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INTERNATIONAL ASPECTS OF
GERMAN ESTATE LAW

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

I. Sources of Private International Law

German conflicts of law rules are codified in the Introductory Law to the "Bürgerliches Gesetzbuch" of 1896.¹

The statute gives a very incomplete picture of the private international law in action. Its rules have been partly superseded by international conventions, and the statute has been supplemented and modified by rulings of the courts and legal scholars.² The Treaty of Friendship between the U.S. and the Federal Republic of Germany of 1954³ has little significance for the conflict rules on succession⁴. In cognizance of the sorry fact that the Introductory Law is not only incomplete, but largely outmoded, discussion for its reform has been in progress for many years. The German Council of private international law recently has published proposals for a reform of the private international law in the field of succession,⁵ but for the lack of a lobby in the parliament there is little hope of a new statute.⁶ As a result, for the purpose of ascertaining the German private international law one has to look to court decisions and scholarly writings rather than to the Introductory Law.

II. The General Conflict Rules on Succession

1. Law of Succession (lex hereditatis)

The principle of the unity of succession has in German Law resulted in the adoption of one and the same succession law for movables as well as immovables. This law will be referred to in the following discussion as the "Law of the Succession" or the "lex hereditatis".

a. The National Law of the Decedent as lex hereditatis

As a general rule derived from art. 24 and 25 EGBGB the national law of the decedent at the time of his death governs the devolution of his property.⁷ If the decedent had no nationality, the law of his last habitual residence or of his last residence applies.⁸

Problems arise if the decedent had 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 a modern and prevailing view, the "most effective nationality" has to be decisive, too, even if one of the nationalities was German.¹⁰ The traditional view, however, which is applied still¹¹, rejects this in favor of German as the deciding nationality.

The nationality test fails, however, where there is no single system of law for the whole of the territory of a given country. For example, the law of decedents' estates in the U.S. is left to the various states; there has to be, therefore, an additional rule in order to ascertain the appropriate state within the U.S. A variety of solutions is offered: Some apply the German interstate principle and look to the decedent's last habitual residence.¹² Some look rather to the domicile as defined by the American law, be it the domicile of the 14th amendment as interpreted by the U.S. Federal Courts¹³ or the domicile concept of the common law.¹⁴ In many decisions it is not clear whether the terms "domicile" and "residence" are to be interpreted according to the German or the American concept.¹⁵ However that may be, uncertainty on this point does not seem to give rise to any real practical difficulties.

b. Exceptions to the Nationality Principle

1. Liability for Debts of the Decedent, Art. 24

II EGBGB

With regard to the liability for the debts of the decedent the heirs may choose his domiciliary law instead of his national law (art. 24 II EGBGB). For example, the heirs of a German whose domicile at death was in the State of New York may invoke New York law and, in case an administration

takes place, thereby limit their liability to the estate. A renvoi (a reference by the laws of one country back to the laws of another nation) of the domiciliary law will be accepted.¹⁶ Art. 24 II AGBGB is of little practical significance and will be eliminated in an upcoming revision of the statute.¹⁷

2. Privilegium Germanicum, Art. 25 sent. 2 EGBGB

If the decedent had a foreign nationality but his last domicile was in Germany, German claimants to his estate may 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 (art. 25, sent. 2 EGBGB). The purpose of this outmoded provision¹⁸ 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 for the determination of the succession of U.S. citizens who die domiciled in Germany. "Domicile" in this context has to be interpreted according to German law.²⁰ Since German law accepts the remission (reference) by U.S. law to the domiciliary law of the decedent with regard to movables,²¹ art. 25 sent. 2 EGBGB is meaningless except in cases where an American national died with his last domicile in Germany according to German law but had retained his

domicile within the U.S. according to U.S. law.²²

Of the substantive German law of succession, especially compulsory shares of decedents or surviving spouses, and also inheritance rights of the illegitimate child²³ may be of importance in the context of art. 25 sent. 2 EGBGB.

3. Lex Situs, Art. 28 EGBGB

A concession to the law of the state where parts of the decedent's property is situated, is codified in art. 28 EGBGB: The provision states that, if parts of the property, movable or immovable, are situated in a state the law of which is not to govern the succession but in which, however, certain "special provisions" for certain species of property exist, then these "special provisions" shall apply for this property. Unfortunately, the meaning of the term "special provisions" is not entirely clear. Obviously included are such provisions as govern the devolution of certain kinds of property, like feudal rules for family property or special provisions for the inheritance of farms.²⁴ Doubtful are special provisions for other kinds of property in the private international law of countries, where the reason for a different treatment in the internal law and consequently the distinction itself have faded away. Since there are no special substantive interests of these states to have their own law applied, it is argued that art. 28 EGBGB should not

be interpreted to command the application of the *lex situs* in such cases.²⁵ The prevailing view and the courts however extend art. 28 EGBGB to special conflicts rules which have no counterpart in the internal law of the state of the *situs*.²⁶ Thus, if a German decedent leaves immovables situated in the U.S., the law of the American state in question will govern the succession of these immovables (art. 28 EGBGB), while German law (as the national law of the decedent) will apply to the succession in all other aspects.

4. Renvoi, art. 27 EGBGB

By far the most important exception to the nationality principle is the broad admission of *renvoi* (reference to another nation's laws) in German law (art. 27 EGBGB). The reference to the national law of the decedent in art. 24 and 25 EGBGB is understood as well as a reference to the conflict rules of that country. Hence, a remission (reference) or transmission (reference to the laws of a third country) contained in such rules will be respected.²⁷ The *renvoi* is especially important for German-American succession cases. "American" law as the national law of a decedent, as interpreted by German courts, refers to the domiciliary law for movables²⁸ or to the *lex situs* for immovables.²⁹ If this means a *renvoi* to German law (on the basis of the last domicile of the decedent in Germany or of real property in

Germany), the remission is understood to refer exclusively to German substantive law, and not to the German conflict rules.³⁰ In order to avoid an international ping-pong match between the conflict systems, German substantive law will be the law of the succession, if and in so far as the national law of the decedent refers back to German law.³¹ Since by way of renvoi the German principle of unity-of-succession may be abandoned, arguments have been advanced in favor of a double-renvoi, (reference back by the country to which the original reference was made) back to the national law,³² 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*,³³ questions arising in the context of the foreign law will be classified in accordance with the law of *lex causae*.³⁴ In applying the conflicts law in a given American state, German courts will, for instance, look to the domicile concept of the law of that state. However, this is not true with regard to the question whether certain property is movable or immovable. The laws of the American states seem to refer this question of classification to the *lex situs*,³⁵ so that 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;³⁶ not so where mortgages³⁷ or company shares³⁸ are concerned, or even institutions of German law which are unknown to Americans, like a spouse's right upon the dissolution of the marriage to a share of the savings effected by the other during the marriage ("Zugewinnausgleich", § 1371 BGB).³⁹ German courts are muddling through by applying internal dogmatic concepts of classification which appear scarcely suitable for international purposes. The only assistance to the courts is the guideline of the Federal Supreme Court stating that, in order to preserve the endangered unity-of-succession, property rights should be classified as movable as often as possible.⁴⁰ A more functional approach to the problem of classification has been suggested,⁴¹ but has not yet been 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.⁴² 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.⁴³

And a will which is invalid under the law of the domiciliary state of the American decedent, but valid according to German law, can be upheld with regard to German immovables.⁴⁴

¶

c. Summary

With respect to American-German relations the general position of German private international law of succession may be summarized as follows:⁴⁵

(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 the American decedent was domiciled at the time of his death 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 (art. 25 sent. 2 EGBGB).

(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 U.S. (Art.

2. Limits to the lex hereditatis

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

a. Preliminary Questions in General

There is no unanimous view in Germany with regard to 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.⁴⁶ This method, which seems to be followed by most of the U.S. courts also, guarantees the harmony of decisions on the national level at the expense of international harmony. The opponents of this practice⁴⁷ 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 would the foreign courts thereby assuring international uniformity of decisions. The determination of preliminary questions according to the lex causae fails, however, where international uniformity has been disregarded at an earlier stage: for example, the marriage between a Greek and a German, concluded in Germany before the registrar as prescribed by

German law (art. 13 EGBGB), will be held valid in Germany, but invalid in Greece, where solely the religious form of marriage 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 is here the *lex hereditatis*. This will not be accepted in Germany; the marriage is held valid under German law, and, thereby, the limping marriage continues in the form of a "limping" succession.⁴⁸

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.⁴⁹

b. Assets belong to the Estate

Preliminary to the actual application of any law of succession the question must, of course, be asked: Which assets are part of the estate? In general, the estate consists of assets in which the decedent had a legal interest and the distribution of which is not determined by special rules, i.e., rules other than rules of succession. Generally, the *lex hereditatis* decides what assets are part of the estate,⁵⁰ but this statement is misleading. 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.⁵¹ We will examine four major problems in this context.

(1) Shares in partnership, trust, etc.

