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The Implementation of the Institute of Inheritance in the European Countries

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Abstract
This paper gives a description of the implementation of the institution of inheritance mortis causa at the international level especially at the European level, based on the new European directive, the Regulation No. 650/2012 which entered into force on August 17, 2015. This paper deals with those aspects that relate with the regulation of the inheritance relationship in private international law, the applicable law, the circulation of court decisions and public acts, their recognition and applicability and the newest act that this regulation has brought, the "European Certificate of Justice", with all its elements which is applied in all countries European and aimed to achieve the highest objective of the European legislator, which is none other than harmonization, unification and international coordination in the field of private law. In the conclusions and recommendations, are identified the main issues where there have been difficulties in the implementation of the institution of inheritance in the EU countries and the definition of common practices for the implementation of this institution have been proposed.

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1. Introduction

1.1 Inheritance in antiquity

In the law of Greek antiquity, the family had a special family regime. According to it, the family was constituted as "oikos", a concept that meant the term " family" and this family had a head called "kyrious" [1], that meant a "gentleman" who leads this family.

In the hereditary right of Greek antiquity, it is noted that the testator has no freedom of choice to determine his heir. According to this hereditary right, if a person died and legitimately had only son, all inheritance passed to him, including the testator's obligations to creditors. If the testator had enjoyed the status of "kyrious", after his death, this status passed to his successors only, to the legitimate son [2].

If the testator had more than one legitimate son, then the bequeathed property would be shared equally between the sons and there was no principle according to which the eldest son had the chance of choice. So no advantage was known. This legacy could continue to remain undivided and to be enjoyed by all equally, but the data around Greek antiquity show that this wealth was in most cases divided equally to be enjoyed and then disposed by the heirs, in a special order.

After the death of the testator, the property was transferred and divided equally among his grandchildren, thus benefiting not only from the wealth of their father but also from the wealth of their father's father (the testator). Property was dividend in a special way, such as the "lottery" distribution.

In Greek antiquity it was given a solution even in the case where the heir was given to a minor who had not reached the major age. These cases had a similar arrangement to today's concept "placed in legal guardianship", i.e. immediately after the death of the testator, there were appointed two or more persons who would be responsible for the administration of the estate inherited

[1] J. H. Lipsius, Das attische Recht u. Rechtsverfahren, Lipsia 1905-15, II, ii, pg. 537
[2] 3 U. E. Paoli, L'ἀγχιστεία nel diritto successorio attico, in Studia et documenta historiae et iuris, I (1936), pg. 313

By the minor [3].
Data from Greek antiquity show that in his will, the testator also pre-selected the "legal guardian" who would have represented his minor son.
Another case of inheritance regulation was that when the testator had no male descendants, but only daughters. In these cases, it was claimed that the daughter would marry and have a child of male sex, who would not only inherit the property but also continue to do the tradition of "oikos". In that case the daughter was forced to marry one of the closest men, cousins of her father. If there were several men at the same time, then the oldest of them had the right to choose for this marriage.
The same thing happened in cases where the heir's daughter was married. Whether she had a male heir, everything was fine as it was mentioned above. But in case the daughter does not had children from the marriage, then she was forced to divorce from her husband, and thus marry her nearest cousin so that he had the right to control the inherited property [3].
In Greek antiquity the role of the woman was very ignored, not allowing her choices in any case, but only her obligations so that the inherited property was regulated, controlled and transferred only within the family. In cases where the testator had no descendants, his wealth passed to his relatives in a certain order but always giving priority to relatives of the male sex. In Greek antiquity it is used the concept of a child born out of wedlock, who did not enjoy any rights over inheritance and was not called part of the family.

