

International Aspects of German Estate Law

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I. GENERAL PRINCIPLES OF GERMAN PRIVATE INTERNATIONAL LAW IN CASES OF SUCCESSION

A. Sources of Private International Law

German conflicts of law rules are codified in the Introductory Law to the Bürgerliches Gesetzbuch (EGBGB) of 1896.¹ This statute gives a very incomplete picture of private international law in action. Some rules have been superseded by international conventions; others have been supplemented and modified by court rulings and legal scholars.² The Treaty of Friendship of 1954³ between the United States and the Federal Republic of Germany has little effect on the conflict rules on succession.⁴

Because the Introductory Law is not only incomplete, but largely anachronistic, discussion about its reform has been in progress for many years. The German Council on Private International Law has recently published proposals for a reform of private international law in the field of succession.⁵ Further, several bills for a completely new private international law have been introduced.⁶

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1. EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH (1896) [hereinafter cited as EGBGB]. For an English translation of the statute see U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW 401 (1972) [hereinafter cited as DROBNIG].

2. For the role of case law and legal scholarship in Germany, see DROBNIG, *supra* note 1, at 47-55.

3. Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America of October 29, 1954, effective July 14, 1956, BUNDESGESETZBLATT [BGB1] II 763 (1956).

4. For the impact of the Treaty on German-American estate law, cf. DROBNIG, *supra* note 1, at 154, 171, 182, 193.

5. VORSCHLÄGE UND GUTACHTEN ZUR REFORM DES DEUTSCHEN INTERNATIONALEN ERBRECHTS (W. Lauterbach ed. 1969) [hereinafter cited as VORSCHLÄGE].

6. KÜHNE, IPR-GESETZENTWURF (Heidelberg 1980); Neuhaus/Kropholler, *Entwurf eines Gesetzes über internationales Privat- und Verfahrensrecht (IPR-Gesetz)*, 44 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELS Z.] 326 (1980); for a discussion see Henrich, in PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHT 2-4 (1981) [hereinafter cited as IPRax]. New statutes on conflict of laws

However, at the moment, it is not foreseeable if, when, and to what extent Germany will promulgate a new private international law.

Several obstacles have prevented the new law from coming into existence, such as the absence of lobbying in Parliament, the lack of experts in legislative committees, the great number of "quarreling" experts at the universities, and finally, the necessity for intra-European coordination. Consequently, the present private international law will probably remain in effect. In order to ascertain this law, court decisions and scholarly writings, rather than the EGBGB, should be consulted.

B. *The General Conflict Rules on Succession*

1. Law of succession (*lex hereditatis*)

In German law, the principle of unity of succession has resulted in the adoption of the same succession law for movables and immovables. This law will be referred to in the following discussion as the "law of succession" or the "*lex hereditatis*."

2. The national law of the decedent as *lex hereditatis*

a. *The nationality principle*

The general rule derived from articles 24 and 25 EGBGB is that the national law of the decedent at the time of his death governs the devolution of his property.⁷ If the decedent has no nationality, the law of his last habitual residence or of his last residence applies.⁸

Problems arise if the decedent has two or more nationalities. If all of them are foreign, German courts will ask for the "most effective nationality," i.e., the nationality of the state with which the decedent has had the closest connection.⁹ According to the modern prevailing view, the law of the "most effective nationality" will gov-

have been enacted in Austria (1978) and East Germany (1975). Switzerland has also published the draft of a new statute.

7. Judgment of May 2, 1966 (Bundesgerichtshof) [BGH], 45 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 351; judgment of April 5, 1968 (BGH), 50 BGHZ 63, 64.

8. For stateless persons *see* art. 29 EGBGB. Article 12 I of the Protocol relates to the status of refugees. Law of Jan. 31, 1967, BGBI II 1294 (1967).

9. GUTACHTEN ZUM INTERNATIONALEN UND AUSLÄNDISCHEN PRIVATRECHT 698, no. 66 (K. Zweigert, G. Kegel & M. Ferid ed. 1967/1968) [hereinafter cited as IPG]; G. KEGEL, INTERNATIONALES PRIVATRECHT 202 (4th ed. 1977) [hereinafter cited as KEGEL]; PALANDT/HELDRIICH, BÜRGERLICHES GESETZBUCH, n.7(a) preceding art. 7 EGBGB [hereinafter cited as PALANDT/HELDRIICH].

ern, even if one of the nationalities is German.¹⁰ But according to the traditional view which is often applied by the courts, German law controls.

The nationality test fails where there is no single system of law for an entire country. For example, in the United States, each state determines its own laws of succession, which requires that the German court first ascertain the appropriate forum within the United States. Some courts have applied the German interstate principle and looked to the decedent's last habitual residence.¹¹ Other courts have applied the rules of domicile as defined by American law, be it the domicile under the fourteenth amendment of the Constitution, as interpreted by the United States federal courts,¹² or the domicile concept of the common law.¹³ In many decisions, it is not clear whether the terms "domicile" and "residence" are to be interpreted according to the German or American concept.¹⁴ However, uncertainty on this point does not seem to cause any real practical difficulties.

b. Exceptions to the nationality principle

i. liability for debts of the decedent: article 24 II EGBGB

Pursuant to article 24 II EGBGB, a decedent's heirs may choose between the decedent's domiciliary law and his national law in determining liability for his debts outstanding at the time of death. For example, the heirs of a German whose domicile at death was the state of New York may invoke New York law, thereby limiting their liability to the estate if an administration occurs. A *renvoi* (a reference by the laws of one country to the laws of another nation) will be accepted.¹⁵ Article 24 II EGBGB is of little practical

10. Ferid, *Zur kollisionsrechtlichen Behandlung von Inländern mit zugleich ausländischer Staatsangehörigkeit*, 23 RABELS Z. 498 (1958); judgment of June 20, 1979 (BGH), IPRax, *supra* note 6, at 25 (1981); *cf.* judgment of May 21, 1974 (Bundesverfassungsgericht), ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FAM. R. Z.] 579, 586 (1974); Firsching, IPRax 14-16 (1981).

11. IPG, *supra* note 9, at 683, no. 65 (1967/1968); IPG 352, no. 36 (1971); IPG 218, no. 22 (1974).

12. IPG, *supra* note 9, at 698, no. 61 (1965/1966); IPG 338, no. 34 (1972).

13. IPG, *supra* note 9, at 711, no. 62 (1965/1966).

14. Judgment of Apr. 15, 1959 (BGH), 12 NEUE JURISTISCHE WOCHEN-ZEITSCHRIFT [N.J.W.] 1317 (1959); *cf.* IPG 351, no. 36 (1971) and IPG 218, no. 22 (1974).

15. PALANDT/HELDRIECH, *supra* note 9, art. 24 n.4. The effect of art. 24 II EGBGB will be substantially weakened in German-American relations by way of *renvoi*, if the liability for debts of the decedent is classified as a matter of administration under the United States law combined with an assumed American conflicts rule, which refers all matters of adminis-

significance and will be eliminated in an upcoming revision of the statute.¹⁶

ii. *privilegium germanicum*: article 25 sentence 2 EGBGB

If the decedent had a foreign nationality, but his last domicile was in Germany, German claimants to his estate could invoke the German law of succession instead of the national law of the decedent, unless this law would submit the estate of a German exclusively to German law. The purpose of this outmoded provision¹⁷ is "retaliation" against states which follow the domicile principle rather than the principle of nationality in private international law. The provision is, therefore, generally applicable to the determination of the succession of United States citizens who die domiciled in Germany. "Domicile," in this context, has to be interpreted according to German law.¹⁸ Since German law accepts the *renvoi* by United States law to the domiciliary law of the decedent with regard to movables,¹⁹ article 25 sentence 2 EGBGB applies only where an American national with his last domicile in Germany (according to German law) has died while retaining United States domicile according to American law.²⁰

iii. *Lex situs*: article 28 EGBGB

In deference to the law of the state in which some of the decedent's property is located, article 28 EGBGB provides that if parts of the property, movable or immovable, are located in a state whose law does not govern the entire succession, "special provisions" may nonetheless control the disposition of some of the property. Although it is somewhat of an ambiguous term, "special provisions" include feudal rules governing the devolution of family property or

tration to the *lex situs*. M. FERID & K. FIRSCHING, 5 INTERNATIONALES ERBRECHT USA 40/160 (1969) [hereinafter cited as FERID/FIRSCHING].

16. Ferid, *Das internationale gesetzliche Erbrecht*, in VORSCHLÄGE, *supra* note 5, at 20, 24 [hereinafter cited as Ferid, VORSCHLÄGE].

17. It has raised unanimous criticism and should be discarded in the future. *Id.* at 24.

18. Judgment of Dec. 21, 1955 (BGH), 19 BGHZ 315, 316. According to German and Swiss law, a person can have more than one domicile (*Wohnsitz*), in contrast to American law.

