towards civil law and is not sympathetic to different legal traditions. The consequence is that it still contains fundamental weaknesses which were transferred from the Convention, particularly in relation to its choice of connecting factor to determine the applicable law, which is the law of the deceased's habitual residence at the time of death.[10] These weaknesses have remained despite the intention that,

> All the legal systems of the Member States have mechanisms intended to guarantee support for the relatives of the deceased, including primarily the mechanisms concerning the reserved portion of an estate. However, testators who are nationals of Member States in which *inter vivos* gifts are considered irrevocable may confirm the validity of such acts by opting for their national law as that applying to their successions.

[8] For the 1961 Convention on the Conflicts of Laws relating to the form of Testamentary Dispositions see: https://www.hcch.net/en/instruments/conventions/full-text/?cid=40 (accessed 7 June 2019) which has 42 Contracting States: https://www.hcch.net/en/instruments/conventions/status-table/?cid=40 (accessed 7 June 2019). Anderson and Amayuelas (n 1 above) 6.

[9] For the status table of the 1989 Convention and the subsequent withdrawal by the Netherlands see https://www.hcch.net/en/instruments/conventions/status-table/?cid=62 (accessed 7 June 2019), https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=49&disp=type (accessed 7 June 2019).

[10] J Holliday 'Reconciling the European Union Succession Regulation with the Private International Law of the UK' in J-S Bergé, S Francq and M Gardeñes Santiago (eds), *Boundaries of European Private International Law* (Bruylant, 2015) 298–309; P Beaumont and J Holliday, 'Some Aspects of Scots Private International Law of Succession Taking Account of the Impact of the EU Succession Regulation', Centre for Private International Law, University of Aberdeen, Working Paper Series, 2015/6, available at: https://www.abdn.ac.uk/law/research/working-papers-455.php (accessed 7 June 2019). A comparative analysis of clawback in all EU Member States was not conducted in preparation for the drafting of the EU Succession Regulation. The initial preparation for the EU Succession Regulation did briefly compare the laws of the Member States who were members of the EU at that time, with regards to the issue of clawback but the information they received was not sufficiently detailed in that it did not distinguish between rules relating to heirs and those relating to non-heirs. The UK Government asked Professor Roderick Paisley from the University of Aberdeen to provide a comparative report on the topic. This report considered Austria, Belgium, Bulgaria, Cyprus, France, Germany, Greece, Italy, Malta, Netherlands, Poland, Portugal, Spain and South Africa, and therefore due to the remit did not consider the laws of the Eastern European Member States that had joined the EU in 2004 and 2007: see R Paisley in Ministry of Justice, European Commission Proposal on Succession and Wills, Consultation Paper, CP41/09 (October 2009): https://www.biicl.org/files/4682_ec-succession-wills%5B1%5D.pdf.

> *A key objective of the Regulation is to ensure that these mechanisms are respected* (emphasis added).[11]

The intended solution to the known weakness was that the testator would be given the ability to choose the law of his nationality to govern his succession. The problem with this is that it still lacks legal certainty for the donee, as the testator may change his nationality or his will.[12]

The point of private international law which requires sensitive handling in order to respect legal and cultural diversity, and which is the focus of this book, is the applicable law for an heir (or dependant) to claim for the clawback/reduction of an *inter vivos* gift from a third party in a cross-border succession context. The retroactive nature of applying the law of the habitual residence of the donor at the time of death to claims to reduce *inter vivos* gifts to third parties puts at risk valid property transfers to third parties where, at the time the gift was made, the law of the donor's habitual residence allowed the gift without any risk of clawback, creating legal uncertainty for all relevant parties.[13]

B. Distinguishing 'Clawback from Heirs' from 'Clawback from Non-heirs'

In the context of succession law, the term 'clawback' is a term used by academics and practitioners when writing about the reduction of *inter vivos* gifts and is generally treated as if there were no distinction between the reduction of gifts that are made to heirs and the reduction of gifts that are made to non-heirs, even though substantive law treats the two as distinctly separate issues.[14]

This book will work on the premise that claims to claw back a gift from heirs and claims to claw back a gift from non-heirs are inherently different and require the application of very different private international law applicable law rules. The reason for this is that the underlying functions behind the two claims are fundamentally different.[15] The purpose behind reducing a gift or advance made by the

[11] EU Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final, 6: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2009)0154_/com_com(2009)0154_en.pdf (accessed 7 June 2019).

[12] Holliday, *Boundaries of European Private International Law* (n 10 above). M Pfeiffer, 'Legal certainty and predictability in international succession law' (2016) 12 *Journal of Private International Law* 566–86.

[13] EU Commission Succession Proposal (n 11 above) 6.

[14] The rules for the reduction of gifts that were made to forced heirs are found within the rules on collation. The rules for the reduction of gifts that were made to third parties are separate to collation.

[15] '… "Clawback" is more than this rule of collation or hotchpotch [sic] as regards a presumed advance. In the various legal systems in which it exists, the aim of "clawback" is to protect against the defrauding or prejudice by means of lifetime gifts (whether to a forced heir or otherwise) of those beneficiaries who are entitled to forced heirship provisions.' Paisley (n 10 above) 18.

donor to an heir is to create equality between the heirs.[16] The effect of reducing an advance even if made with the intention to defraud the other legitimate heirs or simply as a requirement to satisfy the legitimate portion is to create equality between the heirs. This is an accepted succession issue (although there are still issues with the current applicable law rule in that the *lex successionis* lacks legal certainty for heirs).[17] Conversely, the reduction of a gift that has been given to a third party donee is for the purpose of satisfying the legitimate portion in some civil law traditions or, in some common law traditions, for obtaining maintenance where there has been evidence of evading a duty to maintain a dependant after death. Under common law traditions, the claimant may be a non-heir, such as a cohabitant, who is asking the court to reduce a gift given to a third party donee, who is also a non-heir.[18] In this case the claim is arguably one of maintenance not succession.[19] Clawback from a third party in these cases is not a clear succession issue. The common law tradition does not include the value of the *inter vivos* gift when calculating the value of the estate and therefore considers a claim for clawback as a threat to its property laws on title. This would suggest that the applicable law for the claim to claw back gifts from third parties cannot be solely characterised as succession law, and needs to be reassessed.

When the French refer to the '*rapport des libéralités*', they are referring to collation. They are referring to the return of an *inter vivos* gift by a beneficiary to the estate prior to receiving their share in the distribution of the estate; 'for a fair share-out amongst children'.[20] The element that is pertinent to protecting the legitimate portion by ensuring that the 'available portion has not been exceeded by lifetime gifts to persons other than the children' is known as the '*réduction des libéralités*'.[21] However, it appears that the 'person' in this case although not an heir entitled to the legitimate portion, may still be an heir to the estate rather than a clearly defined third-party non-family member, thus blurring the boundaries of what is meant by a third party.[22]

[16] Justinian, n 28 below, Book 37, 6. *Taylor v Taylor* (1875) LR 20 Eq 155, *Hatfield v Minet* (1878) 8 Ch D 136, *Hardy v Shaw* [1976] Ch 82, *Race v Race* [2002] EWHC 1868 (Ch); [2002] WTLR 1193, *Cameron (Deceased), Re* [1999] Ch 386.

[17] Reduction of gifts for the purpose of collation was accepted by negotiators within the 1989 Convention and the EU Succession Regulation.

[18] Sections 1(e) and 10 of the Inheritance (Provision for Family and Dependants) Act 1975 known hereafter as the 1975 Act.

[19] See J Holliday, 'Characterisation within Private International Law: Maintenance or Succession?' in P Beaumont, B Hess, L Walker and S Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing, 2014) 443–58 for an analysis of the characterisation of the claim to claw back an *inter vivos* gift under the 1975 Act.

[20] Louis Garb and John Wood, *International Succession*, 4th edn (Oxford University Press, 2015) 282.

[21] Art 920 French Civil Code. *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 25 (Butterworths/Law Society of Scotland) 609. Garb and Wood, n 20 above.

[22] Art 924(1) French Civil Code clearly states that both heirs to the estate who are not forced heirs and non-heirs are required to return gifts that exceed the disposable portion to the estate. – 'Lorsque la libéralité excède la quotité disponible, le gratifié, *successible ou non successible*, doit indemniser les héritiers réservataires à concurrence de la portion excessive de la libéralité, quel que soit cet excédent.' (emphasis added), with thanks to Aude Fiorini, Senior Lecturer at the University of Dundee for her explanation of the French Civil Code.

There is also evidence of a common (mis)understanding amongst academics and practitioners that 'collation', 'hotchpot' and 'clawback' are the same thing.[23] As Professor Roderick Paisley rightly pointed out in his comparative exercise on clawback, they are not the same thing at all.[24] Hotchpot is the principle that:

> requires that a child 'advanced', that is provided for materially by a parent, is not thereby preferred to his or her siblings but must account for the advance on the parent's intestacy when the value of the advance will be deducted from the advanced child's share of the estate.[25]

The author will, for the purpose of this book restrict the scope of the term 'clawback' to the reduction of *inter vivos* gifts to third-party non-heirs, as the underlying function, purpose, timing of the claim and associated substantive law differ substantially from those relating to a claim for the reduction of the *inter vivos* gifts to children or collateral heirs.[26]

(i) A Civil Law versus Common Law Approach to Clawback

A claim to claw back an *inter vivos* gift from a third party is a tool used in certain civil law countries to restore property to the estate of the deceased in order to satisfy the legitimate portion or in some cases a creditor of the estate. Historically the function behind the legitimate portion was to ensure certain heirs inherited the family property.[27] The concept appears in Justinian and places the idea of family above property.[28] Life expectancy at that time was short, and children had a greater chance of survival at a time when there was no state support if they were entitled to a share of the family wealth. However, with the increase in life expectancy in modern times and the fact that the 'children' may be mature adults with accrued wealth of their own, it is questionable as to whether this type of assumed need for maintenance is, in general, necessary.[29] The legitimate portion is a restriction on testamentary freedom designed to protect the succession rights of close family

[23] See Chapter 3 of this book for further discussion on this point. Jean-Francois Gerkens, 'Legal Certainty v Legal Precision, some thoughts on Comparative Law', Paper presented at Tilburg Institute of Comparative and Transnational Law, March 2009, 121–29, 128 highlights the problem of imprecision in the use of legal terminology when English is the chosen language in the private international law context.

