BRIEF OVERVIEW OF THE RULES GOVERNING THE CONFLICT OF LAWS IN SUCCESSION MATTERS ACCORDING TO THE NEW ROMANIAN CIVIL CODE

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Abstract
The new Romanian Civil Code, in force since 2011, has introduced considerable changes from the previous code in a wide range of aspects concerning our private law, as a response to the significant social developments that took place in the past two decades. Adopting a "monist" view, this code is a vast and ambitious undertaking to institute a coherent treatment of all areas of the private law that have previously been regulated in separate laws or codes, including those regarding the international private law.
The present article endeavors a brief analysis of the rules governing the conflict of laws in succession matters as set out in the new Romanian Civil Code, with comparative references to the previous applicable law, i.e. Law 105/1992, and to the new EU Regulation in this subject-matter. In the present context of ever-growing EU integration and increased global interconnectivity, a better understanding of the various national solutions to the conflict of laws can only benefit scholars and practicians alike.

***Key words**: conflict of laws, succession, private international law, EU Regulation, European Certificate of Succession.*

Introduction

The entering into force on October, 1st, 2011, of the New Civil Code (hereinafter referred to as NCC)[1], is without a doubt, one of the most important legislative reforms that took place in our country in the past two decades, reform that has stirred up a lot of controversy in the Romanian doctrine due to the rather unorthodox manner of its adoption – the Government assumed its political responsibility on this piece of legislation in front of the Parliament – and by the absence of impact studies on its effects, that should have preceded its adoption. As mentioned in the abstract, the code is an ambitious undertaking aimed at bringing together -for better or for worse- all legal norms pertaining to our private law, including those applicable to the international private law, previously regulated by Law 105/1992. The NCC has restated unchanged many provisions of this law, but at the same time, as a result of our EU membership, it has introduced novel legal solutions in some areas, such as the area of conflict of laws regarding succession. It is therefore useful, in our opinion, both for theoretical and practical purposes, to critically compare the new regulations in this subject-matter with those previously found in Law 105/1992.

Moreover, the legislative reform in Romania has entered a new stage with the coming into force at 15th of February 2013 of the New Civil Procedural Code (hereinafter referred to as NCPC)[2], which repeals in full the Law 105/1992, and replaces its procedural norms on conflict of laws in international private law with the provisions of the NCPC, Part VII, concerning "The international civil case".

My analysis concerns the current legal framework, with references -if appropriate- to the relevant jurisprudence based on the previous legislation. The overview of the relevant provisions on succession with an extraneous element will take into account not only the rules governing the law

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[1] Law 287/2009 concerning the Civil Code, re-published in the Official Journal of Romania no. 409/10.06.2011, Part I, on grounds of subsequent modifications after its first publication in the Official Journal of Romania no. 511/24.07.2009.

[2] Published in the Official Journal of Romania no. 465/15.07.2010, Part I, as Law 134/2010.

applicable to the devolution of property by cause of death according to the NCC, but also the provisions of the New Civil Procedural Code and the provisions of the EU Regulation 650/2012 on jurisdiction, recognition and enforcement of decisions and authentic instruments in matters of succession and on the creation of a European Certificate of Succession[3], due to fully come into force in 2015. Some of its provisions regarding preparatory measures incumbent on Member States as to the implementation of this new EU Regulation are already in force since 2012. As both national and European regulations mentioned above are fairly recent, this study may bring an interesting and useful perspective on a very important subject-matter of the international private law.

1. EU Regulation no 650/2012 – a new benchmark for Member States national legislations in area of cross-border successions within EU

Traditionally, states have closely guarded their national regulations on succession matters, since this area of law is in many instances associated with the family law[4], and hence it is deemed to posses a highly sensitive, culturally and sometimes even religiously charged nature. Moreover, the devolution of property by cause of death does imply significant issues such as transfers of property rights over land and other immovable assets, meaning that nation states have a direct stake in establishing rules for dealing with such transfers, especially when an extraneous element is involved.