19. Domicile, for the purpose of *renvoi*, will be determined according to United States law.

20. *Cf.* DROBNIG, *supra* note 1, at 159. This may happen because the German test for "domicile" is less strict than the American concept.

the inheritance of farms.²¹ Such special provisions do not cover other kinds of property which are more "international" in nature, where there is no need for anything other than unified national treatment. Since individual states have no special interest in having their own law applied in such cases, it is argued that article 28 EGBGB should not be interpreted to command the application of the *lex situs*.²²

Following the prevailing view, the courts extend article 28 EGBGB to special conflicts rules which have no counterpart in the internal law of the state of the situs.²³ Thus, if a German decedent leaves immovable property in the United States, the law of the American state in question will govern the succession of these immovables, while German law (as the national law of the decedent) will apply to the succession in all other aspects.

iv. *renvoi*: article 27 EGBGB

By far the most important exception to the nationality principle is the broad admission of *renvoi* in German law. The reference to the decedent's national law in articles 24 and 25 EGBGB includes the conflict rules of that country. Hence, a remission (reference to the *decedent's* national law) or transmission (reference to the laws of a *third* country) contained in such rules will be respected.²⁴ The *renvoi* is especially important for German-American succession cases. In such cases, the national law of a decedent, as interpreted

21. Judgment of July 14, 1965 (BGH), 1 NACHSCHLAGEWERK DES BUNDES-GERICHTSHOFS [LM] on art. 28 EGBGB.

22. L. RAAPE & F. STURM, 1 INTERNATIONALES PRIVATRECHT 185 *et. seq.* (6th ed. 1977) [hereinafter cited as RAAPE/STURM]. Article 28 was primarily designed to give effect to the internal (substantive) law of the state where the property was situated, but only if this law embodied special, exceptional provisions for this type of property as distinguished from the regular rules governing "normal" property. Historically, if a state had such special substantive provisions, it also had corresponding provisions on the conflict-of-laws level, treating this special type of property differently from "normal" property (usually subjecting it to the state's own substantive law regardless of the regular conflict rules). Over the centuries, in the course of social and legal reforms, the special treatment of certain types of property in the *internal/substantive* law may have been eliminated, but the corresponding *conflicts rules*, have persisted as relicts of former times. The American conflicts rules subjecting immovables to the *lex situs* are interpreted in this sense by some German authors.

23. Judgment of Apr. 5, 1968 (BGH), 50 BGHZ 63, 68; M. FERID, INTERNATIONALES PRIVATRECHT no. 3-135 (1975) [hereinafter cited as FERID]; Ferid, VORSCHLÄGE, *supra* note 16, at 36; P. NEUHAUS, DIE GRUNDBEGRIFFE DES INTERNATIONALEN PRIVATRECHTS 292 (2d ed. 1977) [hereinafter cited as NEUHAUS].

24. Judgment of Nov. 21, 1953 (BGH), 28 BGHZ 375, 380.

by German courts, refers to the domiciliary law for movables²⁵ or to the *lex situs* for immovables.²⁶ If this means a *renvoi* to German law (where the decedent's last domicile or the last situs of real property was Germany), the remission refers exclusively to German substantive law, and not to the German conflict rules.²⁷ In order to avoid an international ping-pong match between the conflict systems, German substantive law will be the law of the succession, if the national law of the decedent refers back to German law.²⁸ Since *renvoi* may cause abandonment of the German principle of unity-of-succession, arguments have been advanced in favor of a double-*renvoi*, (reference by the country to which the original reference was made to the national law),²⁹ but so far with little success.

The doctrine of *renvoi* in German law causes problems of classification. While in general, legal questions are to be classified according to the German *lex fori*,³⁰ questions arising in the context of foreign law will be classified in accordance with the *lex causae*.³¹ In applying the conflicts law of a given American state, German courts will, for instance, look to that state's concept of domicile. However, this is not true with regard to the question of whether certain property is movable or immovable. The laws of the American states seem to refer this question of classification to the *lex situs*,³² so that

25. Judgment of Apr. 15, 1959 (BGH), WERTPAPIERMITTEILUNGEN [WM] 662 (1959).

26. Judgment of June 5, 1957 (BGH), 24 BGHZ 352, 355; DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIET DES INTERNATIONALEN PRIVATRECHTS 469, no. 146 (1956/1957) [IPRspr.]; Neuhaus/Gündisch, *Gemeinschaftliche Testamente Amerikanischer Erblasser*, 21 RABELS Z. 550, 564 (1956) [hereinafter cited as Neuhaus/Gündisch].

27. See cases cited *supra* notes 25, 26.

28. The German law was stated correctly in Estate of Strauss, 347 N.Y.S. 2d 840, 844 (Supr. Ct. 1973).

29. IPG, *supra* note 9, at 685, no. 65 (1967/1968); IPG 354, no. 36, n.3 (1971). The double-*renvoi* was considered where it was perfectly clear that the foreign national law would accept it and would apply its own substantive rules of succession. See judgment of Jan. 15, 1974 (Amtsgericht München), IPRspr., *supra* note 26, at no. 130 (1974) (the decision refers to Israeli law). United States law differs in this respect. Sometimes the effects of a double-*renvoi* are reached by overlooking the primary *renvoi* of the United States law. See judgment of Oct. 26, 1961 (BGH), 49 BGHZ 1, 2 (1961).

30. Judgment of Dec. 19, 1958 (BGH), 29 BGHZ 139 (1958).

31. Judgment of Apr. 15, 1959 (BGH) WM 662, 663 (1959); NEUHAUS, *supra* note 23, at 123; FERID/FIRSCHING, *supra* note 15, at 40/183; IPG, *supra* note 9, at 685, no. 65 (1967/1968).

32. Judgment of June 5, 1957 (BGH), 24 BGHZ 352, 355 (1957), *supra* note 26, at IPRspr. no. 146 (1956/1957). For further references see *supra* note 26. This interpretation of the United States law seems to be too broad. The remission of the classification problem is rather a means of avoiding conflicts with the situs-state which might possibly consider the property as movable and, therefore, from an American point of view, is subject to its own

German courts, regrettably, have to draw a distinction which is unknown in German private international law. If the property in question is land, the classification is easy.³³ But difficulties arise if the property consists of mortgages,³⁴ company shares,³⁵ or institutions of German law unknown to Americans, like a spouse's right upon the dissolution of the marriage to a share of the savings acquired by the other during the marriage. German courts attempt to resolve the problem by applying domestic, dogmatic concepts of classification which appear scarcely suitable for international purposes. The only assistance to the courts is a guideline of the Federal Supreme Court stating that, in order to preserve the endangered unity-of-succession, property rights should preferably be classified as movable.³⁶ A more functional approach to the problem of classification has been suggested,³⁷ but has not yet adopted by the courts.

The consequence of a partial *renvoi* with regard to immovables situated in Germany is the effective splitting of the estate into two separate parts, one governed by the law of an American state, the other by German law as the *lex situs*. Each part of the estate is treated (by the German courts) as a separate unit.³⁸ Thus, creditors of the estate cannot be foreclosed by a final probate decree rendered in the domiciliary state with regard to the immovable estate in Germany; they must observe the formalities prescribed by German law.³⁹

Further, a will which is invalid under the law of the domiciliary state of the American decedent, but valid according to German law,

law. The remission of the classification system is not necessary. Property is "movable" only if none of the interested states claim it as "immovable." Smith, *Classification by the Site in the Conflict of Laws*, 26 MOD. L. REV. 16, 33 (1963); NEUHAUS, *supra* note 23, at 124.

33. It is doubtful that in this case the American law leaves any room for classification by the *lex situs*. Cf. Jayme, *Zur Qualifikationsverweisung im internationalen Privatrecht*, 17 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG [Z. F. RVGL.] 93, 104 (1976) [hereinafter cited as Jayme].

34. Mortgages are classified as "movable" by the prevailing view in Germany, FERID, *supra* note 23, at no. 3-98. For a different view, see judgment of Feb. 1, 1952 (BGH), 5 N. J. W. 420 (1952).

35. Company shares are "movable", even if the assets of the company consist largely of real property. Judgment of June 5, 1957 (BGH), 24 BGHZ 352, 355.

36. *Id.*

37. With regard to classification in general, see NEUHAUS, *supra* note 23, at 129 *et seq.*

38. Judgment of June 5, 1957 (BGH), 24 BGHZ 352, 355.

39. Judgment of Sept. 25, 1958 (Landgericht Kassel), IPRspr., *supra* note 26, at no. 146 (1958/1959).

can be upheld with regard to German immovables.⁴⁰

3. Summary

With respect to American-German relations, the general position of the German private international law of succession may be summarized as follows:⁴¹

(1) The personal property of an *American decedent* is governed by the law of his last domicile, which is determined according to the American domiciliary concept. His immovable property is governed by the *lex situs*; German law by way of *renvoi* determines whether the property is immovable. As an exception, if at the time of his death the American decedent was domiciled in Germany, according to German but not American law, the inheritance rights of German claimants to the estate will be determined according to German law.

(2) The estate of a *German decedent* is governed by German law. However, the courts have to apply the American law of the situs to immovable property situated in the United States.

C. *Limits to the Lex Hereditatis*

The *lex hereditatis* does not extend to all questions which might arise in connection with the distribution of a decedent's estate.

1. Preliminary questions

There is no unanimous view in Germany on preliminary questions such as marital status or legitimacy. The prevailing practice determines such questions independently of the *lex causae*, according to general German conflicts rules.⁴² This method, which seems to be followed by most of the United States courts also, guarantees the harmony of decisions on the national level at the expense of international harmony.

The opponents of this practice⁴³ argue, not without reason, that where German conflict rules refer to a foreign law, this law should be applied as a whole in the same way as foreign courts would apply

40. Judgment of May 6, 1930 (Oberlandesgericht Dresden), IPRspr., *supra* note 26, at no. 95 (1931).

41. DROBNIG, *supra* note 1, at 161.

42. Judgment of Apr. 5, 1968 (BGH), 50 BGHZ 63, 70; RAAPE/STURM, *supra* note 22, at 290.

43. Judgment of Jan. 18, 1960 (Kammergericht), IPRspr., *supra* note 26, at no. 137 (1960/1961); RAAPE/STURM, *supra* note 22, at 289 n.17-28.

it, thereby assuring international uniformity of decisions. The determination of preliminary questions according to the *lex causae* fails where international uniformity has been disregarded at an earlier stage. For example, the marriage between a Greek and a German, consummated in Germany before the registrar as prescribed by German law, will be held valid in Germany, but invalid in Greece, where the religious form of marriage, alone, is recognized. It becomes a so-called "limping" marriage. Upon the death of the Greek, the spouse and the children will get nothing if the question of status is answered in conformity with Greek law, which in this case is the *lex hereditatis*. In Germany, however, since the marriage was valid, a "limping" succession will arise upon the Greek's death.