1.2. Roman law

Roman law has been a very important reference point for all legal systems, especially those belonging to the legal family of civil law. A special aspect of the hereditary relationship in Roman law was the notion of universal inheritance (universitas) according to which the transition of the property (all in its entirety) was foreseen after the death of one person from that person to another subject. The inheritance that arose as a result of the death of a person was titled as inheritance mortis causa, since the main cause of the opening of the inheritance was precisely the death of the person (heres) and only from this moment his wealth could be passed or transferred to the heirs (heredes).
In ancient Roman law there was no distinction between the institution of inheritance and family power and the first to bring to life the concept of the personal unity of de cujus-it (of the deceased) according to which the heir follows the personality of the deceased was Justinian.
In Roman law are recognized two inheritance systems at the same time, which were exclusive one to the other, mutually, intestate and the other testamentary [4]. In complete analogy with today's systems (civil law) of inheritance, the Roman law provided those who would be called heirs (heredes), those who were called as such by the testamentary act and in the other case, when the deceased did not had drawn up a testamentary act when he was still alive, then the arrangement of hereditary relationship would come from legal inheritance.

1.3 Far East

In the Far East there were two main principles on which law was applied, the passing of the deceased's property that was regulated by law customary and the law and the patriarchal constitution of the family, according to which the property was in provision for all family members, including the wife and daughters, but after the death of the deceased, this property could only be inherited by the descendant's male members of the family [5]. In fact, the daughters of patriarchal families in the Far East left their family in case they got married and also the father was forced to hand over the girl's dowry, which would later serve as an asset between the newly married couple. With the dowry taken from the family, the girl could no longer have claim on family property.
Married and unmarried girls were not included in the ranks heirs, as opposed to what happened with sons and families the essential principle in the far east was that inheritance was in any case closely related to the descendants. Although in the district of the descendants were not exempted from inheritance, the holder had some freedom in his division. So, for example, the holder could divide the inheritance between to his descendants even if he was still alive. From the data that have been made known until today from the Sumerian laws, it appears that the term "e hereditary right" [6].
It was otherwise predetermined in the laws of Hammurabi in which this the term was widely used. The provisions of Hammurabi's laws concerning with inheritance were defined in article 162 to article 184. According to article 162 it was explicitly determined that after the wife's death, her dowry does not pass to her husband but only to her children. If the wife had no children, then her dowry was returned to her father's family, but never to the husband [7]. The Code of Hammurabi also recognized the concept of exemption from inheritance, according to which the father could exclude one of his sons from inheritance, but this only for serious reasons and expressly provided in law.

2. From the century XI to the codification process

Since the century XI the hereditary right was dominated by the development and the regulation that existed in the medieval period [8] (which had the civil ius of Roman law as a basic principle). Society in this period continued to consider the family as the basic core, closely related to hereditary relations. The heritage passed on to the male members of the family. It was given more priority to the sons of the family.
This arrangement continued to remain strong as long as the aim was the transfer of property within the family and in no case outside it or to third parties [9]. Later periods did not improve the position of women in relation to inheritance and heirs, but they continued to be attributed and to have priority over the males of the family who were supposed to carry on its continuity.
There was a radical change in the period after the French revolution, where Napoleon gave special importance to the figure of the woman and recognized her rights equal to those of men, thus supporting the principle of paterna paternis, in

[3] L. Gernet, Sur l'épiclérat, in Revue des études grecques, XXIV (1921), pg. 337
[4] E. Olldashi, E Drejta Romake, Kapitulli i Trashëgimisë, Mediaprint
[5] J. M. Powis Smith, The origin and history of Hebrew law, Chicago 193, pg.166
[6] G. R. Driver e J. C. Miles, The Assyrian laws, Oxford 1935, pg. 67
[7] G. Mazzarella, Gli elementi irreduttibili dei sistemi giuridici, Catania 1918-1920, pg.54
[8] 8 P. Laband, Wesen des römischen und germanischen Erbrechts, 1861,pg.76
[9] J. Ficker, Zur Erbfolge der ostgermanischen Rechte, Innsbruck 1891-1904, pg.93-95

materna maternis The development of Western Europe was accompanied by the expansion and strengthening of the national law on the regulation of hereditary principle, by thus limiting the application of the principle of territoriality of the law. Exactly, after half first century XIX it began to strengthen the opinion that hereditary relations were closely related to the person and as such would be regulated by the law.

