Will professionals in other countries be able to rely on a European Certificate of Inheritance for all purposes?

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Before I start this short presentation I want to express my great respect for the excellent way in which the present study has been carried out. Obtaining and compiling the laws of the fifteen states was already no small task, and mapping a workable draft regulation that is at the same time acceptable for all member states was even more difficult. That the employees of the Deutsches Notarinstitut and the two expert counsellors (prof. Dörner and prof. Lagarde) have shown themselves as true Europeans becomes clear from the fact that they had no preferences for their own national (German or French) rules of private international law when formulating the proposals (the application of the national law of the decedent or the scission principle were not advocated by them).

It is also clear from the notice of this conference that this conference is designed to discuss perspectives from which to view harmonisation of the private international law of succession and the relevant rules on jurisdiction and the recognition and enforcement of judgements and national acts concerning succession. My task in this discussion is to contribute to the proposed regulation by holding up to the light the European Certificate of Inheritance (the "ECI") in order to highlight the features that need critical examination. However, before I do so it is necessary to discuss the aim and the character of a European Succession Regulation, since the contents of the ECI may also depend thereon.

1. Aim of a European regulation concerning succession and winding up of international estates; a European Succession Regulation

The inheritance laws of the Member States are characterised by their diversity. Unification efforts for this sensitive field of law still appears insurmountable. In the Netherlands work on modernising the law of inheritance has been going on for fifty-five years. How would this be if the other fourteen states were to be involved in trying to harmonise the substantive laws of succession within the European Union? It might take up to fifteen times this period of time which would mean the project would not be finished until after another eight hundred twenty five years!!!

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Within the European Union the nationals of the Member States can freely move themselves about, and in the different states they can freely acquire property or freely move property. The report makes it clear that the potential number of multistate inheritance law cases is large. This fact, in combination with the time-consuming and expensive way international estates are in legal practice settled, now provides sufficient reasons for adopting a European regulation that will set forth uniform conflicts of laws rules in matters of succession. The primary aim of such a regulation should be an equitable but above all efficient regulation of succession cases that touch upon different EU-states. Predictability and ease of application of the conflicts rules to be formulated are therefore the key words. The ECI belongs with, and should be structured in line with, the legal tools needed to carry out this purpose.

2. Character, structure and scope of a European succession regulation

The contents of the conflicts rules in a European succession regulation will strongly depend on what turns out to be the scope of this regulation. If proposals are exclusively directed to legal matters between EU-states, these intra-European conflicts of laws rules will have a different character than proposed conflicts of laws rules that would also take into regard non-EU member states. When the regulation aims exclusively at the regulation of legal matters between the Member States in an equitable and efficient manner, in my opinion, we are dealing with rules of private *interregional* (interlocal, or interstate) law (hereinafter to be referred to as: “intra-European conflicts of laws rules) for which other principles apply than for rules of private international law. Let me cite some differences.

The private international law conflicts of laws rules of the different countries of the world are part of their national legal systems. Every country has its own conflicts of laws rules formulated in the light of its own national values and standards. On the other hand the interregional conflict of law rules will rely on a common basis within the region. This foundation will be a state link within which the countries concerned are themselves unified. In this way the Netherlands, Aruba and the Netherlands Antilles have been linked in a unified way as parts of the Kingdom of the Netherlands. The same concept applies to the European Community, which is the "state link" by which the Member States have unified themselves. This fact of a common basis (the state link) brings with it specific principles which should be applied in the interregional conflicts of laws, and which do not (or just partly) apply in international conflicts of laws. Furthermore, this basis will bring about another result, namely that all kinds of artificial legal concepts used in attempts to coordinate private international law systems with each other (such as renvoi, harmonisation, Näherberechtigung and

retorsion) will play no role in private interregional law. In a private interregional law system the following principles will have an important role:

a) First of all legal decisions of one Member State will be generally recognised in all other Member States and they can be executed there without additional procedures. There will exist therefore a lot of confidence in each other's jurisdiction. Within the EU this is not an unknown phenomenon. In my opinion the Report therefore rightly adopts this solution where it concerns the recognition and enforcement of decisions in intra-European succession cases.

b) In the interregional conflicts of laws the principle of decisional harmony will be strongly enforced. According to this principle the judge, in whatever Member State a case has been pending, always applies the same law. The prevention of forum shopping will be an important result. Moreover, the common structure of the EC would require this result. The Report also identifies the problem of forum shopping and rightly proposes a conflicts rule that will make forum shopping no longer possible.

c) Moreover, the principle of equivalence applies. This principle also results from the structure of the EC. Under it, respect for each other's culture and legal order play important roles. A preference for ones own law (the *lex fori*) can therefore not exist; the law of the other Member States must be treated in a manner that is the same as one's own law is treated. In addition, public policy will not be quickly asserted against applying the law of another Member State.

