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INHERITANCES WITH EXTRANEOUS ELEMENTS - THE INTERNATIONAL TESTAMENT

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Abstract: *Inheritance involves the transmission of the patrimony of a deceased individual to one or more people alive. The inheritance is opened at the last domicile of the deceased. In case there are extraneous elements in the inheritance, meaning any circumstance which would determine the possibility of simultaneous application of certain legal provisions belonging to two or more law systems, then national law provisions are no longer applicable, but those of private international law. In order to uniformly regulate the inheritances with extraneous elements and consequently of the international testaments, considering the freedom of movement is an acknowledged fact for the European citizens within the community, a number of measures have been adopted both in the legislative as well as in the procedures related to succession debate also the creation of a unique system of record of the testaments drawn up at European level. This paper aims at examining the issue of inheritances with extraneous elements and international testaments, namely the regulation and the measures taken at EU level regarding this issue.*

Key words: *inheritance, extraneous element, testament, European norms.*

The inheritance law can be defined as all the legal rules which regulate the transmission of rights upon death. The matter of successions comprises "all rules governing the transmission of assets of the deceased to his/her heirs."[1] By inheritance we mean, according to article 953 of the New Civil Code "the transmission of a deceased person's assets to one or more people alive." So, by opening the legacy, the legal effect of transmitting the heritage occurs. It has a special legal significance as the heirs, whether legal or testamentary heirs may not acquire any rights to the assets until the opening of inheritance through death.

Therefore, the transmission of the inheritance is a transmission upon death (mortis causa) whereas it only occurs after the physical death and the effect ascertained or judicially declared of an individual (viventis hereditas non datur). In fact, before opening the inheritance, we cannot speak about heirs or succession, the

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person alive being the holder of his/her heritage and the heirs are to be determined only on the opening of the heritage.

The heritage is opened at the last domicile of the deceased. Regarding the inheritance forms, the civil law knows two types of inheritance: the legal heritage (intestate) and the testamentary inheritance. The inheritance is legal when the transmission of the heritage occurs by law, in the absence of a testament drawn up by the one who leaves the inheritance. In case of testamentary transmission, deciding upon the people called upon to inheritance and the scope of rights and obligations due to them is the decision of the one who endows, under the conditions and within the limits provided by law [2]

According to art.1034 of the New Civil Code, the testament is the unilateral act, personal and revocable through which a person called testator, decides in one of the forms required by law for the time he/she will no longer be alive. The testament does not make the legatee a rich person if it does not take one of the forms stipulated by law and imperatively imposed for its validity, the Civil Code sanctioning with its absolute nullity the noncompliance with the forms required by the law. In this respect, under the provisions of the New Civil Code, testaments fall into three categories: ordinary testaments, privileged testaments and other testamentary forms. In the category of ordinary testaments fall: the holograph testament and the authentic testament.

The notary public who authenticates a testament is required to immediately register it in the National Notary Register kept in electronic form in order to inform the people who have a legitimate interest. The right to access this record belongs only to notaries public, based on electronic signature. This is a limitation of the citizens' right to be informed, as evidenced by the fact that in other legislations, such as the French, the register may be consulted by notaries, bailiffs, lawyers, judges, administrations, embassies and consulates, individuals or anyone in possession of a death certificate. The privileged testaments are those that may be issued under special circumstances, with the fulfillment of simplified formalities and are actually just simplified authentic testaments.

Besides the ordinary and privileged forms of testaments provided by the New Civil Code, the testator can resort to two other forms of testaments, the so-called special testaments. These are: the testament of amounts and values stored and the testament written abroad.

The inheritance is governed by the national law when it does not contain extraneous elements and by provisions of private international law when it contains extraneous elements.

In the absence of a statutory definition, the element of extraneity received relatively close doctrinal definitions. It was said, in this sense, that the extraneous element is "the factual circumstance in connection with a legal report, thanks to which this report relates to more than one system of law (or laws pertaining to different countries)," "a factual circumstance on one of the elements of the legal report and which makes it linked to one or more systems of law", "a factual circumstance of diverse nature, which is linked to a private legal report, a circumstance that gives the respective legal report an international character." In our view, the extraneous element represents a

factual circumstance which determines the possibility of enforcing concomitantly a law regulation belonging to two or more systems of law.

The international element is not a distinct element of the legal relationship, but it is a factual circumstance actually related to one of the elements of the legal relationship, whether it's on the subject, object or content, and is the premise of a concomitant incidence of more legal provisions pertaining to more law systems.

The issue of the inheritance with extraneous elements is of great importance and topicality, especially given the acknowledgement of European citizens being free to travel within the community. This freedom of movement triggered a series of legal consequences relative to the applicable law in case of a conflict of laws in the space. Hence, the need to ensure an adequate legal framework to settle regulations acting as principles in such conflicting situations. The Romanian legislator felt and responded to the needs of the society to regulate these aspects of private international law, especially regarding inheritance, an institution that is ultimately concerned with the way in which a heritage is transmitted, more so as Romania did not adhere to any of the international conventions regarding succession. The need for uniform regulations was felt, however, at European level, demanding that each sequence is resolved in a consistent manner, according to a unique legislation and by only one authority. The debate on an international succession has always raised serious difficulties because EU countries are characterized by an extraordinary diversity of national laws and regulations applicable in case of conflicts of laws in the space.