[24] Paisley (n 10 above) 18.

[25] *Stair Memorial Encyclopaedia* (n 21 above) 611.

[26] Art 7(3) 1989 Hague Convention and Art 23(i) EU Succession Regulation both contain non-contentious applicable law rules for claims for the reduction of gifts made to heirs. The reduction of gifts to non-heirs, although not directly addressed, falls within the scope of the Convention and Regulation when the claim forms part of the succession law applicable under those instruments: P Lagarde, 'Applicable Law' in U Bergquist, D Damascelli, R Frimston, P Lagarde, F Odersky, B Reinhartz (eds), *EU Regulation on Succession and Wills: Commentary* (Sellier European Law Publishers, 2015) 139, 142.

[27] Pintens (n 1 above) 12.

[28] The *Digest of Justinian* Volume 3, Book 27, 6 Hotchpot.

[29] Pintens (n 1 above) 12.

members, allowing certain heirs[30] a legal right to a share of the estate. The value of these shares differs from State to State. The underlying rationale for clawback from third parties in this context is to protect the legitimate portion, supported by the view that the property of the deceased belongs to the family and that core family members have a right to inherit.[31]

The reduction of an *inter vivos* gift or advance that was made to a legitimate heir creates fairness between the heirs and in essence amounts to reduction of the *inter vivos* gift for the purpose of collation. The claim is triggered by a legitimate heir to the succession of the donor, to reduce an *inter vivos* gift given to another collateral heir. As will be seen in Chapter three, an aspect that overlaps with the common law approach is that clawback from a third party is used as an anti-avoidance strategy to prevent disinheritance. This is particularly evident in some legal regimes where the limitation period restricts the operation of clawback to gifts made in the year or two before the death of the deceased. However, evasion of obligations is not a necessary component for clawback in a civil law system. At the time of the claim, the legitimate heir may be facing the fact that there is no inheritance, or that they are entitled to receive a greater sum in law, if the claim is successful.

In the common law tradition stemming from English statutory developments, the ability to claw back an *inter vivos* gift differs from the varying approaches found within the civil law tradition. In this common law tradition, it is for the purpose of providing reasonable financial provision or maintenance to an heir or dependant where there is evidence that the deceased intentionally gifted the property in order to avoid their responsibilities.[32] In contrast to the position within the civil law tradition, this approach is discretionary, and needs based. The claimant need not be an heir or even a member of the family but has to have been dependent on the deceased in the two years prior to the death of the deceased. In the English law scheme the claim has to be made during the administration of the estate, within the first six months after the death of the deceased and only applies to gifts made in the six years prior to the death of the donor.[33] Under the 1975 Act, the donee can be an heir or a non-heir who received an *inter vivos* gift from

[30] The heirs entitled to the legitimate portion are known as legitimate heirs, reserved heirs or forced heirs. The 'right' to inherit is a right that is protected by a State. It is not a fundamental human right.

[31] Pintens (n 1 above) 12.

[32] Section 10 Inheritance (Provision for Family and Dependants) Act 1975: http://www.legislation.gov.uk/ukpga/1975/63 (accessed 7 June 2019). This approach is also seen for example within the laws of Australia, Ireland and South Africa. For further analysis of this point see Holliday (n 19 above). D Hayton in Appendix B, a joint response to the Law Society and STEP, notes that '… English and Welsh law believes that children should be able to stand independently on their own two feet once they have been fully reared and educated by their parents, so that the parents have no legal obligations to their grown-up children unless the children have physical or mental problems, while the civilian philosophy is that parents must ensure that their children inherit most of their property.' in J Harris, 'The proposed EU Regulation on succession and wills: prospects and challenges' (2008) 22 *Trust Law International* 181, 196.

[33] Section 10(2) Inheritance (Provision for Family and Dependants) Act 1975.

the deceased, although for the purpose of the book the analysis will focus on gifts made to third parties.

The underlying differences between the concepts of clawing back an *inter vivos* gift from a third party who is not an heir and the reduction of the *inter vivos* gift or advance to an heir, to create equality or fairness between heirs, appears clear and they should be treated differently. The ability to distinguish between the two in such a clean way allows for the development of an applicable law rule just for the claims made against third parties. Yet, both within private international law and in legal analysis, distinguishing between the two is rare. This may be due to the superficial similarity in that it is possible to reduce an *inter vivos* gift for both purposes and the claims are both triggered by a succession (it should be noted that the claim to reduce the *inter vivos* gift to an heir occurs before a claim to reduce an *inter vivos* gift to a third party will be considered). However, the consequences of applying the *lex successionis* are far graver for the donee and claimant in a cross-border situation where the gift was made to a third party than where a gift was made to an heir in advance of their final inheritance.

The crucial distinction between collation and clawback concerns the donee; the distinction being from whom the gift can be taken and the underlying intention behind the reduction. If it is an issue of collation, then if the law permits gifts to be reduced, then the gifts that may be reduced are restricted to eligible *inter vivos* gifts or advances that were made to collateral heirs. If it is an issue of clawback, the *inter vivos* gifts that may be reduced are gifts that were made by the donor to third parties during his or her lifetime who are not heirs or family members, such as gifts that were made to friends of the donor or to institutions such as charities.

The author's concern over the blurring of the distinction between the reduction of gifts to heirs and non-heirs arose during her reading of the responses to the questionnaire which formed the basis of the comparative substantive law analysis within this book, from analysis of the international and regional private international law on succession and the academic literature on succession, combined with the close analysis of the documents used during the drafting of the Succession Regulation. As previously stated, from a private international law perspective, the applicable law rule for the reduction of the gift for the purpose of collation is not as contentious.[34] Whereas reduction of an *inter vivos* gift to a third party, from a private international law perspective, is highly contentious due to the retroactive nature of using the *lex successionis* for the applicable law rule, which may overturn

[34] Within the EU it is suggested that where the gift was made to an heir at a point where the *lex successionis* was unknown and it was a valid gift under the applicable law under Rome I it is debatable whether the heir would be required to return the gift: see E Castellanos Ruiz in A-L Caravaca, A Davi, H-P Mansel (eds), *The EU Succession Regulation A Commentary* (Cambridge University Press, 2016) 366. This view is also taken by A Metallionos in H Pamboukis (ed), *EU Succession Regulation, A Commentary* (Nomiki Bibliothiki, CH Beck and Nomos, 2017) 277. A criticism of this approach is that it relies on an interpretation of the law rather than there being certainty, and also favours the donee over the claimant.

what was believed to be an irrevocable gift at the time the gift was made, and the fact that in some countries claimants need not be heirs; they may be a creditor of a legitimate heir. The reduction of an advance versus the reduction of a gift made to a third party needs to be treated differently if we are to achieve a global applicable law solution.

Paisley identified the difficulties of applying the civil law construct of clawback within the UK systems, which was summed up as follows:

- The potential to increase the time and costs of conveying both moveable and immovable property. Such additional expense may reflect the costs of taking out an appropriate insurance-based title indemnity policy.
- The potential to make it impossible for the vast majority of UK solicitors to give complete advice in relation to the risks attendant upon the conveyance of property.
- The potential to undermine the integrity of the various UK Registers of title to land.
- The potential to undermine charitable giving in the UK.
- The potential to undermine the use of *inter vivos* trusts as a mechanism for estate planning in the UK.
- The potential to undermine use of insurance or pension policies taken out in the name of the deceased, where the premiums are paid for by the deceased during his life and written for the benefit of a surviving relative of the deceased as a means of testamentary provision.
- The potential to undermine the title to both immoveable and moveable property situated in the UK. This could arise in a case where the property had previously been acquired as a result of a lifetime gift where the donor later died and the law of a Member State recognising clawback applies to the succession. This could apply not only to rights of property, but also to rights of security, such as mortgage created over the property.
- The potential to give rise to liability on the part of the State to indemnify family heirs where a title to property has been conferred on a third party by registration so as to deprive that heir of title to that property.
- The potential to encourage the evasion of clawback provisions and the consequent legal uncertainty as to whether such evasion is lawful.
- Potential difficulties about determining the valuation of any sums subject to clawback.[35]

Conversely, without a truly global private international law solution to this problem, heirs within a civil law tradition who are entitled to utilise clawback in order to satisfy the legitimate portion are unable to gain satisfaction.

(ii) Not the Whole Picture

As the rules surrounding clawback of an *inter vivos* gift from a third party within the context of a cross-border succession are so visibly contentious and are a clear

[35] Paisley (n 10 above), 15. Quoted at: https://www.biicl.org/files/4682_ec-succession-wills%5B1%5D.pdf.

example of a conflict of laws, it does not seem too far-fetched to suggest that everyone around the EU Succession Regulation negotiating table should have been aware that this would require a lot of work to reach a workable solution that would be agreeable by all. Unfortunately, it appears that not everyone approached the table with that aim. Although speculative, it is suggested that the political noise (which is discussed later on in this chapter) surrounding the issue of clawback from a third party during the Succession Regulation negotiations was unfortunate, as it contributed to drowning out common sense in relation to achieving a solution that would be agreeable to all sides. With hindsight, it is also clear that the guidance given to the drafters of the EU Succession Regulation, to the UK House of Lords and to the UK politicians responsible for giving their support to the project, did not place enough emphasis on the relatively non-contentious aspect of the reduction of gifts for the purpose of collation, nor that clawback from third parties in a cross-border context was not often litigated, but instead chose to focus solely on the headline-grabbing element of reducing a gift given to a third party, fuelled by the concerns of UK charities who were understandably worried about the effect on their receipt of *inter vivos* gifts. The evidence put forward to the UK government prior to the start of the Succession Regulation negotiations contributed directly to the UK's decision not to opt into the Regulation prior to the negotiations, leaving the UK negotiators in the less than advantageous position of attempting to negotiate a compromise when there was no guarantee that they would ultimately opt in.[36]

The following example of clawback was put forward during the gathering of evidence for the UK House of Lords EU Select Committee by Professor Matthews on 9 March 2010.