The interregional character of the conflicts rules will, in my opinion, also influence the way in which the concerned conflicts rules will have to be structured. In private international law conflicts rules are fashioned in light of the social values and standards of one's own country. The social values and standards of other countries are only taken into account in the abstract; there the conflicts rule has been aimed at a solution acceptable to international criteria. In private interregional law this is set differently. Here it is known which legal systems it concerns (that of the Member States). So, in the formulation of a conflicts rule the social values and standards of all Member States, as well as principles of European law, have to be taken into account.

Finally, there is one other point of difference between private international law and private interregional law. In international conflicts law, in principle every legal system in the world randomly qualifies for application. It is a kind of a "Sprung ins Dunkle". This factor influences the choice for the connecting factors to be used in a conflicts of laws rule. However, in private interregional law it will be completely clear which legal systems possibly qualify for application. Thus, doctrines such as public policy, renvoi, Näherberechtigung and retorsion will in principle have no place. With respect to situations outside of EC borders

these doctrines will still be necessary. This also means then that a distinction will have to be made between the appropriate laws to be applied within - and without the borders of the EC.

Naturally the formulation of intra-EU conflicts rules may be inspired by international conflicts rules of the Member States. However, the last mentioned rules cannot be adopted lock, stock and barrel when they have a character that is not consistent with intra-EU application.

In my opinion the discussion today must primarily concern the intra-EU conflicts rules. Within the European Economic Area also legal obstacles should exist as little as possible. So, the discussion concerning the intra-EU conflicts rules does not have to be made confusing by also involving the national conflicts rules that apply to persons with their habitual residence outside the EU.

Naturally, alongside of these intra-EU conflicts rules international conflicts rules can exist which apply in the relation to persons who are legitimately not EU country habitual residents. The fundamental question that must be placed in this context, however, is whether or not this issue should be left for the international conflicts rules of the member states, possibly in combination with an effort to review the Hague Succession Convention 1989, or whether it should be dealt with in a separate section of the European Succession Regulation in conjunction with the aforementioned effort to establish a new Convention within the framework of the Hague Conference.

The report (*vide* p. 56/57) makes a choice for applying the same rules to intra-EU and international situations; Duality would mean that a distinctive element should have to be introduced in order to distinguish the two conflicts of laws systems. However, I do not consider the fact that two systems must be applied side by side and that for this a distinguishing criterion should be formulated as being too difficult or inconvenient. The scope of the intra-EU regulation will simply be restricted to situations in which the decedent has had a last habitual residence in one of the Member States. Moreover, it must be accomplished in a manner appropriate to the intra-EU character of intra-European conflicts rules.

However, even if it is decided to deal with the international aspects of succession in respect of non-EU countries as well, to my way of thinking this should be regulated in a separate chapter of the Succession Regulation. In that event, the scope of the intra-EU conflicts rules also have to be determined, as discussed above.

3. The connection between the ECI and the applicable law on succession and estate administration

The regulation of ECI's must coincide closely with the applicable law on succession and estate administration. The ECI must contribute to an equitable but, above all, efficient regulation of European legal intercourse concerning cross-

border inheritances. Predictability and ease of application of the conflicts rules and instruments to implement them, such as the ECI, in my view, are thereby the key words. The ECI should be structured in line with this aim. The report (*vide* p. 81) has the same view: the European conflicts rules concerning succession must, among other things, aim for a practical and simple administration of decedents estates.

a) Recognition of foreign certificates of inheritance, or introduction of a European Certificate of Inheritance?

