SUCCESSION OF FOREIGN ELEMENTS

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Abstract: Succession of foreign elements raises to the law-professionals issues of procedural linked by some aspects of procedure as well as for competence generated by the entry into force on August 16, 2012 of the Regulation (EU) no. 650/2012 the European Parliament and of the Council of 4 July 2012, Regulation that aimes the competence, the applicable law, the recognition and enforcement of judgments, acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession. Considering that the new European law of international successions continues to maintain and applies the current common law, depending on the time of death, the issues raised in this paper examines the specific issues arising from the connection of the succession with the legal systems in several Member States of the European Union.

Keywords: succession, foreign, certificate, legal, European.

Established in the Constitution by the provisions of art.146 "the right to inheritance is guaranteed", and by the Civil Code, 4th Book, "About inheritance and freedom", the inheritance is an objective need directly connected and strongly influenced by the sociological and economic context of the moment.

Related to terminology, we must remember that Romanian legislation uses, when referring to transmittal of patrimony of a deceased individual to one or several persons who are alive (art. 953 Civil Code), both the term "inheritance" and "succession".

Even if the new Civil Code, as well as the Constitution of Romania, revised in 2003, prefer for most of the times the term "inheritance", the term "succession" can be found in Romanian legislation and in the Civil Code, with the same patrimonial transfer of "mortis causa".

As examples we can mention the use of the term "heir" in art. 46 of Romanian Constitution, Law no. 112/1995, Law no. 10/2001, Land Law no.18/1991, Law of Public Notaries and notaries activity no.36/1995, Order of Minister of Justice no.2333/C/2013 on the approval of the Regulation on the approval of Law of Public Notaries and notaries activity no. 36/1995 (published in the Official Gazette no. 479 dated August 1, 2013).

Regarding the term "succession", we can mention the use of this term both in the national legislation, respectively art. 627, paragraph 5, Civil Code ("The transfer of the asset by the estate of the deceased cannot be ceased by stipulating the inalienability") as well as in art. 806 Civil Code related the conditions the related assets were obtained by the administrator in exercising his/her tasks.

The European legislation, out of linguistic reasons, prefers the term succession, as we can found in the Regulation (EU) no. 650/2012 of the European Parliament and of the Council

dated July 4, 2012 on the competence, law applicable, recognition and execution of the court decisions and acceptance and implementation of the authentic deeds related to the succession and related to the creation of an European Heir Certificate, entered into force on August 16, 2012.

Legal or testamentary inheritance, representing a way to acquire a property (art. 557, paragraph 1, the Civil Code provides that "the property right can be acquired, under the conditions of the law, by convention, legal or testamentary inheritance, accession, usucaptio (prescription), as effect of the good-faith possession in case of movable assets of the results of such assets, by occupation, tradition as well as by court resolution, when it ca be shifted of property by itself"), it is directly connected to culture, political doctrine and economic growth and by reporting to the ownership right of people in a certain times. Starting with the customary norm, from the primitive commune, in the matter of estate of the deceased in the slave-owning or feudal system, continuing with the rules imposed by the Soviet inheritance law and concluding with the legislation of a modem state, member of EU, all the legal norms were subjected to a continual transformation, trying to address needs of reality, needs that can find a correspondence in the whole population and which have an affective component, which is very important.

This permanent change of the legislation related to inheritance, is a challenge at all times for the theoreticians of law as well as for the practitioners who must apply the juridical norm, understanding the will of the law maker and theoretical explanations in the doctrine.

When we are talking about the inheritance procedure, we can say that inheritance procedure, is, on national level, the most used and accessible procedure.

The notary public is, most of the times, the first professional who must implement a new juridical norm, taking into account the interval since it entered into force until the fist application of the rule by a professional.

EU citizens' mobility leads to the need of settling certain law and inheritance procedure issues. In the notary's activity practice we can encounter more and more inheritance situations with foreign elements or with reference to citizens or goods from the EU Member States as well as related to states outside the EU.