It is therefore no mean feat for the European Commission to have drafted and passed a Regulation in such a sensitive matter, given the diversity of national legal solutions within EU. According to the European Commission data, made public on its website, almost half a million (450 000) cross-border successions occur every year in the EU, adding up to a considerable value, estimated to be in excess of 120 billion Euros[5]. The objectives the EU Regulation set out to achieve are the removal of obstacles within EU for citizens who face difficulties in asserting their rights in the context of a cross-border succession (Paragraph 7 of the Preamble)[6], the avoidance of parallel proceedings and conflicting judicial decisions, and hence faster, easier, cheaper procedures. The above-mentioned paragraph also states that citizens must be able to organize their succession in advance and the rights of heirs, legatees, creditors to the succession etc. must be effectively guaranteed. To this end, the Regulation institutes several rules, such as a consistent legal treatment of a given succession, dealt with as a whole, under a single law and under a single authority, the possibility for citizens to choose the law applicable to their succession between either the law of their habitual residence or of their nationality and the creation of a European Certificate of Succession, as an instrument by which the powers of the heirs, legatees, executors of the will or administrators of the estate can be demonstrated in any of the Member States jurisdictions.

In its carefully worded Preamble (Paragraph 9), and in Articles (1) and (2), the new Regulation defines the scope of its applicability as including "all civil law aspects of succession to the estate of a deceased person" and excluding revenue, customs and administrative matters of a public-law nature, matrimonial property regimes, the creation, administration and dissolution of trusts, transfer of property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts. Furthermore, the new Regulation expressly states in Article (2) that the substantive law of the Member States does not fall within its area of applicability: "This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of succession". Article (1) enumerates in a manner which, in our opinion, should be

[3] Published in the Official Journal of the European Union no. 201 from 27.07.2012.

[4] I.P.Filipescu, A.I.Filipescu, "Treatise on International Private Law", ed. Universul Juridic, Bucharest, 2008, p.412-413.

[5] http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm.

[6] All provisions of the EU Regulation 650/2012 quoted in this article are taken from its English version available in html format at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:01:EN:HTM.

construed as limitative, the exceptions to the applicability of the Regulation, including, *inter alia*, the status of natural persons, the legal capacity of natural persons, questions related to the disappearance, absence or presumed death of a natural person, issues regarding the matrimonial property regimes, maintenance obligations other than those arising by reason of death, questions governed by the law of companies and other bodies, corporate or incorporate, the nature of rights *in rem*.

Given the fact that this Regulation does infringe on the traditional jurisdiction of the national courts, by introducing the principle that a given succession will be subjected to one single law and one single authority, thus removing the conflict of competence based on the immovable/movable assets distinction, it is hardly surprising that Denmark, Ireland and United Kingdom have decided to opt out from the adoption of this Regulation and therefore are not bounded by its provisions[7]. Their decision has fragmented the unification movement of the international private law in Europe, though it is not likely that this movement towards ever greater legal integration will actually halt. In fact, the European Parliament has commissioned a study as to the "*Current gaps and future perspectives in the European private international law: towards a code of international private law*?"[8], aimed at identifying current gaps in the European legal framework concerning international private law and debating whether a European code of international private law can be achieved. The study suggests that an incremental policy by individual regulatory acts is preferable to one single piece of legislation, in order to prevent a further fragmentation of the unification agenda.

Since our country is bound by this EU Regulation, that will be applicable, after a transition and preparatory period, according to Article 83, "to the succession of persons who die on or after 17 August 2015", the current provisions of the Romanian code on conflict of laws in succession matters will also be evaluated by taking into account the provisions of the Regulation. The creation of the European Certificate of Succession will be dealt with separately, at the end of this paper.

