

CERTIFICATES OF INHERITANCE - LEGAL FRAMEWORK IN SWITZERLAND

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1 Preliminary Remark

According to a new leading case of the Federal Supreme Court, the recognition of a foreign certificate – in this case the certificate of inheritance established by the Egyptian court – should be refused in Switzerland when it is manifestly incompatible with Swiss public order, that is to say, when it runs against the fundamental principles of the Swiss legal order in an unacceptable way.

Before giving an overview on this case, we will introduce the Swiss legislation regarding certificates of inheritance in general.

2 Legal situation in Switzerland regarding certificates of inheritance

2.1 What is a Swiss certificate of inheritance and why do I need one?

The certificate of inheritance provides confirmation of the persons entitled to inherit and is required in order to dispose of the assets making up the deceased's estate according to the will or by law. In addition, banks usually ask for a certificate of inheritance before the heirs can take possession of the assets of the deceased. Furthermore, a certificate of inheritance is required when the deceased's real estate is to be transferred or sold.

2.2 What are the legal effects of the Swiss certificate of inheritance?

The certificate of inheritance is an official document in which the deceased and his or her heirs are listed by name. It is provided with the statement of the issuing authorities, that the persons listed are recognized as heirs, subject to any action for declaration of invalidity, action for recovery of inheritance, or action in abatement. **The effects of the certificate of inheritance are therefore limited, since it cannot alter the material legal situation.** Rather, actions for declaration of invalidity, actions for recovery of inheritance and actions in abatement are expressly reserved.

The certificate of inheritance is thus based upon a **merely preliminary assessment** of the line of succession, and **takes into account the fact that other persons are legally entitled to an inheritance.**

Even if a certificate of inheritance has been issued, banks usually do not make any decisions on the assets of a deceased as soon as they **become aware** that the **certificate of inheritance** does **not correspond to the substantive legal situation**, for example because a disregarded heir who is entitled to a statutory portion makes an abatement claim.

2.3 What are the costs for a Swiss certificate of inheritance?

The fee for issuing a certificate of inheritance varies from case to case. It ranges from several hundred to several thousand Swiss francs.

2.4 How long does it take for a Swiss certificate of inheritance to be issued?

In simple cases, the issuance of a certificate of inheritance takes about 6 to 12 weeks.

2.5 Who is entitled to request a Swiss certificate of inheritance?



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- In case there is no will or inheritance contract: the statutory heirs.
- In case there is a will or inheritance contract: an official confirmation of the competent Court is required. The official confirmation of the Court will indicate who is entitled to request a certificate of inheritance.

2.6 What else is required in order to obtain a Swiss certificate of inheritance?

- Copy of the death certificate (available from the civil register office);
- Proof that you are entitled to inherit (extract from the civil register);
- Proof that you have not disclaimed your inheritance (declaration of acceptance from all statutory and named heirs or proof that the time limit for a disclaimer has expired).

2.8 International Inheritance Law Cases

When **people abroad** are **bequeathed assets in Switzerland**, the **issuance of a Swiss certificate of inheritance is only possible as an exception**, particularly if the authorities of the last place of residence of the deceased do not deal with the estate.

If **disputes arise with regard to the validity or suitability of foreign certificates of succession**, there is the **possibility of a judicial recognition in Switzerland**. According to Swiss Law, decisions, measures and documents (e.g. foreign certificates of inheritance), relating to, as well as rights deriving from, an inheritance estate in a foreign country shall be recognized in Switzerland:

- if they are rendered, taken, drawn up or declared in the state of the deceased's last domicile or in the state to the law of which the deceased submitted his or her estate, or if they are recognized in any one of these states; or
- if they relate to real property and were rendered, taken, drawn up or declared in the state in which such property is located, or if they are recognized in such state.

With respect to real property located in a state which claims exclusive jurisdiction, only the decisions, measures or documents originating from that state shall be recognized. Conservatory measures ordered in the state where the deceased's property is located shall be recognized in Switzerland.

It is also possible to **recognize foreign executor or heir certificates**.

In the case of Swiss nationals with last place of residence abroad, the judicial office in summary procedures of the place of origin is responsible, and in the case of foreign nationals, that of the place, where the assets belonging to the estate are located.

3 Judgement of the Federal Supreme Court as of November 21, 2016, 5A_355/2016

3.1 Facts

A. A. a. L.A., Egyptian citizen born in 1940, of Muslim faith, died on 10 March 2007 in Paris without leaving any descendants or ascendants. His estate includes properties located in France and Egypt, as well movable assets deposited with banks in France, Germany, and in Geneva, Switzerland. On 6 March 1980, he married J.A., a German citizen of Christian denomination born on 19 January 1949, according to Egyptian and Sharia law.