> 'An extreme example of clawback'
>
> A British national domiciled in, and entirely connected with, England gives away a significant proportion of his property. Forty years later he dies, having moved to France, having become domiciled, bought property, married and raised a family there.
>
> The forced inheritance claims and clawback will apply to the gifts made when he was domiciled in England as far as French law is concerned. They are liable to be returned to the estate to meet these claims.[37]

For the UK, a country which upholds the legal tradition where donation is protected, and where *inter vivos* gifts do not form part of the deceased's estate,

[36] See Holliday (n 10 above), where the author observes that a failure by the UK to opt in when negotiations have been conducted is a failure by all Member States to reach a compromise and to take cultural diversity into consideration, a point which is required under Art 3(3) of the Treaty on the Functioning of the European Union.

[37] The House of Lords European Union Committee on the proposed EU Succession Regulation, 6th Report of Session 2009–10: https://publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/7502.htm, p 25 (accessed 7 June 2019). It should be noted that no distinction is made in this example between clawback from a third party and clawback from an heir. It is also inaccurate, as the laws had changed by this point (2006) and the claim had been changed to a monetary claim for the sum that exceeds the disposable portion and not for the return of the property itself.

the possibility that a gift could be clawed back at an indeterminate point in the future which would threaten the legitimate expectations of the donee was sufficient to set off alarm bells everywhere.[38] However, contrary to this inflammatory representation of clawback to the Select Committee, on conducting the research for this book, it became clear that in countries where clawback from third parties is used, the law in this area is much more nuanced than portrayed in this example. Taking the French Civil Code as an example, the first thing that needs to be mentioned is that it underwent great change in 2006 (a point which was not mentioned during the Succession Regulation negotiations by the French negotiators)[39] in relation to the *inter vivos* gift for both collation and clawback, in that the claim became a monetary claim rather than a claim for the actual property. Under the French Civil Code at the time of the negotiations, it is noted that:

- An *inter vivos* gift for the purpose of succession in French Law only applies to a transfer of property that is registered as such by a notary who records the transfer for the purpose of succession.[40] It is recorded as an ordinary contract and remains valid unless nullified.[41]
- It is possible for the donor to exclude a gift for the purpose of collation.[42]
- It is possible for the heirs to exclude a particular *inter vivos* gift for the purpose of collation through contractual agreement.[43]

[38] See Paisley's study for a list of potential negative effects in relation to the UK and clawback (n 10 above), which amongst other things included: increased conveyancing costs; increased risk of negligence by practitioners; undermining the UK Registers of titles to land which contain insufficient information (for example in order to fulfil the requirements of clawback there would be a need to know who potentially had a right in the property); undermining charitable giving; undermining *inter vivos* trusts; undermining the use of insurance policies taken out in the name of the deceased; undermining title to immoveable and moveable property; raising potential liability on the State to indemnify forced heirs; giving rise to an industry supporting the evasion of clawback; and difficulties providing valuations to be clawed back.

[39] During a meeting between the author and Professor Paul Beaumont in May 2016, Professor Beaumont noted that 'this fact (the changes to the French legislation and that it was only for a monetary claim) was not mentioned by the French Representative during the negotiations of the EU Succession Regulation.' This conversation is recorded in the author's private notes.

[40] Art 931 French Civil Code. The requirement that the *inter vivos* gift is recorded by the notary restricts the scope of what is regarded as an *inter vivos* gift. This is contrary to the understanding of '*inter vivos* gift' within the UK, which refers to any gift made by the deceased during his lifetime. In 2007 it was reported that 586,500 *inter vivos* gifts had been transferred to children by French households with a total value of €33 Billion: C Péres, 'Intestate Succession in France' in K Reid, MJ de Waal, R Zimmermann (eds), *Comparative Succession Law, Intestate Succession* (Oxford University Press, 2015) 34. If we consider that a percentage of these gifts will have included property that was in a different Member State then it would suggest that the current rules relating to estate planning and collation are needed.

[41] Art 931 French Civil Code.

[42] Art 919 French Civil Code. The donor is able to gift a percentage of his estate from his free estate. Only gifts that exceed the freely disposable part of the estate can be clawed back for the purpose of satisfying the reserved share.

[43] Art 919 French Civil Code. The ability under French law for the heirs to agree through contract that a gift will not be clawed back, which allows the donee to have certainty of ownership, does not take into account the possibility that there could be a future heir that has yet to be born. It is not unknown

- *Inter vivos* gifts that were made by the donor and do not exceed the legitimate portion because the sum total of the gifts falls entirely within the disposable share of the estate are not considered for the purpose of satisfying the legitimate portion.
- The scope of who constitutes a legitimate heir is narrow in that it is restricted to descendants, with only the spouse being regarded as a legitimate heir where there are no children.[44]
- There is debate as to whether the legitimate portion is regarded as a matter of public policy.[45]
- The claim for the reduction of the *inter vivos* gift to an heir is not automatic and can only be claimed by a legitimate heir.[46]
- A person entitled to a legitimate portion can waive their rights.[47]
- Testamentary bequests will be used to fulfil the legitimate portion before *inter vivos* gifts/advances to heirs are considered.[48]
- *Inter vivos* gifts or advances are regarded as forming part of a person's legitimate portion or reserved share. If the gift to an heir is valued at more than the person's legal share then the excess can be reduced in order to create equality between the heirs.[49] It is a monetary claim.
- If there is a successful claim, the gifts will be reduced in chronological order starting from the date of the death of the deceased.[50]
- The costs of food, housing and education for descendants do not constitute gifts for the purpose of collation.[51]
- Gifts to certain institutions are also excluded from reduction.[52]

for there to be large age gaps between children of one biological parent. French law does not discriminate between legitimate children and illegitimate children for the purpose of the reserved share.

[44] Garb and Wood (n 20 above) 280.

[45] See M Grimaldi, 'Some brief thoughts on public policy and the hereditary reserve', *Defrénois*, 2012 755, available at *Henri Capitant Law Review*, No 7, 31 December 2014: http://www.henricapitant.org/revue/en/n7.

[46] Art 921 French Civil Code, see: https://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000006165578&cidTexte=LEGITEXT000006070721&dateTexte=20170324 (accessed 7 June 2019).

[47] Art 929 French Civil Code – they may waive their rights to the whole inheritance or to the reduction of a particular gift.

[48] Art 923 French Civil Code.

[49] Art 924 French Civil Code. Art 924 is discussed within Decision No 2012-274 QPC of 28 September 2012 for the purpose of collation, see: https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=859F6825B38B44D54C0DC28D04C3B8B9.tpdila13v_2?cidTexte=JORFTEXT000026426322&idArticle=JORFARTI000026426323&dateTexte=20120929&categorieLien=cid#JORFARTI000026426323 (accessed 25 March 2017).

[50] Art 923 French Civil Code.

[51] Art 852 French Civil Code.

[52] This is interesting from the perspective of the EU Succession Regulation negotiations. The UK was concerned about the effect of clawback on gifts made to charities. The fact that some countries that permit clawback from third parties exclude gifts made to charities was not mentioned during the negotiations.

- The ability to claim for the return of an *inter vivos* gift or for the value to be returned is therefore available for the purpose of collation (*rapport des libéralités*).

And the rule that allows for the reduction of an *inter vivos* gift made to a third party? This is arguably less extreme than at first purported.

- It is possible to make a monetary claim against persons who are not children who have received *inter vivos* gifts that exceed the legitimate portion (*reduction des libéralités*).[53] Only the excess is subject to reduction.[54]

Therefore, the reality of a claim to claw back or reduce an *inter vivos* gift to a third-party non-family member for the purpose of satisfying the legitimate portion is that it occurs:

- only in cases where the estate is not able to meet the requirements for fulfilling the legitimate portion through the reduction of testamentary bequests or through the reduction of advances for the purpose of collation between the reserved heirs,
- and then only if the heirs are aware of a transfer of an *inter vivos* gift to a third party and wish to make the claim. They do not *need* to make a claim.
- and then only if the *inter vivos* gifts exceeded the disposable portion of the estate,
- and if the claimant was not excluded from making the claim by the testator,
- and even then, as is the case in the majority of countries that use clawback, it is not possible to claw back the *actual property* from the donee.[55] The claimants can only make a monetary claim and then only for the amount that exceeds the disposable portion.[56]

[53] Garb and Wood (n 20 above) 282. For literature on the reduction of gifts under French law see, for example, Péres (n 40 above) 49 and R Hyland, *Gifts. A Study in Comparative Law* (Oxford University Press, 2010) 84. In order to obtain clarity on whether French law allowed for clawback, the author contacted Cécile Peres, Professor in Private Law at the University of Paris II Panthéon-Assas and author of the chapter on French law in Garb and Wood. She very kindly clarified that: '*Les règles relatives à la réserve héréditaire et à la réduction des libéralités excessives sont prévues par les articles 912 et suivants du Code civil. Toutes les donations entre vifs sont prises en compte pour le calcul de la réserve héréditaire (art. 913 du code civil): peu importe leur date, peu importe aussi qu'elles aient été consenties à un tiers, étranger à la famille, ou à un membre de la famille. On ne distingue pas suivant le bénéficiaire de la donation.*' Which translates as 'The rules relating to the hereditary reserve and to the reduction of excessive gifts are laid down in articles 912 and following of the Civil Code. All *inter vivos* gifts are taken into account for the calculation of the hereditary reserve (article 913 of the Civil Code) whatever their date; it also does not matter whether they were granted to a third party, a stranger to the family, or a member of the family. There is no distinction between the recipients of the donation.' Email received 31 March 2017. This should be read in light of the fact that the *inter vivos* gift for the purpose of succession is limited to those that are recorded by a notary. The recording of the gift creates awareness between the parties that the gift could be at risk of clawback.

[54] Art 919 French Civil Code.