2. Preliminary considerations on the concept of "succession"

NCC defines the notion of "succession" in Article 953 as "the transmission of the patrimony of a deceased natural person to one or more persons in existence"[9], which implies the fact that the rules governing succession apply only in the event of death of a natural person, and do not apply in the event of the disappearance of a legal person, in whichever way this disappearance may have occurred[10]. To the same effect are the rules instituted by the EU Regulation no.650/2012, which expressly stipulates in Paragraph 1 Section (2), (i), that its provisions do not apply to "the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated". NCC adopts a unified terminology, utilizing consistently the term of "succession", in lieu of "succession" and "inheritance", used alternatively in the previous regulation. The definition set out in Article 953 NCC, is -despite its brevity- in agreement with the definition of "succession" in Article 3 of the new EU Regulation, which stipulates that "succession" means "succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of voluntary transfer under the disposition of property upon death or a transfer through intestate succession".

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[7] This does not mean that there is no preoccupation in UK, for instance, for evaluating the possible effects of the British opt-out of this EU Regulation on UK law. The new EU Regulation and the consequences of its rejection by UK were the object of an international conference organized by the *British Institute of International and Comparative Law* in November 2012, suggestively named "*Out of the frying pan into the fire*? *The UK's rejection of the new EU Regulation on international successions"*, http://www.biicl.org/events/view/-/id/730/.

[8] http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=83495, author: prof. dr. Sandra Kramer, Erasmus University Rotterdam, Erasmus School of Law.

[9] All NCC provisions in this article are quoted from "The New Civil Code and the Previous Regulations", published under the supervision of dr. Mona Pivniceru, Ed. Hamangiu, 2012, Bucharest, p. 214 - 262 and p. 531-562.

[10] Fr. Deak, "Treatise on Succession Law", ed. Universul Juridic, 2nd edition, 2002, Bucharest, p.5.

Article 955(1) NCC stipulates that "the patrimony of the deceased is transmitted through succession by operation of law, insofar the deceased did not stipulate otherwise through a will", indicating the two classic forms of succession in our law – by operation of law and testamentary. These two forms are not mutually exclusive, but, according to section 2 "a part of the patrimony of the deceased can be transmitted through testamentary succession and the other part through succession by operation of law". Both forms fall within the scope of the NCC provisions concerning the determination of the law applicable to international private law relationships.

3. General provisions of the law applicable to succession, with references to the previous Romanian legislation and to the new EU Regulation in this subject matter

The current provisions of the NCC concerning the law applicable to the devolution of property by cause of death with an extraneous element has departed from the previous regulation as set forth by Law 105/1992, being in accordance with the new EU Regulation. Article 2633 NCC stipulates that succession is subject to the law of the State in which the deceased had his habitual residence at the time of death, unlike the legal regime instituted by Law no. 105/1992, which had regulated the succession in a different manner, based on the movable/immovable distinction of the assets forming part of the succession property. Article 66 of Law 105/1992[11] stipulated that a) as regards movable assets, wherever they may be located, the succession will be subject to the law of the State whose nationality the deceased possesses at the time of death and b) as regards immovable assets and goodwill, to the law of the State where each of these assets is located.

The new provisions are consistent with the EU Regulation 650/2012, which lays down as general rule in Article 21 that "unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death". Section 2 of this article institutes an exception from the general rule, allowing for the application of the "proper law" method: "if it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under Section 1, the law applicable to the succession shall be the law of that other State". In our opinion, the current NCC regulation in this subject matter is in agreement with the general objectives pursued by the European Commission, namely, that a given succession is treated coherently, under a single law and by one single authority, and parallel proceeding and conflicting jurisdictions regarding the same given succession are to be avoided. This holds true in respect to the applicable substantive law, but not in respect to procedural law, insofar as the provisions of the New Civil Procedure Code (NCPC) institute exclusive jurisdictional prerogatives for the Romanian courts to decide upon cases that involve an extraneous element as regards either 1. immovable assets situated on Romanian territory and/or 2. (movable) assets located in Romania, left by the deceased person with its last residence in Romania[12]. These special provisions, though imperative in nature, will have to be construed in accordance with the rules laid down by EU Regulation no. 650/2012, upon its coming into force in 2015, which institute in Article 4 a general jurisdiction in favor of "the courts of the Member State in which the deceased had his habitual residence at the time of death (…) to rule on the succession as a whole". The importance of this article should be viewed by taking into account the above-mentioned objectives of the Regulation, as explained in Article 37 of its Preamble: "… For reasons of legal certainty and in order to avoid the fragmentation of the succession, the law should govern the succession as a whole, irrespective of the nature of assets and regardless of whether the assets are located in another Member State or in a third State".