The treatment of shares in companies, which are not considered a separate legal entity,⁵² upon the death of the owner is rather clear. 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 that country where the company has its actual seat of administration.⁵³ A renvoi by that law will be accepted.⁵⁴ Whether or not there are special provisions in the charter of the company, it can be stated as a general guide-line: The law governing the partnership determines what assets will go to the heirs. It also determines the kind of procedure by which these assets will be separated from the common assets of the partners. But it is up to the *lex hereditatis* to determine the heirs or beneficiaries who will succeed to the assets distributed by the law of the partnership.⁵⁵

(2) Joint tenancies

American joint tenancies with the right of survivorship

deserve some special comment. In American law, the acquisition of the title by the surviving tenant is considered an intervivos transfer; the decedent's share does not fall into his estate.⁵⁶ There is no equivalent to this in German law, which knows different forms of co-ownership but no 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 the American law, or by virtue of the German conflicts rule for real property calling for application of the *lex situs*.⁵⁷ Since there is not a 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*.⁵⁸

If the joint tenancy has movables as its object (usually bank accounts) the law of the succession and the law of the property may not be identical: 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.⁵⁹ German courts will prefer the law of the contract⁶⁰ and thereby hold the joint tenancy invalid. If the converse

situation (Germans create a joint tenancy with regard to a New York bank account) this rule leads to New York law. Accordingly, the courts will recognize the right of survivorship; the account is not part of the decedent's estate.⁶¹

3. 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."⁶²

What has been given away validly by the decedent as he or she lived 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.⁶³ In Germany, the views are divided. A choice has to be made in order to ascertain the pertinent system of law, between (1) the law of the succession, (2) the law governing gifts inter-vivos and - insofar as bank accounts are concerned - (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 is generally governs

donations, i.e., the domicile of the donor⁶⁴ or his national law,⁶⁵ except, as I have already mentioned, 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.⁶⁶ If the donation is classified as having been made mortis causa the prevailing view holds that questions as to its validity and effect must be decided in accordance with the lex hereditatis, i.e., the national law of the donor at the time of his death;⁶⁷ 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.⁶⁸ Some writers, on the other hand, argue in favor of the national law of the donor at the time the gift was delivered,⁶⁹ at least insofar as the validity of the donation is concerned.⁷⁰

It appears, therefore, that it is of crucial importance to determine how the transfer of a gift is to be classified: as inter-vivos or mortis causa. This classification will be made in congruence with the German lex fori,⁷¹ although it would be more consistent to have this question, too, decided by the lex hereditatis.⁷²

4. 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 art. 15 EGBGB and the case law, this is the national law of the husband at the time of the conclusion of the marriage.⁷³ This law is called the "law of the marital property".

The law governing the marital property will not be affected by a subsequent change of nationality; it is immutable. Therefore where this concept is applied, it may come to pass, that the succession, on the one hand, and the marital property, on the other, are not governed by the rules of one single legal system, but of two. Taking together the two facts, that (1) the domestic rules on succession and marital property are designed to complement one another and (2) that the rules differ so greatly from country to country, we can see that the stage is set for one of the most difficult problems in German conflicts law.⁷⁴ The dualism of the law of marital property and succession is well known in the U.S. as well, arising out of the community property system in several states.

(a) As a general principle, the law of the marital property determines what assets are not part of the estate, but subject to the regime of marital property rules for the death of one 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 that which is left must be distributed.⁷⁵

(b) More difficult is the classification of statutes which reserve parts of the decedent's property for his surviving spouse. Is a given statute concerned with the dissolution of the marital property regime or with inheritance claims of the surviving spouse? This problem of classification, which has to be solved according to the German *lex fori*,⁷⁶ arises with regard to German as well as to whatever foreign substantive law might be applicable under German conflicts rules. As an example we shall consider § 1371 BGB and §§ 201 and 201.5, California Probate Code.

Under German law, the surviving spouse is doubly bestowed; he takes one part as marital property (§1371 BGB) and the other part by way of succession (§1931 BGB). The most disputed § 1371 I BGB⁷⁷ is right on the border line of the two areas of law. In case of an intestacy, instead of the surviving spouse receiving an adjustment claim amounting to one-half of the savings effected by both partners in the course of their marriage, the surviving spouse is entitled to an aug-

mentation of this inheritance claim by one-quarter of the estate. Some classify this statutory portion of § 1371 I BGB as a real part of the marital property, others see it as an inheritance right.⁷⁸

The view which seems to prevail, however, holds § 1371 I applicable only if German law governs both marital property and succession⁷⁹ since elements of both marital property and succession are inextricably interwoven in this provision. This means for German courts that § 1371 I BGB cannot be applied if the marital property is governed by German law, but 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 amount of property he owned at beginning of marriage) during the marriage, the survivor will be compensated by award of one-half of such gains under German marital property law (§§ 1373 seqq. BGB).⁸⁰ The upshot of this is that American courts may ignore § 1371 I BGB unless German law is applicable to both marital property and succession. This might happen if real property of persons domiciled in the U.S. is situated in Germany since American conflict rules prefer the *lex situs* regardless of the marital property or succession context.⁸¹

As another example, several German courts have had to deal with §§ 201 and 201.5, California Probate Code.⁸² According to § 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 thereof the other half goes to the surviving spouse. § 201.5 extends this rule to property acquired during marriage but while spouses were not yet subject to California law. The treatment of these provisions by American law⁸³ 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.⁸⁴ The first half of the community property which goes directly to the surviving spouse under § 201 is clearly part of the marital property regime. The acquisition of the first half under § 201.5⁸⁵ and of the second half under both provisions by the surviving spouse, where there is no testament to the contrary, has been classified as a marital property rule, too⁸⁶ but the prevailing view correctly considers it a matter of succession.⁸⁷

Let me summarize the position of German law with the aid of two hypothetical cases:

An American husband who had married his wife in Germany

at a time when he was domiciled here 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 German. \$80,000 would have been, under California law, quasi-community property of the spouses. How would a German court decide? The law of the marital property will be German law (Art. 15 EGBGB plus renvoi, Art. 27 EGBGB).

The law of the succession will be that of California.⁸⁸ As a preliminary question, therefore, the marital property issue has to be solved. Art. 1371 I BGB cannot be applied since the law of succession is not German.⁸⁹ But the widow may have an adjustment claim against the heirs (§§1373 et seq. BGB) if the husband has effected savings during the marriage. The whole bank account, however, is part of the decedent's estate which will be distributed according to California law. § 201.5, 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" separate property and is distributed in accordance with § 221, California Probate Code.

The converse legal situation may be illustrated by the

following case: An American domiciled in California married a German. He dies with his last domicile in Germany. The bank account in Munich remains the same. The money in such account was acquired in California but thereafter was transferred to the Munich account. The law of the marital property is Californian law (Art. 15 EGBGB). The succession, on the other hand, is governed by German law by virtue of the renvoi in the California law (Art. 24, 25, 27 EGBGB). The widow will take one half of the community property under § 201, California Probate Code right away, that is \$40,000. The remaining \$60,000 are part of the estate.

German law as the law of the succession will give the widow a share under § 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 share is 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 application of § 1371 I BGB which is applicable only if German law governs both marital property and succession.

(c) One of the largest controversies in the field of

marital property and succession centers on the fact that different conflict rules may lead to different substantive laws. Thereby, the close connection between the substantive rules in both fields is destroyed and the result may be intolerable. The laws of some countries let the surviving spouse take a portion of the marital property, but do not provide for him or her in the law of succession. The laws of others furnish the surviving spouse with a share of the estate, but withhold from him or her 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.⁹⁰ German law does not accept such results; a solution has to be found by way of adaption (adjustment). The proposals for a remedy of this situation are numerous, they cannot be expounded here in detail. All I can offer is a brief survey.

Two basic approaches can be distinguished. Since the problem lies in the area of private international law, it is argued, the solution should be provided by this law. The other approach prefers to change the applicable substantive laws in order to reach some balance.

In particular: On the level of private international law, the whole issue may be left to one of the conflicting systems, be it the law of the succession or that of the marital property.⁹¹ An ingenious device was found by the Bayerisches Oberstes Landesgericht. In that case⁹² a citizen of Lithuania had emigrated (1949) to California, had married there in 1960 and died some years later. At the time of his death he was a naturalized U.S. citizen; 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 this case and thereby came to the application of California law which by virtue of § 201.5, California Probate Code, was effective retroactively from the time of the conclusion 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 (here: California) is given retroactive effect.⁹³

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.⁹⁴ Others would prefer the converse solution,

i.e., the incorporation of the succession rules of the law which governs the marital property into the rules of marital property.⁹⁵ Finally, it has been proposed that both substantive laws be applied cumulatively. The surviving spouse takes not more than each of the laws would grant him altogether (maximum limit), but in any case that portion which he would take under both laws respectively (minimum limit).⁹⁶

There is no prevailing view on how to accomplish satisfying results. As a summary it may be said that some adaptive device will be found in any future case in order to achieve a just distribution of the estate. The rest depends on the inventiveness of the judge.