A.b. By certificate of inheritance n. 679 established on 5 May 2007, the court for family affairs of U. (Egypt) recorded the death of the deceased and the devolution of his legal succession to his brothers and sisters, namely A.A., B.A., C.A., D.A. and K.A.; D.A. died on 27 April 2011, leaving as heirs his wife, E.A., and his four children: F.A., G.A., H.A., and I.A.

J.A. did not participate in the procedure for issuing this certificate, which does not mention that the deceased was married to her.

A.c. On the basis of a French notarial deed of 2 May 2007, J.A. as the declarant sole heir in her capacity as spouse, assigned the A siblings in petition of the entire estate before the High Court of Paris. By a judgment of 2 December 2010, the court declared itself incompetent to hear the application because the deceased was domiciled in Egypt, whose courts were thus competent. The court of appeal of Paris overturned that decision on 24 November 2011; it considered that the High Court was competent to rule on the devolution of the estate located in Paris; on the other hand, it held that, although the deceased had often resided in France, the place of his principal establishment had remained in Egypt.

A.d. By a judgment of 3 December 2008, the district court of Frankfurt am Main, based on German public policy, declared the wife heir to 50% of the assets of the estate situated in Germany, the brothers and sisters of the deceased being heirs of the balance. This judgment was confirmed by the Higher Regional Court on 10 May 2010.

B. On 6 August 2010, A.A., B.A., C.A. and D.A., wishing to receive the assets deposited by the deceased in two banking institutions located in Geneva, asked the lower court of Geneva for the recognition of the certificate of inheritance n. 679 established on 5 May 2007 by the court for family affairs of U.

Ruling on 5 July 2011, the court declared the application inadmissible on the grounds that the document had neither been produced in original nor had been accompanied by any certificate stating that it was no longer subject to appeal and was definitively entered into force. The court of justice of the canton of Geneva affirmed this judgement on 23 March 2012.

By a judgment of 18 September 2012 (5A_344/2012), the second court of civil law of the federal court granted the applicants' appeal and remitted the case to the lower court of Geneva for a new decision taking into account the recitals.

C. Ruling again on 20 July 2015, the lower court recognized and declared enforceable in Switzerland the certificate of inheritance (ch. 1), with corresponding costs and expenses (ch. 2 and 3).

By a judgment of 22 April 2016, the civil division of the court of justice of the canton of Geneva reversed this ruling and dismissed the applicants' application for recognition of the aforementioned title.

D. By a document mailed on 12 May 2016, the applicants lodged an appeal in civil matters, secondarily a constitutional appeal, to the Federal Court; on the merits, they conclude that the first-instance ruling is upheld and, consequently, that the certificate of inheritance is recognized and declared as enforceable in Switzerland. They request legal assistance.

Comments on the merits were not required.

E. By order of 9 June 2016, the President of the second court of civil law refused the suspensive effect to the appeal.

3.2 Considering in Law

(...) 2.3. The qualification of a foreign certificate operates in terms of *lex fori*, namely in this case Swiss law (...). According to the previous authority, the disputed certificate of inheritance equates to a certification of heir, whose establishment is treated as a provisional measure (...). There is no need to examine the merits of this qualification. Where the dispute concerns the recognition or enforcement of a foreign act/certificate, the cognition of the Federal Court is not limited to the violation of constitutional rights, whatever the provisional or non-provisional nature of the act/certificate under discussion.

3. (...) Egyptian legislation does not recognize a succession between a Muslim and a non-Muslim; additionally, the male heir is entitled to a double share of that of the female heiress, which results from the rest of the disputed certificate of inheritance. Consequently, the recognition of that certificate would have the effect, on the one hand, that the widow could not claim, solely on account of her religion, any right with respect to the assets held by her husband with Swiss banks and, on the other hand, that the sisters of the deceased could only assert, on account of their sex, lesser rights than those of their brothers. These consequences violate the principle of prohibition of discrimination (...), further specifying that men and women are equal in law. Such drastic discrimination cannot be "qualified", even if the only link with Switzerland is the location of the bank assets.

(...) 3.3.1. Finally, the appellants state in essence that, by refusing to recognize the certificate of inheritance, the cantonal judges incorrectly applied Article 27 para. 1 Swiss Federal Law on International Private Law (hereinafter "IPLA").