[55] Within the EU only Greece and Romania ask for the actual property to be returned under their rules on clawback – see Chapter 3 of this book.

[56] Art 919 French Civil Code.

If we contrast this experience with the position under the law of England and Wales, the 1975 Act states that the dependant, if in need of financial provision due to having been maintained by the deceased in the two years prior to the latter's death, is able to demonstrate that the gift was made to avoid providing for them, then any gift can be reduced.[57] The reduction is for the actual property and not just in kind. The aim is to provide the dependant with reasonable financial provision. However, there is no case-law within England and Wales on this point.[58]

C. Terminology

In addition to the apparent confusion between the terms clawback and collation, a factor that became clear during the analysis of the substantive law and the legislation in Chapters three and four is that there does not appear to be a common understanding of the key elements integral to the concept of clawback.

(i) There is No Clear Definition of the Term 'Heir'

Across the EU, the term 'heir' can be understood narrowly to mean the statutory heir, sometimes referred to as the blood relatives, or broadly, to include anyone who benefits from the estate of the deceased.[59] The term 'beneficiary' can also be understood narrowly to mean the people who are named within the will, or broadly, to also include those who benefited from receiving an *inter vivos* gift, which could include a third party who is not an heir in the narrow sense of the word. This difference in the scope of what is meant by 'heir' is important if we are to understand who we are actually dealing with, which in turn can affect how we understand the law. If *inter vivos* gifts can only be 'clawed back' from blood relatives, for example, solely from the descendants in order to create equality between the heirs, then it is more accurate to say that this is restoration of the gift to the estate for the purpose of collation. At the other end of the spectrum, if clawback of *inter vivos* gifts is permitted from non-heirs who are not blood relatives, ie third

[57] Section 10 Inheritance (Provision for Family and Dependants) Act 1975.

[58] When discussing clawback, Professors E Crawford and J Carruthers in their evidence to the House of Lords EU Committee (n 37 above) p 65, noted that an English case *Re Korvine's Trust* [1921] 1Ch 343 regarded a deathbed transfer in English law as an issue of property law rather than succession law, and go on to state that they can see that there is a conflict between the two 'innocents' – the donee and the beneficiary – but say that they regard clawback as a substantive issue that should be dealt with under the *lex causae* (*lex successionis*). Crawford and Carruthers also note that there are no cases of clawback from third parties in cross-border cases in Scots law but they recognise that there is a conflict between succession law and property law.

[59] The need for a clear definition of the term 'heir' was requested by the Netherlands during the negotiations of the Succession Regulation proposed by the Council of the European Union, October 2010 JUSTCIV167, p 3.

parties, then this is more accurately defined more narrowly as clawback for the purpose of either satisfying the legitimate portion or for maintaining dependants as per the legal systems of England and Wales and Northern Ireland. Clawback from a third party does not mean in all cases that the heir is otherwise going to inherit nothing, but that if the gift is clawed back they will inherit more. It is not needs based when used to satisfy a legitimate portion. This is an important distinction, as many countries would appear to regard the term collation and clawback as interchangeable, whereas they are in fact separate concepts and have different objectives.

(ii) There is No Clear Definition of the Term 'Inter Vivos *Gift'*

Another point where there appears to be a difference in understanding is what is meant by an *inter vivos* gift. Some countries interpret the term literally.[60] In the UK the term *inter vivos* gift is interpreted literally, but crucially under the *lex fori* they are not considered part of succession law. In other countries, the term *inter vivos* gift is interpreted narrowly and refers specifically to gifts made by the deceased during his lifetime that were formally registered as an *inter vivos* gift by a notary and are not otherwise excluded in law. The *inter vivos* gifts that are included for the purpose of calculating the fictive estate may be restricted to those gifts that were recorded for the purpose of succession that the donor had given to his legitimate heirs. *Inter vivos* gifts that may be excluded are gifts that support the child's day-to-day needs or gifts to charities or government bodies. In non-excluded cases which are recorded, the notary will prepare an appropriate contract to denote the transfer of the property from the donor to the donee. In these contracts, there may be a clause that permits selling of the property by the donee without the risk of clawback if the heirs entitled to the legitimate portion consent. If the donee sells the property it is also noted in the sale that the property is at risk of clawback. If the heirs are willing to contract the gift out of the fictive estate, then their consent excludes this gift from being clawed back in order to satisfy the legitimate portion at a point in time where the value of the succession is unknown.[61] An obvious problem with this approach in contract law is that it is not

[60] England and Wales regard any gift that was made by the deceased during their lifetime as an '*inter vivos* gift'. These gifts do not form part of the estate, as only the property that is owned at the time of death is considered for that purpose. In the alternative, France regards *inter vivos* gifts for the purpose of succession as only those that were noted by the deceased as being such with a notary or that the heirs account for.

[61] The changes in the French Civil Code in 2006 increased the certainty of ownership for the donee and lessened the scope of the legitimate portion by removing ascendants from the list of those entitled to the legitimate portion thus bringing into question whether the legitimate portion can still be considered a public policy issue due to the way the donor is now able to circumvent the legitimate portion. '*la renonciation anticipée à l'action en réduction est une technique pleine d'utilité pour la pratique notariale qui y trouvera le moyen de donner efficacité définitive aux dispositions à titre gratuit du défunt.*' Claude Bremmer, 'Le Nouveau Visage de la Réserve Héréditaire': http://www.henricapitant.org/revue/fr/n7 (accessed 4 August 2019).

possible for heirs to contract out of something where there may be a party to the contract that they are unaware of. For example, a parent may have had a second family that the first family was unaware of where the children also have rights to the legitimate portion. Due to the anti-discrimination laws, children that were born outside of wedlock are still entitled to a share of the legitimate portion of the estate of the deceased parent. In another example, the legitimate heirs known at the time of the contract to exclude the gift would not have taken into consideration that a parent may have a new family late in life and have one set of adult children and a younger set of children from a second or third relationship. Austria only allows children to claw back gifts that were given by the donor during the lifetime of the child, which on the face of it seems fair, yet if a substantial gift was given one year before the death of the deceased and the child is just a few months old and has an older sibling it seems odd that one child is advantaged depending on the date of birth.

It is possible in some cases for the donor to exclude the gift from falling within the scope of the fictive hereditary estate on the basis that it falls within the free share of his estate, thus excluding it from the risk of clawback. This would suggest that in some cases the clawback for the purpose of collation or from the third party can be limited by the donor, and therefore the functions of both concepts of collation and clawback are weakened in these cases in favour of testamentary freedom and clarity for the donee as to the irrevocable nature of the transfer of property.[62]

There are other more difficult areas in terms of defining the *inter vivos* gift which are beyond the scope of this book, such as whether matrimonial gifts fall within the scope of '*inter vivos*' gifts for the purpose of succession law.

(iii) There is No Clear Definition of the Term 'Clawback'

As explained above, the term clawback is a rather abused term. It means different things depending on whether it is being referred to within a procedural or substantive law context.

a) Procedural law

In the context of succession law, the generic use of the term clawback is used to describe the procedure used to reduce a gift. In this way a gift given to either a legitimate heir or a third party by the deceased can be said to be 'clawed back'. Greater clarity could be achieved by restricting the use of the term clawback to the procedure that applies to gifts made to a third party and maintaining the use of the term 'reduction' of the gift for the purpose of collation when referring to gifts made to legitimate heirs. This would be in line with the underlying function

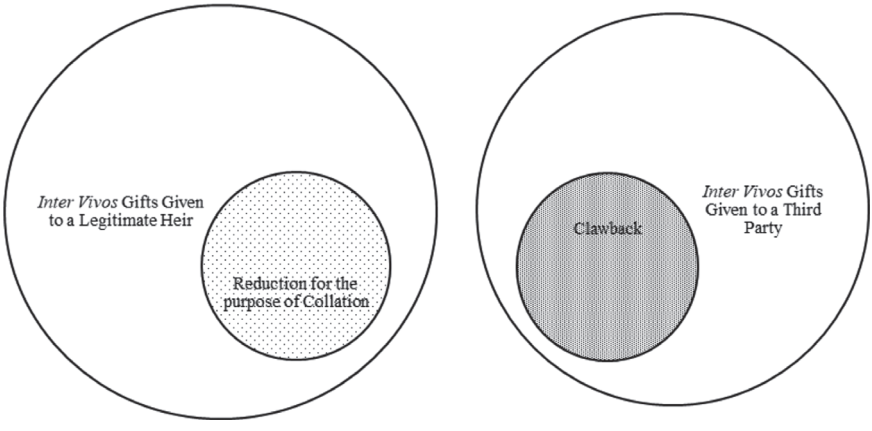
[62] Ibid.

of the substantive law. This would also be in line with the terminology used by Lagarde.[63]

b) Substantive law

The term clawback at the substantive level is more nuanced than is generally understood and is open to misunderstanding. There is a substantive difference between the restoring of property to the estate that has been given to a legitimate heir by the deceased and the restoring of property to the estate that has been given to a third party by the deceased, yet the term clawback is commonly used to describe both forms. It is argued that the substantive differences between the donees and the nature of the gifts and differences in function and procedure highlight the need to treat these two issues separately.

Figure 1 Substantive Law – Collation v Clawback



In the diagram above the *inter vivos* gifts made by the deceased to legitimate heirs may, depending on their nature, be regarded as:

- irrevocable (for example if they are gifts for the purpose of maintenance or education);
- advances, and therefore open to collation. A claim may be brought by the heirs to reduce the gift that was given to an heir, in order to create equality between the heirs.
- advances, but exempt from collation.[64]

[63] Lagarde (n 26 above) 141, restricts his use of the term clawback to the reduction of gifts to third parties. When referring to gifts made to legitimate heirs he restricts his terminology to reduction.

[64] An advance may be exempt from collation if the donor expressly states that the gift is to be exempt or is to fall within the disposable portion of the estate, or if the heirs agree that it is exempt. The gift can also become irrevocable if not challenged by the legitimate heirs and the prescription period elapses.

