

Rules on the conflict of laws in the matter of succession in Romanian private international law

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Abstract

*Until the entry into force of the new Civil Code (1 October 2011), the law applicable to inheritance made the distinction between the inheritance of movable property (to which the national law of the deceased applied) and the inheritance of immovable property (to which *lex rei sitae* applied).*

At present, the Civil Code establishes, as a rule of principle, that inheritance is subject to the law of the state on whose territory the deceased had habitual residence at the time of death. Thus, in the new legal regulation, the Romanian legislator considered, on the one hand, the Hague Conventions in this matter, and on the other hand, European Union law.

In this article I analyzed the law applicable to inheritance in Romanian private international law, namely the law applicable to wills. Likewise, I conducted a comparative study with the legislation of other states in this matter.

As regards the domain of application of the law on inheritance in Romanian private international law, I presented the aspects governed by art. 2636 of the Civil Code.

Keywords: *rule on the conflict of laws, conflict of laws, inheritance, will, *lex succesionis**

JEL Classification: K11, K33

1. Introductory considerations

In the literature², inheritance has been defined as the transmission of property from a deceased individual to one or more individuals or legal entities (or to the state).

The Civil Code, in art. 953, defines inheritance in a similar way, namely “transmission of property from a deceased individual to one or more existing persons”.

According to the source of inheritance rights, inheritance can be legal or testamentary.

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² See in this sense, L. Stănciulescu, *Curs de drept civil. Succesiuni*, Hamangiu Publishing House, Bucharest, 2012; Francisc Deak, Romeo Popescu, *Tratat de drept succesoral*, vol. I, Universul Juridic Publishing House, Bucharest, 2013, p. 19, Codrin Macovei, *Moștenirea legală*, University Publishing “Alexandru Ioan Cuza”, Iași, 2006, pp. 27-28

Until the entry into force of the new Civil Code (1 October 2011), the law applicable to inheritance made the distinction between the inheritance of movable property (to which the national law of the deceased applied) and the inheritance of immovable property (to which *lex rei sitae* applied).³

At present, the Civil Code establishes, as a rule of principle, that inheritance is subject to the law of the state on whose territory the deceased had habitual residence at the time of death (art. 2633). Thus, in the new legal regulation, the Romanian legislator considered, on the one hand, the Hague Conventions in this matter⁴, and on the other hand, European Union law⁵.

2. The law applicable to inheritance

Under art. 2633 of the Civil Code, inheritance is subject to the law of the state on whose territory the deceased had his habitual residence at the time of death.

As regards the establishment of habitual residence, attention should be paid to whether, at the time of death, that person was acting to exercise his professional activity or not. Thus, according to art. 2570 para. 1 of the Civil Code, the habitual residence of a natural person is in the state where that person has his main home, even if he did not fulfill the legal registration formalities. The habitual residence of a natural person acting to exercise his professional activity is the place where this person has his main establishment.

Regarding the choice of law applicable to inheritance, a person can choose between the laws of the states whose citizenship he has (i.e. the national law).

The existence and validity of the consent expressed by the statement of choice of the applicable law are subject to the law chosen to govern the inheritance.

The statement of choice of the applicable law must meet, in terms of form, the conditions of a provision for cause of death. Also, the modification or revocation of such designation of the applicable law by the testator must meet, in terms of form, the condition for modifying or revoking a provision for cause of death.

Comparative law

As regards the law applicable to inheritance, in comparative law, the solutions are varied, with a focus on two systems:

- **The unitary system** – in which the inheritance, regardless of the nature of the property, is subject either to the *national law of the*

³ Art. 66-68 of Law no. 105/1992

⁴ These conventions include: the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons; the Hague Convention of 5 October 1961 on Conflicts of Laws relating to the Form of Testamentary Dispositions.