3.3.2. In accordance with Article 27 para. 1 IPLA (in relation to Article 31 IPLA), the recognition of a foreign certificate – in this case the certificate of inheritance established by the Egyptian court – should be refused in Switzerland when it is manifestly incompatible with Swiss public order, that is to say, when it runs against the fundamental principles of the Swiss legal order in an unacceptable way (...). As an exception clause, the reservation of public order (substantively) is of narrow interpretation; such is the case, in particular, in the area of recognition and enforcement of foreign certificates or judgments, where its scope is narrower than for the direct application of foreign law (...). With this in mind, the operation of the reservation clause assumes, according to

jurisprudence, that the case presents a "sufficient connection" with the State of the requested judge, in this case Switzerland (...).



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3.3.3. The appeal appears from the outset to be inadmissible in so far as the appellants base their arguments on facts which do not emerge from the decision referred to, without properly complaining of the arbitrariness in the establishment of the facts (...); thus, the analogy they try to establish between the certificate under discussion and the "inheritance agreement of waiver" according to Article 495 Swiss Civil Code is unsuccessful, in the absence of findings regarding a waiver by the respondent of her husband's estate. The chronology of facts set out in the notice of appeal and purported to corroborate that conduct must, for the same reason, be excluded from the debate.

Furthermore, the appellants do not demonstrate that the cantonal court acted arbitrarily (...) by stating that there is no succession between a Muslim and a non-Muslim in Egyptian law. That being said, no discernment of what constitutes a waiver of an estate to which the person concerned cannot in any event claim, unless it relates only to assets located outside Egypt - in this case Switzerland - which is not observed either (...).

3.3.4. Whether, as the cantonal authority acknowledges, the certificate of inheritance violates Swiss public order (substantively) in so far as it grants the male heir double the amount as that of the female heir does not need to be resolved here; it is the situation of the respondent, the wife of

the deceased who is opposing the recognition procedure (...), which is at issue in the present case (...).

3.3.5. The appellants rely on a certificate of inheritance drawn up by an Egyptian court in order to claim, in their capacity as heirs, the assets that the deceased held in banking institutions in Geneva; this certificate confirmed the devolution of his legal succession to his brothers and sisters, to the exclusion of his wife. This exclusion is based on the finding - not criticized by the parties (...) - that there is no succession between a Muslim and a non-Muslim (...). As the previous judges have held, such a result clearly contravenes the principle of the prohibition of discrimination on account of religious beliefs, which - irrespective of its constitutional value (...) - falls within the scope of Swiss public order (...).

Without expressly refuting this conclusion, the appellants object, however, to the absence of "domestic connection"; but they are mistaken. According to the author who agreed with the position of the previous court, this consideration is no longer relevant where discrimination based on, inter alia, sex, race or religion is prohibited under various international instruments embodying fundamental rights of man (...); others, however, stick to the requirement of sufficient links with Switzerland (...). There is no need to arbitrate the debate, since such links exist anyway in the present case, given the location in Switzerland of estate assets over which the appellants intend to exercise their inheritance prerogatives (...). The alleged violation of Article 27 para. 1 of IPLA therefore appears to be unfounded, to the extent that it is admissible.

4. In conclusion, the subsidiary constitutional appeal is inadmissible and the appeal in civil law is dismissed to the extent of its admissibility.

4 Summary

Where the dispute concerns the recognition or enforcement of a foreign act/certificate, the cognition of the Federal Court is not limited to the violation of constitutional rights, whatever the provisional or non-provisional nature of the act/certificate under discussion.

Egyptian legislation does not recognize a succession between a Muslim and a non-Muslim; additionally, the male heir is entitled to a double share of that of the female heiress, which results from the rest of the disputed certificate of inheritance. Consequently, the recognition of that certificate would have the effect, on the one hand, that the widow could not claim, solely on account of her religion, any right with respect to the assets held by her husband with Swiss banks and, on the other hand, that the sisters of the deceased could only assert, on account of their sex, lesser rights than those of their brothers. These consequences violate the principle of prohibition of discrimination, further specifying that men and women are equal in law. Such drastic discrimination cannot be "qualified", even if the only link with Switzerland is the location of the bank assets.

In accordance with the Federal Law on International Private Law, the **recognition of a foreign certificate** should be **refused in Switzerland** when it is **manifestly incompatible** with **Swiss**

public order, that is to say, when it **runs against the fundamental principles of the Swiss legal order** in an unacceptable way.

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