In order to be able to suggest an address to settle the inheritance with foreign elements we must identify the judicial norm which regulates this subject. In this regard, we must identify the norms which can be found in the domestic law, that which can be found in the law of the European Union, but also in the bilateral treaties to which Romania is a party, addressing to certain special provisions in the matter of inheritance. If in the domestic law, we can mainly say, that the matter is addressed in the 7th Book "International Civil Process" Art. 1064 – Art. 1109 of the Civil Procedure Code, and in the 4th Chapter "Inheritance" of 2nd Title "Conflict of laws" of the 7th Book "Private international law provisions" and in Art. 2633 – Art. 2636 of the Civil Code, related to the subject of the mater from the law of European Union, we mention:

Regulation (EU) no. 650/2012 of the European Parliament and of the Council dated July 4, 2012 related the competence, law applicable, recognition and enforcement of the court decisions and acceptance and execution of the authentic deeds related to the succession and

related to the creation of a European Heir Certificate, entered into force on the 16th of August 2012.

Regarding some of the bilateral treaties to which Romania is a party and which contain special provisions regarding the inheritance, we take into account both international treaties and the international conventions which comprise provisions on the subject of the succession, even if such conventions were not ratified by Romania.

We mention certain treaties and conventions which have a relevant content from this point of view:

- The treaty between People's Republic of Romania and People's Republic of Albania regarding juridical counseling in the civil, familial and criminal causes, ratified by Decree no. 463/1960.

- The treaty between People's Republic of Romania and Federative People's Republic of Yugoslavia regarding juridical counseling, ratified by Decree no. 24/1961.

- The treaty between People's Republic of Romania and People's Republic of Bulgaria regarding juridical counseling in the civil, familial and criminal causes, ratified by Decree no. 109/1959.

- The agreement between Socialist Republic of Romania and People's Democratic Republic of Korea regarding juridical counseling in the civil, familial and criminal causes, ratified by Decree no. 305/1972.

- The treaty between Romania and Moldavian Republic regarding juridical counseling in the civil, familial and criminal causes, ratified by Law no. 177/1997.

- The treaty between People's Republic of Romania and Mongolian People's Republic regarding juridical counseling in the civil, familial and criminal causes, ratified by Decree no. 415/1973.

- The treaty between People's Republic of Romania and People's Republic of Poland regarding juridical counseling in the civil, familial and criminal causes, ratified by Decree no. 323/1962.

- The treaty between People's Republic of Romania and Czechoslovakia regarding juridical counseling in the civil, familial and criminal causes, ratified by Decree no. 506/1958.

- The treaty between People's Republic of Romania and People's Republic of Hungary regarding juridical counseling in the civil, familial and criminal causes, ratified by Decree no. 505/1958.

- The treaty between People's Republic of Romania and Union of Social Soviet Republics regarding juridical counseling in the civil, familial and criminal causes, ratified by Decree no. 505/1958.

- Convention from Hague dated October 5, 1961 related the conflicts of law related to the form of the testamentary provisions;

- Convention from Hague dated 02.10.1973 regarding the administration of the estate of the deceased, ratified by Czech Republic, Portugal and Slovakia;

- Convention from Hague dated 01.07.1985 the applicable Trust Law and its recognition;

- Convention from Hague dated August 1, 1989 on the law applicable to the estate of the deceased upon death (ratified only by the Netherlands on the 27th of September 1966);

- Convention from Washington dated October 26, 1973 regarding the Uniform Law on the International testament (ratified by countries such as Belgium, Germany, Italy, Portugal, Slovenia, and France);

- Northern Convention dated November 19, 1934 regarding the inheritance and liquidation of the estate of the deceased, in force between Denmark, Finland, Iceland, Norway and Sweden.

We mention that "the entry into force of the Regulation (EU) no. 650/2012 does not affect the implementation of the international conventions existing to which the Member States are parties, except for the conventions concluded exclusively between two or several Member States of the European Union (art. 75 from Regulation (EU) no. 650/2012).

