Lex Succesionis – the Determination of Applicable Law of Inheritance in Private International Law

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Abstract: The physical death of man leads, from a legal point of view, to the loss of the status of subject of law, but his patrimony, rights and obligations of patrimonial character, remain. Also, the deceased traditionally enjoys a certain respect, being protected, meaning that there was talk of a right of corpses to protect the privacy of their own image, a right to their integrity, a right to peace of last place and a right to respect for the memory of the deceased. The Civil Code in Articles 78 to 81 expressly provides for the regulation of rules likely to protect the non-patrimonial rights of the deceased person under the name of „Respect due to the person and after his death”. Thus, according to art. 80 paragraph (Lupașcu, 2012, p. 112) of the Civil Code: „any person may determine his own funeral and may dispose of his body after death. In the case of those who do not have the capacity to exercise or those who have a limited capacity to exercise, the written consent of the parents or, as the case may be, of the guardian is also required”. Without the regulations regarding the respect of the natural person and after his death being irrelevant, the regulations regarding the fate of the deceased person's patrimony are much wider and more complex, making up the matter of successions. In art. 953 C. Civ, the inheritance is defined as the transmission of the patrimony of a deceased natural person to one or more persons in existence. The current Civil Code often uses the notion of inheritance, but the notion of succession has the same meaning, except that it is used less often.

Keywords: *inheritance, lex succesionis, law, private international law*

How to cite: Crețu, G., & Florea, D. (2021). Lex Succesionis – the Determination of Applicable Law of Inheritance in Private International Law. *European Journal of Law and Public Administration*, 8(1), 19-28.

<https://doi.org/10.18662/eljpa/8.1/145>

1. Introduction

According to art. 955 para. (1) Civil Code: „the patrimony of the deceased is transmitted by legal inheritance, insofar as the one who leaves the inheritance did not order otherwise by will”. Therefore, the analysis of the text of the law shows that the Civil Code regulates two types of legal inheritance and testamentary inheritance. Also, the Civil Code also regulates a new form of inheritance, the contractual one, known as the precipitous clause in art. 333 C. Civil (Lupașcu, 2012, p. 248).

Legal inheritance, also known as *ab intestate* inheritance, without a will, is the rule of succession and occurs when the deceased has not left a will to dispose of his property after death, which means that his estate is transmitted according to the rules provided by law, respectively to some persons, in the order and in the quotas established by law. The legal inheritance is also established when the deceased person did not dispose of his own patrimony by will or although he did dispose of it, the will does not produce the effects in whole or in part. Inheritance is also legal if the deceased has left a will, but it does not provide for the transfer of his estate, but only for other provisions, for example, relating to the funeral ceremony (Urs, 2017, p. 2).

In addition to legal inheritance, there is also an extraordinary or anomalous (abnormal) inheritance, which is outside the rules (*a-nomos*). The anomalous succession, arising from French law, is a derogation from the principle of the unitary nature of the succession devolution and represents the devolution based on the nature or origin of the assets of the estate, without taking into account the rules specific to legal inheritance, this type of inheritance also exists the current time in Romanian law being, in essence, an exception to the unitary character of the succession transmission (Chirică, 2014, p. 4).

The testamentary inheritance takes place when the patrimony of the deceased is transmitted on the basis of the manifestation of will of the deceased person; expressed in a will, to the persons established by him as legatees.

Succession is an institution that has a close connection with family law, property law and the law of legal acts, being dominated in France by tradition, as well as matrimonial regimes. The real estate succession was

considered, until the French Revolution, as a typical case of real status. Regarding the furniture succession, recourse was had to the fictitious situation of the furniture from the deceased's home, as a place of opening the succession in the application of the „mobilia sequuntur personam” rule. This fiction has the advantage of ensuring the unity of the regime applicable to movable successions, being in line with the idea that the legislator, regulating the succession devolution, considered the inheritance, in many points of view, as a universality. The previous Romanian jurisprudence has ruled in the sense that the succession of movable property is subject to the law of the situation of property, and the movable succession of a deceased foreigner in our country is subject to its national law (Florea, 2017, p. 301).