B. INTESTATE SUCCESSION

I. Issues Governed by the Lex Hereditatis

The lex hereditatis determines all main questions of inheritance: the person who will succeed to the estate in the absence of a will, capacity to receive as heir, the acquisition of title to the estate,⁹⁷ and the procedure to renounce it. Since the unilateral disclaimer is unknown with respect to intestate succession in most of the American states, the disclaimer of a German has to be construed as to

its effect if American law governs the succession. According to one view the disclaimer has the same effect as under German law.⁹⁸ Others consider it a contractual transfer of a position acquired by succession.⁹⁹ The correct solution will depend on whether an administration of the estate takes place in the U.S. or not.¹⁰⁰ If not, the beneficiary cannot disclaim his position but may only transfer it contractually.¹⁰¹

The law of succession governs the legal relations between the beneficiaries,¹⁰² their liability for debts of the decedent or of the estate,¹⁰³ and contracts between the beneficiaries regarding the distribution of the assets.¹⁰⁴

Finally, the law of the succession governs the administration of the estate.¹⁰⁵ The question which law in particular is the lex hereditatis in German-American succession cases with regard to administration will be discussed separately.¹⁰⁶

II. Inheritance Rights of Illegitimate children Under German Law

Inheritance claims of illegitimate children differ from those of legitimate descendants under German law. This has some consequences for the conflict of laws. While the ordinary claim of the illegitimate child against the estate (§ 1934 a BGB) is clearly subject to the law of succession,

the provisions of § 1934 d and e BGB, which give the illegitimate child a claim against the father during his lifetime, are not easily classified. Some consider it 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.¹⁰⁷ Consequently, the applicable law would be the national law of the mother at the time of the child's birth (Art. 21 EGBGB) or the law of the child's habitual residence.¹⁰⁸ Others would rather apply the national law of the father as the law which governs the relations between father and illegitimate child in general.¹⁰⁹ The majority, however, seems to prefer the law of succession.¹¹⁰

Let us suppose that a German father pays out the portion required by § 1934 d BGB to his illegitimate child during his lifetime, subsequently emigrates to a state in the U.S. the law of which gives legitimate and illegitimate children equal shares in the estate of their father, and then dies with American citizenship, domiciled in that state. There are three possibilities:

1. The illegitimate child acquires upon the death of his father no share of the estate (the effect of §1934 e BGB is extended to foreign succession law);
2. In order to receive the statutory share the child has to pay back the portion already received;

3. The child keeps the portion already received and takes in addition his statutory share under American law.

As one might expect, views are divided on this issue,¹¹¹ and judicial guide-lines are still missing.¹¹²

III. RULES OF ESCHEAT

Whether an escheat of the estate shall take place is determined by the law of succession.¹¹³ The crucial question is only which state should take the estate. Under German law it will be the state whose law governs the succession.¹¹³ The enforcement of this position, where German law governs assets situated abroad, depends on the lex situs.¹¹⁴

C. Wills and Contracts of Inheritance

I. Choice of Law by the Testator

Choice of law clauses in wills, which may be concluded and which are recognized in some states of the U.S. do not bind a German court by its choice of the applicable law. The arguments in favor of party autonomy (choice of law by the parties) in the field of succession law¹¹⁵ have been rejected by the Federal Supreme Court and the majority of scholars,¹¹⁶ 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.¹¹⁷

The standpoint of foreign private international law vis-a-vis party autonomy must be examined with reference to the problem of the renvoi.¹¹⁸ An example: An American decedent who was a Michigan citizen by origin but who later acquired a domicile of choice in Germany made a will declaring the law of Michigan applicable for the disposition of his personal property. A German court will disregard the choice of law clause within the framework of German conflicts law and follow the reference of Art. 24, 25 EGBGB to the national law of the decedent in this case, Michigan law. That law which as a matter of principle would refer back to German law being the law of the testator's domicile, recognizes the said choice of law clause (§ 702.44 a Michigan Probate Code). Consequently, the German court has 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 the movables.

II. The Formal Validity of Wills

The formal validity of wills is governed by a variety of laws in accordance with the Hague Convention of 1961,¹¹⁹ which replaces Art. 11 EGBGB. The policy of the Convention

is to validate wills as far as possible.¹²⁰ It applies with regard to American decedents as well, although the U.S. is not a party to the Convention (Art. 6, sent. 2 of the Convention). Not only wills, but also the formal validity of the revocation of a will by testament are determined by the rules of the Convention.¹²¹

III. The Essential Validity and Effects of a Will

1. The Applicable Law in General

The lex hereditatis (supra A. II) determines the validity and effect of wills, too. 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 time of the making of the will, it is proposed that the law which would have governed the succession at that time, 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.¹²² The prevailing view, on the other hand, considers the latter law applicable to both validity and effects.¹²³ It is to be noted that Art 24 III. EGBGB makes an exception with regard to the capacity to will.¹²⁴

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,¹²⁵ the right of a testator to disinherit family members,¹²⁶ the validity and effect of conditional or life estates,¹²⁷ the nomination of executors,¹²⁸ and the revocation of wills.¹²⁹

a. Construction

A few comments are necessary concerning the construction of wills. Generally, the will is to be construed according to the law of succession,¹³⁰ 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 as under German law the "presumable intent" of the testator serves as a leading guideline for construction, some concepts of American law can be expected to slip in through the back-door,¹³¹ so to speak. But they will have to be adapted and "translated" into the concepts and institutions of German law.

b. "American" Wills in German Law

(1) 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 of items of property does not qualify as 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.¹³² Beneficiaries of an estate upon absolute limitation (like life estates) will be considered provisional heirs, the remainderman reversionary heirs.¹³³ Estates upon conditional limitation can be upheld nearly unchanged. Since these kinds of legacies are not common in German wills, the greatest difficulties lie in the exact formulation of the certificate of inheritance.¹³⁴

(2) Trusts

The concept of a trust is unknown to German law. The trust is not, however, repugnant to German law

being the *lex situs*¹³⁵ and therefore will be considered valid.¹³⁶ A problem of transposition arises as to the classification of the persons affected by the trust. The trustee who is not a beneficiary at the same time does not qualify as an heir, but rather as an executor under § 2209 BGB.¹³⁷ His powers extend to property situated in Germany, as well.¹³⁸ The beneficiaries of the trust may qualify as heirs, provisional or reversionary heirs or as creditors of the estate, as the case may be.¹³⁹ The same applies to the trustee who is beneficiary at the same time.¹⁴⁰ These rules must be modified with regard to charitable or discretionary trusts on a case by case basis.¹⁴¹

(3) 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 its essential validity and effects.¹⁴² If the *lex hereditatis* is German law, problems of transposition arise out of the fact that the German law in general does not admit such powers (§2065 BGB). This will not be the case, however, if the power is limited to

specified items of property - in this respect there is a comparable institution in German law.¹⁴³ 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 at the same time and has a testamentary power to appoint the remainderman, but in default of such appointment a remainderman is designated by the donor-testator.¹⁴⁴ If the donee has a general power of appointment exercisable inter vivos he will be considered to be an heir.¹⁴⁵ If the power is exercisable by testament only, the general power cannot be upheld under German law.¹⁴⁶

In case of a special power, its validity will depend on the question whether the possible appointees are few and the final choice is mostly predetermined by the testator, leaving the donee little or no discretion.¹⁴⁷

IV Joint and Mutual Wills

In general, the lex hereditatis governs joint and mutual

wills as well. But this statement means little unless it is specified as to certain points.

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 one part.¹⁴⁸ Should the result be that one of the testators is not bound, the reciprocal dispositions of the other will lose its binding effects, too.¹⁴⁹ Under German substantive law there is a presumption that the testator would not have made the will at all in this case, so that the disposition is invalid altogether (§ 2270 BGB).

2. Formal Validity

Two questions must be kept distinct from one another: the question is whether persons may will jointly in a single document; the other question is whether their dispositions are dependent on each other and preclude unilateral revocations. The first question relates to the form of wills, the latter to the effect of joint and mutual dispositions. The formal requirements are determined by the Hague Convention of 1961 (Art. 4). 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 called for by the Convention, for example, the law of the place of making the will. (Art. 1 a of the Con-

vention). However, it may be, as in the case of Italy (Art. 589 Cc), that a country forbids mutual wills for reasons of public policy. In this case, the joint and mutual will of a national of this country is void wherever made.¹⁵⁰

3. Effects

The German courts apply, as a rule, the national law of the testators at the time of death.¹⁵¹ The prevailing view in the legal literature, on the other hand, argues in favor of the national law at the time of the making of the will.¹⁵² Neither theory can resolve all problems: If nationals of the Netherlands, the law of which forbid 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 being the national law of the testators. Understandably, Dutch law does not arrange for a binding effect. The result for German courts will be a non-binding mutual will - an institution not known in either of the interested countries.¹⁵³

4. German-American Relations

a. U.S. Law Governing The Succession

If German courts have to apply the law of an American estate, they look for a separate contract to make or

not to revoke a will in order to determine the binding effect of joint and mutual wills.¹⁵⁴ The argument that such contracts violate German public policy¹⁵⁵ is correctly rejected by the majority of legal scholars.¹⁵⁶ In accordance with the prevailing view in the U.S., German courts will not assume an implied contract merely because the testators have made a joint and mutual will.¹⁵⁷

If German spouses, who have made a mutual will in Germany, become U.S. 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 law of New York.¹⁵⁸ There seems to be no way to secure the effects of German law, as it was proposed.¹⁵⁹

b. German Law Governing The Succession

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 rest after the death of the survivor. 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 who apply the national law of the decedent at the time of death have to apply German law which declares that the mutual will is binding and the second will void (§ 2271 BGB). Those who apply the national law at the time of the making have to apply New York law to the mutual will. Under New York law the violation of a contract not to revoke the will does not make the revoking will invalid. Though it would be consistent to decide this case in the same way as the foregoing (supra a), the court tried to impose the effect of German law upon the mutual will made in New York.¹⁶⁰

V. Inheritance Agreements and Release of Expectancy

Inheritance agreements (Erbvertrage) are unknown to American law, but through the recognition and enforcement of contracts to make wills similar results are reached.¹⁶¹ The contractual release of expectancy has a counterpart in German Law.