Especially, the Regulation (EU) no. 650/2012 maintains the application of the Convention from Hague dated October 5, 1961 regarding the conflict of laws related to the form of the testamentary provisions matter (art. 75 paragraph 2 of the Regulation) and of the Northern Convention dated 1934 (art. 75 paragraph 3 of the Regulation)"[1].

Certain specifications must be made, for the settlement of the inheritance causes, without having a direct impact on the succession, but being connected to such, we can remember:

- Regulation (EC) no. 1393/2007 of the European Parliament and of the Council dated November 13, 2007 regarding the notification or communication between the Member States of the judicial and extrajudicial deeds in the civil or commercial matter (notification or communication of deeds) and cancelation of Regulation (EC) no. 1348/2000 of the Council.

- Regulation (EC) no. 1206/2001 of the Council dated May 28, 2001 related to the cooperation between the courts of the Member States related to evidence support in the civil and commercial matter.

Identifying the legal rules governing international matter of the succession, we have to clarify the relation between these rules when a specific procedural moment is regulated both by the domestic law and by the international normative deeds mentioned.

Under such situation, in compliance with the norm imposed by art. 5 Civil Code and art. 2557 paragraph 3 Civil Code, we can found that the "provisions of this book are applicable if the international conventions to which Romania is a party, the Law of the European Union or the provisions of special laws do not impose other regulations".

If we also take into account art. 84 paragraph 4 of the Regulation (EU) no. 650/2012 we found that "this regulation is mandatory under all aspects and it is implemented directly in the Member States in compliance with the treaties".

Therefore, we can conclude that European Union law is directly applicable and take precedence over the domestic law. Regarding the situation in which the Regulation (EU) no. 650/2012 regulates some aspects that are subject to the international conventions or bilateral treaties concluded between some EU Member States, we can consider that art. 75 of the

[1] Ioana OLARU, *Dreptul european al succesiunilor internaţionale. Ghid practic,* Notarom Publishing House, Bucharest, 2014, pp.14.

Regulation (EU) no. 650/2012 clearly establishes which among the juridical norm can be applied under the circumstances that several norms regulate the same aspect.

„Article 75

Relationship with the existing international conventions

1. This Regulation shall not affect the application of international conventions to which one or several Member States are parties on the adoption of this Regulation and relating to matters covered by this Regulation.

In particular, Member States which are Contracting Parties to the Hague Convention dated October 5, 1991 on conflicts of laws relating to the form of testamentary dispositions conditions, the provisions of that convention are still applicable to replace article 27 of this Regulation regarding the formal requirements of wills and joint wills.

2. Without any prejudice to paragraph (1), between Member States, this Regulation shall take precedence over conventions concluded exclusively between two or several Member States to the extent such conventions concern matters regulated by this Regulation.

3. This Regulation shall not preclude the application of the Convention dated November 19, 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on the succession, wills and estate administration, as amended by intergovernmental agreement between those states dated June 1, 2012, by the Member States which are Parties to the Convention to the extent that the convention provides:

(a) rules on procedural aspects of estate administration, as defined in the Convention, and assistance in this regard from the authorities of States which are Contracting Parties to the Convention; and

(b) simplified and faster procedures for the recognition and enforcement of court decisions in matters of succession".[2]

In the following paragraphs, we will try to present the legal norm applicable in certain specific situations.

When the file in question, we are talking about a citizen of an EU member state who died after August 17, 2015, the citizen of a country with which Romania has concluded a bilateral convention under art. 75 paragraph 2 of Regulation (EU) no. 650/2012, the provisions of the bilateral treaty concluded between Romania and that State in matters of succession, would no longer apply, if the citizen died before August 17, 2015, the provisions of the bilateral agreement or treaty concluded by Romania with the state will be applicable, since the European Regulation is applicable only for the persons who died after August 17, 2012.