The *inter vivos* gifts made by the deceased to a third party who is not an heir may, depending on their nature, be regarded as:

- irrevocable and excluded from clawback.[65]
- within the reach of clawback if the applicable succession law takes into account *inter vivos* gifts for the purpose of calculating the fictive estate and if the value of those gifts exceeds the disposable portion of the estate and the legitimate portion has not been satisfied and the heirs wish to make a claim.[66] The reduction of a gift to a third party is to enable the legitimate heirs to receive part or all of the protected reserved share of the estate. The difference between the functions of reducing the gift for collation purposes and reducing the gift made to a third party are subtle but important.
- not being subject to reduction for the purpose of collation, as the donee is not an heir.
- subject to reduction by way of clawback even though the claimant is not an heir but rather a creditor of the heir.
- subject to reduction by way of clawback where the claimant is not an heir but rather a dependant, in countries where clawback from third parties is used to provide dependants with maintenance where a donor has tried to avoid leaving reasonable financial provision for that dependant.

Professor Paisley in his guidance to the Ministry of Justice in 2009, when defining clawback, stated that clawback goes beyond the rule of collation or hotchpot (where the aim is to divide the estate fairly prior to the division of the estate) to one where the concern is to protect the legitimate heirs against 'defrauding or prejudice by way of lifetime gifts' made to either the legitimate heirs or a third party by the deceased.[67] This interpretation of substantive clawback sees the aim of clawback as being separate to that of collation. However, for the purpose of creating a private international law rule, it would be better not to distinguish between the point where collation stops and where clawback starts, but rather between to whom the gifts have been given. When dealing with gifts made to the legitimate heirs the scope of the underlying purpose behind clawback of the *inter vivos* gift made to a legitimate heir is not sufficiently different from reduction of the *inter vivos* gift for the purpose of collation, to be considered separately. Reducing a gift

[65] This may be because the donee and the heirs have agreed to exclude the gift from clawback (although the ability to make a contractual agreement to exclude a gift from clawback has potential weaknesses, such as new legitimate heirs appearing that no one knew about, eg children from second relationships). It may also be because the succession law does not allow for clawback from third parties.

[66] In the past the question as to whether succession law uses clawback was set around the issue of forced heirship. However, on closer scrutiny the issue centres not on forced heirship per se but on whether the succession law considers *inter vivos* gifts as part of the fictive estate. Not all countries that have forced heirship extend the estate to include *inter vivos* gifts. In other cases, they may also restrict the reduction of the gifts only to gifts made to the legitimate heirs.

[67] Paisley (n 10 above) 18.

made to a legitimate heir in order to create fairness between the legitimate heirs, ie for the purpose of collation, implies that the gift in some way prejudiced the remaining heirs. What is taking place when gifts were made to one legitimate heir to prevent other legitimate heirs from inheriting or a legitimate heir does not seek a viable claim (see the *Lambton* case discussed below (Example 3)) can be more accurately stated as procedural clawback for the purpose of the substantive issue of collation. Reducing a gift made to the legitimate heir for the purpose of clawback, as understood by Professor Paisley, creates the same outcome. The outcome when reducing a gift made to the legitimate heirs does not change whether we do it under collation or clawback but it is argued that greater clarity in law can be achieved if we distinguish between donees who are heirs and donees who are not heirs.

The reduction of *inter vivos* gifts made to the original third-party donee can only ever be for the purpose of satisfying the legitimate portion or to help meet the needs of dependants. It can never be for collation, as the third party is not an heir. The reduction of the *inter vivos* gift or advance made to a legitimate heir is a succession issue. The reduction of an *inter vivos* gift to a third-party non-heir for the purpose of satisfying the legitimate portion, as will be demonstrated, has no clear legal character. In addition, there is a further category of third party, which as mentioned is beyond the scope of this book, namely third parties who acquire the property from the original donee in good faith.

This blurring of the use and the meaning of the term 'clawback' leads to misunderstanding amongst academics and practitioners, which has contributed to the acceptance of an applicable law rule that is more appropriate for the concept of collation than the concept of clawback from a third party.

Examples which highlight the need for a clear definition of the term clawback are:

1) In December 2009, a leading practitioner, when advising the UK Select Committee on the European Union, uses the term 'clawback' to refer to the reduction of gifts for the purpose of collation and the reduction of gifts to third parties for satisfying the legitimate portion. Restricting the use of the word 'clawback' in the context of succession to the reduction of gifts to third parties and raising the profile of collation will greatly improve communication in this context, as collation is not contentious.

> My Lord, claw back, I think is a tricky topic and I think one needs to distinguish between rearrangements between heirs and rearrangements not between heirs, so that in general terms in the European Union rearrangements between heirs often have no time limit, whereas rearrangements between people who are not heirs usually have a time limit. … I think the tricky question is claw back between non-heirs and certainly I know that charities in this country are very worried about it …[68]

[68] Richard Frimston's response to Q81 in House of Lords EU Select Committee (n 37 above) pp 35–36.

2) In an academic commentary published in 2016 on the EU Succession Regulation, by clarifying the term 'clawback' to equate to the common law provision of 'hotchpot or advancement', Castellanos Ruiz implies that the meaning of clawback is the reduction of gifts made to heirs, and does not refer to third-party donees at all;

> According to article 23.2(i) ESR the *lex successionis* is only applied in order to identify gifts which are subject to 'clawback', that is to say, gifts made by the deceased which must be reintegrated into the estate in order to determine the shares due to the beneficiaries under the inheritance. As stated in recital 14, it must be the *lex successionis* 'which determines whether gifts or other forms of dispositions *inter vivos* giving rise to a right *in rem* prior to death should be restored or accounted for the purposes of determining the shares of the beneficiaries in accordance with the law applicable to the succession'.
>
> Provision is made for this 'clawback' obligation both in civil law systems and in common law countries. In the latter it is referred to as hotchpot or advancement.[69]

In common law hotchpot or advancement refers to restoring or accounting for gifts for the purpose of collation. Hotchpot is not the same as clawback.

3) A case before the UK Court of Justice Chancery Division in 2013, refers to a claim which speaks of the 'clawback issue' in very general terms:

> … in order to calculate the value of Lord Lambton's estate (for the purposes of calculating each Defendant's share of the estate) assets which Lord Lambton owned but gave away during his lifetime have to be added back to what was left at death in order to calculate a fictitious patrimony of Lord Lambton (the 'clawback' issue)[70]

The accounting of *inter vivos* gifts in order to determine the value of the fictive estate is for the purpose of calculating the legitimate portion. Only after the legitimate portion has been calculated will there be evidence to show whether the *inter vivos* gifts exceeded the legitimate portion, with the initial satisfaction for the forced heirs coming from the bequests in the will before collation is considered, and clawback from a third party being the option of last resort. In this case the forced heirs who had been excluded from their father's will settled out of court when the sole named heir in the will sold moveable bequests he had been left that were within the UK to satisfy the claim. Although the deceased had transferred all of his immoveable property during his lifetime to his eldest son and into trusts, he had left four valuable paintings in his will to his eldest son, worth approximately £12 million. The case uses the term clawback and does mention the issue of gifts given to 'others' but the settlement after the English court case is a separate issue to the Italian case and would appear to be one of reduction for the purpose

[69] Castellanos Ruiz (n 34 above) 365–66.
[70] *Lambton v Lambton* [2013] EWHC 3566 (Ch).

of collation, as the settlement out of court was the result of the son, who was also the executor, selling one of the paintings and dividing the proceeds between the sisters. Also the case did not result in the reduction of *inter vivos* gifts made to the son by the father but rather the redistribution of bequests to the son.

D. How is the Legitimate Portion Calculated? And how does a Claim for Clawback Arise in a Civil Law Context?

(i) An Example under Belgian Law

In order to calculate the value of the estate of the deceased so that the legitimate portion can be established, the value of the assets at the time of death is added to the value of the gifts made by the deceased during his or her lifetime, creating a fictive estate.[71] The debts of the deceased are then subtracted from this figure. The legitimate portion rules are then applied, which vary depending on who the legitimate heir is and how many heirs exist in each tier.[72]

If the deceased had no spouse but had one child, the child as a legitimate heir, under Belgian law is entitled to a legitimate portion of one half of the estate.[73] The remaining half of the estate is considered to be the disposable part of the estate that the deceased is able to bequeath or gift without challenge. If there are insufficient funds in the estate to give the child the share of the estate that they are entitled to then any bequests that the deceased made in his will can be reduced to satisfy the legitimate portion. If there are insufficient bequests and the gifts made during the lifetime of the deceased exceed the half share that the deceased was entitled to dispose of freely, then the child is able to claim for the gifts to be reduced/clawed back in chronological order from the date of death of the deceased until the legitimate portion is satisfied.[74] Gifts made to legitimate heirs (ie, for the purpose of collation) are taken into account for reduction before considering gifts made to third parties.

If the deceased left assets worth €1,000,000 and had gifted property to third parties during his lifetime worth €200,000, the estate for the purpose of working out the legitimate portion is valued at €1,200,000. If the deceased left one child,

[71] Paisley (n 10 above), 19.

[72] Under Art 913 of the Belgian Civil Code, if the deceased leaves one child they are entitled to 50% of the estate. If the deceased left three or more children, this is capped at 75% of the estate. The disposable part of the estate therefore also varies depending on the numbers and classification of the forced heirs to the estate. The Belgian Civil Code is available at http://www.droitbelge.be/codes.asp#civ (accessed 8 June 2019). See also Belgian Succession Law Report conducted by Patrick Wautelet: https://ec.europa.eu/civiljustice/news/docs/study_bxl1_belgium.pdf (accessed 25th July 2019).

[73] Art 913, Belgian Civil Code.

[74] For examples of different scenarios under Belgian law see Gerd D Goyvaerts, Belgium, International Estate Planning Guide, 2017: https://www.ibanet.org/internationalestateplanningguides.aspx (accessed 10 June 2019).

the child is entitled to a legitimate portion of €600,000 which can be satisfied from the assets in the estate. If the deceased had left three children and the value of the *inter vivos* gifts to third parties had instead amounted to €1,000,000, the total value of the estate for the purpose of satisfying the legitimate portion would be €2,000,000 and the children would be entitled to a three-quarters share, meaning that the legitimate portion would be made up of the €1,000,000 of the assets at the time of death and the children would have the right to claim for the *inter vivos* gifts to the third party(ies) which had exceeded the disposable portion, to be clawed back in chronological order from the date of death of the deceased until the legitimate portion was satisfied.