Difficulties of a debate on an international succession are represented by the existence of a multitude of authorities that can be determined in such a situation, as well as the fragmentation of succession as an effect of applying these divergent legal provisions.

Rules regarding the jurisdiction in successions vary considerably between the Member States. The positive conflicts of jurisdiction arise from here, when the courts of several states assume jurisdiction or the negative conflicts of competence when no court assumes jurisdiction. In order to avoid these difficulties encountered by citizens, the need for uniform regulations appeared.

The competence of the Member State where the deceased used to reside is the most prevalent among Member States and often coincides with the location of the deceased person's assets. These courts would have jurisdiction to rule on the entire estate and all its aspects, whether it is a non-contentious procedure, or a contentious one.

Problems arise however when, for example, the deceased habitually resided in a Member State, but his/her estate was on the territory of another State.

The applicable law on international inheritance or with extraneous elements in the national legislation is the law of the state in which the deceased had habitually resided at the time of death, as provided imperatively in Article 2633 from the Civil Code.

Further on, the Civil Code provides that a person may choose as the law applicable to the whole inheritance, the law of the State whose nationality he/she possesses.

The existence and the validity of the consent expressed by the statement of

choice of the applicable law are subject to the law chosen to rule the inheritance. Note that the Romanian legislator, as well as the French one, established the principle of unity in the inheritance transmission, meaning that the law chosen by the deceased is applicable to the entire heritage and aims at solving all the problems of succession, thus avoiding the possibility of fragmentation of the inheritance following the intervention of a foreign element. In other words, the legacy as a whole, meaning all rights and obligations of the deceased, is transmitted to the legal or testamentary heirs by the same legal provisions, regardless of the nature and / or source or origin of goods composing it [3].

The unitary character of the law of succession corresponds to the unity of assets transferred and the right of property, law forming the main object of the transmission of heritage [4], so it lies in the unitary character of the heritage [5].

In testamentary matters, the elaboration, modification or revocation of the testament are considered valid if the document complies with the conditions of form applicable, be it on the date when it was issued, amended, or revoked, or on the date of the testator's death, according to any of the following laws:

a) the national law of the testator ;

b) the law of his/her habitual residence;

c) the law of the place where the document was issued, amended, or revoked;

d) the law regarding the situation of the property that forms the subject of the testament;

e) the law of the court or body performing the procedure of transmission of the inherited property.

What is noteworthy is that this form of testament elaborated abroad involves only an international form, not being subject to restrictive substantive conditions [6], best responds to the modern man's need to circulate, as well as the multitude of international heritages determined by the increased mobility of people and goods.

The international private French law also recognizes the validity of the international testament if it complies with the form required by either the internal law of the place where the testator wrote the testament, or the law of the State whose nationality the testator has, either when he/she elaborated the testament or at the time of death, or the law of the place where the testator lived at the time when he/she ruled it or at the date of death or the internal law of the place where the testator resided at the time when he/she wrote the testament or at the time of death, or the situation of the property that is the object of the testament.

The Hague Convention of 5th October 1961 on the conflicts of law relating to the form of testamentary dispositions represented a very important act in standardizing the European provisions in matters of succession.

The Washington Convention of 26th October 1973, which entered into force in France on 1st December 1994 went further, creating a new form of testament, respectively the testament in international format that is valid in terms of form, regardless of the law to which it is subjected [7]. It can be written by the testator himself/herself or by a third party in handwritten or typed form.

The testator must declare before two witnesses and a notary that the document, whose content he/she is not bound to

disclose, is his/her testament or also that he knows its contents. Regarding the procedure succeeding its elaboration, this type is similar to the mystic testament, as it has to be presented to a notary and signed by him, by the testator and by the witnesses.

If the testament was signed by the testator previously, he/she has to declare before a notary that he/she recognizes and confirms the signature. The international testament may be used by the blind, the illiterate or by those who do not speak the foreign language of the place in which it has been drawn and can be used even if it contains no extraneous elements [8].

The need to elaborate the testament in written form, the testator's statement that the testament is his/hers and that he/she knows its contents, the testator's signature, that of the witnesses and of the notary are conditions for the validity of the international testament, provided under absolute nullity.

This type of testament was presented as the perfect compromise between the holograph testament that can be easily falsified and revoked, and the authentic testament that involves a great responsibility of the notary public to whom it is presented, or who elaborates it [9].

From this point of view, many international French authors qualified the international testament either as a form of mystic testament [10], or as a form of simplified authentic testament [11], or as a guaranteed (secured) holograph testament [11].

The Spanish law also recognizes the testament drawn up in another state, the rule regarding the formal conditions of testaments being that they are governed by the law of the country in which they are drawn, although the testaments drawn up in the form and according to the formal conditions required by the law applicable to their content, as well as those concluded under the personal status of the beneficiary are also valid. Consequently, the international testament may take the form *lex loci, lex patriae or lex substantiae* [12].

