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COMPARATIVE ANALYSIS OF INTESTATE SUCCESSION IN THE LEGISLATION OF THE MEMBER STATES OF THE EUROPEAN UNION

Summary

Intestate succession occupies an important place in the field of Succession law in the civil legislation of the European Union. Intestate succession (devolution of decedent's property to persons indicated in law) is effective in case of an intestacy or if testament is declared invalid entirely or partly. The article reflects the concept, sequence, legal basis and place in judicial practice of intestate succession.

***Key words**: intestate succession, succession law, civil code, legislation, comparative analysis*

Introduction

Succession law varies considerably from one EU country to another. However, in cross-border cases, EU rules provide certainty concerning which authority is to decide on a succession, which law is to be applied and how the ultimate decision is to be recognised and enforced.

A major step to facilitate cross-border successions are new EU rules which make it easier for people to handle the legal side of an international succession.

With the EU rules on succession

-a succession is treated coherently, by one single court applying one single law

-people can choose whether the law applicable to their succession should be that of the country they have last lived in or that of their nationality

-court decisions on successions in one EU country are recognised and enforced in other EU countries.

Some aspects of successions continue to fall under national rules, including

-who inherits and what share of the estate goes to children and spouse

-property law and family law in an EU country

-tax on succession assets

The regulation also creates a European certificate of succession**.** This certificate enables heirs, legatees, executors of wills and administrators of the estate to prove their status and exercise their rights in other EU countries. A European succession certificate is automatically recognised in all EU countries.

Intestate succession occupies an important place in the field of inheritance law in the civil legislation of the European Union. Intestate succession procedure is applied if the testator has not left a will. Relatives inherit in a certain sequence (Parentelensystem). The first category of heirs (Parentel) includes children, the second category includes parents and their descendants, etc. The official spouse is also an intestate heir, however a non-married spouse is not. If the spouse inherits together with children, then he/she is entitled to one third of the succession (and children are entitled to two thirds), otherwise the spouse is entitled to two thirds of the succession.

In this article, we will discuss the intestate succession *in the legislation of* Germany, France and Italy, which are members of the European Union.

Intestate succession in the legislation of the Germany

The main legal source of the German succession law is the Civil Code. Succession is regulated in the fifth book at §§ 1922 et seq. of the BGB (see additionally §§ 563 et seq. and 857 of the BGB, which also deal with the inheritance law) and is guaranteed by the Constitution at article 14, paragraph 1. According to this provision, "the right of inheritance shall be guaranteed" and its "content and limits shall be defined by the laws". There're some additional legal sources too.

The situation is different in Azerbaijan. So that, the constitution does not guarantee inheritance rights in Azerbaijan. The only legislation regulating the right of inheritance in Azerbaijan is the Civil Code of the Azerbaijan Republic.

German law distinguishes between intestate and testamentary succession. Intestate succession is modelled on the so-called parentelic system and only takes place, if the deceased didn't provide otherwise. The testamentary freedom (§§ 1937 et seq. and § 2302 of the BGB) is guaranteed by the Constitution in Article 14, paragraph 1, of the GG (see also Article 2, paragraph 1).

Under the German law there's no prohibition of succession agreements. The possibility of a renunciation of the inheritance in advance is provided. The compulsory share may also be renounced in advance. Reciprocal and joint wills are admitted. In his will the testator may also appoint a subsequent heir or Nacherbe.

Compulsory heirs are protected by the law. However, they're only entitled to demand a certain sum of money.

German law knows a national certificate of succession.

Upon the deceased's death, his or her estate passes immediately as a whole to his or her heirs (§ 1922, paragraph 1, § 1942, paragraph 1 of the BGB; according to § 875 of the BGB, the heir also gets the possession by law). However, according to § 1942, paragraph 1 of the BGB, he or she has the right to disclaim the inheritance "by a declaration to the probate court" (which "must be made in presence of and recorded by the probate court" – Nachlassgericht; "or in notarially certified form": § 1945, paragraph 1 of the BGB) within 6 weeks of having knowledge of the opening of the inheritance and of the "reason for" his or her "entitlement" as a heir or having been notified "of the disposition mortis causa by the probate court". "The period is six months if the deceased had his last residence only abroad or if the heir is resident abroad".