In my opinion, the Report opts on good grounds for a European Certificate of Inheritance. From the standpoint of comparative law it becomes clear that among the Member States there are large differences in the contents of the national certificates of inheritance. The great advantage of the ECI is that a number of substantive requirements can be regulated directly (such as the legitimacy of the beneficiaries, third party protection, and evidentiary functions). functioning). Within the framework of the aim for a practical and simple administration of decedents estates the ECI therefore deserves to be preferred.

b) Must the introduction of the ECI be paired with the unification of conflicts rules in respect of succession and administration of estates?

It is almost superfluous to bring up this question again. One of the main reasons for the lack of success of the Hague Convention of 2 October 1973 on the International Administration of the Estates of Deceased Persons was the absence of uniform conflicts rules in respect of the applicable law on the succession of decedents estates. As the report rightly notices, an ECI only makes sense when it is paired with unification of the conflicts rules as to succession. (*vide* p. 27 and p. 92). To that can be added, in my opinion, that in this context unification of the conflicts rules concerning the matrimonial regime of spouses is just as necessary. The death of one of the spouses affects the matrimonial regime. Within the framework of estate administration the question as to the applicable law on the matrimonial regime will also come up for discussion. It is then both from the point of view of planning and from the point of view of a smooth administration desirable that this question be answered in the same manner in all Member States.

c) Problems concerning the determination of the last habitual residence

The ECI is to be issued by the judge or notary of the country where the decedent had his last habitual residence. By also choosing the last habitual residence as the connection for determining what state's law applies to the succession of the estate in the event no law was designated by a will, "Gleichlauf" is brought about with the competence rule presented in the report (p. 58). By also connect-

ing the issuance of the ECI to the last habitual residence all legal proceedings will be concentrated in the same country.

However, in practice determining the last habitual residence is not always simple.

A more precise explanation of this term, possibly by means of a range of examples, within the framework of the European Succession Regulation is, in my opinion, very desirable. The notary or judge, before he issues the ECI must, determine the decedent's last habitual residence. Some grip on the description of the term "habitual residence" can be found in the explanatory report (by D.W.M. WATERS) on the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, 1 August 1989 (*vide* p. 549):

"It is a regular physical presence, enduring for some time, and a clearly stronger association than 'ordinary' or 'simple' residence, of which the *de cujus* (the decedent MHtW) may have had two or more. However, the manifest hopes and plans of the *de cujus* are also elements that may be legitimately considered by the person who would have to know which State is the habitual residence."

Moreover determination of the habitual residence is not only important *post mortem*, it is also very important within the framework of lifetime estate planning for death! An appropriate designation of the law of the habitual residence (either at the time of choice of law, or directed to the time of death) can only have an impact (legal effect) when there is such a habitual residence. For the practice of furnishing estate planning services therefore within the framework of providing adequate advice, it will be necessary to be able to have a grip on possible habitual residence issues.

With a view to the easy application of conflicts rules it therefore deserves to have recommendations that provide closer consideration devoted to the contents of the term "habitual residence".

Moreover, it is deserving of consideration to examine whether the notary or judge who must issue the ECI should have another tool that can be provided in the form of a presumption (like the one that is used in Article 4, paragraph 2 of the European Contracts Convention 1980). For example, in the sense that it is presumed that, when the decedent had his place of residence (which could be defined as the place where he is registered in the civil registration of a municipality; the place where he can be summoned in court) during a certain time (for example, five years) in the country where he dies, that he had his habitual residence there at the time of death. This will eliminate the need for the notary or judge to do a thorough study into the expectations and plans of the decedent. This presumption would be able to offer a solution, for example, with respect to the thousands of Dutch families who have their houses in Germany only a few kilometres from the Dutch border, which are houses that are much larger and cheaper than those in the Netherlands but where the husband works generally in

the Netherlands and frequently the children also go to school in the Netherlands. Also, the question where the habitual residence is of elderly people who live during the six winter months in Southern Europe and the other six months in their homeland can be more easily answered by use of this presumption.

I note here that the presumption of the five year period differs from the following rule laid down in Article 3, paragraph 2 of the Hague Succession Convention 1989:

> "Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death."

The Dutch in legal practice came across some difficulties in applying this rule.

d) Extension of the right to choose the applicable law in order to have a less time consuming administration of decedents estates?