⁵ On the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession of 14 October 2009. On 4 July 2012, the European Parliament and the Council of the European Union adopted the Regulation (EU) No. 650 in this matter.

deceased (e.g. in Germany, Italy, Hungary, etc.), or the *law of the domicile* (e.g. in Switzerland, Denmark, Norway), or the *law of the place where the property is situated* (e.g. in Mexico, Panama, etc.)

- **The dualist system** – in which the inheritance, depending on the nature of the property – is subject to: 1. *Lex domicilii* for movable property and *lex rei sitae* for immovable property (e.g. in France, England, Belgium), and 2. *Lex patriae* for movable property and *lex rei sitae* for immovable property (e.g. in Monaco, Cameroon, etc.)

3. The law applicable to the form of the will⁶

The preparation, modification or revocation of a will are deemed valid if the document complies with the conditions of form resulting from the alternative application of several laws, in terms of both place and time.

Thus, in terms of place, the testament is valid if it meets the conditions of form mentioned by one of the following laws:

- a. the national law of the testator – *lex patriae*;
- b. the law of his habitual residence;
- c. the law of the place where the document was prepared, modified or revoked – *lex loci actus*;
- d. the law of the place where the real property subject to the will is located – *lex rei sitae*;
- e. the law of the court or of the body conducting the procedure of transmitting the inherited property – *lex fori* or *auctor regit actum*.

In terms of time, the will is valid if it complies with the conditions of form imposed by any of the above-mentioned laws, applicable either on the date when the will was drafted, modified or revoked, or on the date of the testator's death.

This legal regulation also settles the mobile conflict of laws that might appear in this matter⁷.

Comparative law

In Germany, the rule on the conflict of laws regarding the form of the will stipulates that a will is valid in terms of form if it meets the requirements of a legal system with which there is a connection on the grounds of nationality, the habitual residence of the testator or the place where the will was drafted.

In Spain, the rule regarding the conditions of form of the will is that they are governed by the law of the country where they are drafted, even though wills drafted in the form and according to the conditions of form required by the law

⁶ The conditions of form of the will, from the point of view of private international law, are subject to the provisions of art. 2635 of the Civil Code.

⁷ D.A. Sitaru, *Drept internațional privat. Partea generală. Partea specială – Normele conflictuale în diferite ramuri și instituții ale dreptului privat*, C.H. Beck Publishing House, Bucharest, 2013, p. 309

applicable to their content are also considered valid, as are those concluded in accordance with the personal status of the beneficiary.

In Greece, the rule on the conflict of laws regarding the form of the will stipulates that the will is considered valid if it was drafted in the form provided by one of the following laws: the law of the state where the deceased person drafted the will; the law of the state whose citizen the deceased person was, the law of the state where the deceased person had his residence or domicile at the time of drafting the will or on his death; in case the will concerns property: the law of the state where the property is located.

4. The domain of application of the law on inheritance

The establishment of the domain of application of the law on inheritance is a qualification operation, whose purpose is to establish the elements which, in accordance with Romanian law (as *lex fori*), are included in the notion of inheritance, a domain which constitutes the content of the *lex succesionis* rule on the conflict of laws.

The domain of application of the law on inheritance is regulated in the Civil Code⁸ and is aimed particularly at the following aspects⁹:

a. The time and the place of opening the inheritance

The time of opening the successions is important, as far as private international law is concerned, as, depending on this time, which in Romanian legislation is the same as the time of death¹⁰, the habitual residence of the deceased is established, which determines the law applicable to inheritance.

As regards the place of opening the inheritance, it is the place where the deceased had the last domicile.¹¹ This element is important in establishing jurisdiction in succession disputes.

b. Persons entitled to inheritance

Lex succesionis regulates inheritance rights, which is one of the prerequisites to inherit. The law on succession determines the legal and testamentary devolution. Thus, in the case of legal devolution of inheritance, *lex succesionis* is what establishes the persons entitled to inherit, the order of their entitlement, successorial representation, etc. In case of testamentary devolution, the law on succession determines the substantive conditions of the will, special incapacities, etc.