[11] Published in the Official Journal of Romania no. 245/1.10.1992, Part 1.

[12] All NCPC provisions in this article are quoted from the "Code of Civil Procedure", edition coordinated by dr. Viorel Mihai Ciobanu, ed. C.H.Beck, no.500, Bucharest 2013, p.332-354.

The meaning of "habitual residence" of a natural person is furthermore defined by Article 2570

NCC as being in the State where a natural person has its primary lodgings, even if they did not complete the legal registration requirements. The habitual residence of a natural person exercising its professional activity is the place where that person has its primary establishment. The primary lodgings are to be determined also by scrutinizing the personal and professional circumstances indicating lasting connections with the State or the intention to establish such connections. Similar provisions regard the habitual residence of a legal person, presumed to be located in the state where this entity has its principal establishment, i.e. its headquarters.

The applicable law determined in accordance with the Article 2633 NCC provisions will thus apply to all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death (*testate* succession) or a transfer through *intestate* succession. However, Article 2634 NCC stipulates that a person can choose as law applicable to his estate as a whole the law of the State of which he was a national. Should this right to choose the applicable law not be exercised, then the applicable law shall be the law of the State in which the deceased had his habitual residence at the time of death. The law institutes special formalities a person should fulfill for the existence and validity of the said choice of law. The former provisions contained in Article 68 of Law no 105/1992 were to the effect that a testator may subject the transfer by cause of death of his/her assets to a different law than the one indicated in Article 66 (mentioned above), without having the right to circumvent its imperative provisions (*evasion of law* or *fraud a la lois*). As regards the *testate* succession, the NCC institutes an alternative and optional regime that governs the formal requirements of a will[13]. Thus, according to Article 2635 NCC, the drafting, amendment or revocation of the will are deemed to be valid if the will complies with the applicable formal requirements, either on the date of its drafting, amendment or revocation, or on the date of death of the testator, in accordance with whichever of the following laws: a) the law of the State of which he is a national; b) the law of the testator's habitual residence; c) the law of the State where the will has been drafted, amended or revoked; d) the law of the status of the real estate which is the subject matter of the will; e) the law of the court or of the body that fulfills the procedure of transfer of the inherited assets. The only change introduced in this matter from the previous reglementation is that the law of testator's domicile (Article 68 s.3 (b) Law 105/1992) has been replaced with the law of testator's habitual residence, in accord with the new EU Regulation.

The conditions as to the validity of wills are set out in articles 1034-1085 NCC and concern, *inter alia*, formal requirements as regards the disposition of property upon death made in writing – holograph will (art. 1040 NCC), the disposition of property upon death made in front of a competent public authority (art. 1043 NCC), as regards privileged wills (art.1047 NCC), etc. These formal requirements are to be completed with those concerning the substantial validity of the will, such as the testamentary capacity (art. 988 NCC, which also sets forth special incapacities concerning those not allowed to dispose of their property by cause of death) and the consent of the person who disposes of his property (art. 1038 NCC)[14].

As to the scope of the law applicable to succession according to NCC, pursuant to Article 2636 (section 1), the law of succession, determined in accordance with the provisions analyzed above, shall apply to a) the time and place of the opening of the succession; b) the persons entitled to succeed; c) the capacity to inherit; d) the exercise of possession rights over assets forming part of the estate; e) the conditions and effects of the acceptance or waiver of the succession; f) the determination of the heirs' obligation to bear the liabilities; g) the conditions for the validity of the will, the amendment and revocation of a testamentary disposition, as well as special incapacities in

[13] Dan Lupaşcu, Diana Ungureanu, "International Private Law", ed. Universul Juridic, Bucharest 2012, p. 211.