1. Form

The formal validity of both institutions is not provided by the Hague Convention of 1961, but by article 11 EGBGB. Hence, the law of succession of the place of the making governs. If a release of expectancy is contained in an instrument signed by a notary public in the U.S. and

German law governs the succession, the release does not fulfil the formal requirements of German law.¹⁶² After ascertainment of the fact that 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.¹⁶³

2. Effects

With regard to the effects there is again a dispute whether the national law at the time of the decedent's death¹⁶⁴ or at the time of making¹⁶⁵ should be applicable. The latter view seems to be the prevailing one 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.¹⁶⁶ Needless to say that if the parties are of different nationality the law of each will apply to his own dispositions.¹⁶⁷

There may be marriage and inheritance contracts which were made together in one document. The applicable law is determined by the classification of the particular provisions. It may be the law of the marital property (Art. 15 EGBGB), of the personal relations of the spouses (Art. 14 EGBGB) or the law of succession.¹⁶⁸

D. PROBATE AND ADMINISTRATION

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

I Probate

1. German Probate Jurisdiction

Contentious litigation with regard to decedents' estates poses no specific problems: international jurisdiction is derived from the venue requirements.¹⁶⁹ But here we will be concerned rather with the jurisdiction in all estate-related matters which arise in the course of a non-contentious proceeding. The question as to the jurisdiction of the courts in this area is hotly disputed and the law seems to be in a state of flux today.

a. Parallelism of Jurisdiction and Applicable Law

Americans are familiar with the principle that a court with proper jurisdiction applies its own law. The traditional and still prevailing view in Germany puts it the other way around, declaring that German "Probate Courts" have jurisdiction if and insofar as German law governs the succession.¹⁷⁰ They have admitted, 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,¹⁷¹ the receiving of declarations of acceptance or disclaimer by the heir,¹⁷² the opening of the will after the testator's death,¹⁷³ the appointment of a curator (custodian-Ed.) or other orders to secure and protect the estate where the heir is unknown.¹⁷⁴ The jurisdiction of German courts is given, moreover, ipso iure with regard to certificates of inheritance and executorship (§§ 2368, 2369 BGB); 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 is not so closely bound up with one another as the traditional view supposes.¹⁷⁵ 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.¹⁷⁶ From this point of view jurisdiction is given provided the case has some connection with

Germany.¹⁷⁷ The discussion focuses rather on the restrictions for exceptional cases.¹⁷⁸ Though it may be said that the views are coming closer to each other,¹⁷⁹ 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.¹⁸⁰ On the other hand, the view that the period of limitation for claims against the estate under German law is dependent on a domiciliary probate decree,¹⁸¹ must be rejected.

In a recent case, an American decedent with 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. This decision was, after a trial, affirmed by the New York Surrogate Court in a final probate decree. Then, the creditor sued again in Germany with respect to the assets situated in Germany. Is he foreclosed by the principle of res judicata? A published expert opinion advised the court as follows:¹⁸² First, the final probate decree in domiciliary proceedings is given universal effect under the law

of New York.¹⁸³ Second, such decisions generally warrant the application of the res-judicata doctrine within the U.S.¹⁸⁴ Third, this effect extends to Germany if the reciprocity of recognition of judicial decision is guaranteed (§ 328 Zif. 5 ZPO). After an exhaustive discussion of the court practice in New York, the reciprocity was ascertained.¹⁸⁵ As a result, the creditor's action was barred in Germany by the decree of the New York Surrogate Court.

II. Administration

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

The difficulties are not likely to be resolved by the adoption of the new Hague Convention on the International Administration of Decedents' Estates of 1973.¹⁸⁶ This convention seems to create more problems than there are already in existence. It has received harsh criticism¹⁸⁷ and has little chance of being adopted by a significant number of countries.¹⁸⁸

Two basic groups of cases have to be distinguished for the discussion of administration problems: Those cases, where German law governs the succession, and those which are governed by the law of one of the states of the United States.

1. 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 as heirs under German law usually do, as legal successors to the title of the decedent.¹⁸⁹

b. Testamentary Succession

The situation is different with regard to wills only where the testator has made the will according to American law and, as usual, has appointed an executor. It has to be remembered that German law knows the institution of an executor, too. But the function of this German executor is the enforcement and fulfillment of special burdens imposed by the testator rather than a regular administration of the estate.¹⁹⁰ Since many American testators appoint an executor only to avoid the appointment of an administrator c.t.a. 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 conception.¹⁹¹ Other writers would enforce a testamentary appointment in any case.¹⁹² Insofar as the appointment of the executor is affirmed in Germany he has the position of an executor of the German style even if he administers the estate from his home in California together with assets situated in the U.S. and possibly governed by U.S. law.

2. U.S. Law Governing Succession

As has been shown, American succession law is difficult to reconcile with German law. This is true with regard to German procedure, too, which is always applicable as the *lex fori*.

Two approaches can be ascertained by which German lawyers try to cope with the difficulties of administration. One approach avoids foreign law by applying the *lex fori* to matters of administration, and the other approach resorts to adaption and similar devices.

a. Administration Governed By The German Lex Fori

I have already mentioned the proposal of Ferid to

apply the *lex fori* to all matters of administration.¹⁹³ Thus, the German conflict rule would refer directly to German law in this respect. But this doctrine is not yet accepted by others. 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, to the *lex fori*.¹⁹⁴ This theory is based on the two facts that, in the U.S., every state where assets of the estate are situated may order a separate administration, and secondly, that the ancillary 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 real attitude of the 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

is the justifying fact for the application of the lex situs to matters of administration. There is no reference to the lex situs independent of such an appointment. Since 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, it abandons its own starting point and we have a vicious circle.¹⁹⁵

Moreover, if American succession law and German rules of administration have to be combined, the former has to undergo substantial modifications by adaption.¹⁹⁶ 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.

b. Administration Governed By American Law

The prevailing view holds the American law to be applicable to administration. It is, however, disputed among German courts and legal scholars how the American concept of the administration is to be put into practice in Germany.¹⁹⁷

One view sees no way of reconciling American law of

succession and German procedure. The transposition of American institutions into comparable German institutions is possible only in few instances. Consequently, they deny the power of German courts to institute an American-type administration. American administrators/executors are not recognized.¹⁹⁸ The so-called "doctrine of recognition", on the other hand, 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.¹⁹⁹ 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.²⁰⁰

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 U.S. law to their respective states and therefore cannot be extended to Germany,²⁰¹ is not valid for domiciliary administrators.²⁰² The domiciliary state in the U.S. 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.²⁰³ This situation between the various states cannot provide an argument by way of analogy against the recognition of American administrators in Germany. First, the tendency even within the U.S. is towards universal succession, i.e., more and more states allow foreign administrators to sue and to be sued in their courts and let the domiciliary administrator do the whole business with respect to all states where the deceased owned property at death.²⁰⁴ Secondly, the reference of German conflict rules to the American law is unconditional, it includes questions of administration, as well. There is nothing in the German law which prevents foreign heirs or administrators from bringing actions against the estate for assets in Germany.²⁰⁵ The creditors, finally, which 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.²⁰⁶

The view, the so-called "doctrine of recognition", seems, indeed, to prevail in Germany.