⁸ The domain of application of the law on inheritance is stipulated in art. 2636 para. 1 of the Civil Code.

⁹ I. Macovei, *Drept internațional privat*, C.H. Beck Publishing House, Bucharest, 2011, pp. 248-251; D. Lupașcu, D. Ungureanu, *Drept internațional privat*, Universul Juridic Publishing House, Bucharest, 2012, pp. 212-215; O. Ungureanu, C. Jugastru, A. Circa, *Manual de drept internațional privat*, Hamangiu Publishing House, Bucharest, 2008, pp. 232-234

¹⁰ See in this sense the provisions of art. 954 para.1 of the Civil Code.

¹¹ See in this sense the provisions of art. 954 para.2 of the Civil Code.

c. Qualities required to inherit

This aspect takes into account the other general condition required to inherit, namely successoral capacity.

d. The exercise of possession on property left by the deceased

On the date of opening the inheritance, successoral rights are transmitted to heirs. *Lex successionis* will govern the transmission of the assets of inheritance, namely the seisin, the determination of successors having seisin, its effects.

As regards the procedure of livery, as well as the transmission of legacies, they are subject to the law of the place where they occur.

e. The conditions and effects of the successoral option

Lex successionis regulates aspects referring to: the subjects of the right to successoral option, ways to accept successions, the term of exercise of the right to successoral option, documents that are worth the acceptance of succession, the effects of acceptance or, as applicable, the renouncement of succession, etc.

f. The extent of the heirs' obligation to incur liabilities

In this respect, the law on succession determines, in particular, the content of the liabilities of succession, the successors bound by successoral liabilities, the extent to which they incur the debts and burdens of succession, etc.

g. The substantive conditions of the will, the modification and revocation of a testamentary disposition, and the special incapacities to dispose or receive by will

For the validity of testamentary dispositions, certain substantive conditions should be met. Correspondingly, they are subject to different laws.¹²

h. Division of inheritance

Lex successionis determines the scope of persons who can demand the division of inheritance, as well as the regime of the different forms of division. As regards the procedural aspects of division, they are governed by *lex fori*.

In the case when, according to the law applicable to inheritance, succession is vacant, property situated or, as applicable, located on the territory of Romania, is taken over by the Romanian state on the basis of the provisions of Romanian law regarding the assignment of property from a vacant succession¹³.

5. Conclusions

Until the entry into force of the new Civil Code (1 October 2011), the law applicable to inheritance made the distinction between the inheritance of movable property (to which the national law of the deceased applied) and the inheritance of immovable property (to which *lex rei sitae* applied).

¹² As regards the conditions of form of the will, see the provisions of art. 2635 of the Civil Code.

¹³ Special provisions regarding vacant succession are comprised in art. 2636 para. 2 of the Civil Code.

At present, the Civil Code establishes, as a rule of principle, that inheritance is subject to the law of the state on whose territory the deceased had habitual residence at the time of death. Thus, in the new legal regulation, the Romanian legislator considered, on the one hand, the Hague Conventions in this matter, and on the other hand, European Union law.

In this article I analyzed the law applicable to inheritance in Romanian private international law. As regards the law applicable to inheritance, in comparative law, I emphasized the two applicable systems: the **unitary system** – in which the inheritance, regardless of the nature of the property, is subject either to the *national law of the deceased*, or the *law of the domicile*, or to the *law of the place where the property is situated*, and the **dualist system** – in which the inheritance, depending on the nature of the property – is subject to: 1. *Lex domicilii* for movable property and *lex rei sitae* for immovable property, and 2. *Lex patriae* for movable property and *lex rei sitae* for immovable property.

Likewise, I presented the law applicable to the form of the will, both in domestic law and in the legislation of other states.

As regards the domain of application of the law on inheritance in Romanian private international law, I presented the aspects regulated by art. 2636 of the Civil Code.

This article is significant for the field of private international law on account of its topicality and practical applicability in the context of adapting the domestic legislation in this field to European regulations.

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