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In the latest in a series of articles on foreign probate, ***Veit Klinger*** *and* ***Jan Henrik Frank*** *highlight the differences between UK and German probate, and the process of administering the German estate assets of a UK-domiciled decedent*

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German probate law differs in man2y ways from the English system. The German system tends to be less formal than the English system in many respects, as demonstrated by the fact that many German estate assets can be dealt with without complications or court oversight. This article provides a brief introduction to German probate law and practice.

APPLICABLE INHERITANCE LAW

Under the rules of German private international law, succession, administration and distribution are governed by the law of the nationality of the decedent at the time of their death. Generally, the situs of the estate is not relevant. As an exception to this rule, German courts apply English law with respect to immovable property situated in England, irrespective of the nationality of the decedent. Additionally, German private international law allows for the courts to relate back. Thus, German courts will apply German law with respect to German immovable property if the decedent was a British citizen domiciled in England.

Under the rule of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012, which applies from 17 August 2015, German courts will always apply – even with respect to immovables – the law of the last habitual residence of the decedent. The regulation allows for the court to relate back to German law. Thus, German courts will apply German law with respect to German immovable property if the decedent had a habitual place of residence in England.

Additionally, under the regulation, the testator can choose the application of the law of the country of which they are a citizen at the date of death. As the UK has opted out and will not apply the regulation, it is currently unclear if British courts will recognise this choice-of-law provision.

BASIC LEGAL PRINCIPLES

Under German law, the heir (*erbe*) – unlike the legatee (*vermächtnisnehmer*) – takes on all the rights and liabilities of the decedent (this is the principle of universal succession) upon the death of the decedent, by operation of law and without any declaration of acceptance of inheritance (this is the principle of direct acquisition).

The heir can repudiate the inheritance within six weeks after they have received knowledge that they may have inherited. If the place of residence of either the decedent or the heir is outside Germany, the repudiation period is six months. If the decedent died testate, the period does not start to run before the heir has received a court-certified copy of the will from the probate court. If the heir does not repudiate the inheritance, they are personally liable for the estate's debts. However, the heir can limit their liability by initiating estate insolvency proceedings.

Generally, the estate is not administered by a personal representative, but by the heir themselves. However, the testator may appoint an executor in their will and give that executor the right to administer and distribute the estate. The testator may also appoint an executor to administer the estate for up to 30 years (for instance, in the case of a minor heir).

If the decedent leaves more than one heir, the estate will become joint property of the community of co-heirs, and the heirs are called to jointly administer the estate. Generally speaking, any act of administration requires a unanimous decision of the community of co-heirs. However, certain exceptions apply to this general rule.

The testator is free to make a will and make all dispositions allowed

International private client

PS magazine's occasional 'International probate' series covers handling estates with an international element. Articles on the series so far cover:

- accidental revocation of wills (July 2011)
- cross-border estates (January 2011, March 2012)
- cross-border mental capacity (September 2011)
- domicile and residence (January 2011, September 2012, January 2013)
- EU succession (January 2013)
- France (May 2009, September 2011, May 2012, July 2012)
- Germany (January 2013)
- The Hague Convention (May 2012)
- Hong Kong and the British Virgin Islands (November 2010)
- Portugal (January 2010)
- Spain (July 2009, May 2012, November 2012)
- taxation of non-UK trustees (March 2011)
- USA (November 2009)

under the German civil code (*Bürgerliches Gesetzbuch*). However, the spouse and descendants – and, if the decedent left no descendants, parents – are entitled to the statutory forced share. The forced share amounts to half of the net value of the share the forced heir would receive in case of intestacy.

Other acquisitions upon death (such as the accrual of a joint tenant or claim against banks out of payable-upon-death accounts) will be added to the estate in order to compute the statutory forced share. The lifetime gifts of the decedent in the last 10 years prior to their death – or, if the gift was made to the spouse, before that – may be added to the estate in order to calculate the statutory forced share (clawback). Transfers to trusts may be deemed to be lifetime gifts. However, many trust assets are deemed to form part of the estate under German law, regardless. The forced share must be claimed within three years, and otherwise becomes time-barred.