According to German Civil Code, the heir is considered to have accepted the inheritance if he does not give up the inheritance within 6 weeks, and in exceptional cases within 6 months. However, according to the legislation of Azerbaijan, this case is regulated differently. So that, According to the Civil Code of Azerbaijan , heir (heiress) is considered to accept inheritance upon handing in an application on his (her) acceptance of inheritance to notarial office that is in charge of particular place where inheritance commencement took place, or upon his (her) practical commencement of owning and administration of property and thus demonstrated undoubtedly that he (she) accepted inheritance.

In Germany the succession may be intestate (§§ 1924 et seq. of the BGB) or determined by a disposition upon death. Typically, the latter is his will, §§ 2064 et seq. of the BGB. However, a succession agreement is also allowed under the German law (§§ 2274 et seq. of the BGB). Intestate succession is of subsidiary nature, as it only takes place if there's no disposition upon death (i.e. neither a will nor a succession agreement). A cumulative application of different legal titles is possible. In fact, as provided by § 2088 of the BGB, "if the testator appointed only one heir and restricted the appointment to a fraction of his inheritance, the reminder" transfers "under the rules of the intestate succession" (§ 2088 of the BGB). (1)

The consequences of the lack of the deceased's heirs are regulated by § 1936 of the BGB. According to this disposition, "if at the time of the devolution of the inheritance neither a relative, nor a spouse, nor a civil partner of the deceased is living, the Land in which the deceased had his last place of residence or, if none such is ascertainable, his customary place of residence at the time of the devolution of the inheritance is the heir. In other cases, the Federal Government" inherits (§ 1936 BGB). However, the State's liability is limited to the dimension of the estate.

Men and women are equal in succession. The same is for domestic and foreign citizens. Children (born in or out of wedlock) are equal in succession too. However, there is a discriminatory rule concerning "illegitimate" children born before the 1 July 1949. Also after the modification adopted with the Second Act on the Equalization of Illegitimate Children in Succession Law of 12 April2011, only if the father died after 29 May 2009 (the day after the European decision mentioned above, point 2.1.2), the illegitimate child born before 1 July 1949 becomes legal heir. This is not the case, if the father has died before the 29 May 2009. The adopted children are equal in succession. However, there're some differences between the adoption of a child according to §§ 1754 et seq. of the BGB (Volladoption) and the adoption of an adult (§§ 1770 et seq. of the BGB). In fact, only the adoption of a minor establishes a full relationship between him or her and the adoptive parent(s) as well as the latter's relatives.69 According to § 1923, paragraph 2 of the BGB and § 2101 of the BGB a person conceived at the time of entry of succession may be a heir as she or he is "deemed to have been born before the devolution of an inheritance". Spouses and extra-marital registered partners are equal in succession. Note, that a registered partnership is only allowed between same-sex couples. However, it cannot be entered anymore (see point 2.1.2). Since 2017 a marriage between homosexuals is possible. In this case the succession rights foreseen for the survived spouse apply. No legal succession rights are foreseen with regard to other forms of (de facto) partnership or cohabitation.

There is a law on children's rights in Azerbaijan. This law is based on the 1975 Convention on the Rights of the Child. According to this law, children born married or out of wedlock have the same rights as their parents. (6)

The German regulation of the intestate succession (see §§ 1924 et seq. of the BGB) follows the parentelic system. Intestate heirs are the deceased's relatives and his or her spouse (or registered partner). However, the latter has no succession rights in case of a divorce or, under certain conditions, in case of a separate life.