I suspect a considerable portion of the international decedents' estates that exist include holiday houses abroad (exact figures are not available, but the Report p. xxiv mentions for Germans alone already a number between 800,000 and 1,000,000). The application of foreign succession laws (for example the Dutch parental division on French immovable property) on the immovable property (holiday houses) in another country leads to a conflict with the *lex rei sitae* and will cause delay in the administration of this part of the decedents estate. The question arises whether or not it would be desirable for the testators to be granted the competence to choose the law of the *lex rei sitae*. This could shorten the time for the administration of the estate considerably. In such cases succession and the administration is split in two, which would mean that there would also be two authorities competent to issue an ECI for each of the two parts of the inheritance. Of course, this would also mean an extension of jurisdictional grounds. Would such a partial competence to choose violate the unity principle? The Report (*vide* p. 57) contains as an argument for the unity principle and as the biggest disadvantage of the scission principle the fact that the testator cannot make in advance of death an appropriate arrangement with respect to the transfer of his property upon death to his children. Here the choice for the *lex rei sitae* is now proposed precisely as an instrument to enable planning for such inheritance rights in a practical manner. An additional advantage would be that the chosen succession law of the *lex rei sitae* could be connected to the chosen *lex rei sitae* for the matrimonial regime of the spouses, which would also lead to a very practical administration of this part of the decedents' estate. Extension of the right to choose the applicable law in respect of immovable property must thus be viewed especially from the standpoint of efficient estate planning.

4. As to the ECI requirements in light of the ECI's aim and function; Trust is good, certainty is better

The aim of the ECI is to promote the practical and simple administration of international decedents estates (*vide* Report p. 27 and p. 92). In that regard the ECI thereby will only work well in practice when authorities and private institutions in other Member States can rely on the correctness of the contents of the ECI. To my way of thinking, trust in this respect can only be established by at least making it clear in the ECI why the authorities are competent to issue the certificate, why a certain law is applied to the succession, and what the entitlements of the various beneficiaries are. Does the ECI presented here meet these requirements?

It appears from the Report that the ECI will contain the following elements:

a) Statement of the issuing authority

The issuing authority must be mentioned in order to enable authorities and private institutions in other countries to verify the contents of the certificate, or to request rectification or withdrawal of the certificate. In my opinion it is also desirable here to indicate on which grounds the issuing authority considers itself competent for that purpose. An extensive enumeration of the facts (possibly in combination with the proposed five year presumption) that lead to the conclusion that the decedent had his last habitual residence in the Member State of the authority that issues this ECI, will certainly make it easier to accept such an ECI in the other Member States. Trust is good, certainty is better; legal practitioners normally want to verify for themselves whether the contents of a foreign legal document meet the requirements of law.

b) Statement concerning the person of the testator

The Report (*vide* p. 93) correctly states that the facts concerning the person of the decedent must establish his identity with certainty. The connection of this requirement with the Hague Convention 1973 on the International Administration of the Estates of Deceased Persons 1973 seems a good choice.

c) Statement in respect of the law of inheritance in absence of a last will

The report proposes, and I agree, that it is desirable that the ECI also indicate the heirs and their actual portions of the estate. Particularly when there is no estate representative present at the time, this task offers the possibility to the heirs, jointly, to get access to property in another Member State.

In connection with the preceding, I consider it desirable that the issuing authority also indicate how it determined the applicable law. In absence of a last will, the law applicable is the same law as the one on which the authority based its competence for the issuance of the ECI. Therefore, for the way it determined the last habitual residence it could refer to the statement under a) above.

d) Statement concerning last wills

First of all I would strongly advise setting up an (electronic) European register of last wills. Reference should be required to be made to such register. The ECI needs to express the results of consulting that register, and of any other registers which have been consulted.

Indeed, attaching a certified copy of the last will to the ECI with a view to facilitating its conversion in cases of unknown legal concepts under the *lex rei sitae* appears to be a good measure.

Similar to the observation under c) above, in the event of a last will, it is even more desirable to indicate in the ECI how the issuing authority has determined the applicable law: by the testators' choice for his national law or the law of his habitual residence, either at the time of choice or at the time of death. Then it must be established with certainty that the testator had such nationality at that moment. The same applies to the point about applying a choice of the law of the decedent's habitual residence. The point of the last habitual residence can be referred to in the statements discussed under a) above concerning the competence to issue the ECI. If the choice concerns the habitual residence at the time of choosing, then it ought to also indicate in that place the facts that led to the determination of a habitual residence at the time of choice.