Partisan of this opinion was Savigny, who foreseen that the regulation of hereditary issues should be based on the law of residence (lex domicile) that the testator had at the time of death and on the other hand, Savigny did not foresee any distinction between the movable and immovable objects.

Unlike Savigny, Mancini predicted that hereditary relations being closely connected with the family, i.e. with the personal law, would be regulated by the personal law of the testator, the law of his nationality (lex nationalis). It was at this time that were born also the first differences or the main groups of the private international law.

3. The way towards uniform regulation of the institute of Heritage in the European space

The first projects regarding the creation of common and uniform provisions in the field of inheritance law have started since the beginning of the last century. Such projects can be found in the international conventions of The Hague since the years 1893, 1894, 1900, 1904. After the second world war, talks began to have a genuine convention. Unifying Convention on the form and testamentary provisions [10] 59, resulted in the significant reduction of inheritance conflicts with an international character among the 41 countries that decided to sign it and be members of this Convention.

Despite the success of the 1961 Convention, its scope (its field of implementation) remained concentrated only in Europe. Precisely for this reason, in 1973 the "Washington Convention" was approved (in cooperation with "UNIDROIT") which dealt with the subject of formal international validity of testamentary acts.

In the same year, it was adopted The Hague Convention which, with the Washington Convention, would deal with the unification of norms related to the administration of testamentary acts. The success of these two conventions was limited and the causes for both were different. The Washington Convention, which managed to get only twelve ratifications (mostly from Common Law countries) despite reaching a pleasing result in terms of the form of the documents, for recognition of international inheritance acts, provided as mandatory the system of two witnesses present and signing at the time of drafting testament. Such a system, despite of being very successful in the countries of Common Law was not practiced in Civil Law countries. On the other hand, The Hague Convention presents more interesting elements, which, will be applied in the future in the provisions of European Union regarding hereditary relations. Thus, the convention provided that for an international inheritance act, a certificate that clarify which states would administer the testamentary provisions was necessary. This convention also provided that it would be precisely the state of the member country where de-cujusi had the usual place of residence that would have the competence for issuing these inheritance certificates. However, such a convention maybe was very advanced for that time and it was ratified by very few countries.

Again from The Hague Conference of 1989 there was another attempt to create one Convention that could enable the uniformity of the international inheritance provisions, especially in terms of recognizing the application of the law of one foreign state in the territory of the state executing the act. Provisions of this convention were quite similar to those of the current normative texts of the European Union in relation to the heritage institute, but again being a step forward, these provisions and the whole convention, were never approved.

3.1 Legal regulation of European norms related to testamentary acts

Regulation No. 650/2012 in Article 3 provides the meaning of a hereditary pact calling it an "'agreement as to succession' means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement [11]". This definition, which is inspired by The Hague Convention of 1989, has a very wide implementation and it is able to include in it the entirety of the various institutes which are present in the legislations of the member countries.

The basic characteristic of this type of provision is cause of death and it is represented by the connection of the will of the testator, with the will of one, or more people. In this way in the future, the will of the testator to revoke his testamentary act is limited.

A special characteristic of the European notion of hereditary pacts is represented by the condition that the person/persons, whose inheritance rights refer to, are part of the agreement. This limitation, determined by the definition of article 3 paragraph 1 letter b), has the function of distinguishing and changing testamentary acts. Statutes and founding acts of companies, associations and legal entities are included in the clauses that determine autonomously and directly the destination of participation quotas in the death of co-owners or partners. Here actually it may be doubted whether these statutes or acts were followed or not by the covenants hereditary, but on the other hand it turns out that the regulation excludes it in demonstrative order from the field of application, calling them as: "issues disciplined by the law applicable to commercial companies, corporations and legal entities" (Art 1, point 1, letter i).

