Inheritance by contract under Civil Code of Austria: legal relations problematic nature and qualification issues

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Inheritance by contract institution, fixed in the Civil Code of Austria, possesses with the controversial disposition. Disposition of this institution combines two basic agreements legal basis. In this article made an attempt to determine the priority of the agreement and relationships, based on given norm.

The problems of qualification and definition of the legal nature of the contract, which is fixed in the Austria Civil Code section 1217, it is necessary to start with the notation of the norm. This section contained the following provision: "marriage-articles are called those contracts, which are concluded with a view to a matrimonial union to regard to the property, and their objects: the dowry, the jointure, the gift on the morning after the nuptial day, the community of goods, the administration and usufruct of the property intended for a case of death and the widow settlement" [1]. From the text of this provision is clear that it contains within itself the beginning of the various statutes of private international law: family statute, the statute of inheritance, as well as obligation statute. This combination allows this provision may reasonably be qualified as a legal basis for a marriage contract, inheritance contract, and contract maintenance.

In this case, the theory of law truly states that in the case to correct legal relationship qualification it’s necessary to find the "center of gravity" [2] of the agreement, its true legal nature. However, legal norms do not set a completely accurate methodology for finding the "center of gravity" of the institutions of contract law - Regulation (EC) Nr. 593/2008 states that "where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a
contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its center of gravity" [3] - this technique refers to the law enforcement person or entity for an independent qualification of contractual relations that in some cases could not be correct, because in the situation of application of this provision in the law systems of different countries leads to different and various legal consequences.

In support of this statement it’s necessary to analyze the following example.

Thanks to its formulation section 1217 Austria Civil Code can be positioned by law enforcement person as a norm, which constitutes the institution of marriage contract, but the marriage contract - a contract governing the relationship between the spouses, but for the traditional marriage contract in it’s legal understanding address to issues in the areas of family life, as property, property relations and, in some cases, child support and maintenance. For the purposes of this provision the property and child support in the understanding of this contract will not be the subject of this contract. Actually, an agreement based on the Austria Civil Code section 1217 will not be a contract of inheritance in the full understanding of this term. This statement is confirmed by paragraph 8 of the Austrian Private International Law (Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht), which states that "the form of a legal act is determined by the same law as the act itself, sufficient, however, is to comply with the formal requirements of the place of performance of a legal act" [4]. In other words, according to the Civil Code of Austria this agreement will be a prenuptial agreement, however, in applying the law of another state, this act can be classified as maintenance contract [5], concluded between husband and wife. In this connection, it should certainly be mentioned that the form of the inheritance by contract institutions closely connected to nationality or habitual residence of the deceased - Article 1 of the Hague Convention "The conflict of laws relating to the form of testamentary disposition," states that "form testamentary disposition will be valid in relation to domestic law (the state - author notice), if the testator made the order in a certain place, or nationality, who has the testator at the time of making the order, or at the time of death, or the place in which the testator has his domicile or usual place of residence, or the location in the form of immovable property [6].

Under this circumstance before law enforcer raises two basic questions: is the concluded contract has a hereditary nature, or concluded act has obligation particular features and a
character. Additionally, law enforcement entity needs to qualify the individual legal status of an individual.

Boguslavsky M.M in his monography "Private International Law" noted that "like any other civil laws, conflict rule can be either mandatory (compulsory) or dispositive. In the latter case, the parties may agree on a different principle of the law enforcement to the relations between them"[7]. In this case, it should be noted that in a situation of law enforcement under section 1217 Austria Civil Code "super dispositive" (author's note) nature of the disposition of this norm gives rise, inter alia, too large, parties possibility, expound this disposition and, in some cases, unreasonable determine the subject of the concluded contract. Of course, the parties may, in case of concluding of a contract in the order of the mentioned above article, entitled this contract with the term "contract of inheritance," but in the case of possible dispute, or the recognition of the legality of the agreement by jurisdictional authorities and entities of the state in whose territory the object (or objects) of the contract are located, the possibility of setting the compatibility of the name of the contract relations, which are governed by that contract. Due to this fact, the jurisdictional authority has a legal opportunity to put before the parties of the agreement the question about the true complex rights and obligations of the contract and the definition of the subject of the contract, later giving an imperative force to the norm, which was the basis of the contract, and its decision may not coincide with the joint will of the contractual parties. In this case, it should be noted that in some cases the law expressly provides the choice of applicable law by the law enforcement entity - article 2 of the International Private Law Act (Gesetz vom 19. September 1996 über das internationale Privatrecht) states that "factual and legal conditions of the collision norm binding to specific legal order established by virtue of the law enforced entity official authority"[8], according «ex officio» principle. On the basis of this provision may be concluded the following. The Parties may enter into an agreement in order of the above-mentioned article, entitled, this agreement the term "contract of inheritance," but in a possible dispute, or the recognition of the legality of the agreement jurisdictional authorities of the State in whose territory the object (or objects) of the contract, the questions about under the name of the contract relations, which are regulated by the treaty.

