



Towards the entry into force of the succession regulation:
building future uniformity upon past divergencies



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THE IMPLEMENTATION OF THE EU SUCCESSION REGULATION IN GERMANY: A FIRST ASSESSMENT OF THE PROPOSAL FOR AN “INTERNATIONAL SUCCESSION LAW PROCEDURE ACT (ISLPA)”

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Implementation of the EU Succession Regulation in Germany

- Amendments to the PIL division in the Introductory Act to the Civil Code (IACC; EGBGB)
 1. Repeal of domestic conflict of law rules
 2. Formal validity of dispositions of property upon death

- The International Succession Law Procedure Act (ISPLA)
 1. General outset; venue →
 2. Enforcement and recognition of foreign decisions
 3. Reception of declarations; appropriation right
 4. European Certificate of Succession

- Amendments to numerous further Acts (Civil Code; Voluntary Jurisdiction Act, etc.)

Implementation of the EU Succession Regulation in Germany

Amendments to the PIL division in the Introductory Act to the Civil Code (IACC; EGBGB)

1. Repeal of domestic conflict of law rules: Section 25 IACC

2. Formal validity of dispositions of property upon death: Section 26 IACC restricted to wills and joint wills; agreements as to succession (*pact successorial*; *patto successorio*) addressed in Article 27 of the Regulation.

Article 26(5) frase 1 IACC repealed (substantive validity of a disposition of property upon death governed by the law which would have been applicable to the succession at the time the disposition was made = *loi successorial hypothétique*; *Errichtungsstatut*). The Regulation also points to the hypothetical law applicable to the succession, Article 24(1).

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): General outset.

46 Sections, six divisions:

- Scope of application,
- Civil disputes,
- Enforcement and recognition of foreign decisions,
- Reception of declarations; appropriation right in case of estates without a claimant,
- European Certificate of Succession (ECS),
- Authenticity of instruments.

Sec. 1 (scope of application): reference to the Regulation and Recitals no. 82, 83 according to which Ireland, the UK and Denmark are not to be regarded as “Member States” for the application of the Regulation.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): venue (Sec. 2).

Basic rule: territorial jurisdiction determined by reference to the *last habitual residence of the deceased* whenever the general jurisdiction of the German courts follows from Article 4 of the Regulation (Sec. 2 no. 1 of the proposed ISLPA).

In certain cases territorial jurisdiction lies with the court in whose district the deceased had his last habitual residence *in Germany*:

- (i) Under Sec. 2 no. 2 a of the proposed ISLPA if German courts have international jurisdiction in accordance with Article 7 lit. a SR.
- (ii) In case of subsidiary international jurisdiction based on the location of assets in Germany (Article 10 of the Regulation) and in case of a *forum necessitatis* jurisdiction as defined in Article 11 of the Regulation.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): venue (Sec. 2).

If the deceased never had a habitual residence in Germany, territorial jurisdiction lies with the Schöneberg Local Court in Berlin (Sec. 2 no. 2 b of the proposed ISLPA).

Choice-of-court agreements (Sec. 2 no. 3 ISLPA):

- ▶ primarily to the court the parties agreed upon (lit. a).
- ▶ in case of an international choice-of-court agreement which confers jurisdiction on the courts of Germany without indicating any specific court, Sec. 2 no. 2 applies (primarily the last habitual residence).

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): Enforcement and recognition of foreign decisions

Translation requirements

Sec. 4(3) ISPLA: if the application is not drawn up in German, the court may require the applicant to furnish a translation the correctness of which has been confirmed by a person who is qualified to do so in a Member State or in another Contracting Party to the Agreement on the European Economic Area.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): Acceptance or waiver of the succession

Article 13 of the Regulation: the courts of the Member State of the habitual residence of any person who may make a declaration concerning the acceptance or waiver of the succession shall have **jurisdiction to receive such declarations.**

...relevant for Germany because the German Civil Code provides both for the acceptance and the waiver of a succession (Sec. 1945 BGB).

→ Sec. 31 frase 1 ISPLA: competence to receive such declarations of the court in whose district the declaring person has his habitual residence.

→ Sec. 31 frase 2 ISLPA obliges the German court to issue a confirmation of the moment and the contents of the declaration of its own motion.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): Appropriation right in case of estates without a claimant

Article 33 of the Regulation: if there is no heir or legatee for any assets under a disposition of property upon death and no natural person is an heir by operation of law, the application of the law so determined shall not preclude the right of a Member State to appropriate under its own law the assets of the estate located on its territory; the appropriation right is subject to the creditors being entitled to seek satisfaction of their claims out of the assets of the estate as a whole.