The nationality of the decedent is a preliminary question as well, but there is no doubt that it must be determined according to the nationality law of each respective country.⁴⁴

2. Assets belong to the estate

a. general rules

Before applying any law of succession, one must determine which assets are part of the estate. In general, the estate consists of assets in which the decedent had a legal interest and whose distribution is not determined by special rules, i.e., rules other than those of succession. Generally, the *lex hereditatis* decides what assets are part of the estate,⁴⁵ but the law of succession governs only those assets which are "left" in the estate by the international law of contracts, property, marital property, or partnerships.⁴⁶ There are four major problems in this context.

b. shares in partnerships and trusts

Upon the death of the owner, the law explicitly provides for the treatment of shares in companies which are not considered separate legal entities.⁴⁷ The conflict rules on succession have to be reconciled with the special conflict rules on companies. Under German private international law, such associations are subject to the law of

44. For references, see DROBNIG, *supra* note 1, at 60. For an outline of German nationality law, see DROBNIG, *supra* note 1, at 61-74.

45. Judgment of Apr. 15, 1959 (BGH), 12 N. J. W. 1317 (1959).

46. Cf. Ferid, VORSCHLÄGE, *supra* note 16, at 33.

47. In Germany, *Personalgesellschaften*, like the *Offene Handels-gesellschaft* (OHG), or the *Bürgerlich-Rechtliche Gesellschaft*. In the United States: Partnerships, trusts, certain joint tenancies.

that country where the company has its actual seat of administration.⁴⁸ A *renvoi* by that law will be accepted.⁴⁹ Regardless of special provisions in the charter of the company, as a general rule, the law governing the partnership determines what assets will go to the heirs. This law also determines the procedure by which these assets will be separated from the common assets of the partners. But the *lex hereditatis* determines the *heirs* or *beneficiaries* who will succeed to the partnership assets distributed by the law.⁵⁰

c. joint tenancies

American joint tenancies with the right of survivorship deserve some special comment. In American law, the acquisition of title by the surviving tenant is considered an inter vivos transfer; the decedent's share does not fall into his estate.⁵¹ There is no equivalent to this in German law, which recognizes different forms of co-ownership, but not the right of survivorship.

If Americans have formed a joint tenancy with regard to real property situated in Germany, the devolution of this property upon the death of one of them will be determined by German law as the *lex hereditatis*, either because of the *renvoi* of American law, or because the German conflicts rule for real property calls for application of the *lex situs*.⁵² Since there is no right of survivorship under German law, the decedent's share in the property falls into his estate, thus becoming subject to the rules of the *lex hereditatis*.⁵³

If the joint tenancy contains movables (usually bank accounts), the law of the succession and the law of the property may not be identical. If Americans domiciled in Michigan create a joint bank account in Munich, the succession is governed by Michigan law, but the contract with the bank falls under German law as the law of the bank's seat.⁵⁴ German courts will prefer the law of the contract⁵⁵

48. Coester-Waltjen, *German Conflict Rules and the Multinational Enterprise*, 6 GA. J. INT'L & COMP. L. 197 (1976).

49. KEGEL, *supra* note 9, at 270. A partnership, which has its place of business in the United States but is incorporated in Germany, will be governed by German law due to the *renvoi* of the American law.

50. Ferid, VORSCHLÄGE, *supra* note 16, at 38.

51. In re Harris Estate, 169 Cal. 725, 147 P. 967 (1915).

52. DROBNIG, *supra* note 1, at 96.

53. Ferid, *Die Bedeutung einer "joint tenancy" für deutsches Nachlassvermögen unbeweglicher und beweglicher Art bei Erbfällen nach Amerikanern*, DEUTSCHE NOTAR-ZEITSCHRIFT [D. NOT. Z.] 517, 521 (1964) [hereinafter cited as Ferid].

54. *Id.*

and will therefore hold the joint tenancy invalid. If Germans create a joint tenancy in a New York bank account, however, New York law will control. Accordingly, the courts will recognize the right of survivorship; the account is not part of the decedent's estate.⁵⁶

d. donatio mortis causa

The classical device to escape rules of succession is the *donatio mortis causa*, the problem of which is well illustrated by the reported "will" of a decedent: "And so, being of sound mind and understanding, I gave away every damn penny I had before I died."⁵⁷

What has been given away validly by the decedent while he or she lived, of course, can no longer be bestowed upon heirs or beneficiaries. Usually, the laws of the American states recognize the *donatio mortis causa* as a property transfer inter vivos, the validity of which is not governed by the law of succession. In Germany, the views are divided. In order to ascertain the pertinent system of law, a choice has to be made among (1) the law of the succession, (2) the law governing gifts inter vivos and bank accounts, and (3) the law governing the contract with the bank.

If the transaction is classified as an inter vivos transfer, German courts will apply the law which generally governs donations, i.e., the donor's domiciliary⁵⁸ or national law,⁵⁹ except where the gift is a bank account, in which case the courts prefer the law of the contract, which is the law of the bank's seat.⁶⁰

If the donation is classified as having been made *mortis causa*, the prevailing view is that questions as to its validity and effect must

55. Judgment of Apr. 15, 1959 (BGH), 12 N. J. W. 1317 (1959). According to Ferid, *supra* note 53, the same result will be reached in applying American law as the *lex hereditatis*. Joint tenancy statutes have no effect beyond the state borders so that they cannot be applied in Germany. *Kindler v. Kindler*, 169 Neb. 15, 98 N.W.2d 881 (1959).

56. Judgment of Apr. 15, 1959 (BGH), 12 N. J. W. 1317 (1959); judgment of June 10, 1968 (BGH), WM 1170, 1172 (1968). The classification of joint bank accounts (Totten trusts) as a transaction inter vivos is criticized by Knauer, in *Annot.*, 25 RABELS Z. 318, 332 (1960) [hereinafter cited as Knauer].

57. G. KEGEL, ZUR SCHENKUNG VON TODES WEGEN 30 (1972) [hereinafter cited as KEGEL, ZUR SCHENKUNG].

58. Judgment of June 24, 1964 (Oberlandesgericht Frankfurt/M.), *supra* note 26, at IPRspr. no. 37 (1964/1965); FERID, *supra* note 23, at no. 6-86.

59. It seems doubtful that German courts would permit a choice of law by the donor. However, there is some authority favoring the parties' autonomy in this respect. See KEGEL, ZUR SCHENKUNG, *supra* note 57, at 457.

60. See *supra* note 56.

be decided in accordance with the *lex hereditatis*, i.e., the national law of the donor *at the time of his death*.⁶¹ Since the donation is to take effect upon the death of the donor, the same law should govern the succession and transactions which were intended solely to circumvent the substantive rules of succession. Some writers, on the other hand, argue in favor of the national law of the donor *at the time the gift was delivered*,⁶² at least insofar as the validity of the donation is concerned.

It appears, therefore, that it is of crucial importance to determine whether the gift is to be classified as *inter vivos* or *mortis causa*. This classification will be made in congruence with the German *lex fori*,⁶³ although it would be more consistent to have this question, too, decided by the *lex hereditatis*.⁶⁴

e. marital property

Just as there is a provision in German law to determine the *lex hereditatis*, there is a provision that determines which system of law should govern all questions of marital property. According to article 15 EGBGB and the case law, this is the national law of the husband at the time of the consummation of the marriage.⁶⁵ This law is called the "law of the marital property."

The law governing marital property will not be affected by a subsequent change of nationality. It is immutable. Where this law is applied, therefore, the rules of more than one legal system may govern the succession on the one hand and marital property on the other. Since the domestic rules on succession and marital property

61. Judgment of Sept. 20, 1951 (BGH), IPRspr., *supra* note 26, at no. 111 (1950/1951); judgment of Apr. 15, 1959, *supra* note 55; DROBNIG, *supra* note 1, at 165.

62. Kegel, *Die Schenkung von Todes wegen im deutschen internationalen Privatrecht*, in II FESTSCHRIFT ZEPOS 313, 336 (1973) [hereinafter cited as II FESTSCHRIFT ZEPOS]; T. SCHEUERMANN, STATUTENWECHSEL IM INTERNATIONALEN ERBRECHT 114 (1969) [hereinafter cited as SCHEUERMANN].

63. Other views prefer the *lex causae*, be it the national law of the donor at the time of the transaction [SCHEUERMANN, *supra* note 62, at 115] or a combination of all laws possibly applicable [KEGEL, *supra* note 9, at 457]; II FESTSCHRIFT ZEPOS, *supra* note 62, at 332 (1973).

64. Cf. SCHEUERMANN, *supra* note 62, at 115.

65. Judgment of Oct. 18, 1968 (BGH), 22 N. J. W. 369 (1969). A *renvoi* will be respected. There are considerable doubts about the constitutionality of art. 15 and similar provisions of the EGBGB. Cf. for instance, arts. 17 and 19, on the constitutionally guaranteed equality of sexes. While these doubts are shared by higher courts, the prevailing view considers art. 15 EGBGB the applicable law. For references see PALANDT/HELDRICH, *supra* note 9, art. 15 EGBGB n.2; judgment of July 9, 1980 (BGH), IPRax, *supra* note 6, at 23 (1981).

are designed to complement each other but differ greatly from country to country, their conjunction causes one of the most difficult problems in German conflicts law.⁶⁶ This dualism of the law of marital property and succession is also well known in the United States, particularly in those states with a community property system.