It should be mentioned that in the case of solving problematic collision issues of the agreement based on the Civil Code Austria section 1217 agreement parties and law enforcement entities should evaluate the consideration of intensity family of the statute (or law, sometimes)
[9], which includes specific to family relations categories, starting with the mentioned nationality or permanent residence spouses, co-residence, the location of the marital property, the place of marriage, minimum-age limit for marriage, other conditions, and the application of these terms to the contract of inheritance, or other institutions of contract inheritance, leads to legal uncertainty.

On the basis of the mentioned above following conclusion can be made: the nature of legal relations arising from the agreement concluded on the basis of the Austria Civil Code section 1217, has a high rate of abstraction. The combined nature of this legal norm, which is generated by the dense overlapping of the institutions which are used in the Private International Law family and obligatory statutes does not allow to exercise a clear and proper qualification of the given contract. Also, in the case of dense overlapping mentioned above statutes, appears legal effect, known in Private International Law under denotation «forum shopping» [10].

In the presence of this legal phenomenon in the case of law enforcement using testamentary and obligatory Private International Law statutes becomes difficult to solve due to the following additional circumstances:

1. Must be the correct definition of the law applicable in the classification of the legal deal;
2. Based on the material form of the legal deal in relation to the individuals who have legal opportunities to exist in the quality of subjects of this deal;
3. Determination of jurisdiction for proper qualification of this legal deal.

Only with the right resolution mentioned above questions may determine the true legal relations arising out of a contract, concluded according with the procedure and provided by the section 1217 Civil Code of Austria.


[5] Maintenance contract - an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration. Since the law of contracts is at the heart of most business dealings, it is one of the three or four most significant areas of legal concern and can involve variations on circumstances and complexities. The existence of a contract requires finding the following factual elements: a) an offer; b) an acceptance of that offer which results in a meeting of the minds; c) a promise to perform; d) a valuable consideration (which can be a promise or payment in some form); e) a time or event when performance must be made (meet commitments); f) terms and conditions for performance, including fulfilling promises; g) performance. Cited: The free dictionary by Farlex. www.legal-dictionary.thefreedictionary.com/. Access: 05.04.2013. Time: 17:00

[6] Convention on the conflict of the laws relating to the form of testamentary dispositions. Art. 1 “A testamentary disposition shall be valid as regards form if its form complies with the internal law: a) of the place, where testator made it, or b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or d) of the place in which testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or e) so far as immovables are concerned, of the place where they are situated”. Cited: www. hcch.e-vision.nl. Access: 03.04.2013. Time: 13:00


an eine bestimmte Rechtsordnung massgebenden tatsächlichen und rechtlichen Voraussetzungen sind von Amts wegen festzustellen, soweit nicht nach verfahrensrechtlichen Vorschriften in einem der Rechtswahl zugänglichen Sachgebiet (Art. 20, 29 Abs. 3, Art. 39 Abs. 1) tatsächliches Parteivorbringen für wahr zu halten ist.

[9] Family statute (or law in the situations under Private International Law) is an area of the law that deals with family-related matters and domestic relations, including: marriage, civil unions, and domestic partnerships, adoption and surrogacy, child abuse and child abduction, the termination of relationships and ancillary matters, including divorce, annulment, property settlements, alimony, child custody and visitation, child support and alimony awards, juvenile adjudication, paternity testing and paternity fraud. For the conflict of laws elements dealing with transnational and interstate issues, see marriage (conflict), divorce (conflict) and nullity (conflict).

[10] Forum shopping is a practice adopted by litigants to get their cases heard in a particular court that is likely to provide a favorable judgment. Foreign litigants are attracted to the U.S. because of its wide acceptance of personal jurisdiction and favorable litigation environment. A plaintiff can select one forum on the following grounds: 1. The forum is not convenient to the defendant or his/her witnesses. There may be problems of expense of travel, health, or visa or entry permit. 2. The court, the judge, or the law is most likely to favour the plaintiff's case. A defendant can select a forum following on the following grounds: 1. The forum is not convenient to him/her; 2. The court, the judge, or the law is most likely to favour the plaintiff's case. Cited: http://definitions.uslegal.com/f/forum-shopping/. Access: 03.04.2013. Time: 15:00

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