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COMPARATIVE ANALYSIS OF TESTAMENTARY SUCCESSION IN THE LEGISLATION OF THE MEMBER STATES OF THE EUROPEAN UNION

Summary

Testamentary succession occupies an important place in the field of Succession law in the civil legislation of the European Union. According to the testamentary succession physical person can give by a will his (her) property or its part to one or more persons among his (her) heirs or to one or more persons who are not among his (her) heirs. The article reflects the concept, sequence, legal basis and place in judicial practice of testamentary succession.

Key words: testamentary succession, succession law, civil code, legislation, comparative analysis

Introduction

“Inheritance law is the unity of norms, which regulates the legal destiny of a deceased person’s property” (Zoidze B., 2000). “It could appear only after the appearance of the private property” (Javakhishvili I., 1984). The area of family law has suffered crucial changes throughout the centuries. Nowadays, during the times of globalization, these changes are directed towards the internationalization of legal systems of the world. Juridical differences are becoming irrelevant – socio-cultural, socio-economic and political developments of one country influence other countries. The comparative study of these developments is becoming a foundation for future harmonization of the world law.

The given paper presents a precise study of the French and Germany “testate successions”. It singles out major terminological units and underlines the most prominent peculiarities of the capitalistic and “almost” capitalistic mechanisms of the modes of inheritance.

Testate succession in the legislation of the Germany

German law guarantees the testator’s freedom (within the limits of §§ 134 and 138 of the BGB) (see §§ 1937 et seq. of the BGB and Articles 2, paragraph 1 and 14, paragraph 1 of the GG). A will can be revoked at any time by the testator (§ 2253 of the BGB).

The will can be drawn up in one of the forms foreseen by law.

The testator must be capable according to § 2229 of the BGB and he “may make a will only in person” (§ 2064 of the BGB). Pursuant to § 2065, paragraph 1 of the BGB “the testator cannot make a testamentary disposition in such a way that another person has to determine whether it should be effective or not”. Furthermore, he “cannot leave to another person the specification of the person who is to receive a gift and the specification of the object of the gift” (§ 2065 of the BGB).

German law doesn’t prohibit joint and mutual Wills (§§ 2265 et seq. of the BGB). Succession agreement are allowed as well (§§ 2274 et seq. of the BGB). (1)

Persons who are already 18 years old are fully capable to testate. The testamentary capacity is regulated by § 2229 of the BGB. According to this provision also “a minor may make a will”, but “only once he has attained his sixteenth year of age”. In this case, he “does not need the consent of his legal representative to make a will” (for the allowed forms, see § 2233, paragraph 1 of the BGB and § 2247, paragraph 4 of the BGB; for more details, see point 3.3.1.4). The one who has not yet reached the age of 16 cannot make a will (neither through a representative as the will can only be made in person: see point 3.3.1.1).

The law also provides that a will cannot be made by “a person who is incapable of realising the importance of a declaration of intent made by him and of acting in accordance with this realisation on account of pathological mental disturbance, mental deficiency or derangement of the senses”. According to § 2229, paragraph 4 of the BGB, also the one who is contractually incapable cannot draw up a will.

In his will the testator may appoint an heir (§ 1937 of the BGB) or disinherit a relative, his spouse or his civil partner (§ 1938 of the BGB).

Substitute heirs may be appointed according to § 2099 of the BGB. Pursuant to § 2100 et seq. of the BGB the deceased may also appoint a reversionary or subsequent heir, i.e. an heir that only becomes such “after another heir has first been heir”.

One or more executors may be appointed as well (§ 2197 of the BGB).

It is also possible for the deceased to foresee a bequest (§ 1939 of the BGB; see §§ 2147 et seq. of the BGB) (also a preferential one: § 2150 of the BGB). The testamentary gift can be made subject to a condition (a precedent or a subsequent one: §§ 2074 et seq. of the BGB). Furthermore, § 1940 of the BGB allows testamentary burdens (see also §§ 2192 et seq. of the BGB). Thus, the deceased may “oblige his heir or a legatee to perform an act without giving another person a right to the performance” (for the “claim for fulfilment” see § 2194 of the BGB). The deceased may also give directions for the partitioning (§§ 2048 et seq. of the BGB); or exclude it with regard to the estate or individual objects of the estate or make it dependent on a notice period (§ 2044 of the BGB). According to §§ 2050 of the BGB a compensation obligation may be ordered or excluded.