III. 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 (§§ 2353-2370 BGB). The certificate is issued upon application of persons who have a legal interest in its issuance. In succession cases which are governed by U.S. law a great difficulty lies in the translation of the legal situation in German legal language and concepts.²⁰⁷ This is certainly not of great interest to Americans. It may be generally noted that the distributees or residuary legates are considered "heirs" for purposes of the certificate; but it will be added that the law of a particular state of the U.S. governs the succession and that the estate is subject to administration under American law.²⁰⁸

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.²⁰⁹

Footnotes

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1. Einführungsgesetz zum Bürgerlichen Gesetzbuch, Aug. 18, 1896 (EGBGB); for an English translation of the statute see Drobnig 401 seq.
2. For the role of case law and legal scholarship in Germany see Drobnig 47-55
3. Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America of Oct. 29, 1954, effective July 14, 1956 (BGBI. 1956 II 763)
4. For the impact of the Treaty on German-American estate law cf. Drobnig 154, 171, 182, 193
5. Vorschläge und Gutachten zur Reform des deutschen internationalen Erbrechts (Ed. W. Lauterbach, 1969)
6. The reform proposals will be referred to in the discussion below
7. BGH 2 May 1966, BGHZ 45, 351
 BGH 5 Apr. 1968, BGHZ 50, 63, 64
 RG 8 Nov. 1917, RGZ 91, 139, 140 seq.
 BayObLG 3 Jan. 1967, BayObLGZ 1967, 1, 3
8. Art. 29 EGBGB for stateless persons; Art. 12 I of the Protocol relating to the status of refugees, of 31 Jan. 1967 (BGBI. 1969 II 1294)
9. IPG 1967/1968, No. 66, p. 698; Kegel 202; Palandt/Heldrich, n. 7a) preceding art. 7 EGBGB. Older court decisions preferred the nationality of the country where the decedent was domiciled, RG 24 Jan. 1908, FJG. A II 1, no. 98; but the domicile will coincide with the "closest relationship" in most cases.
10. Ferid, RabelsZ 23 (1958) 498 seqq., followed by: BGH 20 Dec. 1972, FamRZ 1973, 138, 142; OLG Düsseldorf 17 May 1974, FamRZ 1974, 528, 430, OLG Köln 26 June 1975, FamRZ 1976, 170, 171; IPG 1967/1968, No. 67, p. 712; cf. BVerfG 21 May 1974, FamRZ 1974, 579, 586
11. KG 27 Apr. 1973, IPRspr. 1973, no. 105, OLG Hamm 15 July 1975, FamRZ 1976, 107, 168; BayObLG 16 Feb. 1976, FamRZ 1976, 363, 364

12. IPG 1967/68, no. 65, p. 683; IPG 1971, No. 36, p. 352; IPG 1974, no. 22, P. 218
13. IPG 1965/1966, no. 61, p. 698; IPG 1972, no. 34, p. 338
14. IPG 1965/1966, no. 62, p. 711
15. RG 30 Nov. 1906, RGZ 64, 389; BGH 15 Aprl. 1959, NJW 1959, 1317; BayObLG 31 Mar. 1966, BayObLGZ 1966, 115; BayObLGZ 1970, 300, 302; Bay ObLG 27 May 1974, BayObLGZ 1974, 223, 224; OLG Karlsruhe, 29 Aug 1956 FamRZ 1957, 224; cf. IPG 1971, no. 36, p. 351; IPG 1974, no. 22, p. 218; for further references see Drobniq 77 seq.
16. Soergel/Kegel, Art. 24 n. 3; Palandt/Heldrich, Art. 24 n. 4; Art. 24 II EGBGB will be substantially reduced in German-American relations by way of renvoi, if the liability for debts of the decedent is classified as a matter of administration under US-law, combined with an assumed American conflicts rule, which refers all matters of administration to the lex situs, cf. Ferid/Firsching p. 40/160; see infra N. 194
17. Ferid, Vorschläge 24
18. It has raised unanimous criticism and should be discarded in the future, Ferid, Vorschläge 24
19. BGH 15 Apr. 1959, WM 1959, 662, 663
20. BGH 21 Dec. 1955, BGHZ 19, 315, 316; 15 Apr. 1959, supra; 3 May 1961, FamRZ 1961, 364
21. See 4, p. 206 "domicile" for purpose of renvoi will be determined according to US-law
22. Cf. Drobniq 159; this may happen, because the German test for "domicile" is less strict than the American concept
23. See infra N. 167 and accompanying text
24. BGH 14 July 1965, LM no. 1 on art. 28 EGBGB; OLG Köln 1 Dec. 1954, IPRspr. 1954/1955, no. 133
25. Kegel 188 seqq.; Soergel/Kegel, Art 28 no. 11; Wochner,

- Festschrift Wahl 1973, 161, 176 seqq.; Raape/Sturm, Internationales Privatrecht, Vol. 1, 6th ed. 1977, 185 seqq.
26. BGH 5 Aprl. 1968, BGHZ 50, 63, 68; Ferid, no. 3-135 seqq; Ferid, Vorschläge 36; Neuhaus 292; Drobniq 160
 27. RC 2 June 1932, RGZ 136, 361, 365; BGH 21 Nov 1953, BGHZ 28, 375, 380, BayObLG 2 July 1971, BayObLGZ 1971, 238, 241; BayObLG 15 Dec. 1972, BayObLGZ 1972, 383, 385; BayObLG 10 Apr. 1975, BayObLGZ 1975, 153, 154; BayObLG 22 June 1976, BayObLGZ 1976, 151, 157
 28. BGH 15 Apr. 1959, WM 1959, 662, 633; BayObLG 7 Feb. 1958; BayObLGZ 1958, 34, 38 f., BayObLG 14 Dec 1970, BayObLGZ 1970, 300, 304; BayObLG 27 May 1974, BayObLGZ 1974, 223, 225
 29. BGH 5 June 1957, BGHZ 24, 352, 355 = IPRspr. 1956/1957 no. 146; BGH 20 Mar. 1967, FamRZ 1967, 473, 474; BayObLG 15 Dec 1972, BayObLGZ 1972, 383, 386; OLG Frankfurt/M. 29 Dec. 1962; IPRspr. 1962/1963, no. 146; LG Kassel 25 Sep. 1958, IPRspr. 1958/1959 no. 148; IPG 1965/1966, no. 51, p. 523; no. 61, p. 701; IPG 1967/1968, no. 65, p. 685; no. 72, p. 772; no. 74, p. 815; IPG 1972, no. 34, p. 339; IPG 1974, no. 32, p. 344; Neuhaus/Gundisch, RabelsZ 21 (1956) 550, 564 und 43; Ferid/Firsching p. 40/43, 40/183; Drobniq 159
 30. See cases cited supra n. 28,29
 31. The German law was stated correctly in this respect in Estate of Strauss, 347 N.Y.S. 2d 840, 844 (Surr. Ct. 1973)
 32. Kegel 174 seq.; IPG 1967/1968, no. 65, p. 685; no. 74, p. 814; IPG 1971, no. 36; p. 354 n. 23.
The double-renvoi was considered in cases where it was perfectly clear that the foreign national law would accept it and would apply its own substantive rules of succession: AG München 15 Jan. 1974, IPRspr. 1974, no. 130; cf. BayObLG 22 June 1976, FamRZ 1977, 490, 493 (obiter dictum; both decisions with regard to Israeli law). But this cannot be said of the US law. Sometimes the effects of a double-renvoi are reached by over-looking the primary renvoi of the US law: BGH 26 Oct. 1961, BGHZ 49, 1, 2

33. RG 12 Nov 1932, RGZ 138, 245; 6 July 1934, RGZ 145, 121; 11 Apr 1940, RGZ 163, 367; BGH 19 Dec 1958, BGHZ 29, 139
34. RG 5 July 1934, RGZ 145, 85, 86; BGH 5 June 1957, BGHZ 24, 352, 355; BGH 15 Apr. 1959, WM 1959, 662, 663; BayObLG 7 Feb. 1958, BayObLGZ 1958, 34, 38; Neuhaus 123; Ferid/Firsching, p. 40/183; IPG 1967/1968, no. 65, p. 685; no. 72, p. 772; Jayme, ZfRvgl. 1976, 93
35. BGH 5 June 1957, BGHZ 24, 352, 355 = IPRspr. 1956/1957, no. 146; 20 Mar. 1967, FamRZ 1967, 473, 474; for further references see supra N. 29.
This interpretation of US 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 immovable and therefore - consequently, from an American point of view - subject it to its own law. The remission of the classification question is not necessary, therefore, if already the forum state considers the property as immovable. Property is "movable" only if none of the interested states claims it as "immovable"; cf. Smith, Mod. L. Rev. 26 (1963) 16, 33; Neuhaus 124; Jayme FamRZ 1973, 659 N. 6. Beyond that, the remission of the classification question makes no sense, if the situs state generally does not distinguish between movables and immovables, cf. Jayme, FamRZ 1973, 659
36. It is doubtful, if in this case the American law leaves any room for classification by the lex situs, cf. Jayme, ZfRvgl. 1976, 93, 104, and supra N. 35.
37. Mortgages are classified as "movable" by the prevailing view in Germany, IPG 1967/1968, no. p. 774 seqq.; Ferid, N. 3-98; Ferid/Firsching, p. 40/184; Firsching 90. For a different view see BGH 1 Feb. 1952, NJW 1952, 420; Jayme, ZfRvgl. 1976, 93, 105; Rabel IV, 21
38. Company shares are "movable", even if the assets of the company consist largely of real property, BGH 5 June 1957, BGHZ 24, 352, 355
39. The compensation claim is considered "movable" even if the acquired property by one spouse during marriage was real property, LG Wiesbaden 30 Mar. 1973, FamRZ 1973, 657; critical Jayme, FamRZ 1973, 659; ZRvgl 1976,