To my opinion the ECI should additionally deal with the formal validity of the will. It should point out which law applies as to the form of the will and state, that according to this law, the will is formally valid. The conflict of law rules in this respect will need to be reviewed for intra-European cases. Special attention should be paid to the question regarding minimum form requirements.

The same counts for the question whether the testator had the capacity to make testamentary dispositions. One conflicts of laws rule for intra-European cases is, to my opinion, advisable. The rules for choosing this applicable law then need explanation in the ECI.

Extensive considerations concerning the applicable law here will also contribute to the trust that authorities and private institutions of other Member States will place in the issued ECI.

e) Statement concerning the scope and the authority to dispose of the decedent's estate property

It is indeed very desirable that it be closely specified to which persons the authority is granted in accordance with the succession law applicable to dispose of the decedents' estate property and whether they can act jointly or separately. With respect to the scope of their powers, it seems more practical to make a negative demarcation of these powers rather than to make a long list of assets in respect of which these persons can have such powers.

f) Statement concerning the matrimonial property regime

It might be a good idea to pay attention to the contents of the applicable matrimonial law regime. Often this law also affects the property of the deceased.

g) Referral to the authorities in the State of the applicable law? An ancillary ECI?

Another question that will need answering is whether the issuing authority should apply the applicable foreign law itself, or should for reasons of certainty request the authority in that EU country to issue an ancillary ECI? Legal practice now already is often that the civil law notary or judge demands a legal opinion or statement from a judicial authority in that other country explaining the contents of the applicable foreign law. This, for the heirs, is a costly measure and also leads to serious delays in the administration of the decedent's estate. I would therefore strongly advocate the possibility of requesting an ancillary ECI from the issuing authority in that other country. This ancillary ECI should only deal with the questions concerning the content of that law as far this is questioned, and should not deal with the questions as to the competence of the issuing authority and the conflicts of laws issues, which should be decided solely by the competent authority which that makes the request.

This will save costs and hopefully will accelerate the winding up of the decedent's estate. In order to really achieve these goals an efficient European network of civil law notaries or courts should be established. The CNUE and other notarial organisations can probably assist by setting up such a network.

After the issuing authority receives the ancillary ECI, it can attach this (together with a certified translation) to its own ECI and issue the two together. Only after issuance of the main ECI should both ECI's become effective.

5. The legal effects of the ECI

a) Legitimation of dispositive power

The persons named in the ECI should be considered by government institutions and private institutions and parties to be the persons competent to dispose of the property of the decedent's estate. Any disputes must, in my opinion, be concentrated in the forum of the country of the issuing authority.

b) Adequate protection of third parties' interests

The Report (*vide* p. 96) rightly advocates the protection of third parties who are dealing in good faith with the persons named in the ECI as the persons competent to act in respect of the decedent's estate.

c) Evidence

Subject to counter-evidence, the contents of an ECI will be deemed complete proof of the same. The Report (*vide* p. 97) proposes that counter-evidence can be provided in the presence of every competent judge. Abrogation on the other

hand can only be done by the issuing authority. The question arises whether it would or would not be desirable to bring procedures concerning alleged incorrect contents of an ECI exclusively before a judge of the country of the issuing authority.

6. Remaining questions concerning the ECI

The Report deals with a few other issues concerning the ECI.

a) Is an ancillary ECI necessary, or is simple registration sufficient?

If a legal concept provided for in the applicable law is not used in a Member State where immovable property is located, the question arises whether such state may adapt it to its own legal system, or whether an ancillary ECI is necessary. In my opinion, this issue should be dealt with in a practical manner. Therefore an ancillary ECI would not be absolutely necessary. Stating the reasons for the adaptation in the notarial deed needed to register ownership of the property would be sufficient.

b) Limited scope of the ECI

The ECI is exclusively for cross border use and not for use within the borders of the issuing country. The reason for this limitation on intra-country use is not completely clear to me.

c) Competence to issue the ECI

In the previous pages I advocated the concept of having an ECI and ancillary ECI's.