As a general principle, the law of the marital property determines what assets are not part of the estate, subject to marital property rules upon the death of a spouse. Only those assets which are not distributed by the marital property rules of this law are part of the decedent's estate. The law of the succession determines how what is left must be distributed.⁶⁷

The classification of statutes which reserve parts of the decedent's property for his surviving spouse involves a determination of whether a given statute is concerned with the dissolution of the marital property rules or with inheritance claims of the surviving spouse. The problem of classification, which has to be solved according to the German *lex fori*,⁶⁸ arises in reference to what German or foreign substantive law might be applicable under German conflicts rules. As an example, we shall consider section 1371 BGB and sections 201 and 201.5 of the California Probate Code.

Under German law, the surviving spouse is doubly bestowed; he takes one part as marital property and the other part by way of succession. The most disputed provision, section 1371 I BGB,⁶⁹ borders on both areas of the law. In case of intestacy, in lieu of the surviving spouse receiving an adjustment claim amounting to one-

66. I cannot share the hope that Graue expresses in his article, *The Rights of Surviving Spouses Under Private International Law*, 15 AM. J. COMP. L. 164, 194 (1967) [hereinafter cited as Graue], that the problem is fading away because tendencies in substantive law confine the marital property regime to the duration of the marriage. The problem would be solved, however, if the proposal of the "Deutscher Rat für IPR" would be adopted by the legislature. The law of the marital property should be mutable and govern all questions of succession even if the decedent was married at the time of his death. VORSCHLÄGE, *supra* note 5, at 1, 6 *et seq.*

67. FERID, *supra* note 23, at no. 8-128; Neuhaus, *Miszelle—Postmortaler Wechsel des Güterstatuts?*, 32 RABELS Z. 542, 544 (1968).

68. FERID, *supra* note 23, at no. 9-39; PALANDT/HELDRICH, *supra* note 9, at n.9 preceding art. 7 EGBGB.

69. The German "community of gains" or "community of surplus" is explained and the statute reported in English by Graue, *supra* note 66, at 185 *et seq.* For the classification problem, see Graue, at 188, and the exhaustive discussion in Gamillscheg/Lorenz, *Die Bewältigung des § 1371 BGB durch das IPR*, in VORSCHLÄGE, *supra* note 5, at 65-82 [hereinafter cited as Gamillscheg/Lorenz, VORSCHLÄGE].

half of the savings acquired by both partners in the course of their marriage, he is entitled to an augmentation of this inheritance claim by one-quarter of the estate. Some classify this statutory portion of section 1371 I BGB as a real part of the marital property; others see it as an inheritance right.⁷⁰

The view which seems to prevail, however, holds section 1371 I applicable only if German law governs both marital property and succession,⁷¹ since elements of both marital property and succession are inextricably woven into this provision. This means that German courts should not apply section 1371 I BGB where the marital property is governed by German law, but where the applicable succession law is foreign. In this case, the share of the surviving spouse under foreign succession law will not be automatically augmented. But if the deceased spouse has in fact made a surplus (excess over the amount of property he owned at the beginning of the marriage) during the marriage, the survivor will be compensated by an award of one-half of such gains under German marital property law.⁷² As a result, American courts may ignore section 1371 I BGB, unless German law is applicable to both marital property and succession. This might happen if the real property of persons domiciled in the United States is situated in Germany, since American conflict rules prefer the *lex situs* regardless of the marital property or succession context.⁷³

As another example, several German courts have had to deal with sections 201 and 201.5 of the California Probate Code. According to section 201, the surviving spouse takes one-half of the community property forthwith; the other half is subject to the testamentary disposition of the decedent, but in the absence of such disposition, the other half goes to the surviving spouse. Section 201.5 extends this rule to property acquired during marriage, but while the spouses were not yet subject to California law. The effect given

70. Gamillscheg/Lorenz, VORSCHLÄGE, *supra* note 69.

71. *Id.*

72. Graue, *supra* note 66, at 189.

73. DROBNIG, *supra* note 1, at 186. But if the American court adopted the classification of the *lex rei sitae*, the result could be different. In the judgment of Mar. 30, 1973 (Landgericht Wiesbaden), FAM. R. Z. 657 (1973), the compensation claim of the American husband was classified as "movable," though the only asset acquired by the wife was real property in Germany. The court rejected the husband's claim, for Indiana law does not grant such compensation (art. 15 EGBGB). This decision concerned a divorce case, but the classification issue is the same. For a criticism see Jayme, *supra* note 33, at 105.

these provisions by American tribunals⁷⁴ will not be automatically adopted by German courts. In applying German law, they have to consider, however, the system and context of the California Probate Code.⁷⁵ The first half of the community property, which goes directly to the surviving spouse under section 201, is clearly part of the marital property regime. The acquisition by the surviving spouse of the first half under section 201.5⁷⁶ and of the second half under both provisions, where there is no testament to the contrary, has been classified under the marital property rule, but the prevailing view correctly considers it a matter of succession.⁷⁷

The posture of German law may be summarized with the aid of two hypothetical cases:

An American husband who marries in Germany while domiciled there dies intestate with his last domicile in California. His estate consists of a bank account in Munich, the value of which is \$100,000. The money was acquired while he was still domiciled in Germany. Of this amount, \$80,000 would be, under California law, quasi-community property of the spouses. How would a German court decide? The law governing the marital property would be German law, but the law of the succession would be that of California. As a preliminary question, therefore, the marital property issue has to be solved. Article 1371 I BGB cannot be applied since the law of succession is not German. But the widow may have an adjustment claim against the heirs if the husband has accumulated savings during the marriage. The whole bank account, however, is part of the decedent's estate, which would be distributed according to California law. Section 201.5 of the California Probate Code, as a rule of succession, gives both halves of the quasi-community property to the surviving spouse. The remaining \$20,000 is quasi-sepa-

74. Graue, *supra* note 66, at 193.

75. FERID/FIRSCHING, *supra* note 15, at 40/179.

76. The general rule that the classification has to be made according to the German *lex fori* receives special meaning. From an American point of view §§ 201 and 201.5 may, with regard to one half of the community property, have to be treated alike. However, the peculiarities of the German conflict rule on marital property require a different solution. In cases where art. 15 EGBGB refers to California law, it would be almost always § 201 and not § 201.5. Section 201.5 can be classified as a rule of succession, since the property affected has in reality never been community property. FERID/FIRSCHING, *supra* note 15, at 40/181 *et seq.*

77. Judgment of Sept. 10, 1959 (Oberlandesgericht Celle), IPRspr. *supra* note 26, at no. 148 (1958/1959). FERID/FIRSCHING, *supra* note 15, at 40/182 refers to the unpublished decisions of the Amtsgericht München.

rate property and is distributed in accordance with section 221 of the California Probate Code.

The converse legal situation may be illustrated by the following case. An American, domiciled in California, marries a German and dies with his last domicile in Germany. The bank account in Munich remains the same. The money in the account was acquired in California but thereafter was transferred to the Munich account. The law of the marital property is California law. The succession, on the other hand, is governed by German law by virtue of the *renvoi* in the California law. The widow will immediately take one-half of the community property (\$40,000) under section 201 of the California Probate Code. The remaining \$60,000 is part of the estate. German law, as the law of the succession, will give the widow a share under section 1931 BGB. The size of the share is dependent upon the existence of descendants or other relatives entitled to a share in the estate. It should be noted, however, that the widow takes a share of the entire remaining estate, without any differentiation between separate or community property, which is unknown to German law. As in the foregoing example, the share will not be augmented by the application of section 1371 I BGB, which is applicable only if German law governs both marital property and succession.

One of the greatest difficulties in the fields of marital property and succession is that different conflict rules applicable to each may lead to different substantive laws, and the close connection between the substantive rules in both fields may thereby be weakened. Some countries permit the surviving spouse to take a portion of the marital property while ignoring him in their law of succession. The laws of others furnish the surviving spouse with a share of the estate but refuse him any claims upon the marital property after the termination of the marriage. In extreme cases, the combination of two legal systems can lead to great injustice: either the surviving spouse gets nothing, though he or she would have taken a share under each of the internal laws, or he gets much more than provided for by either law.⁷⁸

German approaches to this inequity take two forms. Since the problem lies in the area of private international law, one approach is to utilize this law. The other remedy is to change the applicable substantive laws in order to reach some balance.