93, 105

40. BGH 5 June 1957, BGHZ 24, 352, 355
41. Jayme, FamRZ 1973, 659; ZfRvgl 1976, 93, 104 seqq.; with regard to classification in general see Neuhaus 129 seqq.; Lewald, Rec. des Cours 69 (1939-III) 1, 81
42. BGH 5 June 1957, BGHZ 24, 352, 355 = IPRspr. 1956/1957, no. 146
43. LG Kassel 25 Sept. 1958, IPRspr. 1958/1959, no. 146; Drobni^g 164
44. OLG Dresden 6 May 1930, IPRspr. 1931, no. 95; OLG Köln 8 Aug. 1960, IPRspr. 1964/1965, no. 72; Drobni^g 164
45. cf. Drobni^g 161
46. BGH 5 Apr. 1968, BGHZ 50, 63, 70; BayObLG 31 Mar. 1966, BayObLGZ 1966, 115, 121; LG Aurich 7 Sept. 1972, FamRZ 1973, 54; IPG 1967/1968, no. 65, p. 684; Kegel 458; Raape/Sturm, Internationales Privatrecht, vol. 1, 6th ed. 1977, 290
47. KG 18 Jan. 1960, IPRspr. 1960/1961, no. 137; BayObLG 13 Jan. 1961 BayObLGZ 1961, 4, 17; Ferid/Firsching, p. 40/177; for further references see Raape/Sturm, Internationales Privatrecht, vol. 1, 6th ed. 1977, 289 N. 17-28
48. It seems more appropriate to reach this result in application of German law to the status (LG Aurich 7 Sept. 1972, FamRZ 1973, 54) than to resort to adaption devices (cf. Expert opinion of the Max-Planck-Institut in Hamburg, FamRZ 1973, 55, 57)
49. For references see Drobni^g 60; for an outline of German nationality law see Drobni^g 61-74 (there have been some modifications in the meantime, however).
50. BGH 15 Apr. 1959, WM 1959, 662, 663 = NJW 1959, 1317; Kegel 457; Drobni^g 161, 184
51. Cf. Ferid, Vorschlä^ge 33; KG 7 Oct. 1976, OLGZ 1977, 457

52. In Germany: "Personalgesellschaften" like the "Offene Handelsgesellschaft" (OHG) or the "Bürgerlich-Rechtliche Gesellschaft"; in the USA: Partnerships, trusts, certain joint tenancies
53. See Coester-Waltjen, German Conflict Rules and the multinational Enterprise, 6 Georgia J. Int. and Comp. Law 197 (1976) = Corporate Counsel's Annual 1977, Vol. 2, 1315
54. Kegel 270. A partnership with its real seat in the US but incorporated in Germany, will be governed by German law because of a renvoi of the American law.
55. Ferid, Festschrift A. Hueck (1959), 343, 357, 366; Ferid, Vorschläge 38
56. In re Harris Estate, 169 Cal. 725; 147 P. 967 (1915)
57. Drobnig 96; Ferid, Festschrift A. Hueck (1959), 343, 360; Ferid, DNotZ 1964, 517, 521; KG 7 Oct. 1976, OLGZ 1977, 457
58. Ferid, DNotZ 1964, 517, 521
59. Ferid, supra N. 58
60. BGH 15 Apr. 1959, NJW 1959, 1317 = WM 1959, 662, 663; According to Ferid, supra N. 58, p. 525, the same result will be reached in applying American law as the lex hereditatis: Joint-tenancy-statutes have no effect beyond the state borders (Kindler v. Kindler, 169 Neb. 15, 98 N.W. 2d 881 (1959)), so that they cannot be applied in Germany.
61. BGH 15 Apr. 1959, supra; BGH 10 June 1968, WM 1968, 1170, 1172. The classification of joint bank accounts (Totten trusts) as transactions inter-vivos is criticized by Knauer, RabelsZ 25 (1960), 318, 332; Drobnig 194: They want the law of the succession to be applied.
62. Quoted from Kegel, Zur Schenkung von Todes wegen (1972) 30
63. Rabel IV 367 with further references in N. 57

64. OLG Frankfurt/m. 24 June 1964, IPRspr. 1964/1965, no. 37; Raape 481, 529; Ferid no. 6-86
65. Kegel 457. It seems to be doubtful whether German courts would permit a choice of law by the donor. In favor of the parties' autonomy in this respect: Kegel 457; Festschrift Zepos Vol. II (1973) 313, 328
66. See supra N. 61
67. BGH 20 Sept. 1951, IPRspr. 1950/1951, no 111; BGH 15. Apr. 1959, supra N. 60; Raape 443; Knauer, RabelsZ 25 (1960) 313, 334; Ferid, no. 9-68; Ferid, Vorschläge 120; Drobniq 165; Jayme FamRZ 1978, 366, 367
68. Knauer and Ferid, supra
69. Kegel 457; Festschrift Zepos Vol. II (1973) 313, 336; Scheuermann 114
70. Soergel/Kegel, no. 53 preceding art. 24 EGBGB
71. References see supra N. 67. Other views prefer the *lex causae*, be it the national law of the donor at the time of the transaction (Scheuermann 115) or a combination of all possibly applicable laws (Kegel 457; Festschrift Zepos Vol. II (1973) 332 seqq.)
72. Cf. Scheuermann 115
73. BGH 18 Oct 1968, NJW 1969, 369. A *renvoi* will be respected. There are considerable doubts about the constitutionality of Art. 15 and similar provisions of the EGBGB (Art. 17, 19) with regard to the constitutionally guaranteed equality of sexes (Art. 3 II GG, Basic Law). While these doubts are even shared by higher courts (KG 16 Apr. 1975, FamRZ 1975, 627 (Art. 17); OLG Stuttgart 23 June 1975, NJW 1975, 483 (Art. 19); cf. also BayObLG 10 Apr. 1975, BayObLGZ 1975, 153; BGH 14 July 1976, FamRZ 1976, 412), the prevailing view considers Art. 15 EGBGB as applicable law, particularly because only a decision of the Federal Constitutional Court can strike it down; for references see Palandt/Heldrich, Art. 15 EGBGB, N. 2.
74. I cannot share the hope of Graue, 15 Am J Comp L 164,

- 194 (1967), that the problem is "fading away" because of tendencies in substantive law to 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, too, if the decedent was married at the time of his death (Vorschläge 1, 6 seqq.; Muller-Freienfels, Vorschläge 42 seqq.).
75. Ferid, no. 8-128; Ferid/Firsching, p. 40/33, 40/183; Neuhaus, RabelsZ 32 (1968) 542, 544, Rabel I 376; LG München 26 Feb. 1976, FamRZ 1978, 364, 365; Jayme RZ 1978, 366
 76. Ferid Nr. 9-39; Ferid/Firsching, p. 40/35; Palandt/Heldrich, N. 9 preceding Art. 7 EGBGB.
 77. The German "community of gains" or "community of surplus" is explained and the statute reported in English by Graue, 15 AmJCon L 164, 185 seqq. (1967); for the classification problem see Graue, *ibid.* 188 and the exhaustive discussion in Gamillscheg/Lorenz, Vorschläge 66-82
 78. For references, see Gamillscheg/Lorenz, *supra*.
 79. This view was first expressed by Braga, FamRZ 1957, 341; for further references see Gamillscheg/Lorenz, *supra*.
 80. Cf. Graue 15 AmJCompL 164, 189 (1967).
 81. Cf. Drobniq 186. But if the American court would adopt the classification of the *lex rei sitae* (see *supra* text accompanying N. 35), the result could be different: In LG Wiesbaden 30 Mar. 1973, FamRZ 1973, 657 the compensation claim of the American husband (Indiana) 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 (Art. 15 EGBGB) does not know such compensation. This decision concerned a divorce case, but the classification issue is the same, For sharp criticism, see Jayme, FamRZ 1973, 659; ZfRvgl. 1976, 93, 105.

82. Similar questions arise in the law of other community property states. Thus, the former § 83 sub div. 4 N.Y. Decedents' Estate Law was classified as a succession rule, KG 7 feb. 1969, RzW 1969, 341
83. See Graue 15 AmJCompL 164, 193 (1967)
84. Ferid/Firsching, p. 40/179
85. Here the general rule that the classification has to be made according to the German lex fori receives a special meaning; while from an American point of view § 201 and § 201.5 may, with regard to the first half, have to be treated alike, the peculiarities of the German conflict rule on marital property (immutability; national law of the husband at the time of conclusion of the marriage, Art. 15 EGBGB) command a different solution. In cases where Art. 15 EGBGB refers to California law, it would nearly always be § 201 and not § 201.5. In the cases § 201.5 is designed for this provision would not be applicable if classified as a rule of marital property. Thus the whole § 201.5 has to be classified as a rule of succession. This is justified, since the property affected has in reality never been community property. Cf. also Ferid/Firsching, p. 40/181 seq. and infra, N. 87.
86. AG München, cited by Ferid/Firsching, p. 40/179 N. 5; Ettisch, RZW 1968, 381.
87. OLG Celle 10. Sept. 1959, IPRspr. 1958/1959, No. 148 Ferid/Firsching, p. 40/182, who refer to unpublished decisions of the AG München; Erlanger, RzW 1958, 207; Graue 15 AmJCompL 164, 193 (1967); the question was discussed, but left open in BayObLG 30 Mar. 1966, BayObLGZ 1966, 115, 124.
88. See supra II. 1.a).
89. See text accompanying N. 79, supra.
90. See Graue 15 AmJCompL 164, 181, seqq.; Kegel 148-151; Staudinger, Gamillscheg, Internationales Privatrecht Vol. II (1973), Art. 15, N. 344
91. Law of the succession: Neuhaus 131; Drobnig 186; Law of

the marital property: Muller-Freienfels, Vorschläge 42, 53 (de lege ferenda); a differentiation is made by Kegel (151; Soergel/Kegel Art. 15 N. 10): of 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 only mortis causa, the law of the succession should govern exclusively.