Relatives are divided up into 4 classes. Heirs of 1st class are the deceased's descendants (§ 1924 of the BGB); heirs of the 2nd class are the deceased's parents and their descendants (§ 1925 of the BGB); heirs of the 3rd class

are the deceased's grandparents and their descendants (§ 1926 of the BGB); heirs of the 4th class are the great-grandparents and their descendants (§ 1928 of the BGB). A heir belonging to the previous class excludes from the inheritance the descendants of subsequent, more distant classes (see § 1930 of the BGB). Furthermore, an ascendant excludes from the succession his or her descendants. If the grandparent's descendants have already died, the closest relative is the sole heir. (4)

According to § 1942, paragraph 1 of the BGB, the heir has the right to disclaim the inheritance "by a declaration to the probate court" (which must be "made in the presence of and recorded by the probate court" – Nachlassgericht; "or in notarially certified form": § 1945, paragraph 1 of the BGB) within 6 weeks of having knowledge of the opening of the inheritance and of "the reason of" his or her "entitlement" as a heir or having been notified "of the disposition mortis causa by the probate court". The "period is six months if the deceased had his last residence only abroad or if the heir is resident abroad at the time of the beginning of the period" (§ 1944 of the BGB). The heir cannot disclaim the inheritance if": a) "he has already accepted it"; b) "the time of six weeks laid down for disclaimer" (§ 1944 of the BGB) "had passed" and the inheritance is therefore "deemed to have been accepted" (§ 1943 of the BGB).

Intestate succession in the legislation of the France

The main legal source for the French succession law is the Civil Code. There are also additional legal sources: General Taxation (Code général des impôts), Article 758 et seq., Article 292 A et seqq. of annex II and Article 280 et seq. of annex III., Consultation rules of the Civil Registry (Règles de consultation de l'état civil).

There are two types of succession in French: legitimate succession and testamentary succession. The rules on the legitimate succession only apply if no will was drawn up. French law also guarantees a reserved portion for certain heirs, the so-called 'legitimate' heirs (since 2006 ascendants no longer form part of this category). In French law it is possible for heirs to waive in advance their right to bring an action in abatement (Article 929 of the Civil Code) and to obtain an amount of money for the gift that interferes with their reserved portion.

Proof of heirship can be made by any means (article 730 of the Civil Code). The French legal system does not have anything like a certificate of succession, which proves heirship. The usual way of proving heirship is by means of acte de notoriété (statutory declaration). Article 730-1 of the Civil Code establishes that proof of heirship may be by means of such a declaration requested by one or more of those entitled and drawn up by a notary. It gives the names of the heirs of the deceased and established for each their share in the estate. Since the 2001 reform (Act of 3rd December 2001) heirship, identified by the acte de notoriété statutory declaration, is no longer confirmed by witnesses but by the prospective heirs themselves. Proof of heirship is based on documents supplied by the interested parties (such as a declaration of marital status or a death certificate) accompanied by their own sworn affidavit. The involvement of witnesses has become optional. The 2001 law has the merit of giving greater weight to the statutory declaration: in the new system, the notary receives the declarations of those entitled, solemnly sworn before a public official who, however, is not responsible for them nor guarantees their accuracy or veracity. They are declarations, which are held to be true unless proved otherwise (article 730-3 of the Civil Code).

If the deceased has not left a will, the estate is distributed according to the order of succession laid down by the law (intestate succession). Intestate succession only happens in the absence of a will or when the dispositions are only partial. In the latter scenario intestate succession will only apply to the portion not covered in the will. This law identifies the legal heirs, i.e. the deceased's family members ranked in a specific order, depending on their degree of kinship to the deceased

If there are no heirs or only collateral heirs beyond the 6th degree, and if there are no donees or legatees, succession is declared vacant or abandoned, and the estate devolves to the State (article 539 of the Civil Code).

There is no distinction made between male and female heirs or between French citizens and foreigners.

Children born in wedlock (legitimate) or out of wedlock (natural) have since 1972 had the same inheritance rights (even though some differentiation remained until the Act of 3.12.2001) and in 2005 (ruling 759/2005) the distinction was eliminated from the code civil.

