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Extraneity Elements Inheritance

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ABSTRACT: In matters of succession, the European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured, adopting thus measures relating to judicial cooperation in civil matters having cross-border implications, to facilitate the understanding of foreign law. This is also the rationale behind the provisions of Regulation (EU) No. 650/2012 designed to ensure that conflicting judgments are avoided in EU Member States. According to this European legal act, the European Certificate of Succession issued under the Regulation should constitute a valid act for the registration of succession in the registers of another Member State. This is not mandatory since the national authorities are the ones that may impose additional procedures and formalities.

KEYWORDS: applicable law, successions, competence, residence, European Certificate of Succession

Introduction

According to Section 1 of the Preamble to *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 Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession*, the European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured, adopting thus measures relating to judicial cooperation in civil matters having cross-border implications, to facilitate the understanding of foreign law. This is also the rationale behind the provisions of Section 34 of the Preamble, i.e., for a harmonious judicial cooperation, conflicting judgments in EU Member States should be avoided.

Taking into account the provisions of the European Union Treaty, *the Regulation,* sought compatibility of the conflict of laws and jurisdiction rules applicable in the EU Member States, but excluded matters such as *property rights and assets created or transferred otherwise than by succession* (such as gifts). However, the law considered to be the law applicable to successions will determine whether various *inter vivos* provisions establishing rights in rem prior to death should be restored or calculated in determining the shares. Regulation no. 650/2012 also allows the creation or transfer by succession of rights and immovable or movables, depending on the law applicable to succession, but cannot affect the limited number (*numerus clausus*) of rights in rem accepted in the national laws of the Member State (According to Section(15) of the Preamble to the *Regulation*).

The Regulation has also *a universal application*, in that any law specified shall be applied whether or not it is the law of a Member State. Regarding the conflict of laws, the main rule should ensure that the succession is governed by a predictable law and therefore the law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State. However, as we shall show below, the settlement of a succession with cross-border implications also depends on the national laws, with regard to procedures, the estate or the heirs' shares of the estate.

1. Recording of the Certificate of Succession

According to Section 18 of the *Preamble*, the conditions relating to the recording of rights or assets in public registers should be excluded from the scope of the *Regulation*. Such matters concern the law of the Member State *in which the register is kept*, i.e. for immovable – *lex rei sitae* (In Romania, the conditions for recording immovable in the land book are provided by Law no. 7/1996 regarding cadaster and real estate publicity, republished). All matters related to these conditions are regulated at national level, in Romania being involved authorities such as land registers or notaries including in the verification of the documentation required for recording.

The European Certificate of Succession issued pursuant to the *Regulation* should constitute a valid document for the recording of succession property in a register of a Member State, but such operation is not mandatory since the national authorities are the ones imposing additional procedures and formalities. In Romanian law, according to Article 24 (3) of *Law no. 7/1996*, the property right or other rights in rem regarding immovable can be recorded in the register *only based on an authentic notary act or a certificate of succession prepared by the Romanian Notary.* Thus, we can conclude that for the succession properties in Romania, the notary must issue a national certificate of succession and the European Certificate of Succession shall remain a so called "supranational" document which can be issued after the division of the estate in a certain state.

2. The general competence of the issuing authorities

Regarding the *competence* on the issuing of the European certificate of succession, we make some clarifications, taking into account the provisions of Sections (21) to (23) of the *Preamble* to the Regulation (EU) No. 650/2012. Thus, notarial acts issued in matters of succession in the Member States should circulate under the Regulation. If notaries exercise judicial functions (such as in succession proceedings), they are bound by the rules of jurisdiction and the decisions (equivalent to judgments) issued will circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions. When notaries exercise extrajudicial functions, the authentic instruments issued (such as donation, will, declaration of acceptance or waiver of inheritance) will circulate according to the legal provisions on authentic instruments. In order to determine the competent court and the law applicable to the succession, the reference criterion is the *habitual residence* of the deceased at the *time of death.*

The determination of habitual residence depends on the circumstances of the life of the deceased during the years preceding his death and at the time of his death, such as the duration, regularity and the reasons of the deceased's presence in the State concerned and therefore the criterion for choosing the applicable law of succession will be the choice of the State with which the deceased had the closest connections.

The Regulations is meant not to preclude the rules determining the national competence. In Romania, the authorities competent to settle successions are courts and notaries. Article 954(3) of the Romanian Civil Code lays down the rules for determining the competence in matters regarding *successions with cross-border implications*.

Thus: a) if the last habitual residence of the deceased is not known or is outside the territory of Romania, the succession will be opened at the place in the country within the jurisdiction *of the first notary to whom the matter was referred*, if there is at least one immovable property of the deceased in that jurisdiction; b) when the chart of heirs does not include immovable property, the place of opening of the succession shall be in the jurisdiction of the first notary to whom the matter is referred, if there is *movable property* in that jurisdiction; c) when the chart of heirs *does not include assets on the territory of Romania*, the

place of opening of the succession shall be in the jurisdiction of the first notary whom the matter is referred

It should be noted that this last sentence is applicable in conjunction with the provisions of the Regulation (EU) No. 650/2012, in that it is necessary to determine which authority is competent at European level to discuss the succession. In addition, the legal importance of the place of opening of the succession is of practical interest in determining the territorial authorities which deal with matters relating to the succession (Baias, Chelaru, Constantinovici and Macovei 2021, 1160).