92. BayObLG 31. Mar 1966, BayObLGZ 1966, 115, 125.
93. Cf. Kegel 152.
94. Wolff, Das Internationale Privatrecht Deutschlands, 3rd ed. 1954 59; Wengler, RabelsZ 8 (1934) 171.
95. Neuner, Der Sinn der internationalprivatrechtlichen Norm (1932) 69-73; cf. Thiele, FamRZ 1958, 397; Staudinger/Gamillscheg (supra N. 90), Art. 15 N. 361.
96. Staudinger/Gamillscheg (supra N. 90), Art 15 N. 364.
97. The beneficiaries under American succession statutes are considered "heirs" in the German meaning of this notion for the purposes of estate situated in Germany, regardless whether an administration takes place in the US or not; cf. IPG 1965/1966 no. 61, p. 705, 709; no. 62, p. 726; no. 67, p. 791, 791; 1967/1968 no. 74, p. 820, 830; 1969 no. 32, 251.
98. Wengler, JR 1965, 41, 43; Kühlewein, NJW 1963, 142, IPG 1965/1966, no. 51, p. 524.
99. Ferid/Firsching, p. 40/174.
100. Drobniq, 163.
101. The same applies in any case, where the disclaimer is limited to certain assets of the estate, 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 1965/166 no. 51, p. 524.
102. BGH 1 June 1968, WM 1968, 1170, 1171; 29 Jan. 1964, WM 1964, 348, 349; OLG Nürnberg, 20 Oct. 1964, AWD

- 1965, 93; see Drobniġ 193 for more information. The law of the succession does not, however, determine the legal title of the heirs with regard to the single assets: The applicable law insofar as determined by the general conflicts rules for each kind of property; Ferid, Vorschlage 34.
103. But see Art. 24 II EGBGB; Drobniġ 191; cf. IPG 1971, no. 36, p. 350; The German heir of an estate of a California decedent, which is administered there, is not personally liable for debts, as he would be under German law.
With regard to immovables situated in Germany see supra, text accompanying No. 43.
The effect of final probate decrees of American courts in Germany is discussed infra, N. 180 and accompanying text.
104. IPG 1965/1966, no. 73, p. 876.
105. Drobniġ 183; to avoid the complications caused by foreign administration systems in Germany, Ferid has proposed generally to apply the lex fori to matters of administration (Rec. des Cours 1974 II 71; Festschrift Cohn (1975), 31). This proposal was rejected by Kegel 459.
106. See infra D.II.
107. Palandt/Heldrich, Art. 24 EGBGB, No.3.
108. Hague Convention on the Law Applicable to Obligations to Support Minor Children of Oct. 34, 1956, effective Jan. 1, 1962 (BGBI 1961 II 1012; 1962 II 16; 1972 II 589). Insofar as applicable, the convention displaces Art. 11 EGBGB.
109. Siehr, Auswirkungen des Nichtehechengesetzes auf das Internationale Privat- und Verfahrensrecht (1972), 146; FamRZ 1970, 458, 463; Jochem, Das Erbrecht des nichtehelichen Kindes nach deutschem Recht bei Sachverhalten mit Auslandsberührung (1972), 69; this view has been rejected by KG 9 Dec. 1971, OLGZ 1972, 435, 437.
110. Beitzke, StAZ 1970, 236, 237 N. 14; Bosch, FamRZ 1969, 505, 509; Damrau, BB 1970, 467; Soergel/Kegel, N. 22a and 72 preceding Art. 24; Stocker, NJW 1970, 2003.

111. According to Siehr (supra N. 109), 148 Jochem (supra No. 109), 71, and Palandt/Heldrich, 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 the succession, i.e., the national law at the time of the death, to govern the anticipated claim (see supra N. 110).
112. KG 9 Dec 1971, OLGZ 1972, 435, 437 has left the question open. A comparable problem may arise, if the child is not German and dies before his father. German internal law denies inheritance claims of the father if he had to compensate the child's anticipated claim in lifetime (§ 1934 e BGB). Will he take a share under the foreign law of succession? See Siehr (supra N. 109); Jochem (supra N. 109), 74 N. 131
113. Ferid/Firsching, p. 40/189; IPG 1967/1968, no. 78, p. 880
114. In the American states, the conflicts rules seem to refer to the lex situs, so that the states are likely to claim estate situated within their borders even if it is governed by German succession law, cf. Ferid/Firsching, p. 40/119. On the other hand, it was argued, that California law will not insist on its right if another country considers the estate as situated there (concerning the bank-account in Munich of a California decedent), IPG 1967/1968, no. 78, p. 881.
115. Dolle, RabelsZ 30 (1966) 205: cf. D. Müller, RabelsZ 31 (1967) 337; for a limited freedom of choice Scheuermann 137; Kuhne, Die Parteiautonomie im internationalen Erbrecht (1973) 94, 98, 167; Drobnig 168; Dopffel, DNotZ 1976, 335, 347 (choice valid insofar as the testator is free to dispose of his property)
116. BGH 29 Mar 1972, NJW 1972, 1001 = IPRspr. 1972 no. 124, IPG 1972, no. 32, p. 310; Kegel, Festschrift Zepos II (1973) 313, 336; Ferid, N. 9-13; Ferid, Vorschläge 93-104; Ferid, Festschrift Cohn (1975) 31, 38. Party autonomy in the field of succession was rejected, also de lege ferenda, cf. Vorschläge 12, but cf. Neuhaus, FamRZ 1970, 12, 14; Wietholter, Vorschläge 183.

117. BGH 29 Mar 1972, supra N. 116; Dolle, RabelsZ 30 (1966) 205, 211, 216; Dopffel, DNotZ 1976, 335, 347; as to the construction itself, see N. 130, infra, and accompanying text.
118. LG Bochum 21 May 1959, IPRspr. 1958/1959 no. 147; IPG 1967/1968 no. 74, p. 838; no. 70, p. 750; 1973 no. 35, p. 353; Drobnig 168; the problem is overlooked in BGH 29 Mar 1972, supra N. 116.
119. Hague Convention on the conflict of laws relating to the form of testamentary dispositions of 1961, effective Jan. 1. 1966 (BGBl. 1965 II 1145).
120. For a discussion of the rules in particular see Drobnig 166.
121. Art. 2 of the Convention; a revocation other than by testament is not governed by the Convention; the form will be determined by Art. 11 EGBGB, Palandt/Heldrich, Appendix to Art. 24-26 EGBGB, Annot. to Art. 2. A renvoi of the applicable law will not be respected, BayObLG 6 Nov. 1967, BayObLGZ 1967, 418, 426; IPG 1972 no. 34, p. 334.
122. Kegen 460; Soergel/Kegel, N. 29 seqq. preceding Art.24; Jochem (supra N. 109) 73; IPG 1967/1968 no. 71, p. 766.
123. BayObLG 28 Nov 1974, BayObLGZ 1974, 460; Palandt/Heldrich, Art. 24, N. 3; Scheurmann 76 seqq.; Drobnig 167; Ferid, Vorschläge 131-134.
124. The exception is limited to foreign testators who subsequently acquire the German nationality; cf. Drobnig 167.
125. BayObLG 31 Jan. 1961, BayObLGZ 1961, 4, 16; KG 2 July 1962, IPRspr. 1962/1963 no. 144; OLG Düsseldorf, 26 Aug. 1963, IPRspr. 1962/1963 no. 151; IPG 1965/1966 no. 67, p. 783.
126. RG 23 Oct. 1911, JW 1912, 22 (German public policy not violated if the applicable law provides for no forced shares at all); IPG 1965/1966 no. 67, p. 786.
127. OLG Celle 3 Dec. 1956, FamRZ 1957, 273.

128. OLG Frankfurt/M. 25 Sep. 1958, IPRspr. 1958/1959, no. 145; LG München 23 May 1958, IPRspr. 1958/1959, no. 144.
129. OLG Neustadt 29 Febr. 1952, IPRspr. 1952/1953, no. 234; LG Bochum 21 May 1959, IPRspr. 1958/1959, no. 147.
130. IPG 1972, no. 33, p. 328; Ferid/Firsching, p. 40/195.
131. Gottheiner, Anpassungs- und Umdeutungsprobleme bei deutsch-englischen Erbfällen (thesis Tübingen 1955) 136 seqq.; IPG 1972, no. 33, p. 328.
132. This result is widely undisputed, cf. Ferid/Firsching, p. 40/212 with further references; Drobnig 171
133. Gottheiner (supra N. 131) 152; Ferid/Firsching, p. 40/201, 204
134. See the examples given by Ferid/Firsching, p. 40/201 seqq.
135. See supra text accompanying N. 56
136. Kotz, Trust and Treuhand (1963) 97 seqq.; Goldstein, Trust of Movables in the Conflict of Laws (thesis Köln 1966) 78-85; Gottheiner, RabelsZ 21 (1956) 36 seqq.; IPG 1967/ 1968 no. 74, p. 827
137. OLG Frankfurt/M. 25 Sep. 1958, IPRspr. 1958/1959, no. 145; 29 Dec. 1962, IPRspr. 1962/1963, no. 146; LG Wiesbaden 18 Jan. 1960, IPRspr. 1960/1961, no. 138; IPG 1965/1966, no. 66, p. 774; 1967/1968, no. 73, p. 799; no. 74, p. 831; Ferid/Firsching, p. 40/199 and 207; Drobnig 189
138. OLG Frankfurt/M. 2 May 1972, IPRspr. 1972, no. 125
139. See references supra N. 137; Goldstein (supra N. 136) 78
140. See references supra N. 137; the problem seems to be overlooked in IPG 1965/1966, no. 66, p. 774
141. Cf. Gottheiner (supra N. 131) 172; Ferid/Firsching, p. 40/208

