JURISDICTION AND APPLICABLE LAW ON VACANT PROPERTY IN EUROPEAN UNION

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AÇAR SÖZLƏR:

Avropa ittifaqı, Avropa ittifaqı üzv dövlətləri, Avropa ittifaqında vərəsəlik münasibətləri, vərəsəsiz qalmış əmlak, ittifaq daxilində sərbəst hərəkət, vərəsəsiz qalmış əmlakla bağlı yurisdiksiya məsələləri və onların həlli, vərəsəsiz qalmış əmlaka tətbiq edilməli hüququn seçilməsi, Avropa Vərəsəlik Nizamnaməsi.

KEYWORDS:

European Union, European Union Member States, succession relations in European law, vacant property, free movement within union, jurisdiction issues on vacant property and their solutions, selection of applicable law to the vacant property, European Union Succession Regulation.

XÜLASƏ:

Məqalə Avropa ittifaqının yaranması məqsədlərindən biri kimi ittifaq vətəndaşlarının sərbəst hərəkət azadlığının təmin edilməsindən, sərbəst hərəkət azadlığı daxilində vərəsəlik münasibətlərinin iki və daha çox üzv dövləti əhatə etməsindən və bu zaman yaranmış yurisdiksiya və tətbiq edilməli olan hüququn müəyyən edilməsi problemlərinin həllindən bəhs edir.

RESUME:

The Article speaks of ensuring of free movement right of union citizenship as one of the primary goals of the creation of European Union, succession relations in cross-border issues within free movement and in this case, solution of jurisdiction and applicable law issues.

The European Union (EU) is an economic and political union of 28 independent states.

It has not been made all at once, or according to a single, general plan. It will be formed by taking measures, which work primarily to bring about real solidarity [1, p.61].

Primary goals to establish such a Union in Europa lie in political and economic interests of Member States. After two World Wars, strong coordination and cooperation was a great need for Europe. Second interest was disguised under economic interest. Therefore, first treaties on establishment of Union were designated to remove main obstacles to an economical partnership in order to create an internal market.

Building a stronger and fairer EU economy was the primary goal behind the idea of internal (single) market. Allowing people, goods, services and capital to move more freely opens up new opportunities for citizens, workers, businesses and consumers.

Succession is most closely related to free movement of people of EU, therefore Treaty on Functioning of European Union (TFEU) envisages free movement of persons in Article 28.

Succession plays an important role in the economic policy of the Member States. It is a guarantee for economic independence of States and a guarantee for economic stability.

A testator decides how to divide his property. Where there is no (valid) will, then state overtakes it. In 25 Member States where there is no heir, vacant property goes to State. It is an indication of how succession is important for the state and its economy.

Therefore primary goals of the Union and economic interests of the Member States overlap. However, an interesting feature is in front. As we know succession law is an internal issue of the state.

Europe knows no uniform succession regime. Each Member State knows its own coding in the succession matter, which reflects the existing traditions specific and the peculiarities of historical development in each country [2, p.6].

Procedures on succession and its legal consequences cannot be interpreted by other states because of the sovereignty rights of the Member States. Therefore,

European Union law does not regulate internal matters of the State, including succession where there is no other state element. The succession matters know, therefore, the most diverse regulations in the world states laws.

Union law comes into play arena when there is a cross-border issue. It means Union law comes into effect when two or more Member States are engaged.

For a long time Union left jurisdiction and applicable law issues in disputes arising from succession. Both Brussels Regulation II on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Rome I Treaty on the law applicable to contractual obligations excluded succession law from their scope, even if there was a cross-border issue.

Although Brussels Regulation II on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters apply in civil and commercial matters whatever the nature of the court or tribunal, it explicitly shows that, "this regulation shall not apply to wills and succession, including maintenance obligations arising by reason of death" [3, 2 (f)].

At the same time Rome I Treaty on the law applicable to contractual obligations shows that "obligations arising out of wills and succession" shall be excluded from the scope of this Regulation [4, 2 (c)].

On 4 July 2012, adoption of EU Succession Regulation (also called Brussels IV Regulation) on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enfor¬¬cement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession was a major step to facilitate cross-border successions. New Union rules designed to make it easier for citizens to handle the legal aspects of an international succession and these new rules apply to the succession of those who die on or after 17 August 2015.

Only Denmark, Ireland and the United Kingdom do not participate in the Regulation. That is why cross-border succession procedures continue to be governed by their national rules in those states.

Preamble of the EU Succession Regulation make it easier to understand thereof goals. The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who also face difficulties in asserting their rights in the context of a succession in cross-border issues [5, Preamble (7)]

EU Succession Regulation shows different possible jurisdictions for disputes.

Before going to jurisdiction matters, choice of law of the Regulation must be examined. Accordingly, a person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death [5, A.22].

In jurisdiction part of the regulation, general rule is that the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole [5, A.4].