The reform of 2001 extended to adulterine children (natural children whose father or mother was, at the moment of conception, married to somebody else) the same rights as those of legitimate children.

Where adopted children are concerned, we need to distinguish between two kinds of adoption:

- Simple adoption (adoption simple) in which there are ties between the biological family and the adopted child;

- Plenary adoption (adoption pléniére) where all ties with the biological family have been broken.

A child adopted by simple adoption has dual succession rights: in his/her family of birth and in his/her adoptive family. He/she is a forced heir of both the biological and adoptive parents. However, the child adopted in

an adoption simple does not have the same rights as the other children in terms of hereditary "representation", in other words the right to inherit instead of one of his/her dead parents. A child adopted in a simple adoption cannot inherit in a case of intestacy from the ascendants of his/her deceased adoptive parents.

Children adopted in a "plenary adoption" have the same legal rights as the other children of their adoptive parents. In fact, in this type of adoption all ties with the biological family are severed. These ties are substituted by ties with the adoptive family. Therefore, the adopted child will only inherit from his/her adoptive parents (and not from his/her biological parents) and enjoys the same rights as a non-adopted child.

According to the Civil Code of Azerbaijan, children adoption is the same "plenary adoption". İn such an adoption, all ties with the biological family are severed. These ties are replaced by ties with a foster family. Thus, an adopted child inherits only from his adoptive parents (and not from his biological parents) and enjoys the same rights as a non-adopted child.

Article 725 of the Civil Code established that babies conceived before the death of the deceased person would inherit in the same way as children already born, so long as the pregnancy is successfully carried to term. The law (article 311 of the Civil Code) presumes that the child was conceived between 300 and 180 days before the date of birth. (2)

There is no distinction between the inheritance rights of heterosexual and homosexual couples, whether married or in a civil partnership.

However, a partner's rights differ from those of a spouse in that a partner in a civil partnership is not automatically an heir. To enjoy inheritance rights, the partner must be designated in a will. The partners in a registered partnership only have the usufruct rights over the family house after their partner's death in accordance with article 763 of the Civil Code.

When a person dies without leaving a will, the law designates the heirs, called "devolution by law". Only members of the family can inherit. The French civil code ranks the heirs in a very specific order depending on their degree of kinship to the deceased. It is up to the notary to designate the heirs of the 1st degree before moving on to the 2nd degree, 3rd degree and so on. If an heir ranks higher in the order of succession, she/he inherits before any of the lower ranking heirs.

1st degree: the children, the grandchildren and then the great grandchildren.

2nd degree: the father and mother of the deceased, the brothers and sisters, then the descendants of the latter.

3rd degree: the grandparents, then the great grandparents.

4th degree: uncles and aunts, the great-uncles and great-aunts, then the first cousins, then the first cousins once removed, then the first cousins twice removed. The surviving spouse inherits in any case, but his/her rights will vary depending on the rights of the other heirs.

If the deceased leaves a spouse, the matrimonial property rights must be settled before settlement of the estate proper. After settlement of rights arising out of the matrimonial property regime, the following rules apply:

– Where a predeceased spouse leaves children or descendants, the surviving spouse shall take, at his or her option, either the usufruct of the whole of the existing property or the ownership of the quarter where all the children are born from both spouses and the ownership of the quarter in the presence of one or several children who are not born from both spouses (article 757 of the Civil Code). The spouse will be deemed to have opted for usufruct if he/she dies without having made a choice.

– Where, in the absence of children or descendants, a deceased leaves his father and mother, the surviving spouse shall take one half of the property. Where the father or the mother is predeceased, the share which he would have taken (one quarter) devolves to the surviving spouse (article 757-1 of the Civil Code).

– In the absence of children or descendants of the deceased or of his father and mother, the surviving spouse shall take the whole succession (article 757-2 of the Civil Code).

Notwithstanding article 757-2, in case of predecease of the father and mother and in absence of descendants, the property that the deceased received from them by succession or gift and that is found in kind in the succession devolves for one half to the brothers and sisters of the deceased or to their descendants, themselves descending from the predeceased parent or parents from whom the devolution originates. This is the right of reversion (Article 757-3 of the Civil Code). All other assets pass to the surviving spouse.