An executor can be appointed by a testamentary disposition (§§ 2197 et seq. of the BGB). In the same way, a foundation can be established (§ 83 of the BGB). Additionally, the deceased may stipulate that one parent shall not manage the child’s property (§ 1638 of the BGB) or that the parents or the guardian are not to manage the property of the person subject to their custody (§ 1909 of the BGB). A guardian can be named according to § 1777 of the BGB. A declaration that the acquisition upon death is to be reserved property can be made by means of a will as well (§ 1418, paragraph 2, no 2 of the BGB).

A will can also be used to revoke a previous one

A choice of the law applicable to the succession may be included in the will as well (see Article 22, paragraph 1 of the European Succession Regulation).

In the German legal system, a will can be a handwritten or holographic or a public one (see § 2231 of the BGB).

According to Article 1179 of the Civil Code of the Republic of Azerbaijan, there are 2 forms of a testament. Testament must be made in written form. Written testament is allowed in notarial form as well as without it. (3)

The handwritten or holographic will (§ 2247 of the BGB) is made “by a declaration written and signed by” the testator “in his own hand”. “The deceased should state the time when and the place where he wrote it down”. “The signature should contain the first name and the last name of the testator. If the testator signs in another manner and this signature suffices to establish the identity of the testator and the seriousness of his declaration, such a signature does not invalidate the will”. If “the will does not contain any information about the time when it was made and this causes doubts about its validity, the will is to be deemed to be valid only if the necessary ascertainties about the time when it was made can be established in some other manner. The same applies with the necessary modifications to a will that does not contain any information about the place where it was made”.

A handwritten will can only be made by a person who turned 18. A minor (i.e. the one who hasn’t already reached the age of majority) may not make a handwritten will (the same is for a person incapable of reading) (§§ 2233, paragraphs 1 and 2 and 2247, paragraph 4 of the BGB; see also §§ 22 et seq. of the BeurkG).

The public or notarial will requires a declaration of the deceased’s last will to a notary. The latter records it in writing. The deceased can also hand the notary “a document with the statement that it contains his last will”. He “may hand over the document either unsealed or sealed” and “it is not required to be written by him” (§ 2232 of the BGB). A public will can be drawn up by minors, if they’re already 16 years old (see point 3.3.1.2).

Special rules apply to the emergency will(s) (§§ 2249 et seq. of the BGB).

Spouses and registered partners are permitted to draw up joint (and reciprocal) wills too (§ 2265 et seq. and § 2270 et seq. of the BGB). In case of a joint handwritten will, “it suffices if one of the spouses makes a Will in the manner provided there, and the other spouse co-signs the joint declaration in his own hand. The co-signing spouse should thereby state the time (day, month and year) and the place at which his signature was affixed” (§ 2267 of the BGB).

Article 1169 of the Civil Code of the Republic of Azerbaijan defines a joint testament. As stated in this article, in testament there must be only an order of testator (testatrix). It’s inadmissible to make testament by two or more persons. Only spouses have a right to make a joint testament on counter inheritance. This testament may be terminated at the request of either spouse but in life time of both of them. (3)

Handwritten and notarised dispositions put in custody by the local court (§§ 344 and 246 of the FamFG; §§ 2248 and 2259 of the BGB) are registered electronically in the Central Register of Wills (Zentrales Testamentregister) at the Federal Chamber of Notaries (Bundesnotarkammer) which exists since 2012 (§ 78b of the BNotO). (4)

Testate succession in the legislation of the France

According to the commonly excepted legal definition: an “inheritance law – sometimes called wills and probate – is concerned with the distribution of a person’s property after his (her) death” (Haigh, 2006). It means, that “the successors occupy the part of the deceased person in property relations. This type of permanent link

between generations is a sine qua non (an essential precondition) for public stability and perpetuity of cultural, property and spiritual traditions" (The Commentary of the Civil Code of Georgia, 2000) all over the world

The contemporary French law differentiates two ways of property transference: a testate succession (succession testamentaire) and an intestate succession (succession ab intestate, succession légale, succession légitime). An intestate succession arises by operation of law in the events, when there is no will/testament or the existed testament has been invalidated. In cases of a valid will, "succession testamentaire" takes place.

According to the French Civil Code: "Any person may dispose by will, either under the name of appointment of an heir, or under the name of legacy, or under any other denomination suitable for expressing his wish ... A will may not be made in the same instrument by two or several persons, either for the benefit of a third person, or as a mutual and reciprocal disposition" (Civil Code of France, 2006).