2. The determination of applicable law of inheritance

We note that, traditionally, with regard to successions with an element of foreignness, the principle is applied according to which the inheritance is governed in respect of immovable property by the law of the place of their location - *lex rei sitae*, and in the case of movable property by national law of the deceased. date of death, *lex patriae*. Therefore, depending on the nature of the assets that formed it, one and the same succession, by derogation from the rule of the unitary character of the succession transmission could be governed by different laws of succession return. The Civil Code renounced the principle of dualism, without distinguishing, as to the nature of property, that „the inheritance is subject to the law of the state in whose territory the deceased had at the date of death, the habitual residence” (art. 2633 Civil Code). The cited legal norm is in accordance with art. 21 of Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments of succession and the creation of a European Certificate of Succession. Also, according to art. 2634 alin. (1) Civil Code: „a person may choose, as a law applicable to the inheritance as a whole, the law of the state of which he is a citizen”, this legal norm is in accordance with the provisions of art. 22 of Regulation (EU) no. 650/2012 of the European Parliament and of the Council (Sitaru, 2013, p. 303).

According to art. 2636 of the Civil Code „the inheritance is subject to the law of the state on whose territory the deceased had at the date of death, the habitual residence”. It is apparent from the text of the law cited that the legislature sought to prioritize the objective location of the succession, regarded as a legal universality, in the sphere of the legal system of the habitual residence of the deceased person (Lupașcu, 2012, p. 532).

Regarding the category of real estate, they are of great interest in the heritage, thus being in close connection with a certain territory. The social status of a person was given by land ownership, consisting of fief and castle. Thanks to their role in society, real estate was regulated by the law of the place where they were located. So, the rules applicable to the succession in which there are real estate were considered as real statutes, thus, each inheritance was subject to the law regarding the situation of real estate, the regulations being strictly territorial. On the other hand, movable property was of insignificant importance, often of short duration, so the saying "res mobilis res vilis" is the only thing that can be summarized as the lack of social value of these goods. Due to this fact, the situation of movable property was regulated by the law of the place where the deceased had his domicile, even if they were in several places, it was considered that all his *cujus* property was at his domicile. As for the conflicting norms in the matter of international successions, we mention that the phrase *lex successionis* designates the law that applies to the inheritance, regardless of its type, legal or testamentary. Also, the expression „at the date of death of the deceased” plays an important role in facilitating the resolution of the mobile conflict of laws, thus preferring the law in force at that time, removing the other laws of the states on whose territory *cujus* and - could have had his habitual residence when he was alive (Sitaru, 2013, p. 305).

Adoption of the monistic system regarding the law applicable to inheritance

The civil code in force adopted the monistic system regarding the law applicable to successions, so that there is no difference in the object of the inheritance, especially as it concerns movable or immovable property. The legislator decided to abandon the dualist system, which was a tradition in Romanian law, this being adopted not only as long as Law no. 105/1992

was in force, but also before that moment, thus knowing an extensive practical application as well as doctrinal support.

The dualist system involves the application of different laws on succession depending on its purpose, thus distinguishing:

- in the case of movable property, regardless of where they are located, the national law (*lex patriae*) of the deceased person who had it at the time of death shall apply in the inheritance, applying the principle „*mobilia sequuntur persona* (... the property mobile follows the person, ie to whom they belong)”;

- in the case of movable property, the law of the place where each building in the estate is located - *lex rei sitae* (Sitaru, 2013, p. 307).