Article 1, paragraph 2, letter g) of Regulation No. 650/2012 excludes from the field of application (its applicability) and all those " property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2".

From the reading of this provision, it appears that its content talks about a number of things of legal remedies that between them are almost completely heterogeneous and each one has different conclusion. But on the other hand, all these legal remedies tend to use to determine the creation of rights, or the transfer of goods materials, which are related to the death of

[10] http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=41

[11] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:0134:EN:PDF

a person even though they have no connection with his own heritage.

Regarding "mortis causa" donations are excluding those in which death does not constitute a cause for the transfer of property but it works as a term of time or as a condition, such as "donation inter vivos" (with usufruct clause) or "donation as moriar" which does not come as a cause of death but it is simply a clause provided in the act which takes effect after the will is opened and constitutes a right which can be protected before and during its opening.

When the pact involves the inheritance of more than one person (but all must be parties to a pact) the regulation in its final version has introduced two distinct regimes: the first regime is that of the cumulative application of laws (of the inheritance of all persons) related to the admissibility of pact and the second regime which is the application for only one regulatory law, chosen in basis of the criterion of the closest connection, which includes all other aspects, that is more correct, with substantial validity and binding effects between the parties. It includes also the conditions for the relative invalidity of the pact (an exception is made only for the formal validity that is disciplined by Article 27 of the Regulation).

The choice to accept a "composed" inheritance act is made thanks to the desire to give a rigorous regulation these complicated acts. This strictness is more apparent than real, because it is softened by the opportunity (given to the parties by article 25, paragraph 3) to choose one of these aforementioned laws to discipline the pact.

Article 25 is limited only to the regulation of binding effects between the parties, including the circumstances that imply the disappearance of the pact. On the other hand, this article does not extend to possible effects vis-à-vis to third parties, including the possible beneficiaries of the pact. This takes a special importance in the case where the pact derives from the two-way expression of the will, so it has a more special validity in this case, while for the case where it derives from unilateral will, it seems to be of importance more relative [12].

4. European Certificate of Succession

The reasons for establishment of a European Certificate of Succession are many. On the one hand, there is the free movement of persons, which encourages individuals to purchase material goods (to live, to work or business, to invest, or for holidays). On the other hand, there is the frequency of solving inheritance issues, such as inheritance by reason death. This relationship is often regulated by a single law (that can be that of citizenship, place of residence, or the law chosen by the testator), independently from the location of the assets of the property. The combination of these two elements (ownership of many assets that belongs to one person, located in different countries) has given more importance to the phenomenon of so-called legacies with foreign elements or international heritage.

European Certificate of Succession was born as a tool with the specific purpose of allowing the circulation of faster and safer transfer of material goods due to death although on the other hand this certificate itself neglects any important element, such as the protection of the heir's creditors or legatee.

The necessity for international administration and regulation of hereditary matters brought into light The Hague Convention of 1973, which entered into force only 20 years later after its drafting, i.e. in 1993 and has been ratified in very few countries. This convention provided specifically the creation of an "international certificate" which on the one hand had to establish (Article 1) "the person, or persons in charge to administer the immovable and movable assets of an inheritance" and by on the other hand, to show "the power of these people".

Then, the certificate had to be prepared in accordance with a certain model (Article 2) by the competent state authorities of the habitual residence of the deceased and it would be precisely this authority that would apply and implement the internal legislation.

The Convention did not impose any procedural rules, but limited itself to require only adapting appropriate measures to inform the interested parties (especially the surviving spouse) on the initiation of the investigation, if it was e necessary (Article 7).