Contrary to the situation regarding gifts/advances made to heirs, in general it is not possible for the donor to exclude a gift from clawback from third parties to satisfy the legitimate portion.[75] It is also not necessary for the heir who is entitled to claim the legitimate portion to be in a state of need at the time of the claim or to be a current dependant of the deceased.[76] The claim by the legitimate heir simply allows them to obtain what is theirs in law. The property that is 'clawed back' into the estate from a third party is then shared between the legitimate heirs. The sharing of the reduced gift is so that the legitimate heir receives what is due to them in law. The sharing of the property is not to create equality in the face of the deceased favouring one child above the others.

E. Conclusion

Different legal traditions have developed differing approaches for protecting heirs and dependants from disinheritance. Some countries have opted to protect heirs by ring-fencing a percentage of the estate for a specific group of heirs, the value of which includes *inter vivos* gifts, and provides the heir with tools to obtain their share. Others offer discretionary solutions which can be used by dependants to obtain financial provision but with the caveats that the deceased had to be maintaining them for a certain period prior to death and (an additional very difficult element, which probably explains the lack of case-law) that the dependant has to prove that the donor gifted the property with the intention of evading their duty to maintain. Some countries do not permit any clawback of *inter vivos* gifts made to third parties, either to protect the legitimate portion or to provide maintenance. Some countries value family above property. Other countries place emphasis on testamentary freedom and the need to protect title in relation to transfers of property.

[75] It is possible for the donor to exclude gifts/advances made to heirs from being reduced. The donor is able to state that the gift is to fall within the disposable portion. It is also possible in some countries for the heirs to create a contract with the donee (either an heir or third party) that they will not make a claim for the reduction of the gift.

[76] Pintens (n 1 above) 12.

The clear conflict of laws surrounding this issue makes it a strong topic to assess from a traditional private international law perspective.

II. Aim and Purpose

This book therefore aims to identify the appropriate applicable law rule that will be suitable at an international level for the claim for the clawback of property from third parties who are not family members, whether it be for the purpose of satisfying the legitimate portion or for reasonable financial provision.[77] It does not seek a solution that will only work at a regional level. From this point on, 'clawback' for the purpose of collation – ie, to reduce the advancements from heirs – although pertinent to the issue of characterisation, falls outside the scope of this book. The current private international law approach to the applicable law to the claim for clawback of *inter vivos* gifts made to third parties who are not family members does have the potential to affect estate planning, the security of title for the third party, as well as giving inadequate protection for legitimate heirs. The applicable law rule in the EU Succession Regulation, the law of the habitual residence of the deceased at the time of death, will also affect non-EU nationals[78] who are habitually resident in a participating Member State or have immoveable property in a participating Member State. Within the EU, the rule also has the potential to affect the third-party donee who received an *inter vivos* gift unaware of the possibility that the gift may be at risk of a claim for clawback at an unknown time in the future, whereby they could be required to return the actual property or to pay the estate the value of the property or part of the value of the property. Outside the EU there appears to be little or no harmonisation of the applicable law rules on clawback and the national private international law rules on the point may often be uncertain. This is an area of law that has not been adequately addressed and is a topic in need of further analysis if the Hague Conference on Private International Law wishes to take its attempts at determining the applicable law for succession any further.[79]

[77] The definition of what constitutes a 'third party' is restricted to those parties who are not a member of the family because, during the assessment of the laws of succession within the contracting Member States to the Succession Regulation, it became clear that the use of the term third party can mean anyone who is not a legitimate heir, which can therefore include close family members. Reduction of *inter vivos* gifts and bequests to family members is not contentious within private international law.

[78] For the purpose of the EU Succession Regulation, Denmark and Ireland are considered as third States even though they are EU Member States, because they are not bound by the Regulation. See Beaumont and Holliday (n 10 above).

[79] The lack of academic comment on clawback from third parties or available guidance on this topic, combined with the lack of translations available of civil codes means that any practitioner or affected party requiring information on this point is at a disadvantage. The substantive rules tend to focus on who is able to make the claim rather than from who can be claimed from, with the ability to reduce the gift to a non-family member more often implied rather than explicit.

With this in mind, the intention will be to identify a pragmatic and fair private international law solution, suitable to be used at an international level within a future Hague Convention or at a regional level in the EU Succession Regulation, by splitting the two issues of the rules for reduction of gifts to heirs for the purpose of collation, and the rules for clawback from third parties. In order to achieve this the characteristics of clawback from third parties for the purpose of maintaining a dependant of the deceased, where it can be demonstrated that the *inter vivos* gift was transferred in order to avoid providing the dependant with reasonable financial provision, which was not adequately considered for the purposes of the Convention or the Regulation, will also be considered. A truly 'international' private international law solution cannot be achieved if an issue is only viewed through a single lens. By taking common law approaches into account and by considering the differing ways the claim is characterised, the aim is to find a solution that would protect the legitimate expectations of all relevant parties and meet the aims of simplicity, flexibility and legal certainty in estate planning.[80] As the EU Succession Regulation is in force and has the potential to affect many people, it will also be recommended that when the opportunity arises in the future to fine-tune the EU Succession Regulation it would be helpful to amend the flawed rules relating to the law applicable to clawback that survived the initial negotiation process, clearly separating the non-contentious rule for collation from a new provision for clawback from third parties.

The European Commission's wish that cross-border estate planning should invoke 'serenity' should not be considered to be a pipe-dream, but maybe as something to aim for, however unlikely in reality.[81] By adopting a pragmatic approach, a theory used by the majority of British private international law scholars,[82] the needs of affected parties will be considered, with recommendations being made to promote fairness and certainty in cross-border succession planning and in the process protecting the legitimate expectations of the donee and the donor's intentions, or the expectations of a donee receiving a gift where there was no awareness that the gift could be clawed back at an indeterminate date in the future. It will also consider the legitimate expectations of the claimant who may be an heir or dependant.[83]

By using the evidence from the preparation and drafting of the EU Succession Regulation, this book will argue that a lack of understanding as to the extent of the diversity within the substantive law on clawback in the succession laws of the Member States contributed towards the difficulties faced by the UK during the

[80] The relevant parties are the donor, donee and claimant.

[81] Vice President Jacques Barrot, the member of the Commission for Justice, Liberty and Security, quoted in Europa Press Release, 'The Commission proposes to simplify the settlement of international successions and to make the rules governing them more predictable.' (2009) Brussels.

[82] Beaumont and McEleavy, *Anton* (n 6 above) paras 2.87–2.99.

[83] Consideration will also be given to the effect for parties from other major non-EU countries such as, Australia, South Africa and USA.

negotiation stage.[84] The objection to the *lex successionis* applying to clawback from a third party was seen solely as a common law problem; whereas in reality many of the EU Member States who joined post 2004 did not provide for it either. This fact has only been established as a result of the research conducted for this book. This lack of understanding contributed to some of the longer established Member States of the EU adopting a political stance during the final stages of the negotiations that failed to respect diversity in legal cultures. As it currently stands the general applicable law rule within the Regulation for the clawback of an *inter vivos* gift to a third party is inherently weak, and these weaknesses need to be addressed in order to meet the core aims: that of being able to plan an estate in advance with certainty; and for the rights of heirs and legatees to be guaranteed.[85]

By restricting the scope of the analysis to this one small but highly contentious point, the aim of the book will be to identify the most appropriate global and regional solution.

III. Methodology

A. Comparative Approach

As part of a comparative project on the evidentiary effects of authentic instruments in the Member States of the EU in the context of succession, which the author worked on, a comprehensive questionnaire was compiled and sent out to academics and anonymous notaries in 25 Member States participating in the EU Succession Regulation.[86] This questionnaire contained several questions on the

[84] Recital 82 to the EU Succession Regulation: 'In accordance with Arts 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States are not taking part in the adoption of this Regulation and are not bound by it or subject to its application. This is, however, without prejudice to the possibility for the United Kingdom and Ireland of notifying their intention of accepting this Regulation after its adoption in accordance with Article 4 of the said Protocol.'

The UK and Ireland had made a decision not to opt into the Regulation from the outset under the UK and Ireland Protocol but remained part of the negotiating team with an option to 'opt in' at the end of the discussions. For Protocol 21 of the TFEU, see: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A12012E%2FTXT (accessed on 8 June 2019). The decision that the UK was not opting into the EU Succession Regulation at the negotiation stage can be found at: https://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/7503.htm (accessed 8 June 2019). See further, for the UK status in relation to the Regulation, Beaumont and Holliday (n 10 above) where at fn 18 it is recorded: 'Scottish Government Consultation on Technical Issues of Succession (Scottish Government 2014): http://www.gov.scot/Resource/0045/00457666.pdf accessed 18 December 2015: "In 2012 the EU Regulation (No 650/2012) on Succession was adopted … The UK, as agreed with Scottish Ministers, will not be party to this Regulation when it comes into force in 2015." 5.1'.

[85] The aims of the Regulation are inferred from Recital 7 to the Succession Regulation.

[86] For the co-authored study see the European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, P Beaumont, J Fitchen and J Holliday, 'The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions.' (2016)

issue of clawback. The data that was gathered on this point was not published in the final report on authentic instruments but is used in this book with the permission of my co-researchers and the national reporters.[87]

Where the responses to the questionnaire did not provide full answers to the questions, or in some cases where there was confusion between the concept of clawback and reduction of the gift for the purpose of collation, the relevant law in each country was referred to in order to fill in the gaps where it was possible to access the relevant information in either English or French. Where this was not sufficient, requests were made by email to specialists on succession law within the countries where the law was not clear, in order to obtain clarity. The author is very grateful to everyone who offered their help. It should be noted that the number of Civil Codes in EU Member States that are now available in English has increased since the work conducted by Professor Paisley in 2009 and this is to be commended for its consequences for ease of understanding within the EU.