→ Sec. 32 of the proposed ISPLA creates such an appropriation right if foreign law applies.

→ Sec. 1936 BGB provides for an appropriation right if German law applies.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): Appropriation right in case of estates without a claimant

Delicate question: Article 33 of the Regulation excludes national appropriation rights also in case there is a legatee. This can only mean a legacy by which the assets are transferred to the legatee, i.e. with effects *in rem* (cf. Article 23(2)e of the Regulation), e.g. under French or Italian law, but not under German law where the legatee only has an obligational claim against the heir to transfer of ownership of the asset.

Problem: In the past German courts did not recognize the transfer of title related to a foreign law legacy. Position backed by Article 1(2)(k) of the Regulation which excludes rights *in rem*?

→ The argument is not entirely convincing: A legacy *in rem* is not a right *in rem*; it is a way to acquire title and as such regulated by the law applicable to the succession.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS) and German *Erbschein* (certificate of inheritance)

Article 62(3) of the Regulation: the ECS shall not take the place of internal documents used for similar purposes in the Member States, e.g. the German *Erbschein*.

→ **Coexistence** of the German certificate of inheritance and the European Certificate of Succession.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): ECS and German *Erbschein* (certificate of inheritance)

Differences as to the **protection of third parties** (e.g. a bank where the deceased held a bank account).

Article 69(3) of the Regulation: Any person who, acting on the basis of the information certified in an ECS, **makes payments or passes on property** to a person mentioned in the ECS as authorized shall be considered to have transacted with a person with authority.

Article 69(4) of the Regulation: Where a person mentioned in the ECS as authorized to dispose of succession property **disposes of such property** in favour of another person, that other person shall, if acting on the basis of the information certified in the ECS, be considered to have transacted with a person with authority.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS) and German *Erbschein* (certificate of inheritance)

Differences as to the **protection of third parties** (e.g. a bank where the deceased held a bank account).

Under Article 69 of the Regulation no protection if the third party knew that the contents of the Certificate was not accurate *or was unaware of such inaccuracy due to **gross negligence***.

Example: the third party *should have known* about the existence of a will according to which the person mentioned in the ECS was not the heir of the deceased.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS) and German *Erbschein* (certificate of inheritance)

Differences as to the **protection of third parties**. Under the **BGB** there is **no investigative requirement** for the third party regarding the accuracy of the certificate. Even *gross negligence* regarding the inaccuracy of the certificate does therefore *not* exclude the third party's protection!

If a person acquires from the person named in the certificate of inheritance as heir an asset forming part of the estate, the contents of the certificate of inheritance are deemed in his favour to be correct, *unless he knows of the incorrectness* or knows that the court has demanded the return of the certificate of inheritance for incorrectness; also in case of a payment that has been effected to the person named as heir in the certificate of inheritance.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS) and German *Erbschein* (certificate of inheritance)

Differences as to the **protection of third parties:**

These rather far reaching provisions of the BGB (Sec. 2366, 2367) on third party protection are not subject to any modifications in the proposed framework law.

→ **Consequence:** In the case of assets located in Germany, the incentive for the applicant is rather to request the issuing of a German *Erbschein* than of a European Certificate of Succession. A German bank would rather rely on a German *Erbschein* than on an ECS.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS); territorial jurisdiction.

Under Sec. 34(1) frase 1 of the proposed ISLPA the ECS is issued by the court indicated in Sec. 2 (In general, the competence lies with the court in whose district the deceased had his **last habitual residence**).

→ This rule is in line with the proposed new criteria for determining the territorial jurisdiction for the issuing of a (domestic) certificate of inheritance (*Erbschein*) under Sec. 343(2) Voluntary Jurisdiction Act.

→ **Proximity to the subject matter:** Decisions regarding the rectification, modification or withdrawal of the ECS, the issuing of certified copies and the suspension of the effects of the ECS fall within the territorial jurisdiction of the court that had issued the ECS (Sec. 34(1) frase 2 of the proposed ISLPA).

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Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS); translation requirement and other general aspects of the procedure

→ Pursuant to Sec. 35(1) of the proposed ISLPA, the rules of procedure for the issuing of the European Certificate of Succession are governed by the Voluntary Jurisdiction Act (FamFG), subject to the specific provisions contained in the proposed ISLPA.

→ Just like in case of a request for the enforcement or recognition of a foreign decision – Sec.4(3) – if an application is not drawn up in German , the court may require the applicant to furnish a **confirmed translation**.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS); Statutory declaration in lieu of an oath

Article 66(3) of the Regulation: the issuing authority may require that declarations be made on oath or by a statutory declaration in lieu of an oath, where this is provided for by its own law.