We mention that after "August 17, 2015, the Regulation (EU) no. 650/2012 is also applied for the deceased who are citizens of another Member State of the European Union or which did not have their last residence in a Member State, when the settlement competence of the succession is the liability of an authority from a Member State".[3]

"Any law mentioned by this regulation is applied regardless if it is a law of a Member State or not." (Art. 20)

[2] Ibidem, pp.18-19.
[3] Ibidem, pp.23.

Consequently, we suggest the practitioners called to settle the international succession, the following steps that we find in the paperwork "Dreptul European al Succesiunilor Internaţionale - Ghid practic" ("*European Law of International Inheritance – Practical Guide*"), author Ioana Olaru.

"1. Establishing the normative deed comprising the juridical norms applicable to the succession matter;

2. Establishing the norm applicable, when relevant provisions are to be found in several national and international law sources;

3. Establishing the content of the foreign law applicable and acquiring the customary certificates;

4. Determining the norms of conflict and substantive rules applicable, depending on the date of death of the persons whose estate is discussed, following the change of their content over the time, by implementing Law no. 287/2009 on the Civil Code as well as of Law no. 71/2011 on the implementation of Law no. 287/2009 on the Civil Code, as well as by the implementation of Regulation (EU) no. 650/2012 of the European Parliament and of the Council dated July 4, 2012 related to the competence, the law applicable, the recognition and execution of the courts decisions and acceptance and execution of the authentic deeds related to the succession, as well as regarding the issuance of the European Heir Certificate;

5. Determining the fact that a body from Romania is able to settle the heritage (international competence);

6. Verification of competence of the Romanian notary notified;

7. Determining the substantial law applicable to the succession;

8. Identification of the circumstances when a foreign law, considered as applicable, can be canceled as exception from the public order in the private international law;

9. Considered the merits and the form validity of the options related to the succession;

10. Determining the merits and the form validity of a will;

11. Acceptance of effects produced by foreign documents in the Romanian procedure related to the succession, including the authentic deeds or courts decisions;

12. Issuing the National Heir Certificate;

13. Issuing the European Heir Certificate, in accordance with Chapter 6 of Regulation (EU) no. 650/2012."[4]

We consider that for the fulfillment of the procedures related to the succession with foreign elements aspects related to the determination of the content of foreign law will be clarified, the application on time of the substantial law related to a relation with foreign elements under the situations that its provisions were changed in time, to establish the relation and the juridical deeds to which the Regulation (EU) no. 650/2012 is applicable, verification of the competence in case of debating an international succession, the law applicable to the succession, using foreign documents into the procedure applicable for the succession (courts decisions, authentic deeds, documents of marital status).

In order to support the professionals, the European Juridical Network in the civil and commercial matter was established by Decision No. 2001/470/EC of the Council dated 28th of

[4] Ibidem, pp.9-10.

May 2001, to create an European Judicial Network in the civil and commercial matter amended by Decision No. 568/2009/CE of the European Parliament and of the Council dated June 18, 2009, as we can find useful information on: http://ec.europa.eu/civiljustice/index_en.htm, https://e-justice.europa.eu, www.successions-europe.eu, www.couples-in-europe.eu, and "European Notarial Network launched on the 1st of November 2007 following the decision of the EU Council of Notaries (CNUE), official and representative body of the notary profession in Europe. RNE is a structure of national interlocutors dealing with cross-border cases, to support the notaries from 22 Member States of the European Union. (www.enn-rne.eu, http://www.notaries-of-europe.eu/index.php?pageID=228)"[5].

Finally, we have to mention that this paper seeks only to challenge the people interested in the international procedure related to the succession, to analyze the available juridical and normative resources to identify the correct procedure applicable in such a situation, in full compliance with the constitutional right to inheritance, the right to free movement within the EU and regulations in the matter which we can find both in the domestic and European legislation and the content of treaties and conventions concluded by Romania and the content of which concerns some aspects of the case relating to the succession with foreign elements.

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[5] Ibidem, pp.29.