78. Graue, *supra* note 66, at 181.

In particular, on the level of private international law, the whole issue may be left to one of the conflicting systems, either the law of the succession or that of the marital property.⁷⁹ An ingenious solution was articulated by the Bayerisches Oberstes Landesgericht.⁸⁰ A Lithuanian citizen, who had emigrated in 1949 to California and married there in 1960, died some year later. At the time of his death he was a naturalized United States citizen, but his nationality at the time of his marriage was not clear. The court simply declared the law of the marital property to be mutable (law affecting such property becomes the law of the new nationality) for the purposes of that case and thereby applied section 201.5 of the California Probate Code, which was effective retroactively from the time of the consummation of marriage. Thus, the law of the succession and of the marital property were identical. Unfortunately, this solution works only in the exceptional case where the new law of the marital property is given retroactive effect.⁸¹

In respect to substantive law, some writers would like to see the substantive rules of marital property of the *lex hereditatis* incorporated into its rules of succession.⁸² Others would prefer the converse solution, namely the incorporation of the succession rules of the law which governs the marital property into the rules of marital property.⁸³ Finally, it has been proposed that both substantive laws be applied cumulatively, whereby the surviving spouse would take either the combined total of the two laws (maximum limit) or the higher amount of the two laws (minimum limit).⁸⁴

There is no prevailing view on how to accomplish satisfactory results. Some adaptive device must be found in any future case in

79. Law of succession, NEUHAUS, *supra* note 32, at 131; Müller-Freienfels, *Zur kollisionsrechtlichen Abgrenzung von Ehegüterrecht und Erbrecht*, in VORSCHLÄGE, *supra* note 5, at 42, 53; 7 SOERGEL/KEGEL, BÜRGERLICHES GESETZBUCH, art. 15, n.10 (10th ed. 1970) [hereinafter cited as SOERGEL/KEGEL]. If one of the laws has a community property regime *inter vivos*, only this law should determine the distribution upon death. If one of the laws has a community property regime *mortis causa*, the law of succession should govern exclusively.

80. Judgment of Mar. 31, 1966 (Bayrisches Oberstes Landesgericht), ENTSCHEIDUNGEN DES BAYRISCHEN OBERSTEN LANDESGERICHTS IN ZIVILSACHEN [BAY. OB. L. G. Z.] 115, 125 (1966).

81. KEGEL, *supra* note 9, at 152.

82. M. WOLFF, DAS INTERNATIONALE PRIVATRECHT DEUTSCHLANDS 59 (3d ed. 1954) [hereinafter cited as WOLFF].

83. STAUDINGER/GAMILLSCHEG art. 15, note 361.

84. *Id.*, n.364.

order to achieve a just distribution of the estate. The rest depends on the inventiveness of the judge.

II. INTESTATE SUCCESSION

A. Issues Governed by the *Lex Hereditatis*

The *lex hereditatis* determines all main questions of inheritance: the succession to the estate in the absence of a will, the capacity to receive as heir, the acquisition of title to the estate,⁸⁵ and the procedure to renounce it. Since the unilateral disclaimer is unknown with respect to intestate succession in most American states, the effect of the German disclaimer is construed as if American law governed the succession. According to one view the disclaimer has the same effect as under German law.⁸⁶ Another view considers it a contractual transfer of a position acquired by succession.⁸⁷ The correct solution will depend on whether an administration of the estate takes place in the United States.⁸⁸ If it does not, the beneficiary cannot disclaim his position but may only transfer it contractually.⁸⁹

The law of succession governs the legal relations among the beneficiaries,⁹⁰ their liability for debts of the decedent or of the estate,⁹¹ and contracts among the beneficiaries regarding the distribution of the assets.⁹²

Finally, the law of succession governs the administration of the estate.⁹³ The question of which law in particular is the *lex*

85. The beneficiaries under American succession statutes are considered "heirs" in the German meaning of this notion for the purposes of estates situated in Germany, whether an administration takes place in the United States or not. IPG, *supra* note 9, at 820, no. 61 (1965/1966).

86. Kühlewein, *Die Erbscheinserteilung nach Ausschlagung amerikanischer Erben*, 16 N. J. W. 142 (1963).

87. FERID/FIRSCHING, *supra* note 15, at 40/174.

88. DROBNIG, *supra* note 1, at 163.

89. The same applies where the disclaimer is limited to certain assets of the estate, as for example, the assets situated in Germany. Since such partial disclaimer will not be admitted in Germany, it has to be interpreted as a contractual relinquishment by release between the heirs. IPG, *supra* note 9, at 524, no. 51 (1965/1966).

90. Judgment of June 1, 1968, WM 1170, 1171 (1968). See also DROBNIG, *supra* note 1, at 193 for more information. The law of succession, however, does not determine the legal title of the heirs concerning single assets. Ferid, VORSCHLÄGE, *supra* note 16, at 34.

91. But see art. 24 II EGBGB; DROBNIG, *supra* note 1, at 191; IPG, *supra* note 9, at 350, no. 36 (1971). The German heir of a California decedent's estate administered in California is not personally liable for the debts, as he would be under German law.

92. IPG, *supra* note 9, at 876, no. 73 (1965/1966).

93. DROBNIG, *supra* note 1, at 183. To avoid the complications caused by foreign

hereditatis in German-American succession cases will be discussed separately.

B. Inheritance Rights of Illegitimate Children Under German Law

Inheritance claims of illegitimate children differ from those of legitimate descendants under German law. While the ordinary claim of the illegitimate child against the estate is clearly subject to the law of succession, the provisions of sections 1934(d) and (e) BGB, which give the illegitimate child a claim against the father during his lifetime, are not applicable here. Some consider this claim a matter of maintenance, because the portion paid out to the illegitimate child is calculated according to alimony standards and replaces the inheritance rights of the child.⁹⁴ Consequently, the applicable law would be the national law of the mother at the time of the child's birth or the law of the child's habitual residence.⁹⁵ Others would rather apply the national law of the father as the law which governs the relations between father and illegitimate child in general.⁹⁶ The majority view, however, prefers the law of succession.⁹⁷

If, before leaving Germany, a German father pays out to his illegitimate child the portion required by section 1934(d) BGB and later dies as an American citizen domiciled in a state whose law gives illegitimate and legitimate children equal shares in the estate of their father, three possibilities exist:

1. Upon the death of his father, the illegitimate child acquires no share of the estate (the effect of section 1934(e) BGB is extended to foreign succession law); or
2. In order to receive the statutory share, the child has to pay back the portion already received; or
3. The child keeps the portion already received and takes, in addition, his statutory share under American law.

administration systems in Germany, Ferid has proposed to apply the *lex fori* to matters of administration. This proposal was rejected by KEGEL, *supra* note 9, at 459.

94. PALANDT/HELDRICH, *supra* note 9, art. 24 EGBGB, n.3.

95. Hague Convention on the Law Applicable to Obligations to Support Minor Children of Oct. 3-4, 1956, effective Jan. 1, 1962, BGBI I 1012 (1961); BGBI II 16 (1962).

96. K. SIEHR, AUSWIRKUNGEN DES NICTHEHELICHENGESETZES AUF DAS INTERNATIONALE PRIVAT- UND VERFAHRENSRECHT 146 (1972) [hereinafter cited as SIEHR]; R. JOCHEM, DAS ERBRECHT DES NICTHEHELICHEN KINDES NACH DEUTSCHEM RECHT BEI SACHVERHALTEN MIT AUSLÄNDERBERÜHRUNG 69 (1972) [hereinafter cited as JOCHEM].

97. SOERGEL/KEGEL, *supra* note 79, at nn.22(a) and 72 preceding art. 24.

As one might expect, views are divided on this issue,⁹⁸ and there are no judicial guidelines.⁹⁹

C. Rules of Escheat

Whether an escheat of the estate will occur is determined by the law of succession. The crucial question is which state should possess the estate. Under German law, the state whose law governs the succession will apply.¹⁰⁰ The enforcement of this position, where German law governs assets situated abroad, depends on the *lex situs*.¹⁰¹

III. WILLS AND CONTRACTS OF INHERITANCE

A. Choice of Law by the Testator

Choice of law clauses in wills, which may be conclusively recognized in some states in America, do not bind a German court in its choice of the applicable law. The arguments in favor of party autonomy (choice of law by the parties) in the field of succession law¹⁰² have been rejected by the Federal Supreme Court and the majority of scholars,¹⁰³ so that at least on this issue the law is settled. The reference of the testator to a certain law may be used, however, as an aid in the construction of the will.¹⁰⁴

The position of foreign private international law on party au-

98. According to SIEHR, *supra* note 96, and PALANDT/HELDRIICH, *supra* note 9, art. 24, n.3, the anticipated share will not be affected by a subsequent change of the applicable law. A different result has to be reached by those who want the law of succession to govern the anticipated claim, that is, the national law at the time of death. SOERGEL/KEGEL, *supra* note 97.

99. A comparable problem may arise if the child is not German and dies before his father. German law denies inheritance claims of the father if he had to compensate the child's anticipated claim during its lifetime (§ 1934(e) BGB). Will he take a share under the foreign law of succession? SIEHR, *supra* note 97, at 109.

100. FERID/FIRSCHING, *supra* note 15, at 40/189; IPG, *supra* note 9, at 880, no.78 (1967/1968).

101. In the American states, the conflict rules seem to refer to the *lex situs*, so that the states are likely to claim the estate situated within their borders even if it is governed by German succession law. Cf. FERID/FIRSCHING, *supra* note 15, at 40/119. On the other hand, it has been argued that California law will not insist on its right if another country considers the estate as situated there. IPG, *supra* note 9, at no. 78 (1967/1968).

102. Dölle, *Die Rechtswahl im internationalen Erbrecht*, 30 RABELS Z. 205 (1966) [hereinafter cited as Dölle]. Cf. Müller, *Miszelle—Die Rechtswahl im internationalen Erbrecht*, 31 RABELS Z. 337 (1967). For a limited freedom of choice, see SCHEUERMANN, *supra* note 62, at 137.

103. Judgment of Mar. 29, 1972 (BGH), IPG, *supra* note 9, at 310, no. 32 (1972); Ferid, VORSCHLÄGE, *supra* note 16, at 93-104.