→ Sec. 36(2) frase 1 ISLPA obliges the applicant to state in a declaration in lieu of an oath (*Eidesstattliche Versicherung*) that to his knowledge no circumstances exist that hinder the truthfulness of his statements (e.g. a will that differs from the applicant's request).

→ Sec. 156 German Criminal Code: "Whosoever before a public authority competent to receive a declaration in lieu of an oath, falsely makes such a declaration or falsely testifies while referring to such a declaration shall be liable to imprisonment not exceeding three years or a fine."

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS); recording of succession property in the land register

Article 69(5) of the Regulation: ECS constitutes a valid document for the recording of succession property in the relevant register of a Member State, e.g. the land register (in Germany the *Grundbuch*).

→ To date the German Land Register Act (*Grundbuchordnung, GBO*) requires that the registration of the heir of the deceased owner of a piece of land prove the succession by presenting a certificate of inheritance, Sec. 35(1) GBO.

→ The proposed amendment of that provision includes also the European Certificate of Succession.

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS); recording of succession property in the land register; problem: legacy *in rem* under foreign law.

No amendment of the Land Register Act has been proposed with respect to **Article 63(2)(b) of the Regulation** (“The Certificate may be used, *inter alia*, to demonstrate the attribution of a specific asset forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate”, e.g. legacies *in rem* as foreseen in French or Italian law).

According to the authors of the ISPLA proposal, such legacies have **no effect *in rem* if the immovable asset is situated in Germany**, and this is why the Land Register act is not subject to any amendment in this regard. This German antagonism towards the acquisition of single assets under foreign law is not entirely convincing (Recital no. 15 of the Regulation).

Implementation of the EU Succession Regulation in Germany

The International Succession Law Procedure Act (ISPLA): European Certificate of Succession (ECS); recording of succession property in the land register; problem: legacy *in rem* under foreign law.

Example: Italian national chooses Italian law as the law to govern his succession (Article 22 Succession Reg.). With regard to immovable property located in Germany, the will contains a legacy in favour of his aunt, as defined in Sec. 649(2) codice civile (“Quando oggetto del legato è la proprietà di una cosa determinata o altro diritto appartenente al testatore, la proprietà o il diritto si trasmette dal testatore al legatario al momento della morte del testatore»).

Currently, German courts would not accept the *in rem* effect of such a legacy. The aunt of the deceased (legatee) would have to claim the transfer of the property from the heirs. In the meantime, the heirs could dispose of the property and be liable only to damages vis-a-vis the legatee!

Implementation of the EU Succession Regulation in Germany

Summary (part 1 of 3)

1. It is welcome that the proposed reform **repeals the principal domestic conflict of law rule** and **restricts** the scope of application of a further conflict of law rule for matters of form **to wills**, leaving agreements as to succession (*pact successorial, patto successorio*) to the Regulation.
2. The ISPLA rules on **territorial jurisdiction** use the habitual residence of the deceased as the primary criterion. This is in line with the Regulation.
3. As far as the recognition and enforcement of foreign decisions and requests for the issuing of a ECS are concerned, the court may require the foreign applicant to furnish a **translation** into German.
4. In case of **acceptance or waiver** of the succession, the proposed ISLPA obliges the German court to issue a **confirmation** of the moment and the contents of the declaration of its own motion.

Implementation of the EU Succession Regulation in Germany

Summary (part 2 of 3)

5. Creation of an **appropriation right in case of estates without a claimant** under foreign law fills a gap; it is however not convincing to deny the effect *in rem* of foreign law legacies related to assets located in Germany.

6. The **ECS is less protective vis-à-vis third parties** than a German certificate of inheritance (*Erbschein*). Under German law, a third party acquiring title from or making a payment to a person erroneously classified as heir in the certificate is protected even in case of **gross negligence**. With respect to assets located in Germany the heir will rather request the issuing of a German *Erbschein* than of an ECS.

7. **Territorial jurisdiction** for the issuing of an ECS is largely based on the last habitual residence of the deceased.

Implementation of the EU Succession Regulation in Germany

Summary (part 3 of 3)

8. In case of a **false declaration** in lieu of an oath in the course of an application for the issuing of an ECS, German law provides for severe punishment.

9. As to recording of succession property in the **land register**, the ECS is treated equally to the German certificate of inheritance (*Erbschein*); it must be criticized that also in this regard German law denies the effect *in rem* of foreign law legacies related to assets located in Germany (Article 1(2)(k) of the Regulation; Recital no. 15).