

EJTN - Seminar on Cross- border Inheritance Law The European Certificate of Succession

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I. Introduction – the Need for a European Intervention

- Starting point : 'having rights, being able to use them'
- Outcome of succession → heirs/legatees enjoy (property) rights over succession assets
- How can heirs/legatees demonstrate title to the assets?
- Not a new problem → 1973 Hague Convention (international certificate)

I. Introduction – the Need for a European Intervention

- *e.g.* Mr Schaeffer, French citizen living in Strasbourg, France, dies at the age of 77
- Estate includes bank account in Germany holding substantial amount
- Mr Schaeffer leaves two children, who live in France
- How can the children get hold of money?

I. Introduction – the Need for a European Intervention

- *e.g.* Luxembourg notary requested to draw up deed for sale of immovable located in Luxembourg
- Seller : two German citizens living in Germany – who inherited the house from their mother, a German citizen living in Germany
- How can the notary ensure that the sellers are indeed authorized to sell the house?

I. Introduction – the Need for a European Intervention

- Today many different systems in order to demonstrate quality/rights of heirs/legatees:
 - France : '*acte de notoriété*' – delivered by notary (art. 730-1 French Civil Code)
 - Germany : '*Erbschein*' – delivered by court (§ 2353 ff BGB)

I. Introduction – the Need for a European Intervention

- 'Export' of national documents
 - French '*acte de notoriété*' in Germany? Recognition very uncertain (Regulation : art. 59)
 - German *Erbschein* in Luxemburg : recognition may be denied – exclusive jurisdiction of Luxembourg courts for immovable in Lxbg (CA Lxbg 7.7.1999) (Regulation : art. 39)

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II. European Certificate of Succession the Principles

- 1) *Evidentiary* tool
- Art. 63-1 : ECS may be used by heirs /legatees /executors /administrators who “need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate”

II. European Certificate of Succession the Principles

- 2) *Hybrid* nature of ECS : no extension or Europeanization of existing national certificates but still nat'l dimension:
 - *European* tool – procedure to issue and effects dealt with by European rules
 - *National* dimension:
 - ECS clearly influenced by national experiences (*Erbschein*)
 - ECS (nor Regulation) builds complete succession system – national law will be applied (to succession) + rights *in rem*

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II. European Certificate of Succession the Principles

- 3) *Optional* system
- Art. 62(2) : “The use of the Certificate shall not be *mandatory*”
- Choice between:
 - ECS
 - National evidentiary tools
(additional value thanks to Regulation – but doubts)
 - Proof by application of the law
- Challenge : will ECS appeal in practice?

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II. European Certificate of Succession the Principles

- 4) '*High cost, high value*' system
- ECS demanding tool
 - For parties – information to be supplied
 - For authorities – verification/analysis / content of ECS (information on heirs/legatees and list of their rights/assets)
- Far reaching effects : ECS very useful tool for heirs / legatees etc.

II. European Certificate of Succession the Principles

- 5) *Flexible* system
- ECS may be issued in various formats – depending on stage of proceedings or purpose (art. 68 : “to the extent required for the purpose for which it is issued”)
- *e.g.* request by one legatee in respect of one specific asset or request by all heirs after estate has been shared

III. European Certificate of Succession

How to obtain it?

- Delivery : 'authority' – art. 64:
 - Court
 - Another authority which, under national law, has competence to deal with matters of succession
- Choice of MS - *e.g.* Netherlands : notaries (free choice?)
- Other possibilities : courts, registrars, etc.

III. European Certificate of Succession

How to obtain it?

- Which authority? Rules of jurisdiction
 - Art. 4 – habitual residence
 - Art. 7 – choice of law
 - Art. 10 – subsidiary jurisdiction
 - Art. 11 – *forum necessitatis*
- Possible conflict? Multiple ECS?
- Examination of jurisdiction (art. 15)

III. European Certificate of Succession

How to obtain it?

- Application (art. 65):
 - Any heir, legatee having direct right in succession, executor of will or administrator (not : creditor; legatee with obligatory claim against heir)
 - No mandatory form
 - Detailed list of information to be supplied – on deceased, applicant, other heirs, the rights, etc.