104. Judgment of Mar. 29, 1972 (BGH), *supra* note 103; Dölle, *supra* note 102, at 205, 211, 216.

tonomy must be examined with reference to the problem of *renvoi*.¹⁰⁵ For example, if an American decedent, who was originally a Michigan citizen, later acquired voluntary domicile in Germany and made a will declaring the law of Michigan applicable for the disposition of his personal property, a German court would disregard the choice of law clause within the framework of German conflicts law and would follow the reference of articles 24 and 25 EGBGB to the national law of the decedent, in this case Michigan law. That law, which contains a choice of law clause (section 702.44 of the Michigan Probate Code), would in turn refer back to German law as the law of the testator's last domicile. As a consequence, the German court would have to respect the choice of law clause within the framework of Michigan conflicts law and thereby apply Michigan law as the law of the succession with regard to movables.

B. The Formal Validity of Wills

The formal validity of wills is governed by a variety of laws, in accordance with the Hague Convention of 1961,¹⁰⁶ which replaces article 11 EGBGB. The policy of the Convention is to validate wills as far as possible.¹⁰⁷ It applies to American decedents although the United States is not a party to the Convention. Both the validity of a will itself and the revocation of a prior will by testament are determined by the rules of the Convention.¹⁰⁸

C. The Essential Validity and Effects of a Will

1. The applicable law in general

The *lex hereditatis* also determines the validity and effect of wills. The will, however, may have been drawn up many years before the death of the testator. A change in nationality may have brought about a change of the relevant *lex hereditatis* in the meantime. In order to protect the expectations of the testator at the

105. Judgment of May 21, 1959 (Landgericht Bochum), IPRspr., *supra* note 26, at no. 147 (1958/1959); IPG, *supra* note 9, at 838, no. 74 (1967/1968). The problem is overlooked in the judgment of Mar. 29, 1972 (BGH), *supra* note 104. See also Coester, JURISTISCHE ARBEITSBLÄTTER 351, 353 (1979).

106. Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions of 1961, effective Jan. 1, 1966, BGBI II 1145 (1965).

107. For a discussion of the rules in particular, see DROBNIG, *supra* note 1, at 166.

108. Art. 2 of the Convention, *supra* note 106. A revocation other than by testament is not governed by the Convention; the form will be determined by art. 11 EGBGB. PALANDT/HELDRIICH, app. arts. 24-26 EGBGB, annot. art. 2.

time of making of the will, it has been proposed that the law which would have governed the succession at that time should determine the validity of the will, leaving only the effect of the will to be determined by the law of succession at the time of death.¹⁰⁹ Under the prevailing view, however, the latter view is applicable to both validity and effect.¹¹⁰ Article 24 III EGBGB makes an exception with regard to the capacity to make a will.¹¹¹

2. Issues governed by the *lex hereditatis*

In particular, the law of succession will determine matters relating to the forced shares of surviving spouse and relatives,¹¹² the right of a testator to disinherit family members,¹¹³ the validity and effect of conditional or life estates,¹¹⁴ the nomination of executors,¹¹⁵ and the revocation of wills.¹¹⁶

3. Construction

Generally, a will is to be construed according to the law of succession,¹¹⁷ even if the testator had another law in mind when making the will. Thus, "American" wills have to be construed according to German rules of construction if German law governs the succession. But since under German Law the "presumed intent" of the testator serves as a leading guideline for construction, some concepts of American law may influence a court's construction,¹¹⁸ although they will be adapted and "translated" into the concepts and institutions of German law.

109. KEGEL, *supra* note 9, at 460.

110. PALANDT/HELDRIICH, art. 24, n.3; SCHEUERMANN, *supra* note 62, at 76 *et seq.*

111. The exception is limited to foreign testators who subsequently acquire the German nationality. Cf. DROBNIG, *supra* note 1, at 167.

112. Judgment of August 26, 1963 (Oberlandesgericht Düsseldorf), IPRspr., *supra* note 26, at no. 151 (1962/1963).

113. Judgment of Oct. 23, 1911 (Reichsgericht), JURISTISCHE WOCHENSCHRIFT 22 (1912). German public policy is not violated if the applicable law provides for no forced shares at all.

114. Judgment of Dec. 3, 1956 (Oberlandesgericht Celle), FAM. R. Z. 273 (1957).

115. Judgment of Sept. 25, 1958 (Oberlandesgericht Frankfurt/M.), IPRspr., *supra* note 26, at no. 145 (1958/1959).

116. Judgment of Feb. 29, 1952 (Oberlandesgericht Neustadt), IPRspr., *supra* note 26, at no. 234 (1952/1953).

117. IPG, *supra* note 9, at 328, no. 33 (1972).

118. Gottheiner, *Anpassungs- und Umdeutungsprobleme bei deutsch-englischen Erbfällen* (Thesis Tübingen 1955).

4. "American" wills in German law

a. *The classification of beneficiaries*

Under German law, an heir is any person who takes the whole estate or an undivided fraction thereof. A person who takes only specifically designated assets or items of property does not qualify as an heir. The distinction is important in German law for purposes of taxation or a certificate of inheritance.

Accordingly, specific or general legacies in "American" testaments do not make the beneficiary an heir under German law. But the residuary legatees are considered heirs regardless of whether or not an administrator first has possession of or title to the estate.¹¹⁹ Beneficiaries of an estate upon absolute limitation (like life estates) will be considered provisional heirs and the remaindermen will be reversionary heirs.¹²⁰ Estates upon conditional limitation can be upheld without change. Since these kinds of legacies are not common in German wills, the greatest difficulties lie in the exact formulation of the certificate of inheritance.¹²¹

D. *Trusts*

The concept of a trust, although not recognized in Germany, is not repugnant to German law like the *lex situs*¹²² and will be considered valid.¹²³ A problem of transposition arises as to the classification of the persons affected by the trust. A trustee who is not a beneficiary at the same time does not qualify as an heir, but rather as an executor under section 2209 BGB.¹²⁴ His powers extend to property situated in Germany, as well as elsewhere.¹²⁵ The beneficiaries of the trust may qualify as provisional or reversionary heirs or as creditors of the estate.¹²⁶ The same rules apply to the trustee

119. This result is widely undisputed. Cf. FERID/FIRSCHING, *supra* note 15, at 40/212 and DROBNIG, *supra* note 1, at 171.

120. FERID/FIRSCHING, *supra* note 15, at 40/201, 204.

121. See the examples given by FERID/FIRSCHING, *supra* note 15, at 40/201 *et seq.*

122. See *supra* text accompanying note 51.

123. Gottheiner, *Zur Anwendung englischen Erbrechts auf Nachlässe in Deutschland*, 21 RABELS Z. 36 (1956) [hereinafter cited as Gottheiner].

124. FERID/FIRSCHING, *supra* note 15, at 40/199 and 207; DROBNIG, *supra* note 1, at 189.

125. Judgment of May 2, 1972 (Oberlandesgericht Frankfurt/M.), IPRspr., *supra* note 26, at no. 125 (1972).

126. *Id.*

who is a beneficiary at the same time.¹²⁷ These rules must be modified with regard to charitable or discretionary trusts on a case-by-case basis.¹²⁸

E. Powers of Appointment

With regard to powers of appointment created by a will, German and American conflict rules agree in applying the law of succession to determine their validity and effect.¹²⁹ If the *lex hereditatis* is German, problems of transposition arise since German law in general does not acknowledge such powers. This will not be the case, however, if the power is limited to specified items of property, where there is a comparable institution in German law.¹³⁰ But if the donee is empowered to dispose of the entire estate or an undivided fraction of it, i.e., to appoint legatees who are to be classified as heirs under German law, the situation becomes complicated. The institution of provisionary or reversionary heirship can be applied if the donee is the beneficiary of a life estate and has a testamentary power to appoint the remainderman, but in default of such appointment a remainderman is designated by the donor-testator.¹³¹ If the donee has a general power of appointment exercisable inter vivos, he will be considered an heir.¹³² If the power is exercisable by testament alone, the general power cannot be upheld under German law.¹³³

In case of a special power, its validity will depend on whether the possible appointees are few in number; the final choice is generally predetermined by the testator, leaving the donee little or no discretion.¹³⁴

F. Joint and Mutual Wills

In general, the *lex hereditatis* governs joint and mutual wills as well as individual ones, subject to the qualifications discussed below.

127. *Id.* The problem seems to have been overlooked in IPG, *supra* note 9, at 774, no. 66 (1965/1966).

128. Gottheiner, *supra* note 124, at 172.

129. For a discussion of powers of appointment in a civil law sphere, see Lipstein, in II FESTSCHRIFT FÜR WENGLER 431-441 (1973).

130. §§ 2151, 2153 BGB.

131. FERID/FIRSCHING, *supra* note 15, at 40/210; IPG, *supra* note 9, at 831, no. 74 (1967/1968).

132. FERID/FIRSCHING, *supra* note 15, at 40/210; Gottheiner, *supra* note 123, at 168.

133. FERID/FIRSCHING, *supra* note 15, at 40/210.

134. *Id.*

1. Cumulation of the national laws

If the national laws of the testators differ, both laws have to be applied, each with regard to the disposition of its appropriate part of the will.¹³⁵ Should the result be that one of the testators is not bound by the testamentary provisions, the reciprocal dispositions of the other will also lose their binding effect.¹³⁶ Under German substantive law, there is a presumption in this case that the testator would not have made the will at all, so the disposition is invalid in its entirety.