The monistic system has the advantage of the uniqueness of the law applicable to inheritance, which, viewed as universality of law, is subject to the same law, regardless of its object. However, this system seems to be in contradiction with the civil regulations on private international law, which, by other provisions, removes the real estate regime from the general law governing the matter, thus being within the law of the location of the building, such as regulations from the content of art. 2589 para. (3) and art. 2636 alin. (2) The Civil Code The law of the location of the building, is applied indirectly through the mechanism of remittance as a consequence of its removal as a direct conflicting norm due to the adoption of the monistic system. The successions are no exception from the application of the resubmission, not being mentioned in the exceptional cases enshrined in art. 2559 para. (3) Civil Code Therefore, if the deceased person had at the date of death the habitual residence abroad and by applying art. 2633 of the Civil Code „the inheritance is subject to the law of the state on whose territory the deceased had, at the date of death, the habitual residence”, but this legal system contains the conflicting norm *lex rei sitae* for real estate succession, Romanian law will apply if the building in the succession table is located in Romania (Lupaşcu, 2012, pp. 518-532).

3. Choosing the law applicable to inheritance

The Civil Code, establish in art. 2634 of the Civil Code a special regulation, according to which there is the possibility to choose the law

applicable to the inheritance. According to art. 2634 of the Civil Code „a person may choose, as a law applicable to the inheritance as a whole, the law of the state of which he is a citizen”, thus applying the principle of autonomy of will in matters of succession (*lex voluntatis*), conferring the provisions of art. 2633 Civil Code an discretionary character.

The autonomy of the will of the person in question of the inheritance in question (the deceased *de cuius successione agitur*) is limited, being reduced to two aspects: first, the choice must look at the inheritance as a whole, as universality. therefore, a law cannot be chosen to apply only to goods individually determined by the estate. This provision is likely to supplement the will of the legislator to apply a unitary law for all elements of the inheritance. Secondly, the object of the option is reduced to a single law, namely, the law of which the person to whom he opts is a citizen. The law applicable to the inheritance can therefore be only the *lex patriae* of the deceased. The fact that the law gives the possibility to opt for the law applicable to inheritance by a person, and not only by a testator, shows the existence of this possibility, both for legal and testamentary inheritance.

The legal act by which a person expresses his intention to choose the law applicable to the inheritance, according to art. 2634 alin. (2) and (3) of the Civil Code, is called a declaration of election, having the character of a unilateral legal act. The declaration of election has a testamentary character, producing effects only after the person's death. If a person opts only for the law applicable to the inheritance, but without disposing of the actual inheritance, the rules of legal devolution will apply. If the declaration of choice is incorporated in a will, it will follow the rules of the will in private international law. When the declaration of election is taken into account in isolation, it will be subject to the formal and substantive conditions enshrined in art. 2634 alin. (2) and (3) of the Civil Code, regarding the substantive conditions, art. 2634 alin. (2) the Civil Code stipulates as follows: „the existence and validity of the consent expressed by the declaration of choice of the applicable law are subject to the law chosen to govern the inheritance”. Therefore, the validity of the substantive conditions of the declaration of election will be assessed according to the law that *de cuius* has designated to govern the inheritance (*lex voluntatis*). This legislative solution is also found in art. 3 para. (5) of the Rome I Regulation.

Regarding the formal conditions, according to art. 2634 alin. (3) The Civil Code stipulates that: „the declaration of choice of the applicable law must meet, in terms of form, the conditions of a provision for the cause of death. Likewise, the amendment or revocation by the testator of such designation of the applicable law must satisfy, as to the form, the conditions for the amendment or revocation of a provision for death”. Because the provisions for the cause of death borrow, in principle, the characteristics of the will, the declaration of choice must be concluded in one of the forms of the will. If the deceased person has chosen the law of his citizenship as applicable, he will govern all the elements that form the field of inheritance law, according to art. 2636 C. Civ (Sitaru, 2013, pp. 307-308).

In the field of successions, there are many attempts to unify in private law, but there is still no common legal language „a common European legal language”. We cannot yet speak of a *jus successionis europaeum*, but rather of a „plurality of software installed on the common European hard drive”, which are triggered and run by activation caused by the conflict rule.

The Regulation is based on certain principles, some common, related to the methodology of international (European) law, others being specific to successions, the European legislator considering them an instrument likely to facilitate free movement and mutual recognition (acceptance) of judgments. These principles operating in the field of private international law are: the principle of unity of inheritance, the principle of proximity, the principle of predictability, the principle of the will of the author of the inheritance, the principle of solemnity and form, the principle of competition between European succession systems.