[14] For a detailed presentation of these conditions under the provisions of the previous applicable law, see I.P.Filipescu, A.I.Filipescu, "Treatise on International Private Law", ed. Universul Juridic, Bucharest, 2008, p. 416-417.

order to receive or transmit an asset through a will; h) the partition of succession and (Section 2) the right of the State to claim a vacant estate as an heir. These main coordinates of the scope of succession law[15] belong to the substantive law, Romanian authorities being solely entitled to regulate these areas that do not fall under EU Regulation 650/2012. The old provisions did not expressly mention the conditions for the validity of the will and the partition of succession, although in practice these two categories were included in the scope of the succession law. An interesting change from the previous regulation is the replacement of the lapidary reference to "the rights of the state to a vacant succession" with an entire section stating that "in case that, according to the law of succession, a given estate is vacant, the assets situated or located on Romanian territory will be appropriated by the Romanian state under its own law according to the law of succession on vacant estates". One commentary on this article has interpreted this provision as limiting the rights of the Romanian state to claim a vacant estate only to those assets located on its soil[16], so if the vacant estate is formed in part by assets located on the territory of other states, the Romanian state will not be entitled to them. Romanian courts have recognized the right of a foreign state to claim movable assets part of a vacant estate left by its national on Romanian soil[17], the consensus being that the immovable assets should be appropriated by the Romanian state, though the now repealed law did not make this distinction. It is still too early to decide which way the new provision will be interpreted by our courts.

The EU Regulation leaves the matter of determining the rights of the state to a vacant succession to the discretion of the Member States, the only condition stipulated in Article 33 being that the creditors of the estate are to be allowed to seek satisfaction on their claims out of the estate as a whole.

Based on our comparative analysis between the new regulations of the international private law, the previous legislation and the EU Regulation no. 650/2012, we can conclude that the NCC provisions are in accordance with the European law and, at the same time, preserve most of the legislative solutions of the repealed Law 105/1992. One area where the NCC might have to be amended in the near future in order to comply with the EU Regulation regards the certificate of succession, currently regulated by Articles 1132-1134 NCC, as to its meaning, effects, issuing authority and annulment conditions. The related legislation, especially Law no. 36/1995 regarding the public notaries[18], will have to be amended, too.

4. The creation of European Certificate of Succession - a promising instrument to ease up the legal and administrative tangle for the European citizens

The EU Regulation dedicates Chapter VI to this new legal instrument it introduces for the purpose of speeding up the settling of successions with cross-border implications. The European Certificate of Succession (hereinafter referred to as "the Certificate") is, according to Article 62 corroborated with Article 64, an instrument which shall be issued in the Member State whose courts have jurisdiction in a given succession matter (either as general jurisdiction, by choice of law or subsidiary jurisdiction) for use in another Member State and shall produce the effects set out in Article 69. This Certificate is an instrument that has evidentiary effects (Paragraph 71 of the Preamble) as to the status and/or rights and powers of the heirs, legatees, executors of the will or administrators of the estate in another Member State, for instance in a Member State in which the

[15] Idem 14, p. 212-215.

[16] Diana-Alina Rohnean, "The New Civil Code. Commentaries, doctrine and jurisprudence", vol. III, co-authorship (D.M. Gavris, Marius Eftimie & co.), Ed. Hamangiu 2012, Bucharest, p. 1170.

[17] The case of a Greek national leaving a vacant estate on Romanian soil, in R.D.D. no.3/1973, quoted by I.P. Filipescu, A.I. Filipescu, idem 5.