d) Issuing authority's duty to examine all relevant facts

There can be no doubt as to the obligation of the issuing authority to examine all the facts relevant to the administration of the decedent's estate. Setting up a list of matters they should examine, but that is not limited to those matters, would be helpful. For purposes of acceptance of the ECI in other Member States the issuing authority must be an authority like the civil law notary or a court authority.

e) Abrogation of the ECI

As stated above and in the Report (*vide* p. 99) the procedure for abrogating the ECI should be exclusively in the issuing State, in accordance with its law.

f) Non-EU Certificates

It is interesting to see that the Report (*vide* p. 100) limits the scope of the ECI to the European Union for which it applies the last habitual residence of the decedent. Recognition of certificates of inheritance from non-EU countries should be left for the private international law rules of the Member State involved or should be dealt with in a separate chapter in the Succession Regulation.

7. Conclusion

The proposed solutions of the Deutsches Notarinstitut for the ECI are of high quality and they reflect careful thinking not withstanding my disagreement with some of the points.

I am grateful for the honour of being selected to participate in this useful endeavour.

Prof. ten Wolde: Le Certificat Européen est-il suffisant pour la Liquidation de la Succession à l'Etranger à tous égards? - Sommaire -

Les auteurs de l'étude ont fait abstraction de toute préférence nationale. Leurs propositions montrent plutôt une approche européenne.

Le droit des successions matériel des Etats membres est caractérisé par sa variété. Il existe un besoin d'harmonisation à l'échelon européen. Cependant, cette harmonisation ne se fait pas du jour au lendemain. Il faut compter plusieurs centenaires. Pour cette raison, il faudrait d'abord harmoniser les règles de conflit de lois en matière de successions.

L'harmonisation au niveau européen devrait avoir pour objectif principal la réglementation efficace et équitable des successions internationales. La Réglementation devrait être prévisible et facile à appliquer.

Dans ce contexte, les discussions portent sur le champ d'application d'une éventuelle réglementation au niveau européen, notamment sur la question de savoir si le règlement devrait avoir un caractère interlocal ou même international. En matière de droit international privé de l'UE, il serait important de reconnaître et d'exécuter les décisions dans tous les Etats membres. Pour le commerce juridique interlocal, il serait également important d'harmoniser les décisions. Car il faut respecter la culture des autres Etats membres et ne pas tolérer une préférence du propre droit. Les principes comme l'ordre public, le renvoi et la *Näherberechtigung* ne devant plus jouer aucun rôle au niveau du droit interlocal, ils gardent leur importance en matière de droit international privé.

Dans le cadre des dévolutions successorales transfrontalières, la prévisibilité et l'applicabilité facilitée revêtent une importance particulière. Il faut approuver l'idée de l'étude de créer un certificat d'héritier européen au lieu de reconnaître les certificats d'héritiers étrangers. Les grandes différences dans les ordres juridiques nationaux sont incompatibles avec l'idée de la reconnaissance. Un certificat d'héritier européen permettrait par contre de régler directement certaines conditions. Il devrait accompagner l'harmonisation de la loi applicable. La dernière résidence habituelle, comme critère de rattachement proposé par l'étude, n'est pas toujours facile à constater. Il faudrait donc donner une définition exacte de la notion.

Le certificat d'héritier européen ne sera d'utilité dans la pratique que si les instances qui le délivrent bénéficient de la confiance. L'instance compétente devrait désigner la loi applicable ainsi que les faits justifiant la résidence habituelle. La liquidation de la succession pourrait être facilitée par un registre européen des testaments tenu sous forme électronique. Le certificat d'héritier de-

vrait porter sur la validité formelle du testament et sur la capacité de tester du *de cujus*. Il faut qu'il contienne des informations sur le champs d'application et sur la compétence de l'autorité qui délivre le certificat d'héritier. Par ailleurs, il faut y inscrire le régime matrimonial puisque celui-ci produit des effets sur les biens successoraux. En plus, *ten Wolde* examine la nécessité de créer un certificat européen complémentaire.

Ensuite, la contribution traite les effets du certificat d'héritier européen: Légitimité, bonne foi, force probante. Finalement, *ten Wolde* soulève la question de savoir si le certificat d'héritier européen, pour faire l'objet d'une inscription au livre foncier, demande l'authentification d'un acte, la question de la compétence pour délivrer et retirer ce certificat et enfin, la question des problèmes dans les rapports avec les Etats qui ne font pas partie de l'UE.