2. Formal validity

Two problems must be analyzed separately: one is whether persons may will jointly in a single document, and the other is whether their dispositions are mutually dependent and preclude unilateral revocation. The first question relates to the form of wills, the second to the effect of joint and mutual dispositions. The formal requirements are determined by article 4 of the Hague Convention of 1961. Thus, if the national law of the testators forbids joint wills on formal grounds, the will may nevertheless be valid under the law of some other country recognized by the Convention, such as that of the nation where the will was made. As in the case of Italy, however, a country may forbid mutual wills for reasons of public policy. In this case, the joint and mutual will of a national of that country is void wherever made.¹³⁷

3. Effect

As a rule the German courts apply the national law of the testators at the time of death,¹³⁸ but the prevailing view in the legal literature argues in favor of the national law at the time of the creation of the will.¹³⁹ Neither theory can resolve all problems: If nationals of the Netherlands, where the law forbids joint wills on formal grounds, make a joint and mutual will in Germany, the will is formally valid. Its effect has to be determined according to Dutch law, the national law of the testators. Understandably, Dutch law does not arrange for a binding effect. The result for German courts will

135. FERID, *supra* note 23, at no. 8-129.

136. FERID/FIRSCHING, *supra* note 15, at 40/193.

137. KEGEL, *supra* note 9, at 461; DROBNIG, *supra* note 1, at 167.

138. Neuhaus/Gündisch, *supra* note 26, at 551-554.

139. KEGEL, *supra* note 9, at 461; Ferid, VORSCHLÄGE, *supra* note 16, at 137.

be a non-binding mutual will—an institution not known in either of the interested countries.¹⁴⁰

4. German-American relations

a. *United States law governing succession*

If German courts have to apply the law of an American state, they look for a separate contract to create or refrain from revoking a will in order to determine the binding effect of joint and mutual wills.¹⁴¹ The argument that such contracts violate German public policy¹⁴² is correctly rejected by the majority of legal scholars.¹⁴³ In accordance with the prevailing view in the United States, German courts will not assume an implied contract merely because the testators have made a joint and mutual will.¹⁴⁴

If German spouses, who have made a mutual will in Germany, become United States citizens domiciled in New York, and the surviving spouse revokes his previous disposition by a new will, the remedies of the beneficiaries under the mutual will have to be determined according to the laws of New York.¹⁴⁵ There seems to be no way to secure the operation of German law, as has been proposed.¹⁴⁶

b. *German law governing the succession*

If an American couple makes a mutual will in New York, each marital partner leaving everything to the other and providing for the children to take the remainder after the death of the survivor, and after the death of the man, the wife married a German, acquires German nationality, and makes a will exclusively in favor of her new husband, how can the children enforce the rights under the mutual will after the death of their mother? Those courts applying the national law of the decedent at the time of death have to apply German law, which holds the mutual will binding and the second will void. Those courts invoking the national law at the time of the crea-

140. SCHEUERMANN, *supra* note 62, at 104. For a critical view, see G. KEGEL, Festschrift für Jahrreis 158 (1964).

141. IPG, *supra* note 9, at 768, no. 71 (1967/1968).

142. M. WOLFF, DAS IPR DEUTSCHLANDS 234 (3d ed. 1954), quoting § 2302 BGB.

143. SCHEUERMANN, *supra* note 62, at 112.

144. IPG, *supra* note 9, at 768, no. 71 (1967/1968).

145. Neuhaus/Gündisch, *supra* note 26, at 573.

146. IPG, *supra* note 9, at 817, no. 68 (1965/1966); SCHEUERMANN, *supra* note 62, at 113.

tion of the instrument will apply New York law, which provides that the violation of a contract not to revoke a will does not make a second revoking will invalid. In such a case, the court will impose German law upon the mutual will made in New York.¹⁴⁷

G. Inheritance Agreements and Release of Expectancy

Inheritance agreements (Erbverträge) are unknown to American law, but through the recognition and enforcement of contracts to make wills, similar results are reached.¹⁴⁸ The contractual release of expectancy has a counterpart in German law.

1. Form

The formal validity of institutions is provided for not by the Hague Convention of 1961, but by article 11 EGBGB. Hence, the law of succession of the place of creation governs. If a release of expectancy is contained in an instrument signed by a notary public in the United States and German law governs the succession, the release does not fulfill the formal requirements of German law.¹⁴⁹ After ascertaining whether the American and German institutions are equivalent, the formal validity is approved according to the law of the place where the release has been executed.¹⁵⁰

2. Effect

With regard to effect, there is again a dispute as to whether the national law at the time of the decedent's death¹⁵¹ or at the time of creation of the instrument¹⁵² should apply. The latter view seems to prevail today. However this dispute may be settled, the law of succession will govern bilateral contracts of inheritance only for that contracting party who makes dispositions upon his death.¹⁵³ If the parties are of different nationalities, the law of each will apply to his own dispositions.¹⁵⁴ If there are marriage and inheritance contracts together in one document, the applicable law is determined by the classification of the particular provisions and may be that of the

147. SCHEUERMANN, *supra* note 62, at 113, 114.

148. FERID/FIRSCHING, *supra* note 15, at 40/51 and 40/96.

149. FERID, *supra* note 23, at no. 5-115.

150. IPG, *supra* note 9, at 809, 818, no. 68 (1965/1966).

151. Ferid, VORSCHLÄGE, *supra* note 16, at 119.

152. KEGEL, *supra* note 9, at 460.

153. SOERGEL/KEGEL, *supra* note 79, at nn.35 and 41 preceding art. 24.

154. FERID, *supra* note 62, at no. 8-129.

marital property, that of the personal relations of the spouses, or that of succession.¹⁵⁵

IV. PROBATE AND ADMINISTRATION

Finally, problems of probate and administration arise in the context of international estate cases. First, we shall consider jurisdictional questions and the effect of American probate court decisions. The second and final point will be the administration of German-American estates.

A. Probate

1. German probate jurisdiction

Contentious litigation involving decedents' estates poses no specific problems: international jurisdiction is derived from the venue requirements.¹⁵⁶ But here we will be concerned rather with the jurisdiction in all estate-related matters arising in the course of a non-contentious proceeding. The question as to the jurisdiction of the courts in this area is hotly disputed.

a. Parallelism of jurisdiction and applicable law

Americans are familiar with the principle that a court with proper jurisdiction applies its own law, but the traditional and still prevailing view in Germany is that German "Probate Courts" have jurisdiction if and insofar as German law governs the succession.¹⁵⁷ There are, however, some exceptions to this rule, to assure that a denial of jurisdiction does not lead to a denial of justice. Thus, the jurisdiction of German courts was affirmed despite the fact that foreign law governed succession in the following situations: an application to draw up an inventory of the assets of the estate,¹⁵⁸ the receiving of declarations of acceptance or disclaimer by the heir,¹⁵⁹ the opening of the will after the testator's death,¹⁶⁰ and the appointment of a curator (custodian) or issuance of other orders to secure

155. *Id.*

156. FERID/FIRSCHING, *supra* note 15, at 40/156.

157. Judgment of Oct. 26, 1967 (BGH), 49 BGHZ 1; DROBNIG, *supra* note 1, at 173, 174.

158. Judgment of Dec. 2, 1965 (Bayrisches Oberlandesgericht), BAYRISCHE OBERLANDESGERICHTSZEITUNG 423, 431 (1965).

159. *Id.*

160. IPRspr., *supra* note 26, at no. 202 (1958/1959).

and protect the estate where the heir is unknown.¹⁶¹ In addition, jurisdiction of German courts is given *ipso jure* with regard to certificates of inheritance and executorship. They may be issued for assets in Germany even if governed by a foreign law of succession.

b. Modern tendencies

It has been argued that in the field of succession substantive and procedural law are not so closely intertwined as the traditional view supposes.¹⁶² The jurisdictional restriction of the German courts to cases which are governed by German law is said to be intolerable in an age of such high international mobility.¹⁶³ From this point of view jurisdiction is given, provided the case has some connection with Germany,¹⁶⁴ and discussion focuses rather on the restrictions for exceptional cases.¹⁶⁵ Although these views may be converging, they are still far from reconciliation, as can be shown with respect to the administration of estates.

2. American probate court decisions in Germany

Generally, an American domiciliary probate decree is not necessary for the recognition of the validity of a will. It may, however, raise a presumption of validity for American or English wills.¹⁶⁶ On the other hand, the view that the period of limitations for claims against the estate under German law is dependent on a domiciliary probate decree¹⁶⁷ must be rejected.

Recently, an American decedent with his last domicile in New York left personal property in New York and Germany. A creditor filed his claim against the estate with the administrator in New York. The administrator rejected the claim. After a trial, this decision was affirmed by the New York Surrogate Court in a final probate decree.

161. Judgment of Oct. 26, 1967 (BGH), 49 BGHZ 1, 2.

162. For a criticism of the traditional view, see Dölle, *Über einige Kernprobleme des internationalen Rechts der freiwilligen Gerichtsbarkeit*, 27 RABELS Z. 201, 232 (1962) [hereinafter cited as Dölle]; Neuhaus, *Zur internationalen Zuständigkeit in der freiwilligen Gerichtsbarkeit*, 25 N. J. W. 1167, 1168 (1967) [hereinafter cited as Neuhaus].

163. Ferid, in Festschrift COHN 31, 33, 37 (1975).

164. KEGEL, *supra* note 9, at 463; Heldrich, *Fragen der Zuständigkeit der deutschen Nachlassgerichte*, 10 N. J. W. 417 (1967); A. HELDRICH, *INTERNATIONALE ZUSTÄNDIGKEIT UND ANWENDBARES RECHT* 211 (1969).