Heirs can renounce their succession rights by filing a declaration at the court of first instance within the jurisdiction where the estate was opened. Waiver of the succession must be expressly declared (article 804 of the Civil Code). Heirs who waive a succession are deemed never to have been heirs. The court of first instance within the said jurisdiction also receives waivers of universal legacies and legacies by general title. Under French law, no declaration is required for waivers of individual legacies.

According to French Civil Code, heirs can renounce their succession rights by filing a declaration at the court of first instance. However, according to the legislation of Azerbaijan, this case is regulated differently. According

to the Civil Code of Azerbaijan, heir (heiress) may relinquish succession within three months following the day of appeal for inheritance not depending on whether he (she) was aware about appeal or not. In case of valid reason the court may extend this period for no more than two months. Succession relinquishment should be registered officially at notarial body.

Intestate succession in the legislation of the Italy

The main legal source of the Italian succession law is the Italian Civil Code. Succession is regulated in the second book of the Civil Code at articles 456 et seq. and is entrenched by the Italian Constitution at article 42, paragraph 4, too. There are also additional legal sources.

The Italian legal system is based on the principle of the universality of inheritance (however, there are some special rules concerning the succession to specific rights). There're two types of succession in Italy: the legitimate succession (articles 565 et seq. of the Civil Code) as succession of relatives (see articles 565 et seq. of the Civil Code; the possibility of succession by representation is foreseen by articles 467 et seq. of the Civil Code), and the testamentary one (articles 587 et seq. of the Civil Code). The rules on the legitimate succession only apply, if there is no will or if the testator didn't regulate his/her entire estate. However, the disposition autonomy is limited in favour of the forced heirs, which necessarily have to get a part of the estate (articles 536 et seq. of the Civil Code: see point 3.3.4)

The Italian legal system does not know a general instrument, like a certificate of succession, certifying the quality of heir.

In the praxis the so called atto di notorietà (Deed of Notoriety), a public deed issued by a public notary, certifying that a certain fact – i.e. the quality of heir – is known in a certain context, is used to demonstrate the quality of heir. Although, the atto di notorietà is not intended to found a presumption and it doesn't have a probative value. On the contrary, its value is based on the sanctions foreseen for those who declare the false to a public official.

According to article 586 of the Civil Code, "in the absence of others eligible to succeed" (i.e. spouse, registered partner and relatives up to the sixth degree: article 572, paragraph 2, of the Civil Code), "the inheritance devolves on the State". The State acquires the inheritance "by operation of law without need of acceptance". On the contrary, he cannot renounce the inheritance. The State "is not responsible for hereditary debts and legacies beyond the value of the property acquired" (article 586, paragraph 2, of the Civil Code). The possibility for the State to succeed is also recognized by article 42, paragraph 4, of the Italian Constitution, as it permits to the ordinary legislator to establish "rights of the State in matters of inheritance" (including the imposition of taxes on the succession).

Article 462 of the Italian Civil Code establishes that all person alive or en ventre sa mere at the moment when the succession begins are capable of inheriting. According to article 462, paragraph 3, of the Civil Code, children who were not yet conceived at the start of succession can nevertheless benefit from a Will if one of their parents was alive at the time of the testator's death. Having regard to those provisions, any person can succeed if he has capacity of inheriting. There are no different succession rights between men and woman, domestic and foreign nationals, children born in wedlock and children born out of wedlock and adopted children. In relation to the children born out of wedlock, article 573 of the Civil Code states that the provisions concerning intestate succession by children born out of wedlock apply when filiation has been acknowledged or judicially declared, without prejudice to cases where the children born out of wedlock have the right to a life annuity whose amount is determined in proportion to the size of the inheritance. (3)

Pursuant to article 565 of the Italian Civil Code, in intestate succession the inheritance devolves on the spouse, descendants, ascendants, collaterals, natural relatives and the State, in the order and according to the rules established in the articles 566 et seq. of the Civil Code:

– the children, also the adopted children, succeed to the father and mother in equal shares;

– the father and mother in equal shares, or the surviving parent, succeed to one who dies without leaving descendants or brothers or sisters or descendants from them; – the ascendants in the paternal line succeed to one half and the ascendants in the maternal line to the other half in the case of one who dies without leaving descendants or parents or brothers or sisters or their descendants. However, if the ascendants are not of equal degree, the inheritance devolves on the nearest without distinction by line;

– brothers and sisters succeed in equal shares to one who dies without leaving descendants, parents or other ascendants. However, brothers and sisters of the half blood receive half the share of those of the whole blood.

When with the parents or only one of them, there are brothers or sisters of the whole blood of the decedent, all are admitted to succession per capita. In this case the parents (or one of them) receive one half of the share. If there are brothers and sisters of the half blood, each receives one half of the share received by each brother and

sister of the whole blood or by parents, subject in every case to the share of one half in favour of the latter. At last, if neither parent can or wishes to succeed and there are other ascendants, the share that would belong to one parent in the absenc of the other devolves in the manner specified in article 569 of the Civil Code, on such ascendants. When one dies without leaving descendants, parents, other ascendants, brothers or sisters or their descendants, succession opens in favour of the close relative or relatives, without distinction according to line, but not beyond relatives of the sixth degree.

The effect of benefit of inventory consists in keeping the patrimony of the deceased distinct from that of the heir. Consequently, in accordance with article 490 of the Italian Civile Code, the heir retains all the rights and obligations that he had against the deceased in the inheritance, including those that are extinguished by the death, and he is not bound to payment of inherited debts and legacies beyond the value of the property received. In addition, the creditors of the inheritance and the legatees have preference in the heritable patrimony over the creditors of the heir. Pursuant to articles 471, 472 and 473 of the Civil Code, the acceptance must be made with benefit of inventory when the inheritance is devolved to minors, emancipated minors, people under a legal incapacity and legal persons, associations and foundations (except companies).

The renunciation of the inheritance can be attacked only if it is the result of duress or fraud and within the deadlines of five years from the day on which the duress ceases or the fraud is discovered. So long as the right to accept the inheritance is not prescribed as to those called who have renounced it, they can always accept it, if it has not already been acquired by others than those called, without prejudice to the interests acquired by third person in the heritable property.

According to İtalian Civil Code, the renunciation of the inheritance can be attacked only if it is the result of duress or fraud and within the deadlines of five years from the day on which the duress ceases or the fraud is discovered. However, according to the legislation of Azerbaijan, this case is regulated differently. According to the Civil Code of Azerbaijan, discussion on succession relinquishment may commence within two months following the day when a person concerned is aware about appropriate ground for that.

One who renounces an inheritance is considered as if he never had been called. The renouncer can, however, retain a gift or demand a legacy made to him to the extent of the disposable portion referred to in article 556 of the Civil Code, unless the legacy is a legacy in place of forced share or against forced share. Those called to the inheritance who have taken or concealed property belonging to the inheritance forfeit the power to renounce it and are considered heirs pure and simple, notwithstanding their renunciation.

In any event, if someone renounces an inheritance, without fraud, with damage to his creditors, they can have themselves authorized to accept the inheritance in the name and place of the renouncer, for the sole purpose of satisfaction from the heritable property to the extent of their claims.

Conclusion

We have seen that there are two types of succession in the Civil Code of France, Germany and Italy. They are intestate and testamentary succession. In all three EU countries, intestate succession is carried out in four shifts, albeit with slight differences. In all three European countries, inheritance creates certain obligations. In the Civil Code of France and Germany, the renunciation of inheritance is carried out only in court. However, the Italian Civil Code does not provide for such a requirement in the event of a rejection of an inheritance. The German Civil Code gives heirs 6 weeks to file a waiver claim. I believe that this time is very short and should be increased.

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