5. The reasons for the lack of success of inheritance provisions

The main reason for the lack of success lies, in the choice of convention not to create a true certificate of inheritance, but merely one certificate for the administration of the inheritance which had the sole purpose to identify who is legitimate to administer the goods that were part of inheritance. The reason of dysfunction is even deeper and should be sought in the technical choice implemented by The Hague Convention of 1973. Indeed, it can be accepted that this convention strongly privileged hereditary systems that were characterized by the typical discipline of Anglo-American systems (common law). In Anglo-American legal systems between the deceased and the heir is included another subject (person or entity) who becomes the holder of all situations hereditary relationship. The Hague Convention of 1973 is focused exactly this model since the certificate provided for by this convention simply serves to identify the person or persons charged with the administration of one's movable property hereditary relationship278. At the same time, the convention neglects almost entirely continental systems, where the heir is always included in the entire estate of the deceased inheriting the deceased in all his legal relations.

The arrangements that originated from central Europe (above all, Germany and Austria) ask exactly the public authorities to pronounce by means of a specific regulation (Erbschein), related to the setting of those entities that enjoy the qualities of the heir even decide in whose favor it will be possible property registration is established [13]. In the French regulation and those after it, there has not been a legal instrument to whom the law had clearly given the duty to identify all possible testators of an heir and this as because in practice was used a completely different tool, that of the notarial deed.

The German or Austrian certificate of inheritance is based on the legal assumption that heir is assumed only the one who is defined as such thanks to the certificate and in these cases the act of the notary does not have any special effect in terms of genuine inheritance. Its role is to "unmask" (reveal) all those who can claim inheritance rights or any other but fictitious

[12] "lex Successionis", see: Khairallah:"La loi applicable a la Succession", pg 75

[13] Zoppini: "Le Succession in diritto comparatortivo", pg 30

right in relation to inheritance.

6. The new European perspective: Regulation Rr.650 /2012

The "Green Book" or the so-called "Green Paper" on inheritance and testamentary acts, came to life from the study of the German Notarial Institute (Deutches Notarininstitut), in the year 2002. The Green Paper specifically highlighted that: (i) quality assurance evidence of the heir is disciplined differently in different legal systems: (ii) it is important to be able to exercise the acquired rights, because they are possessors of these rights in different countries without having to develop processes for this purpose and (iii) in the presence of harmonized rules for conflict of jurisdiction would be possible to use a certificate with effects of uniformly throughout the territory of the European Union. Almost all the suggested general indicators of the "Green Book" could be summarized in four main points:

a. The European Certificate of Inheritance must identify correctly the heir;
b. The certificate must be unique for each heir, wherever are located material goods, movable or immovable;
c. The certificate must allow its holder to claim material goods left after death by the deceased in all countries of the European Union
d. The certificate must have a certain mandatory form.
e. European Certificate of Succession: presumption of the status of the legatee heir.

One of the most important elements of Regulation No. 650/2012 is presented in the Article 69 of this regulation, which presumes the truth of some legal facts that manifest their effects in two directions: first, the person mentioned in this certificate as heir, legatee, executor or administrator of the will, will be presumed to enjoy this status and exercise all the rights arising to him and secondly, any agreement made between the testator and third parties that enjoy a certain status in this certificate will be presumed without doubts and in good faith that are exactly the parties who have committed this agreement.

The regulation is detailed and provides that the protection provided by the certificate is offered either for the protection of the one who fulfils an obligation to the subject identified in the certificate, and for the protection of the one who has material goods that originate from the hereditary relationship. On the other hand, it turns out that this presumption is relative as long as anyone interested can contest the validity of the certificate by providing the contrary evidence, until he can benefit from its cancellation (as provided in Article 71 of this regulation). Of course, the question on circulation of the certificate of inheritance in the field of the European Union will be different. The preferred solution for this (Articles 62 and 69 paragraph 1) is that of “immediate effectiveness and validity”, which consolidate the tendency to overcome the old procedure that required legitimacy as a primary condition of validity.