4. European Certificate of Succession

An important innovative tool, the European Certificate of Inheritance is a standardized form whose purpose is to facilitate, to help heirs, legatees, executors or administrators of the estate to prove their quality and rights (art. 63) in open inheritances. starting with August 17, 2015, representing a means that helps to solve quickly and efficiently the issues of succession, especially for its probative and legitimizing effects, thus being a

tool to materialize the free movement of decisions. Art. 62 of the Regulation stipulates that the use of the European certificate of heir is optional, and not mandatory, so its use together with national certificates of heir or other such documents, which do not become substitutable for them or even in countries where in the past it was not issued such certificates, for example, Italy. „If its issuance is conditioned by the vocation of the certificate to be used in other Member States, it will also take effect in the State of origin” (Article 62 (3), second sentence), thus avoiding a possible Reverse discrimination, this fact playing an important role especially in the states where the institution of the certificate of heir, is not fully recognized, but whose right of succession comes into contact, attracting numerous criticisms. The nature of the link between the European certificate of heir and the national certificate of heir has not yet been fully clarified, where the regulation expressly states in the event of a conflict, which of them has priority or the rules of procedure to be followed. - their issuance was requested at the same time.

According to art. 64, the European certificate of heir is issued by jurisdictional authorities (defined by art. 3 section 2 of the Regulation), but also by other authorities that are competent in matters of succession in accordance with domestic law, such as notaries from countries such as Romania, Czech Republic or Austria have the prerogative to issue the certificate. Chapter II of the Regulation contains general rules of jurisdiction according to which international jurisdiction will be assessed (art. 64 para. (1)), which will keep alive the „jurisdictional monism” specific to court decisions, and the rules in force in the forum state will establish internal territorial jurisdiction, so the certificate must contain an indication of the basis of the jurisdiction or competence (Popescu, 2014, pp. 101-102).

Art. 65 - 68 of the Regulation represents the headquarters of the matter regarding the procedure of obtaining an heir certificate. The starting point is the request made by the interested person (heir, legatee, executor, administrator) to which are attached various documents (identity documents, birth certificates, marriage, death, marriage agreements, will, declarations of succession option, etc.) either in certified copies, or in original, containing adequate data regarding the applicant, the deceased person and his family or the actual inheritance, art. 65 para. (3) contains more details on the issue in

question, as it does not need to crystallize the determination of the international character of the inheritance, the certificate can be used later to collect data for this purpose, it also does not matter whether the inheritance has been settled or not (Crişan, 2015).

Regulation prior to the competence, is obliged to carefully analyze the documents and information provided, their strength and probative value, thus conducting verification investigations, may require the completion of evidence or solemn statements from the applicant, it is required to inform all beneficiaries of the inheritance information on the application, being able to intervene and provide accurate information. Cooperation with the authorities of the other Member States (land register, civil status, trade register) is possible, but the Regulation does not contain details on the concrete ways in which it is carried out (Crişan, 2015).

5. Conclusions

Currently, more and more Romanian and foreign citizens are settling in other states, in most cases in those of the community space, so they can end up owning goods abroad, being the owners of the property right over them. The biggest problem arises when, sooner or later, the succession will inevitably open up, asking the question under whose rule it will be governed, in which case the rules of private international law in this area come to answer this question.

In Romanian law, the Civil Code in art. 2633, offers a solution to this question, establishing that "the inheritance is subject to the law of the state on whose territory the deceased had, at the time of death, his habitual residence", so this text of law is essentially a starting point in the settlement process of the issue of succession with an element of foreignness, but things do not stop here, the relevant legal rules offer other alternatives regarding the treatment of this legal issue, depending on the factual situations encountered in practice.

In private international law, in the current context mentioned above, successions play an important role in legal relations, being one of the most important legal institutions whose primary purpose is the transfer of assets to heirs immediately after the death of the author of the succession, given

the intervention of a possible conflict of laws in the matter, the norms of private international law having the purpose to solve these problems, given that at present they are more and more often encountered in practice.

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