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?

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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)
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 national 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
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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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.

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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.

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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)

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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.)
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

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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 (\textit{lex successionis} / other law) + factual analysis
• Effects of ECS detailed in art. 69
• If ECS issued by a court:
  – \textit{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
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?