The questions relevant for this book that were asked within the questionnaire that was sent out to academics and notaries in every participating Member State were:

1. Clawback – please explain whether or not it is possible for a person entitled under a domestic legitimate portion/*réserve héréditaire* rule to bring a claim in connection with a life-time gift made by the deceased that has diminished the value of the estate (and hence the reserved amount that is owed to the claimant).
2. How is a 'clawback claim' commenced and how long is the limitation/prescription period for such a claim?

With hindsight, these questions contained a weakness that only became apparent on receipt of the responses. When designing the questionnaire, the questions were divided into questions relating to collation and separate questions relating to clawback. From the responses, it was evident that 'clawback' was being used to mean the reduction of the gift or advance for the purpose of collation, with several

The report is available online at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556935/IPOL_STU(2016)556935_EN.pdf (accessed 10 June 2019). The questionnaires were sent to National Reporters in mid-July 2015. The EU Succession Regulation entered into force on 17 August 2015. The reports were completed towards the end of 2015. The list of the National Reporters is available in Annex III of this book. I would like to take this opportunity to again thank the National Reporters for their responses to the questionnaire. The author is also grateful to the Council of the Notariats of the European Union (CNEU) which sent the questionnaire to its Members and delegates on the CNEU working group on succession. The CNEU circulated the questionnaire on a pro bono basis to its members and delegates in its working group on succession in August 2015. I am grateful to the 15 anonymous notaries who took the time to complete the questionnaire.

[87] The author obtained permission to use the data within the national reports and is grateful for the support and encouragement she has received from the National Reporters. The author supports the view put forward by Professor Ralf Michaels that comparative law and private international law are inherently connected (see Chapter 4, fn 17 of this book) For further explanation on the relationship between comparative law and private international law see Chapter 4.

reporters choosing not to report on the reduction of the gift made to a third party and filling in that section as if reporting on collation.

In order to build on the work of Professor Paisley of the University of Aberdeen in his research on clawback, which was commissioned by the UK government for its Consultation Paper on the European Commission proposal on succession and wills, additional questions that were asked as part of that study were also considered. If the answers to these additional questions were not offered within the responses to the questionnaire then the author undertook to find the answers within the relevant laws where there were translations available in either English or French. Due to the comprehensive comparative research undertaken for the report on Authentic Instruments it was possible to expand Professor Paisley's study from 13 EU Member States to 25 EU Member States.[88] It is believed that this exercise provides a valuable comparative analysis of the substantive law of clawback from third parties that will be useful to practitioners, academics and legislators alike.

The additional questions from Professor Paisley's research that were considered were:

1. Does the value of the compensation claim made by the heirs assess the value of the gift as at the date the gift was made or at the date of death?
2. Is there a limit to the size of a compensation claim in respect of a gift made during the lifetime of the deceased?

The substantive laws in relation to clawback from third parties in five other countries were also considered for the purpose of comparison to the countries within the EU that are bound by the EU Succession Regulation. These countries are Australia, Denmark, Ireland, South Africa, and the UK. Australia was chosen as a common law country whose citizens are known to live and work within the EU and therefore could be affected by the EU Succession Regulation. As the UK, Denmark and Ireland are considered to be 'third countries' for the purpose of the Succession Regulation, and with the outcome of the EU referendum within the UK meaning that the UK is now withdrawing from the EU, the author has opted to place the UK, Denmark and Ireland within the latter group of countries as opposed to being placed within the list of EU Member States albeit in a non-participating category. South Africa was chosen as an example of a country with a mixed legal tradition of common law and civil law.

Desk-based research was utilised to prepare this book. The book considers documents that are in the public domain. The primary documents to be considered are the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, the EU Succession Regulation, the Inheritance (Provision for Family and Dependants) Act 1975, the Succession (Scotland) Act 1964 and

[88] The countries that were considered within Professor Paisley's research (n 10 above) were Austria, Belgium, Bulgaria, Cyprus, France, Germany, Greece, Italy, Malta, Netherlands, Poland, Portugal, Spain and South Africa.

relevant civil codes. The book takes into account the preliminary or background documents relating to the 1989 Convention, EU Succession Regulation and any subsequent official documents, any relevant case-law and secondary sources. The book considers all relevant documents produced prior to 31 March 2019.

B. Pragmatism

This book takes a pragmatic approach which suits the final aim to produce an applicable law framework which would be of interest to the Hague Conference and the EU. Pragmatism, a concept founded by the German scholar Ernst Rabel, drawn from a comparative law methodology, gained momentum in the late twentieth century as a reaction against the 'artificial theoretical barriers' that Rabel viewed as an obstruction to conflicts law.[89] It is characterised as 'anti-theoretical, favouring practicality and simplicity of solutions for specific legal problems and valuing the importance of justice.'[90] The character of this approach is therefore suited to the needs of the book to find practical solutions to issues arising in the private international law of succession and to provide justice in relation to protecting the legitimate expectations of the relevant parties.[91]

The use of pragmatism in private international law scholarship is evident within the UK, the EU and the Hague Conference on Private International Law.[92] Indeed the pragmatic approach to the working methods within the Hague Conference on Private International Law, which promotes the unification of

[89] Beaumont and McEleavy, *Anton* (n 6 above) paras 2.88–2.90. E Rabel, 'An Interim account on Comparative Conflicts Law' (1948) 46 *Michigan Law Review* 625, 635.

[90] Beaumont and McEleavy, *Anton* (ibid) paras 2.91–2.99.

[91] The author considered the application of the economics theory, which advocates economic self-interest through the use of party autonomy and the ability to circumvent mandatory rules, but rejected this approach due to the nature of succession and the UK's expectation that an individual has a minimum duty of care to his dependants, which the individual should not be able to circumvent. For a brief summary of the economic model with private parties as relevant actors, see Beaumont and McEleavy, *Anton* (n 6 above) paras 2.102–2.104.

[92] Pragmatism is evident within British scholarship in *Anton* by Beaumont and McEleavy (ibid) paras 2.87–2.99, supported by Professor Trevor Hartley in his review of *Anton*: T Hartley, 'Review: *Private International Law* by AE Anton' (2012) 8 *Journal of Private International Law* 407. The European Group for Private International Law also takes a pragmatic approach, see: http://www.gedip-egpil.eu/ (accessed 10 June 2019). One of the leading English books on private international law says: 'There is no sacred principle that pervades all decisions, but when the circumstances indicate that the internal law of a foreign country will provide a solution more just, more convenient and more in accord with the expectations of the parties than the internal law of England, the English judge does not hesitate to give effect to the foreign rules. What particular foreign law shall be chosen depends on different considerations in each legal category. Neither justice nor convenience is promoted by rigid adherence to any one principle … Private international law is no more an exact science than is any other part of the law of England; it is not scientifically founded on the reasoning of jurists, but it is beaten out on the anvil of experience.' Paul Torremans (ed), *Cheshire, North and Fawcett: Private International Law*, 15th edn (Oxford University Press, 2017) 37.

private international law, has proven to be extremely successful in areas such as the 1980 Hague Convention on the Civil Aspects of Child Abduction. However, it should be noted that even within the Hague Conference, reconciling private international law within common law and civil law countries has not been without its difficulties, although there are signs of improvement.[93]

The pragmatic approach endeavours to consider the whole of the legislative process in order to achieve the proper administration of justice.[94] It pays attention to how the rules are constructed and how they will work in practice.[95] This aspect is crucial to attaining successful and just legislation. An issue during the drafting of the EU Succession Regulation was that concerns surrounding substantive succession law were ultimately sidestepped by the majority, leaving the legitimate expectations and property rights of individuals potentially unprotected.

The creation of fair and just legislation is achieved through the evaluation of the interests of the individual. Whether the tool that is chosen to achieve this is the harmonisation of substantive private international law[96] or the preference of substantive justice over conflicts justice,[97] the intended outcome should remain at the heart of the drafting process. As part of the evaluation of the interests of the individual, this book briefly takes into consideration fundamental human rights, in particular rights in relation to property.[98] Strictly speaking, the evaluation of human rights with respect to substantive succession law leans towards a theoretical approach rather than the pragmatic. However, Dr Lara Walker in her development of the scope of the pragmatic approach,[99] considered that as human rights law forms part of the principles of law of the UK and the EU and plays a strong role in the interests of the individual, in order to take a pragmatic

[93] Beaumont and McEleavy, *Anton* (n 6 above) 2.99. Hans Van Loon, 'The Hague Conference on Private International Law: Current Problems and Perspectives', p 33: https://www.ehu.eus/documents/10067636/10678077/2002-Hans-Van-Loon.pdf/fc4a27f4-a808-f680-2096-77a413bf6033 (accessed 4 August 2019). Submission of Dr Alex Mills, 'Review of the Balance of Competences: Civil Judicial Cooperation' (Ministry of Justice, United Kingdom, 2013): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279300/dr-mills-evidence.pdf (accessed 4 August 2019). The Judgments Project shows evidence of current successful working practice between the common law and civil law jurisdictions see: https://www.hcch.net/en/projects/legislative-projects/judgments (accessed 10 June 2019).

[94] G Kegel, 'Fundamental Approaches' in *International Encyclopaedia of Comparative Law. Volume III, Private International Law* (Martinus Nijhoff, 1986) 12–16.

[95] Ibid. This book will demonstrate that one of the reasons for the UK making the decision not to opt into the Succession Regulation was not the use of pragmatism by the UK negotiators being inappropriate, but rather a failure within the legislative drafting process that did not sufficiently promote inclusivity between the legal systems as required by EU Law, resulting in the premature acceptance by a majority of negotiators to agree to weak solutions in complex areas of law and therefore failing in the primary aim of pragmatism – to create legislation which offers proper justice for the individual.

[96] Kegel (n 94 above) 14.

[97] Ibid 15.

[98] Art 1, First Protocol, European Convention on Human Rights

[99] Lara Walker, *Maintenance and Child Support in Private International* (Hart Publishing, 2015) 7.

approach it is necessary to take fundamental human rights into consideration.[100] Issues concerning the fundamental interests of the individual should be dealt with pragmatically at the drafting stage in order to protect the legitimate expectations of the individual.