The French legal system presents three major types of a will (testament): an holographic will (testament olographe), an authentic will (testament authentique) and a mystic will (testament mystique). (4)

Testament olographe must be handwritten by the will-maker: "An holographic will is not valid unless it is entirely written, dated and signed by the hand of the testator: it is not subject to any other form" (Civil Code of France, 2006).

The "authentic" will (testament authentique) is made in the presence of two notaries or a notary and two witnesses. The testator dictates the will and the notary writes or types it. Afterwards, it is read and signed in the presence of the notary by the testator and witnesses.

This form is used in the Civil Code of the Azerbaijan Republic when the disabled and illiterate make a will. So that, Article 1183 of the Civil Code of the Republic of Azerbaijan is called "Testament of deaf-mute and blind person". This article states that If testator (testatrix) is a deaf-mute or deaf-mute and illiterate person then he (she) must make his (her) will in notary office in presence of two witnesses and one person who is able to explain to testator (testatrix) the fact of the matter and who can approve by his (her) signature that substance of testament complies with testator (testatrix)'s will. (3)

A mystic/secret will (testament mystique) is usually "typed or handwritten by the testator or by someone on his/her behalf. It is then signed by the testator and sealed in an envelope in the presence of a notary and two witnesses. The notary creates an acte de suscription registered on the sealed will or envelope. The content remains secret until it is opened on the death of the testator" (French wills). Article 976 of the Civil Code of France gives more precise description of the preparation of "testament mystique": "Where a testator wishes to make a secret will, the paper which contains the dispositions or the paper used as an envelope, if there is one, shall be closed, stamped and sealed up. The testator shall present it thus closed, stamped and sealed up to the notaire and to two witnesses, or he will have it closed, stamped and sealed up in their presence and he shall declare that the contents of that paper is his will, signed by him, and written by him or by another, while affirming in that latter case, that he has personally verified its contents; he shall indicate, in all cases, the mode of writing used (by hand or mechanical)... instrument shall be signed by the testator as well as by the notaire and the witnesses" (Civil Code of France, 2006) (2)

Despite a vividly expressed freedom of disposition, the French law limits the testator's rights of devolution of the estate by recognizing the so-called "reserved heirs" (héritiers réservataires). It's a well-known fact, that in France a person's estate is divided between the quotité disponible (a disposable portion) and the réserve légale (reserved portion). The former is freely disposable by will, while the latter "must go to the protected heirs, regardless of the wishes of the deceased. "The réserve légale protects the interests of children (réservataires) who survive a parent and the reserved portion must pass equally between them, regardless of the wishes of the deceased or of any will. (5)

Since January 1, 2007, where there are no children, a surviving spouse is able to take all of the estate, in preference to the deceased's parents. Prior to this change in the law, the parent would have inherited a considerable portion of the estate" (Kinnealy L., 2013). Therefore, the French "testate succession" comprises the following major elements:

- testateur (a testator) – a creator of a will. In case of a female-creator (testatrix), the French term testatrice is used.
- légataire (an heir) – a person or a legal entity, which receives property from the estate of a deceased, through a will;
- testament (a will) – a document created by the testator.

It's worth mentioning, that the French law recognizes a family agreement (Pacte de Famille), which allows persons to get family members to agree to the organization of their inheritance during their lifetime. All interested parties sign "Pacte de Famille" with notaire (a notary) which binds them to agreements made during the life of the deceased.

Conclusion

We have seen that the contemporary laws of Germany and France make distinction between testate and intestate successions. The legal systems of both countries single out three major elements of testate succession: a testator, an heir and a will.

The laws of Germany and France nominate a "will" as the most commonly used legal instrument by which a testator regulates the rights of others over his/her property after his/her death. The legal systems of both countries differentiate official (notarized) and unofficial types of wills. However, the major difference lies in the fact, that the Civil Code of German recognizes official, private and joint wills. The French legal system has no joint wills, but presents a mystic will (testament mystique).

Finally, it's worth mentioning, that the comparative analysis of the German and French legal systems revealed their major differences and similarities. Obviously, the existed terminological and conceptual gaps will be filled during the flow of time via the influence of ongoing globalizing processes. Supposedly, the final establishment of capitalism will "increase the homogeneity" of the German and French legal systems.

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