However, the European legislator has not recognized the validity of the certificate for one indefinite time but has limited it to a period of 6 (six) months and only in case it is requested by the parties in the interest of the inheritance process, the authority that issued the certificate may extend its validity period. So it seems that the European legislator has attributed to this document an "ad hoc" validity which can be extended only by the decision of the authority that issued it.

7. Conclusions and recommendation

The European Commission's proposal presented in 2009 was anything but the final result that the plan of action brought. The new instrument which attempts to regulate and includes in its scope of application all those hereditary situations or relationships that are affected by the foreign element, based on the transitional provisions foreseen in Article 84 of the regulation, was fully applicable from August 17, 2015. The new European regulation is undoubtedly one of the most important achievements or ambitious works that has ever been undertaken by the European Union in the framework of judicial cooperation for civil law issues.

All other regulatory instruments undertaken previously or in force (including the Regulation "Brussels 1" and today "Brussels 1 bis"), didn’t managed the functioning of the heritage regulation by allowing thus a considerable gap in the field of hereditary matters, which from on the other hand, disappeared completely after the approval of Regulation 650/2012.

Regulation No. 650/2012 represents, not only in the European community but also broad, the first attempt to "achieve" the realization of a complete unification of norms of international law related to the institution of inheritance. Regulation and solutions foreseen in Regulation No. 650/2012 seems that best reflect the effort to overcome all obstacles or difficulties techniques encountered in inheritance law with foreign elements. Such efforts, started with The Hague Convention of 1989 which although never entered into force in the international level, has been the main source and reference for the drafters of the new Regulation No. 650/2012 of the Union European. At the same time, the adjustments and solutions provided in this regulation clearly express the desire to reform the previous solutions, adapting, changing and combining them with new and original flows and always in accordance with the "constitutional" values of European Union law.

A problematic issue that may arise at the international level by the Regulation 650/2012 is the interpretation of the notion "court". According to this regulation, the notion "Court" shall mean not only judicial bodies but also any other bodies including the legal professionals/officials who have the competence to pronounce on hereditary matters (notaries). The question that arises is “can this bring new concept and compatibility problems with internal laws of respective member states”. As long as each state regulates the operation and the organization of legal officials according to its internal norms and in complete discretion, it is understandable that this matter would indeed bring controversy or debate which would be easy to find an immediate solution.

In order to unify its functioning and implementation as easy as possible in the European space, the regulation has foreseen the implementation of the legal norm that belongs to the state of residence of the testator at the time he died. But in the regulation, there is no provision to establish the conditions of a place of residence to be called ordinary, and this brings many problems regarding free movement of persons from one-member state to another. The difficulty to identify the usual place of residence of the de cujus, would require, before judging the inheritance issue, to prepare a genuine analysis which would then derive in view of the prevailed jurisdiction that would be pronounced on the issue of inheritance. This genuine analysis will mainly belong to the national courts of the member states and especially the European Court of Justice, which as the main regulating and interpreting body

of European law will have to provide explanations through its interpretive ability, not only regarding this notion but also for all the difficulties that this regulation may encounter in its application in the future.

Taking into consideration that in the field of inheritance, such comprehensive legal norms applied are complex it is very difficult to give recommendations about the future functioning of these norms. As long as these norms constitute de facto the main body for their implementation, it is the role of the courts of the member states to implement properly the Regulation No. 650/2012.

The need for such a recommendation may arise as a result of the positions that some of the judicial bodies of the member states have taken during the process of creating this standard (where we can mention the positions of Supreme Court of Germany, Austria and Poland), in which they expressed their non-compliance with some of the basic principles of the norm, for example the provision of "optio legis". It will remain to be seen whether the national courts of the member states will or will not be able to overcome their legal convictions (closely related to the national laws), in favour of European Community legislation that has the main purpose of further integration of member countries. Another element which can present the need for a recommendation, will be the ability of these courts to overcome the obstacles that may arise from the interpretation or application of this norm, that should be addressed to the European Court of Justice through a preliminary refererence.

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