142. For a discussion of powers of appointments in a civil law sphere see Lipstein, Festschrift für Wengler, Vol. II 1973, 431-441
143. § 2151 and § 2153 BGB
144. Ferid/Firsching, p. 40/210; IPG 1967/1968 no. 74, p. 831
145. Ferid/Firsching, p. 40/210; Gottheiner (supra N. 131) 168; Breslauer 149
146. Ferid/Firsching supra in N. 6
147. Ferid/Firsching, supra with further references
148. Ferid N. 8-129
149. Ferid/Firsching, p. 40/193
150. BayObLG 13 Dec. 1957, BayObLGZ 1957, 376, 381; OLG Hamm 18 Dec. 1963, NJW 1964, 553; Kegel, p. 461; Drobnig, p. 167; Kegel, Festschrift für Jahrreiss 1964, 156
151. BayObLG 13 Dec. 1957, BayObLGZ 1957, 376, 385; OLG Düsseldorf 26 Aug. 1963, NJW 1963, 227; Drobnig 169; Dopffel, DNotZ 1976, 335, 347; Neuhaus/Gündisch, RabelsZ 21 (1956) 550, 551-554
152. Kegel 462; Raape 431-434; Ferid, Vorschläge und Gutachten 137; Scheuermann 111; IPG 1967/1968 no. 71, p. 766
153. OLG Düsseldorf 6 Febr. 1963, NJW 1963, 227, 229; OLG Hamm 18 Dec. 1963, NJW 1964, 553, 555, Scheuermann 104; Ferid, Vorschläge und Gutachten 138; for a critical view see Kegel, Festschrift für Jahrreiss (1964) 158
154. BayObLG 6 Nov. 1967, BayObLGZ 1967, 418, 429; Drobnig 169; IPG 1967/1968 no. 71, p. 768
155. Wolff, Das IPR Deutschlands, 3rd ed. 1954, 234, in quoting § 2302 BGB

156. Breslauer 198; Scheurmann 112; Dopffel, DNotZ 1976, 335, 347
157. IPG 1967/1968 no. 71, 768
158. Neuhaus/Gündisch, RabelsZ 21 (1956) 550, 573
159. IPG 1965/1966, no. 68, p. 817; Scheuermann 113
160. Scheuermann 113, 114
161. BayObLG 27 May 1974, BayObLGZ 1974, 223, 225; Ferid/Firsching p. 40/51 and 40/96
162. See Ferid N. 5-115
163. IPG 1965/1966, p. 809, 818
164. Ferid, Vorschläge und Gutachten 119; Wolff, supra. 228; for further references see Scheuermann 108, in N. 4
165. Staudinger/Raape Art. 24, p. 682; Kegel 460; Soergel/. Kegel Art. 24, N. 41; Scheuermann 109
166. Firsching, DNotZ 1954, 247; Soergel/Kegel N. 35, 41 preceding Art. 24
167. See supra N. 148
168. Ferid N. 8-129; LG München I 26 Feb. 1976, FamRZ 1978, 364; Jayme, FamRZ 1978, 366.
169. Ferid/Firsching p. 40/156; Firsching, Rpfl 1972, 1, 3
170. BGH 26 Oct. 1967, BGHZ 49, 1; BGH 25 May 1955, IPRspr. 1954/1955 no. 135; BayObLG 6 Nov. 1967, BayObLG 1967, 418; 27 May 1974, BayObLGZ 1974, 223, 224; 22 June 1976, BayObLGZ 1976, 151, 155; Drobnig 173, 174
171. BayObLG 2 Dec. 1965 BayObLGZ 1965, 423, 431; Firsching, Rpfl 1972, 1, 8
172. BayObLG 2 Dec. 1965, supra; IPG 1965/1966 no. 51, p. 524

173. LG Lübeck 25 Mar. 1958, IPRspr. 1958/1959 no. 202
174. BGH 26 Oct. 1967, BGHZ 49, 1, 2; Drobni \ddot{g} 174, 175
175. For the traditional view; Firsching, Rpf1. 1972, 1, 4; criticized by Dolle, RabelsZ 27 (1962) 201, 232; Neuhaus, NJW 1967, 1167, 1168
176. Ferid, Festschrift Cohn (1975) 31, 33, 37
177. Kegel 463; Soergel/Kegel N. 57, 58 preceding Art. 27; Schlechtriem, Ausl \ddot{a} ndisches Erbrecht in deutschem Verfahren (1966); Wieth \ddot{o} lter, Vorschläge und Gutachten 141; Heldrich, Internationale Zuständigkeit und anwendbares Recht (1969) 211; NJW 1967, 417; Schroder, Internationale Zuständigkeit (1971)
178. See the discussion and references by Neuhaus, NJW 1967, 1167, 1168
179. Wietholter, Vorschläge und Gutachten 141
180. OLG Köln 26 June 1975, FamRZ 1976, 170, 172
181. This was the argument of LG Bonn, quoted in OLG Köln, supra
182. IPG 1973 no. 41, p. 420; cf. supra N. 43
183. Goodrich/Scoles, 4th ed. 1968, 371
184. New York SCPA of 1 Sep. 1967, §§ 203, 601 and 1808, 1810
185. The discussion focused on the Uniform Foreign Country Money-Judgments Recognition Act
186. RabelsZ 39 (1975) 104-129
187. Firsching, Festschrift Wengler, Vol. 2 (1973), 321, 331; Lipstein, RabelsZ 39 (1975) 29; Kegel 473; Ferid, Festschrift Cohn (1975) 31, 35
188. For the English text and an introduction to the Convention, see Nadelmann, 21 (1973) AmJCompL 139

189. Ferid N. 9-80-82; Drobniq 190; Wengler, JR 1955, 41
190. Compare the distinction between an executor and a trustee in American law, Thompson on Wills (1947), § 551, p. 773
191. Ferid, N. 9-83; Ferid/Firsching p. 40/198 and 40/212; Firsching DNotZ 1959, 354, 371; IPG 1965/1966 no. 62, p. 726 and no. 66, p. 771; IPG 1972 no. 33, p. 330
192. Kegel 466; IPG 1965/1966 no. 67, p. 791; Gottheiner, RabelsZ 21 (1956) 36, 66
193. See supra N. 105
194. Ferid N. 9-21 and 9.80; Ferid/Firsching p. 40/172 seqq.; Firsching Rpfl. 1972, 1, 7 with further references
195. Cf. IPG 1971 no. 36, P. 354
196. Firsching 127-148; for a critical view see Rheinstein, AcP 166 (1966) 547, 549
197. Even different senates of one court may differ in this point, see KG 20 Mar 1972, IPRspr. 1972, no. 123
198. Firsching DNotZ 1959, 368; Wengler, JR 1955, 41; Raape 452; Firsching 135; KG 20 Mar 1972, supra; BayObLG 22 June 1976, BayObLGZ 1976, 151; IPG 1967/1968 no. 78, p. 872
199. KG 7 June 1966 and 13 Nov. 1969, quoted in KG 20 Mar. 1972, supra. IPG 1967/1968, no. 65, p. 695; IPG 1969 no. 32, p. 251; IPG 1973 no. 41, p. 428; Gottheiner, rabelsz 21 (1956) 36, 69; Drobniq 191; Kegel 468
200. IPG 1965/1966 no. 67, p. 796; no. 61, p. 709; Drobniq 179; BGH 26 Apr. 1976, ZFRV18 (1977) 133, 134
201. IPG 1965/1966 no. 51, p. 528; Ferid/Firsching p. 42/199; Firsching DNotZ 1960, 640, 643; Wengler, JR 1955, 41
202. IPG 1965/1966 no. 61, p. 705; IPG 1973 no. 41, P. 428; IPG 1967/1968 no. 74, p. 820; IPG 1969 no. 39, p. 308

203. This was overlooked by KG 20 Mar 1972, IPRspr. 1972, no. 123
204. Cf. D.P. Currie, 33 UChiLRev 429 (1966); Rheinstein, AcP 166 (1966) 547, 549
205. Rheinstein, supra
206. DrobniG 192
207. See supra text accompanying N. 132-141, Ferid/
Firsching p. 40/212
208. BayObLG 13 Jan. 1961, BayObLGZ 1961, 4, 22; 26 May 1961, BayObLGZ 1961, 176, 182; OLG Düsseldorf 6 Feb 1963, NJW 63, 2227, 2230; IPG 1965/1966 no. 61, p. 709; IPG 1969 no. 32, p. 252; DrobniG 179
209. DrobniG 181