The book seeks to follow the school of pragmatism in order to offer practical solutions to support the simplification of international cross-border estate planning and intra-EU cross-border estate planning whilst promoting international cooperation and comity and protecting the property rights and the legitimate expectations of individuals. Emphasis on an understanding of how the substantive law works in practice is regarded by the author as essential to the creation of sound private international law.

IV. Structure and Scope

Within the UK there is no case-law regarding a cross-border claim to claw back an *inter vivos* gift from a third party.[101] This does not mean that revising the private international law is unnecessary. The revision is necessary because the current applicable law rule for clawback from a third party is perceived as an issue that is so contentious that countries will refrain from signing up to private international

[100] Ibid.

[101] Lawrence Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws*, 15th edn (Sweet and Maxwell, 2012) at para 27-015, asserts that under the private international law of England and Wales, 'Where a person has made a gift or settled assets on trust shortly before death, the *lex successionis* may provide that such assets should be considered as part of the deceased's estate for the purposes of calculating the compulsory share of a spouse or child. If, however, the gift or settlement on trust is valid and unimpeachable according to its governing law, then the assets no longer form part of the deceased's estate and it follows that the *lex successionis* should not be applied in respect of those assets. See *Pouey v Hordern* [1900] 1 Ch. 494, 494*;* Underhill and Hayton, *Law Relating to Trusts and Trustees* (18th edn 2010), p. 1369. See also *Gorjat v Gorjat* [2010] EWHC 1537 (Ch.), where the deceased had instructed a bank to transfer certain Swiss bank accounts held in his own name into new accounts held in the joint names of himself and his second wife. When he died intestate some months later, the children from his first marriage challenged the validity of those transfers. The court characterised the issue as one relating to the validity of an *inter vivos* transfer, and not as a matter of succession see 152 below. Contrast European Commission's Proposal for a Regulation on succession: COM(2009) 154, paras 27–136 et seq.'. The recent *Lambton v Lambton* case [2013] EWHC 3566 (Ch), although it speaks of 'clawback' was resolved as an issue of collation in that bequests left to the favoured heir, the son (moveables (valuable paintings) within the UK) were sold and the funds distributed equally between the siblings. The *inter vivos* gifts that were given to the son by the father were not reduced. The case was settled out of court, see text accompanying n 70 above. Cases in England and Wales involving the Inheritance (Provision for Family and Dependants) Act 1975 are primarily claims for reasonable financial provision, which, if the claim is successful, is taken from the estate at death. The estate of the deceased within the UK does not include the value of the *inter vivos* gifts. The English courts have upheld the concept of testamentary freedom and are firm in needing to see clear evidence of the claimant being maintained by the deceased: see *Ames v Jones* [2016] EW Misc B67 (CC), 2016 WL 04772447 and *Ilott v Mitson* [2017] UKSC 17, The additional issues surrounding the 1975 Act relate to problems identifying the domicile of the deceased (*Musa v Holliday* [2012] EWCA 1268) and the fact that there is no guidance as to the factors that need to be taken into account when trying to work out if an adult child is deserving of maintenance (Lady Hale *Ilott v Mitson* [49]–[66]).

law legislation because of it. The way the claim is characterised in different countries means that merely 'tweaking' a succession rule doesn't solve the perceived problems.[102] A more refined solution is required.

Chapter two will begin by setting out elements that support good legislative drafting by considering the principles of legal certainty and legitimate expectations of the relevant parties. In this book the relevant parties are the donor of the *inter vivos* gift, the donee of the *inter vivos* gift (referred to as the third party in this book) and the claimant. In some countries, it is possible for the legitimate heirs to claim not only against the donee but also against a buyer of the gifted property from the donee, or from an heir of the donee, or from someone that the original donee donated it to, in order to satisfy the legitimate portion. However, clawback from such buyers/donees and heirs is beyond the scope of this book due to the change in the nature of the transaction between the donee and such parties. It is also possible for the claimant in a civil law tradition to be a creditor and not an heir. The issue of insolvency will also not fall within the scope of the book. This chapter will argue that failure to conduct appropriate comparative substantive legal research resulted in a lack of understanding as to the extent of the legal and cultural diversity, which in turn led to the acceptance of private international law rules which are not fit for purpose.

Chapter three endeavours to support the argument in Chapter two by describing the substantive laws in relation to clawback from third parties in the civil law countries that are participating in the EU Succession Regulation and from five common law/mixed legal systems. The findings will be compared with the aim of identifying the extent to which clawback from third parties to protect the legitimate portion is regulated within these countries.

The book will then focus on two key areas within private international law: characterisation of the claim (Chapter three) followed by what is the most appropriate connecting factor for the new applicable law framework (Chapter four).

Chapter four considers the nature of the claim for clawback from third parties as the precursor to identifying an appropriate applicable law solution. The applicable law rules relevant to the claim to claw back a gift from a third party within the 1989 Hague Convention and the EU Succession Regulation will be assessed. It will be argued that characterising the claim for clawback from third parties as succession results from a partial understanding of the substantive law picture. Yes, the vast majority of the countries at one point in the history of the EU regarded 'clawback' as a succession issue (ie prior to the expansion in 2004) but when explored more fully it would also appear that this categorisation arises because the term 'clawback' is commonly used as a generic term for the reduction of gifts which encompasses the non-contentious reduction of *inter vivos* gifts for the purpose of collation. These points need to be distinguished. When this is taken into account, a third of Member States do not allow for the reduction of gifts that were given to

[102] Holliday, *Boundaries of European Private International Law* (n 10 above) 298–309.

third parties. Neither the Hague Convention nor the EU Regulation sufficiently acknowledged the countries that do not use clawback from third parties, leaving the parties themselves, presumably along with the associated legal costs, to work out any legal uncertainty.[103]

The chapter will also consider the character of clawback of *inter vivos* gifts to third parties for the purpose of maintaining a dependant of the deceased within the UK, to assess whether this type of claim falls within the law of maintenance rather than succession. The law of England and Wales permits clawback from a third party for the purpose of obtaining maintenance from the estate of the deceased where the deceased has not provided for the dependant as a result of making *inter vivos* gifts intended to defeat a legitimate financial provision.[104] It is necessary for the purpose of this book to consider the various approaches to claims for clawback from third parties that protect not only heirs but dependants (who may not be heirs) of the deceased in order to obtain a balanced picture of what the revised law needs to achieve.

Based on the evidence presented in Chapter four it will be argued in Chapter five that a claim to claw back an *inter vivos* gift from a third party requires a *sui gener*is approach to determining the applicable law. Chapter five will consider the issues relevant to 'international' private international law; the issue of party autonomy; the law applicable in the absence of acceptable party autonomy; whether the revision requires a manifestly closer connection exception to the objective applicable law rule when the parties have not agreed or are not allowed to agree the applicable law; overriding mandatory rules and public policy; and options for modal law in order to support estate planning and legal certainty for the parties.

The issues that fall outside of the scope of the book are:

- Insolvent estates.

[103] In the UK, the *inter vivos* gift does not form part of the estate and therefore does not fall within the law of succession. A valid gift within the UK would be governed by Rome I. The EU Succession Regulation came into force in July 2015. So far there have been no cases on clawback before the CJEU.

[104] Section 10, Inheritance (Provision for Family and Dependants) Act 1975, 'Dispositions intended to defeat applications for financial provision. (1) Where an application is made to the court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under subsection (2) below. (2) Where on an application under subsection (1) above the court is satisfied – (a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and (b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as "the donee") or by any other person, and (c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act, then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.'

- The ability of creditors of the heirs to claim for the clawback of the *inter vivos* gift.
- Clawback from a third-party buyer or heir who is not the original third party non-heir donee.
- Gifts given to trusts.
- Donations *mortis causa*.
- Matrimonial property.
- Domestic property law.

V. Conclusion

Legal certainty is a necessary requirement in cross-border estate planning.[105] The number of people who are relocating within Europe and globally is increasing, with more people owning property in different countries.[106] At present, the private international law rule concerning the general applicable law to a claim to claw back an *inter vivos* gift from a third party does not give legal certainty to the donor or donee at the point at which the property is transferred.[107] Nor does it give certainty to the claimant. The current rule is also not suitable for use within a global private international law context, as it fails to acknowledge the diverse nature of the claim within different legal traditions. The suggestion that the solution to this problem is that the reader ought to infer from the Succession Regulation that the donee's property rights are protected in countries which do not use clawback of gifts from third parties is unsatisfactory, as it lacks clarity and favours the legitimate expectations of the donee to the detriment of the claimant – the very parties the Succession Regulation was trying to protect.

The flawed applicable law rule for claims in relation to third parties was sufficient to stop the UK opting into the Succession Regulation.[108] The rule may not have led to litigation prior to harmonisation of the rules in the Succession Regulation but the lack of certainty is a real problem for those wanting to draft private international law on the applicable law to succession. By analysing the nature of the claim and taking into account the legitimate expectations of the parties, a *sui generis* approach to determining an applicable law framework for a

[105] Lagarde (n 26 above) Art 23 para 43. Metallionos (n 34 above) 277. Holliday, *Boundaries of European Private International Law* (n 10 above); Pfeiffer (n 12 above).

[106] For international migration figures, see the OECD: http://www.oecd.org/migration/international-migration-outlook-1999124x.htm (accessed 10 June 2019).

[107] Pfeiffer (n 12 above).

[108] Letter from the Hon. Mr Justice David Hayton: https://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75we05.htm (accessed 10 June 2019).

future Convention will be recommended. The aim will be to put forward possible solutions that will improve legal certainty, protect the legitimate expectations of the parties involved and be practical to use. This is in line with the pragmatic approach taken by the Hague Conference on Private International Law.

To the author's knowledge there is no one else working on this issue from this perspective and therefore the recommendations for the applicable law framework and the modal law rules to support the overall aims, as found within this book, are regarded as new knowledge and of value to future development of the law in this area.