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Adapting rights in rem

 Germany

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European Judicial Network
(in civil and commercial
matters)

1 Which are the rights in rem that could arise from a succession under the law of this Member State?

Under German law all of the deceased's property, i.e. all rights and obligations, are transferred to the heirs upon death. If the deceased leaves his/her estate to several heirs, it becomes the joint property of the heirs in accordance with Section 2032 of the Civil Code (*Bürgerliches Gesetzbuch*). New rights in rem do not arise by virtue of succession. Bequests and instructions on the division of the estate by the deceased are only effective under the law of obligations.

However, experience since the entry into force of the EU Succession Regulation has shown that limitations on dispositions in particular can pose problems because of provisions relating to provisional and reversionary succession (*Vor- und Nacherbfolge*) in German law (Sections 2100 to 2146 of the Civil Code). Under this process the deceased appoints a number of successive heirs, whereby one person (*Nacherbe*) becomes heir under subsequent succession only after another person (*Vorerbe*) has been heir beforehand. However, the reversionary heir acquires expectancy (*Anwartschaftsrecht*) on the death of the deceased. Expectancy is a legally secure position arising in cases of acquisition covered by several acts whereby the first beneficiary can no longer unilaterally prevent the property from subsequently being acquired (*Eigentumserwerb*) by the other beneficiary. Expectancy is not explicitly regulated by the Civil Code. Therefore, because of the exhaustive list of rights in rem (*numerus clausus* in property law), it cannot be characterised as a right in rem. However, it does represent a subjective right with effect in rem.

Provisional and reversionary succession come with numerous limitations and obligations for the provisional heirs, in particular limits on their powers of disposition. Dispositions of land are invalid under subsequent succession if they infringe upon the rights of the reversionary heir (Section 2113(1) of the Civil Code). The same applies to dispositions of gifts (Section 2113(2) of the Civil Code). The deceased can, however, exempt the provisional heir from some of these restrictions under a disposition of property upon death. The 'exempted provisional heir' can then sell the property and use the proceeds. Exemption from the prohibition on gifts under Section 2113(2) of the Civil Code is not possible. If the property is sold, the sale price must therefore correspond to the market value. Restrictions on disposition under subsequent succession must be entered in the German land register.

2 Are these rights in rem recorded in a register of rights in immovable or movable property and, if so, is such recording compulsory? In which register(s) are they recorded and what are the registration requirements and procedure?

Under German law, all of the deceased's rights are automatically transferred to the heir or joint heirs upon his/her death. These rights, and even rights that require registration, need not be recorded in a register for that purpose. In so far as rights that require registration are involved, the relevant registers (land register, register of companies) will no longer be accurate upon accrual of the inheritance and must be amended. For this purpose,

succession must be proved by official or authenticated instruments or a European Certificate of Succession. Certain subsequent transactions (e.g. encumbrance of inherited land) require correction by means of registration of the heir or joint heirs in the land register. Registration in the register of companies is generally not a prerequisite for the validity of subsequent transactions, but is merely the basis for the good faith effect of the register.

The restrictions on disposition linked to provisional and reversionary succession and the expectancy of the reversionary heir also arise directly on the death of the deceased. However, provisional and reversionary succession are recorded in the land register in order to prevent good faith acquisition without encumbrances by third parties (recording of reversionary heirs, Section 51 of the Land Registry Code [*Grundbuchordnung*]). Any exemption of the provisional heir is also recorded in the land register.

If individual heirs or beneficiaries have a claim (under the law on obligations) on specific assets by law or disposition of property upon death, ownership of these assets must be transferred to them by means of a contract with the heirs and any real estate rights must be recorded in the land register on the basis of official or authenticated instruments or a European Certificate of Succession.

3 Which effects are linked to the registration of the rights in rem?

The registration of rights in rem transferred to an heir or joint heirs as a result of succession is merely declaratory. It does, however, form the basis for the good faith of third parties and is necessary for certain subsequent transactions.

4 Are there specific rules and procedures in place for the adaptation of a right in rem to which a person is entitled under the law applicable to the successions in case the law of the Member State in which the right is invoked does not know such right in rem?

Rights in rem not known under German law are generally adapted to a similar German legal concept under Article 31 of Regulation (EU) No 650/2012 (EU Succession Regulation). German law does not provide for special procedural rules to adapt rights in rem.

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