A testamentary disposition made abroad is valid in what concerns the form if it complies with the internal law:

a) of the place where the testator has disposed;

b) of a nationality the testator had either when he/she disposed it, or at the moment of his/her death;

c) of a place in which the testator lived either when he/she disposed it, or at the moment of his/her death;

d) of the place where the testator resided either when he/she disposed it, or at the moment of his/her death;

e) in the case of buildings, the place where they are located.

If the international testaments in the French or Spanish legislation are subject to conditions stipulated by the Washington Convention in 26th October 1973 related to a Uniform Law on the International testament form, developed under the auspices of UNIDROIT (International Institute for the Unification of Private Law), Romania has not signed any of the international conventions related to the form of testaments and their system of registration: The Nordic Convention (Denmark, Finland, Sweden) of 19th November 1934 on successions, the Hague Convention of 5th October 1961 adopted by most EU countries but that only concerns the conflict of laws regarding the form of testamentary dispositions, the Hague Convention of 2nd October 1973 on the

management of international successions (adopted by only three Member States and concerning only mobile successions), the Hague Convention of 1st August 1989 on the law applicable to successions, the Council of Europe Convention from Basel of 16th May 1972 on the establishment of a system of testamentary inscriptions (applied only in nine EU member states), the Washington Convention of 26th October 1973 concerning the International testament form (applicable only in six EU Member States).

However, certain provisions of the Hague Convention were introduced in the Romanian private international law. Consequently, the rules that govern the inheritances with extraneous elements and, implicitly, international testaments are those provided by the new Civil Code, in the seventh book on the provisions of the private international law.

These provisions are, however, fully consistent with the provisions of the EU Regulation no.650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE EUROPEAN UNION COUNCIL from 4th July 2012 regarding the jurisdiction, the applicable law, the recognition and enforcement of judgments and the acceptance and enforcement of authentic documents in matters of succession regarding the creation of a European Certificate of Succession, regulation which in art. 27 amends the national provisions in the following sense: "A disposition of property upon death elaborated in written form satisfies the formal conditions if its form complies with the law:

(a) of the state in which the provision has been made or in which the agreement on a future succession has been concluded;

(b) the state whose nationality the testator has or at least one of the persons whose succession is concerned by an agreement on a future succession, either when the provision is elaborated or when the agreement is concluded, or at the time of death;

(c) the state where the testator lives or at least one of the persons whose succession is concerned by an agreement on a future succession, or either when the provision is drawn up or when the agreement is concluded or at the time of death;

(d) the state of habitual residence of the testator or at least of one of the persons whose succession is concerned by an agreement on a future succession, either at the time the provision is drawn up or the agreement concluded, or at the time of death;

(e) with respect to immovable property of the state in which they are located."

Without explicitly using the notion of testament, the EU Regulation refers to the provisions for the cause of death, others than the agreements on an unopened inheritance, ruling as a principle the fact that they are regulated in their admissibility and the substantive conditions by the law which, under this Regulation, should have been applicable to the succession of the person who drew up the disposition, in case he/she had died on the day the disposition was drawn up. A person can choose the law to regulate his/her disposal upon death, on the admissibility and the substance of it, the law that the person could have chosen in accordance with Article 22 of the same regulation.

This Regulation with applicability at Union level is a major step in the European authorities' attempt to achieve the

unification of the European law, and therefore, in solving the problems arising in succession reports with extraneous elements. The stated objective of this regulation is to allow people who reside in the European Union to organize their succession in advance by choosing the applicable law and to ensure in an effective way the rights of heirs and / or legatees, of other persons who are in relation with the deceased as well as those of the creditors of the succession. The regulation opts for the law of the last habitual residence of the deceased, instead of the one of the state of citizenship, as it coincides with the center of interest of the deceased and is often the place where most of his/her assets are.

Such a connection favours the integration in the Member State of habitual residence and prevents any discrimination of the people who lived in that state without having its citizenship.

Unfortunately, these new provisions apply to the succession of the deceased after 17th August 2015 including, but they will facilitate the management of legal aspects of an international legal or testamentary succession by the European citizens.

Also a major step in the European authorities' attempt to create a unified system of succession in the Member States is represented, along with the standardization of the European legislation, by the attempt to create a unique system of evidence for the testaments drawn up at European level.

In many Member States of the European Union there is a national record of testaments which is managed by the state or by a notary. However, it is not always possible to access such records at a European level. In order to enable an effective collaboration between institutions in the Member States, the need to regulate a program to enable the interconnection of these records was born. In this respect, under the program "Europe Testaments", the "European interconnection of testaments" project was born, which set itself to develop and implement an effective interconnection of the European records of testaments.

ENRWA is a non-profit organization that has developed two applications to create a European network of testaments records: RERT and RERT Light. RERT allows direct interconnection of testaments directly and automatically. RERT Light is an effective tool when the record of testaments is not computerized or centralized. Through a correspondent, the record can access other European records that can thus be consulted.

This project is particularly important because through it, it is possible to access testaments recorded in other Member States, and represents a major step in the authorities' attempts to equalize the law and the procedure regarding succession.

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