III. European Certificate of Succession

How to obtain it?

- Examination by authority (art. 66)
- Regulation provides framework for examination/issue of ECS
- National rules may supplement Regulation (minimum standards)

III. European Certificate of Succession

How to obtain it?

- Examination by authority (art. 66)
 - Verification of information/declaration/documents
 - Additional enquiries ('ex officio')
 - Legal analysis of the case
 - Information of other beneficiaries (opportunity to assert their rights) (confidentiality?)
 - Cooperation between MS – access information held in registers (land registers, civil status registers, etc.)

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III. European Certificate of Succession

How to obtain it?

- Delivery (art. 67-68)
 - Issue 'without delay'
 - Mandatory form
 - Original kept by authority – certified copies issued to applicant (valid 6 months – renewal)
 - European electronic register for certificates (e-Justice Action Plan)
 - Information to beneficiaries

IV. European Certificate of Succession

The effects

- ECS is a '*self-sufficient*' title
- Authorities / private persons cannot impose production of other title (decision, authentic instrument, court settlement) to grant effects of ECS

IV. European Certificate of Succession

The effects

- ECS issued based on legal analysis (*lex successionis* / other law) + factual analysis
- Effects of ECS detailed in art. 69
- If ECS issued by a court :
 - *Res judicata*? Recognition under art. 39 Regulation?
 - Content of ECS can be challenged – art. 72

IV. European Certificate of Succession

The effects

- *Free circulation* of ECS (art. 69)
- No need for any procedure to rely on effects of ECS in other MS
- No possibility for MS to control ECS (public policy, jurisdiction etc.)
- Translation
- ECS has no effect *outside EU* – except if granted by 3rd States (*e.g.* Switzerland)

IV. European Certificate of Succession

The effects

- 1) *Evidentiary* effect
 - Limited to succession issues (*e.g.* quality and title of heirs, etc.) - *not* applicable to other issues (*e.g.* validity of marriage; matrimonial property issues)
 - Presumption of accurateness may be reversed
 - Art. 71/72
 - Proceedings on the merits

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IV. European Certificate of Succession

The effects

- 2) *Protection* value
- ECS protects 3rd persons acting in good faith on basis of information included in ECS
 - Art. 69(3) : person making payment or transferring property to heir/legatee etc. : transaction cannot be questioned (obligatory protection)
 - Art. 69(4): person receiving property from heir/legatee etc. mentioned in ECS (*in rem* protection)

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IV. European Certificate of Succession

The effects

- Limitation of protective effect:
 - Protective effect only applies for *authority* to act – does not cover other issues
 - Unless person making payment/receiving property knows or should have known (positive knowledge or gross negligence) that content of ECS not accurate

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IV. European Certificate of Succession

The effects

- 3) Recording in registries?
- ECS “valid document for the recording of succession property in the relevant register of a Member State...” (art. 69.5)
- ECS as basis for registration of transfer of property rights?

IV. European Certificate of Succession

The effects

- ECS between a rock and a hard place:
 - MS retain control of their registers (art. 1 par. 2 / : legal requirements for recording + effects of recording - Recital 18)
 - MS must accept ECS as document to avoid duplication (Recital 18)

IV. European Certificate of Succession

The effects

- How does this play out?
 - In some MS, no effect of ECS – *e.g.* Belgium : registration only for *inter vivos* transfer of immovable
 - In other MS, access to registers for national documents → ECS must be accepted on basis of equivalence test – MS may require additional documents/information

IV. European Certificate of Succession

The effects

- Additional information/document? *vivos* transfer of immovable
 - Succession : no additional document (*e.g.* transfer of succession asset to legatee by heir under German law) → direct registration of legatee under ECS should be possible
 - Rights in rem – *e.g.* French '*attestation notariée*'

IV. European Certificate of Succession

The effects

- What about national monopolies on transfer of immovables? *e.g.* Art. 701-1 French Civil Code; art? 3:33 Dutch NBW
 - Cannot be challenged on basis of Regulation (exclusion of registers)
 - Incompatible with free provision of services?