[18] Public notaries are the competent authority to issues certificates of succession or certificates of recognition as heir/legatee in our legal system. The procedures regarding successions are set out in Law 36/1995, published in The Official Journal of Romania no. 92 from 16/05/1995.

succession property is located. Its use is not deemed mandatory and is in no way going to take the place of the internal documents used for similar purposes in the Member States. The competence to issue the Certificate is, according to Article 64, either a court as defined in Article 3 (2) or another authority which, under national law, has competence to deal with matters of succession. In our law, this competence will belong to the public notaries. The procedures for the application and the issuing of the Certificate are set out in Articles 65-67, issues regarding the rectification, modification and withdrawal of the Certificates, suspension of its effects, being dealt with in Articles 72-73.

As stated at the beginning of this paper, The EU Regulation no. 650/2012 will fully come into force on 5th of July 2015. However several of its articles already apply from 5 July 2012, including Article 78 that states, *inter alia*, the obligation of the Member States to provide the relevant information regarding the authorities competent to issue the Certificate and the redress procedures against decisions taken by the issuing authority.

The creation of the European Certificate of Succession is an important practical measure to ease up the difficulties involved in settling cross-border successions. Our recent court rulings in this field have dealt with the thorny issues of establishing the status and/or powers of heirs, legatees, etc. and hence the validity of their claims on a given estate. For instance, the Supreme Court ruled on a case of a succession involving property rights over an immovable asset located in Romania, left by a German citizen, where the certificate of succession proved to be a highly contentious issue. The court decided that, even if the deceased was a German national, it is not mandatory for the certificate of succession to be issued by the German authorities, since the succession concerning immovable assets is governed by the Romanian law and hence the certificate of succession can be validly issued by the Romanian competent authorities[19]. Another case decided by our Supreme Court highlights the difficulty of finding the right equivalent in Romanian law of an authentic act issued by a foreign authority as to the status, rights and obligations of the heirs/legatees. The case involved the testamentary succession of an Italian national that included immovable assets on Romanian soil and the issue of interpretation of an authentic act issued by the competent Italian public notary as being the equivalent of a certificate of succession[20]. In this case, an authentic declaration of the main plaintiff in and of two other witnesses in front of the public notary does not constitute a certificate of succession, but merely a declaration of assuming responsibility, due to the provisions of Italian substantive law concerning the effects of testamentary dispositions on legatees and their rights.

These two cases exemplify the practical difficulties that should be smoothed away in settling cross-border succession matters, after the implementation of the European Certificate of Succession.

5. Conclusions

The New Civil Cod does not significantly depart from the previous legislation in the manner of regulating the conflict of laws on succession matters with an extraneous element, and its provisions are consistent with the EU Regulation 650/2012. However, several procedural aspects will have to be addressed after the Regulation will come into force, to fully meet the general objectives of removing legal and administrative barriers that hamper citizens in the assertion of their rights in the context of a cross-border succession. Thus, the newly adopted Civil Procedure Code will have to be amended, so as to allow that a given succession is treated as a whole, subject to a single law and to a single authority. Other pieces of legislation will have to be amended as well, as to include the new legal instrument created by the Regulation, i.e. the European Certificate of Succession, such as Law 36/1995 regarding the public notaries and the notarial activity. It is too early to analyze court rulings

[19] Decision no. 4097/2003 of the Supreme Court of Justice, Civil and Intellectual Property Section, quoted from www.legalis.ro. by Dr. Dan Lupaşcu, Nicoleta Cristuş, in "Judiciary Decisions and Legislation in the Area of the International Private Law", ed. Wolkers Kluwer, 2009, Bucharest, Romania, p.41-46.

[20] Decision no. 503 from 31/01/2012 of the Supreme Court of Justice, Civil Section, quoted from www.legalis.ro.

in this subject-matter based on the NCC, due to the period of time involved in settling out a case, especially if it goes through all appeal stages. In most instances, the past rulings still have a persuasive effect and prove to be important study tools as to the established mode of deciding on a specific issue in cross-border successions.

Taking into account that most of the relevant legislation analyzed in this paper is very recent, and hence both doctrinal analysis and court decisions are scant or lacking entirely to this date, we hope that his paper will have started a debate as of the future developments in the conflict of laws regarding succession matters.

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