To conclude the references to competence in matters of cross-border succession, it should be noted that the provisions of Article 954 Civil Code on competence in matters of international succession also apply in a similar way when the authority seized is the court. At national level, the Romanian Code of Civil Procedure provides in Article 118 for cases of exclusive competence of the court of the last habitual residence of the deceased for the following petitions: a) petitions concerning the validity or execution of testamentary dispositions; b) claims concerning the succession and the liabilities under the succession, as well as those concerning the claims that the heirs may have against each other; c) claims of legatees or creditors of the deceased against one of the heirs or against the executor of the will. The text of the new amended Code introduced in the first part the words "until the termination of the joint possession", referring to the fact that, according to judicial practice and doctrine, after the sharing-out of the estate, exclusive territorial competence no longer exists (Ciobanu and Nicolae 2016, 457). Joint possession is also inferred from the theory of assets, according to which a natural person has a unitary estate, and heirs cannot opt to inherit part of the estate but only to share it after they have become heirs (Bob 2012, 190).

For the purpose of the Regulation (EU) no. 650/2012, the term "court", as explained above, refers to the judicial authorities and legal professionals who deal with matters of succession, where the principle of impartiality is required. The *general* rule of competence for the authorities concerned to rule on the succession as a whole is that the competence belongs to the courts of the Member State in which the deceased *was habitually resident at the time of death*.

According to Article 5 of the *Regulation* on "the choice-of-court agreement", if the deceased himself chose, during his life, that the law applicable to his succession be the law of a Member State (for example, by a will), the parties to the proceedings may agree that the court of that Member State is to have *exclusive competence* to rule on any succession matter. Such a choice-of-court agreement shall be expressed in writing, dated and signed by the parties concerned, any communication by electronic means being deemed equivalent to writing. The court chosen as competent may decline competence depending on the practical circumstances of the succession, the habitual residence of the parties and the location of the assets or if the parties to the proceedings have agreed to confer competence on a court of *the Member State of the chosen law*.

3. Subsidiary competence

Where the habitual residence of the deceased at the time of death is located in a *third State*, the court of a EU Member State in which assets of the estate (*lex rei sitae*) are located shall nevertheless be competent to rule on the succession as a whole in so far as:the deceased had the nationality of that Member State at the time of death; or, failing that , the deceased had his previous habitual residence in that Member State (but at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed).*We thus note that the two conditions are not cumulative, but it would follow from the wording of the text that they must be verified and complied with successively*. Where no court of an EU Member

State is competent, the courts of the Member State in which the assets of the estate are located shall nevertheless be competent to rule on those assets.

It is important to point out that, if in the context of a notarial procedure carried out in Romania, a judgment is presented which was delivered in a Member State in matters of succession and which concerns a deceased person who died after 17 August 2015 – the date provided for in the Regulation (EU) no. 650/2012 – this judgment will produce effects similar to those which would have been produced by a judgment delivered in Romania. This would be *recognition by operation of law* of a judgment (Olaru 2014, 139).

As stated above, the main criterion used for choosing the law applicable to the succession and, implicitly, for determining competence in its dealing, is the *residence*. Article 24 of the *Preamble* to the European legislation on the subject gives examples of situations in which it would be difficult to establish residence, such as for professional, family or social reasons. The final sentence of the text states that if the deceased was a national of one of the Member States concerned or had all his main assets in one of those States, his *nationality* or the location of the assets could be of particular importance in determining the overall circumstances of the succession. In practice, complex cases may also arise, such as the deceased travelling or living in several States alternatively without settling permanently in any of them.

4. Applicable Law and the European Certificate of Succession

In order to simplify the procedures for heirs and legatees who have their habitual residence in a Member State other than the State in which the succession is being dealt with, the Regulation allows operations such as making declarations concerning the acceptance or waiver of the succession, of a legacy or concerning the limitation of liability for the debts under the succession, - mentioning that such declarations shall be communicated to the authority dealing with the succession within the time limit laid down by the law applicable to the succession. The choice of law applicable to the succession by a person has been connected by the provisions of Regulation (EU) No. 650/2012, to the law of the State of which that person is a *national*, the reasoning behind the text being to ensure a certain connection between the deceased and the law chosen and to avoid the intention of circumventing or diminishing the rights of the persons entitled to a reserved share.

In determining the law applicable to the succession, where the deceased had moved to the State of his habitual residence recently before death and all the circumstances indicate that he was manifestly more closely connected with another State, the authority dealing with the succession may, by way of exception, conclude that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased, but the law of the State with which the deceased was manifestly more closely connected (according to Section 25 of the *Regulation*). Where a court of a Member State is seized in a succession case and it is not competent under Regulation (EC) No 650/2012, the competence is automatically *declined.*

After the succession is dealt with, a national certificate of succession or a judgment, depending on the method of settlement, non-contentious or contentious proceedings. Subsequently, the notary or the competent authority in each Member State dealing with matters of succession, may also issue the *European Certificate of Succession*. The purpose of this document is to enable heirs, legatees, executors of wills or administrators of the estate to exercise their rights and powers in another Member State, for example in the Member State where the succession property is located.

However, we reiterate that this certificate cannot replace national procedures, in particular for reasons of determining the shares and recording immovable property in the public registers. Moreover, the text of the Regulation (EU) No. 650/2012 also states that the

issue of the European Certificate of Succession is optional, but once it has been issued, no authority will be able to request another document in its place, such as a judgment, authentic instrument or court settlement. One point we consider important is set out in Section 71 of the *Preamble*, namely that the European Certificate of Succession *should produce* the same effects in all Member States, but should not be an enforceable title, but have an evidentiary effect.

Conclusions

We can see from the complexity of the European legislation on succession that the dynamics of successions and succession properties are much more highlighted than would appear at first glance. This is because the free movement of persons and assets allows the diversification of business, family, social and economic relationships, which also leads to the diversification of the acts that a person can conclude during their lifetime in relation to succession matters. *Mortis causa* dispositions of property thus also become a way of facilitating succession procedures, a civilized method by which heirs, legatees, executors of wills or creditors of the estate can receive or organize the estate left by the deceased.

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