In order to understand better EU Succession Regulation, definition of habitual resident is crucial. Neither EU Succession Regulation nor other acts of EU law give comprehensive definition of habitual residence. It is something less than domicile but more than simple residence. Although EU legislators do not give a comprehensive definition of habitual residence, the European Court of Justice has given some tips to determine habitual residence of a person. Case 523/07 of the ECJ shows factors and a degree of integration to determine habitual residence. From nature of the case, related factors include in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the nationality, the place and conditions of attendance at school (or university), linguistic knowledge and the family and social relationships of the person.

The habitual residence represents a flexible concept, rooted in reality, in the specificity of each person`s living individuality. This concept`s factuality and flexibility is consistent with the increasing mobility of people and the principles of free movement in the European law [2, p.69].

At any case, it is for the national court taking account of all the circumstances specific to each individual case.

Subsidiary jurisdiction to Article 4 is established in Article 10. Accordingly where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction 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, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed [5, A.10].

The Regulation allows the interested parties to choose the court of the Member State whose law has been chosen, pursuant to Article 22, by the author of the succession. Choice-of-court agreement designs surpassing rule to general jurisdiction.

Thus, accordingly where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter [5, A.5]. Such a choice-of-court agreement must be expressed in writing, dated and signed by the parties concerned.

Some remarks are necessary first; the choice of forum is only possible in the assumption that the deceased had chosen the law applicable to the succession, under the conditions and limits set by the Regulation. In other words, the efficiency not only depends on the agreement of all the heirs, but also on the previously expressed will of the succession author, by choosing which he made on the applicable law. The succession`s internationality is primarily assessed by reference to its author. The purpose pursued by the European legislator through allowing the choice of the forum was to promote freedom of action in this matter and to ensure unity between jurisdiction and the applicable law, thus avoiding the situation that the court from the last habitual residence of the deceased would have to apply a foreign successional law to the succession. Choice could only regard the jurisdiction of a Member State (excepting Denmark, the United Kingdom and Ireland). If the deceased had chosen as the law applicable to the inheritance the law of a third country, the choice of forum by the heirs shall not be possible [2, p.33].

The courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall have jurisdiction to rule on the succession if a court previously seised has declined jurisdiction in the same case pursuant to Article 6; the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of that Member State; or the parties to the proceedings have expressly accepted the jurisdiction of the court seised [5, A.7].

In deciding on applicable law, things can be different relating to vacant property since universal application is in force. That means law of the Member State is not mandatory. It is a robust difference between jurisdiction and applicable law rules set down.

Jurisdiction and applicable law were inconsistently determined. For example, in determining applicable law, not only one connector, but also two connectors were used, due to the submission of the estate inheritance to the law of their location place. That determination of applicable law led to the collision divisibility of the estate in which the succession is divided into separate assets subject to inheritance by different substantive laws requiring courts in different countries often ruled. It is in contradiction to the collision uniformity of succession, also known as a uniformity of the succession status, where the applicable succession law is indicated with a single connector.

The succession estate as a whole can be inherited under one substantive law, in these cases. From the very beginning of the EU Succession Regulation, the EU legislator opted for collision uniformity of the succession. It was met with the widespread acceptance. Therefore, the Regulation promulgates provisions based on the connector of the habitual residence of the deceased. The justification for the use of this connector for jurisdiction and substantive law was included in Recital 27 of the Regulation. Recital 27 states, “The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will be applying its own law”. This solution removes the need to examine and interpret foreign legal regulations.

It will always be a court of Member State to have a jurisdiction on disputes related to succession, but applicable law may be a law of non-Member State law. Therefore, it must be emphasized that any law specified by this Regulation will be applied whether or not it is the law of a Member State [5, A.20].

Then, we need to look at Article 22 (choice of law) of the Regulation. We see from that Article that a person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses. Where a person possessing multiple nationalities he may choose the law of any of the States whose nationality he possess.

If this Article is not invoked by the acts of the testator, then we need to look at general rule.

Accordingly, 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 [5, A.21].

First paragraph of Article 21, however, may be suppressed if there is a manifestly more closely connected state with the deceased. Paragraph 2 of the same Article makes it clear. It is understandable from that paragraph that 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 paragraph 1, the law applicable to the succession will be the law of that other State.

In terms of rights in rem, especially when they bear on immovable properties, things seem, at least at the first glance, quite clear. The immovable properties are part of a territory, over which the State exercises its sovereignty. Their movement requires changing their rights in rem holders and not their "movement" from one national territory to another, as is often the case of the movable property. Therefore, in principle, the immovable properties cannot escape the control of the national legislator of the State on whose territory they are situated. Therefore, all aspects related to their status and movement were considered to be "at the wand" of the national legislator, not being allowed intrusions in this field. In other words, they would have the same legal regime as the territory itself, being joined ("absorbed") thereof, constituting an object of the concerned State power and discretion [2, p.24].

Thus, to finish above-mentioned approaches, it will always be a court of Member State to have a jurisdiction on disputes related to succession, but applicable law may be a law of non-Member State law.

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