The testator can either make a public will or a holographic will. A public will is usually written and notarised by a German notary, according to the instructions of the testator. A holographic will must be entirely made in the handwriting of the testator, and the testator must sign the will at the end of the text. The date and place of signature should be added, although failure to comply with this obligation does not necessarily make the will invalid. No attestation or signature of a witness is necessary, and there is no tradition in Germany that wills are witnessed. As Germany is a member state of the Hague Convention on the formal validity of wills, Germany recognises a will as properly executed if it complies with the internal law of either:

- the country of nationality of the deceased; or
- the place where the deceased made the will; or
- a place in which the deceased had their domicile or habitual residence;
- as far as immovable property is concerned, the place where the property is situated.

In case of intestacy, the relatives of the deceased, especially their issue and their surviving spouse, are the first entitled to claim inheritance rights. The share of the surviving spouse depends on the matrimonial property regime. The children of the deceased share the remainder in equal parts. If the decedent made lifetime gifts to a child, the other children may claim equalisation.

ADMINISTRATION BY UK ADMINISTRATORS OR EXECUTORS

Generally, German banks, land registries or other institutions do not recognise UK grants of probate or UK letters of administration. Instead, German institutions generally require a German certificate of inheritance (*erbschein*), which names the heirs and proves their full or limited legitimacy to administer the estate. However, if the decedent named an executor in their will, the executor should (additionally) apply for a German grant of probate (*testamentsvollstreckerzeugnis*). An English administrator generally cannot obtain such a grant, and thus cannot effectively administer the estate unless the heirs give the administrator power of attorney.

An application can be made via a German notary or a German consulate. The German notary or consulate drafts the application document, and there is generally no need to seek assistance from a German lawyer. However, in more complex or high-value estates, it may be advisable to seek additional assistance from a German lawyer. The application must be affirmed by at least one heir or, in cases where the testator named an executor, by that executor, in front of the German notary or consulate. Additionally, the applicant must provide documents that support their application (such as a court-certified copy of the will or the grant of probate).

The German notary or consulate sends, upon the request of the applicant, the application document to the competent German probate court, which generally is the court of the last residence of the decedent. The probate court will send a copy of the application document and all supporting documents to all interested persons (such as intestate heirs). If no interested parties object in due course, and the court is convinced that the applicant has the right to receive the requested certificate, the court issues the certificate after payment of the court fees. There is no further supervision by the court – unless there is a formal application of an interested person – and the distribution is made on the basis of the unanimous consent of the heirs, or, if the testator named an executor with the power to divide the estate, on the basis of that executor's unchallenged distribution plan.

Within three months after the death, the heirs or the executor must inform the competent tax office of all relevant facts as far as already known (such as the names of the heirs and their residence, and the value of the estate). Failure to comply can lead to prosecution. The tax office will receive additional information from German banks, insurance companies, notaries and the probate court.

The tax office will, on the basis of all information received, decide whether the executor or heirs will have to file an inheritance tax return. If the tax office does not insist that such a return must be filed, there is no obligation to do so. However, it may become necessary to get a tax clearance certificate (*unbedenklichkeitsbescheinigung*), as German banks generally refuse to make any payments to an heir or executor residing outside of Germany before they have proved that no German inheritance tax is outstanding. This certificate is directly sent to the bank, and the executor and / or heirs are not generally informed.

In many cases, estate assets situated in Germany are not taxable if neither the decedent nor the beneficiaries had a home or habitual abode in Germany at the time of death. Additionally, if the tax-free amounts – which depend on the familial relationship to the decedent – are not exceeded, then no German inheritance tax is due. However, even in this case, the competent local tax authority may demand that an inheritance tax return be filed, and if so, this demand must be complied with.