165. See the discussion and references by Neuhaus, *supra* note 162, at 1167, 1168.

166. Judgment of June 26, 1975 (Oberlandesgericht Köln), FAM. R. Z. 170, 172 (1976).

167. This was the argument of the Landgericht Bonn, quoted in the Oberlandesgericht Köln, *supra* note 166.

Then the creditor sued again in Germany with respect to the assets situated there. A published expert opinion advised the court on whether the creditor was foreclosed from bringing the second claim because of *res judicata*.¹⁶⁸ First, a final probate decree in domiciliary proceedings is given universal effect under the law of New York. Second, such decisions generally warrant the application of the *res judicata* doctrine of the United States. Third, this effect extends to Germany if reciprocity of recognition of judicial decisions is guaranteed. After an exhaustive discussion of the court practice in New York, the reciprocity was recognized.¹⁶⁹ As a result, the creditor's action was barred in Germany by the decree of the New York Surrogate Court.

B. Administration

1. In general

In contrast to American law, the German law of decedents' estates does not, in general, allow for an administration in the Anglo-American sense. The German principle provides for self-administration by the heirs and self-protection by the creditors. It is not surprising, therefore, that American-German cases often cause special difficulties in the field of administration.

These problems are not likely to be resolved by the adoption of the new Hague Convention on the International Administration of Decedents' Estates of 1973.¹⁷⁰ This Convention has received harsh criticism¹⁷¹ and has little chance of being adopted by a significant number of countries.¹⁷² In discussing administration problems, one must distinguish those cases where German law governs the succession from those which are governed by American law.

168. IPG, *supra* note 9, at 420, no. 41 (1973).

169. The discussion focused on the Uniform Foreign Country Money Judgments Recognition Act.

170. *Haager Konferenz für internationales Privatrecht*, 39 RABELS Z. 104 (1975).

171. Lipstein, *Das Haager Abkommen über die internationale Abwicklung von Nachlässen*, 39 RABELS Z. 29 (1975); KEGEL, *supra* note 9, at 473.

172. For the English text and an introduction to the Convention see Nadelmann, *Draft Convention Concerning the International Administration of Estates of Deceased Persons*, 21 AM. J. COMP. L. 139 (1973).

2. German law governing the succession

a. Intestate succession

If the decedent has left no will, the legal situation is simple: no administration will take place. An administration ordered in an American state will be ignored, and the heirs will take their shares under German law as legal successors to the title of the decedent.¹⁷³

b. Testamentary succession

The situation is different with regard to wills only where the testator has made the will according to American law and has appointed an executor. German law recognizes the institution of an executor, but the function of this German executor is the enforcement and fulfillment of special burdens imposed by the testator rather than the regular administration of the estate.¹⁷⁴ Since many American testators appoint an executor only to avoid the appointment of an administrator *cum testamento annexo* by the court, some scholars would like to see the testamentary appointment under German law enforced only if the testator's aim was to confer upon the administrator duties which exceed the regular duties of an administrator according to the Anglo-American concept.¹⁷⁵ Other writers would enforce a testamentary appointment in any case.¹⁷⁶ Insofar as the appointment of the executor is affirmed in Germany, he has only the position of an executor as conceived by German law, even if he administers the estate from his California home together with assets situated in the United States and possibly governed by United States law.

3. United States law governing succession

American succession law is difficult to reconcile with German law, including German procedural rules, which are always applicable as the *lex fori*.

German lawyers try to cope with the difficulties of administration through two approaches. The first avoids foreign law by apply-

173. DROBNIG, *supra* note 1, at 190.

174. Compare the distinction between an executor and a trustee in American law. THOMPSON ON WILLS 773 (1947).

175. FERID, *supra* note 23, at no. 9-83; FERID/FIRSCHING, *supra* note 15, at 40/212.

176. KEGEL, *supra* note 9, at 466; Gottheiner, *supra* note 124, at 60.

ing the *lex fori* to matters of administration, and the other resorts to adaption and similar devices.

a. *Administration governed by the German lex fori*

One proposal would apply the *lex fori* to all matters of administration.¹⁷⁷ Thus, the German conflict rule would refer directly to German law in this respect. But this doctrine is not widely accepted. The next best solution from this point of view is the application of the German *lex fori* by way of *renvoi*. In this regard, German writers have discovered a hidden *renvoi* in the law of the American states, which is said to refer all questions of administration to the *lex situs*, or what is the same in all but a few cases, the *lex fori*.¹⁷⁸ This theory is based on the fact that in the United States, every state holding assets of the estate may order a separate administration, and each administration is governed by the respective *lex fori*. As a result, regardless of the law governing the succession, German substantive law would determine the questions of administration in American-German succession cases. This doctrine is ingenious but does not reflect the reality of American law. American law is concerned with jurisdictional requirements and does not state separate rules for the applicable law. There is no question that an administrator who is appointed by a court in a given state has to act according to the law of that state. Hence, the appointment of an executor justifies the application of the *lex situs* to matters of administration. There is no reference to the *lex situs* independent of such an appointment. The German theory uses the alleged *renvoi* to the German *lex fori* for the very purpose of avoiding the appointment of an administrator, which is not necessary under German law.¹⁷⁹

Moreover, if American succession law and German rules of administration have to be combined, the former has to undergo substantial modification.¹⁸⁰ But it seems more appropriate to adapt German rules of procedure as far as possible to the foreign law of succession, the application of which is ordered by the German conflicts rules, rather than change the applicable substantive law for reasons of procedural convenience.

177. *Supra* note 96.

178. FERID, *supra* note 23, at no. 9-21 and 9-80; FERID/FIRSCHING, *supra* note 15, at 40/172 *et seq.*

179. IPG, *supra* note 9, at 354, no. 36 (1971).

180. K. FIRSCHING, DEUTSCH-AMERIKANISCHE ERBFÄLLE 127-148 (1965).

b. Administration governed by American law

The prevailing view is that American law should be applied to administration. It is, however, disputed among German courts and legal scholars how the American concept of administration is to be put into practice in Germany.¹⁸¹

On the one hand, reconciling the American law of succession with German procedure is seen as impossible. The transposition of American institutions into comparable German institutions is possible only in a few instances. Consequently, this view denies German courts the power to institute an American-type administration, and American administrators or executors are not recognized.¹⁸² On the other hand, the so-called "doctrine of recognition" adopts American principles of administration and recognizes the powers of appointed executors and administrators, at least if they have been appointed by the domiciliary court of the decedent.¹⁸³ Accordingly, the American administrator or executor is entitled to a certificate under German law which spells out his powers under the law of his state of appointment.¹⁸⁴

The first opinion, that German procedure cannot be combined with American substantive law of succession, runs counter to the practice of German courts, which follow the "doctrine of recognition." The second argument, that the powers of administrators are limited under United States law to their respective states and therefore cannot be extended to Germany,¹⁸⁵ is not valid for domiciliary administrators.¹⁸⁶ The domiciliary state in the United States will accept, however, the position of other states which do not recognize or admit acts of the domiciliary administrator, but prefer to institute an ancillary administration.¹⁸⁷ This arrangement among the various states cannot, however, provide an analagous argument against the recognition of American administrators in Germany. First, the tendency even within the United States is towards universal succession, since more and more states allow foreign administrators to sue and

181. Judgment of Mar. 20, 1972 (Kammergericht), IPRspr., *supra* note 26, at no. 123 (1972).

182. *Id.*

183. IPG, *supra* note 9, at 251, no. 32 (1969); IPG 428, no. 41 (1973); Gottheiner, *supra* note 124, at 69.

184. Judgment of Apr. 26, 1976 (BGH), 18 Z. F. RVGL. 133, 134 (1977).

185. IPG, *supra* note 9, at 528, no. 51 (1965/1966).

186. IPG, *supra* note 9, at 705, no. 61 (1965/1966); IPG 428, no. 41 (1973).

187. This was overlooked by the judgment of Mar. 20, 1972 (Kammergericht), IPRspr., *supra* note 26, at no. 123 (1972).

to be sued in their courts and let the domiciliary administrator regulate the estate with respect to all states where the deceased owned property at death.¹⁸⁸ Secondly, the reference of German conflict rules to the American law is unconditional and includes questions of administration. There is nothing in the German law which prevents foreign heirs or administrators from bringing actions against the estate for assets in Germany. Finally, the creditors, who are said to be placed in a disadvantageous position through the recognition of American administrators, have to protect themselves, as in all other succession cases.¹⁸⁹ The "doctrine of recognition" view, therefore, seems to prevail in Germany.

C. Certificates of Inheritance

The issuance of certificates of inheritance is one of the main tasks of German courts in succession cases. The certificate is designed to legitimate the persons who have the title to the estate and may dispose of it. The certificate is issued upon application of persons who have a legal interest in its issuance. In succession cases which are governed by United States law, difficulties arise in the translation of the legal posture into German legal language and concepts.¹⁹⁰ The distributees or residuary legatees are considered "heirs" for purposes of the certificate, the law of a particular state of the United States governs the succession, and the estate is subject to administration under American law.¹⁹¹

German certificates of inheritance do not represent a final adjudication and therefore are not conclusive for American courts, but they may provide prima facie evidence for the correctness of a particular interpretation of the German law.¹⁹²

188. Currie, *The Multiple Personality of the Dead: Executors, Administrators, and the Conflict of Laws*, 33 U. CHI. L. REV. 429 (1966).

189. DROBNIG, *supra* note 1, at 192.

190. FERID/FIRSCHING, *supra* note 15, at 40/212.

191. IPG, *supra* note 9, at 709, no. 61 (1965/1966); IPG 252, no. 32 (1969); DROBNIG, *supra* note 1, at 179.

192. DROBNIG, *supra* note 1, at 181.