Prof. ten Wolde: Genügt der Europäische Erbschein in jeder Hinsicht zur Nachlassabwicklung im Ausland? – Zusammenfassung -

Die Verfasser der Studie haben sich nicht durch nationale Präferenzen leiten lassen, vielmehr haben sie bei ihren Vorschlägen einen europäischen Ansatz gefunden.

Das materielle Erbrecht der Mitgliedstaaten ist durch seine Vielzahl gekennzeichnet. Es gibt ein Bedürfnis dies zu harmonisieren, doch wären für eine Harmonisierung auf europäischer Ebene mehrere 100 Jahre zu veranschlagen. Aus diesem Grunde sollten primär die Kollisionsnormen des Internationalen Erbrechts vereinheitlicht werden.

Hauptzweck einer Harmonisierung sollte dabei eine faire und effiziente Regelung von Nachlassfällen in den verschiedenen EU-Mitgliedsländern sein. Die Regelung muss voraussehbar und leicht anwendbar sein.

Diskutiert wird der Anwendungsbereich einer etwaigen Regelung, also die Frage, ob die Verordnung eine nur interlokale oder eine internationale EU-Regelung sein sollte. Im interlokalen Privatrecht der EU wird von besonderer Bedeutung sein, dass Entscheidungen in allen Mitgliedsländern anerkannt und vollstreckt werden. Weiteres wichtiges Prinzip für den interlokalen Rechtsverkehr ist die Notwendigkeit eines Entscheidungseinklangs. Schließlich ist die Kultur der anderen Mitgliedsländer zu achten und eine Präferenz für das eigene Recht darf nicht bestehen. Während Prinzipien wie ordre public, renvoi, Näherberechtigung im interlokalen Recht keine Rolle mehr spielen dürfen, werden sie im internationalen Privatrecht weiterhin von Bedeutung bleiben.

Im Rahmen der internationalen Nachlassabwicklung bei grenzüberschreitenden Fällen ist von besonderer Bedeutung die Voraussehbarkeit und eine leichte Anwendbarkeit. Hinsichtlich der Frage, ob ausländische Erbscheine anzuerkennen sind oder ob ein einheitlicher europäischer Erbschein geschaffen werden sollte, ist der Studie zuzustimmen. Einer Anerkennungslösung widersprechen die zahlreichen Unterschiede in den nationalen Rechtsordnungen. In einem europäischen Erbschein hingegen können bestimmte Anforderungen unmittelbar geregelt werden. Er sollte gekoppelt werden an einen Gleichlauf mit dem anwendbaren Recht. Das in der Studie vorgeschlagene Kriterium des letzten gewöhnlichen Aufenthaltsortes ist nicht immer einfach festzustellen. Dieser Begriff wäre genauer zu bestimmen.

Ein europäischer Erbschein kann nur funktionieren, wenn die ausstellende Instanz Vertrauen besitzt. Die zuständige Instanz sollte das anwendbare Recht angeben, sowie die Tatsachen, worauf sich der gewöhnliche Aufenthalt begrün-

det. Zur Nachlassabwicklung aufgrund Testaments sei ein elektronisches europäisches Testamentsregister hilfreich. Der Erbschein sollte Aussagen zur Formgültigkeit des Testaments treffen und zur Testierfähigkeit des Erblassers. Erklärungen über den Anwendungsbereich und über die Zuständigkeit der Behörde, die den Erbschein erstellt, sind aufzunehmen. Aufzunehmen sind auch Erklärungen über das Ehegüterrecht, da sich dieses auf das Nachlassvermögen auswirkt. Untersucht wird weiter die Notwendigkeit, einen zusätzlichen europäischen Erbschein zu erstellen.

Nachfolgend geht der Beitrag auf die rechtlichen Auswirkungen des europäischen Erbscheins ein: Legitimationswirkung, Glaubenswirkung und Beweiswirkung. Abschließend wird erörtert, ob dieser europäische Erbschein einer zusätzlichen Urkunde bedarf, wenn die Registrierung im Grundbuch erforderlich ist, die Zuständigkeit für die Ausstellung und die Einziehung des Erbscheins sowie die sich stellende Problematik im Verhältnis zu nicht EU-Mitgliedsländern.