INHERITANCE BY CONTRACT INSTITUTIONS: APPLICABLE LAW
DEFINITION PROBLEMATIC ISSUES

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International succession law traditionally uses two main collision formulas – “lex personalis” and “lex rei sitae”. Succession law complication with law of obligations needs for “lex voluntatis” collision formula introduction. This essay deals with the problems of interaction between collision formulas mentioned above and, as a consequence, with the development of criteria of the applicable law in the situation of the inheritance by contract institutions.

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The main reason for this essay became a comprehensive nature of the inheritance by contract institutions. The presence in the institutions of contract and secured hereditary succession statutes of private international law, their relationship and interaction generate a lot of problems with implementation and determining the applicable law. The main sources of the law applicable in the situation of the inheritance by contract are the national codification of laws and their introductory laws or sometimes, parts. They located in the bodies of codes and laws, existing as “a manage link” in the application of the rules of Private International Law.

Also a subject of study of this essay will be separate laws, which regulate Private International Law rules, the adoption of which became a logical step by the national legislator.

Simultaneously, the main sources in the research of the applicable law issues will be regulations and directives of the European Union.

First seems important to state, that traditional and fundamental principle in determining of the applicable law in testamentary law relations in the situation of inheritance of movable property is the personal law (citizenship) of the testator [1] or its domicile [2]. Inheritance of immovable property takes place in accordance with the rules of collision formula “lex rei sitae” – this disposition based on the principle of the place of location of the property [3].

However, in the situation of the denoting of the law, applicable in the situation of the inheritance by contract, this law should be determined otherwise – to the concluded agreement at the same time should be applied formula “lex voluntatis” – parties choice of law autonomy, based on the principle of voluntarily expressed will of the parties and its free embodiment. It is important to mention that in the case of absence of fixed in the contract choice of law, the law of the country with which the contract is most closely connected to the contract, mediating inheritance legal succession [4].

Because of this, before the person exercising the choice of law, or applying law, elected by the parties, emerges the question of the appropriateness and legitimacy – the law applicable to the “traditional succession” [5] and the law applicable to contractual obligations have different characteristics and conditions of this legal orderliness and it is quite obvious that these two legal orders interaction arises a conflict – for example Convention on the conflicts of laws relating to the form of testamentary dispositions, concluded on 5 October 1961 establishes the principle that states that the form of testamentary disposition will be valid relation to national law, if the
testator made it, being in his permanent place of residence or domicile [6]. However, this Convention has two major drawbacks in regard to the institutions of contract inheritance – firstly this convention does not establish the applicable law, and secondly the action of this convention extended within the territory of 14 countries of the European continent – the United States of America and Canada do not participate in this document [7], and an array of inheritance law of these states is not uniformed. This is a disadvantage, because the law of these countries contains “mirror” and mutual wills institutions. Despite the fact that civil law system knows mutual wills institution, inheritance law under the meaning of the United States, this institution has a completely different legal content and requires a completely different approach than the similar institution enshrined in civil law system. Even in the situation of the law of the European Union this convention does not provide answers for all questions, related with the inheritance by contract institution. For example parties, entering into contractual relations of inheritance by contract should take into consideration that succession contract, concluding with the essential rules, provided by Swiss Civil Code inheritance is valid with respect to Swiss law. But this contract may not be accepted by the legal system of another state because of the ambiguity in legal formulations, defining the essential components of this institution. To avoid this situation it is necessary to determine the applicable law in accordance with Swiss law – with the dispositions of Switzerland's Federal Code on Private International Law [8].

Illustrating the problems of the law, applicable in the situation of the inheritance by contract, it seems reasonable to model the situation, using the example of the implementation of the treaty inheritance institutions into the legal systems of Austria and Switzerland. These states participate in the Convention on the conflict of laws relating to the form of testamentary dispositions, this document ratified in their territories because of this circumstance form of testamentary disposition shall be valid with respect to national legislation, but the content of essential parts of the main succession institutions is significantly different. Due to this fact the choice of applicable law should be complicated. The main sources of research in addition to Switzerland’s Federal Code on Private International Law will be Austrian Act on Private International Law [9], Civil Code of the Republic of Austria (Allgemeines Burgerliches Gesetzbuch) [10]. Several provisions of Swiss Civil Code [11] will be explored. According to Professor H.Batiffol (Henry Battifol) opinion follows, that codes and laws, regulating the dispositions of Private International Law contain “conflict rules, which refer to the law of the
Inheritance contract, enshrined in paragraph 602 of Civil Code of Austria as follows: «hereditary contracts in respect to the whole inheritance or a part determined in regard to the whole of it can validly be concluded only between spouses” [13]. Before July 1, 2014 paragraph of the Civil Code of Austria 1217 secured the norm mediating hereditary succession as a continuation of paragraph 602 of the Civil Code of Austria in the following disposition: “marriage-articles are called those contacts, which are concluded with a view to a matrimonial union in regard to the property, and their object is especially: the dowry, the jointure, the gift on the morning after the nuptial day, the community of goods, the administration and usufruct of the property, the hereditary succession or the life-long usufruct of the property intended for a case of death and the widow's settlement” [14]. On July 1, 2014 the rules governing treaties enshrined in a modified form: “marriage agreements are called those contracts which are concluded with the intention in regard to the marital relationship to provide management over the family assets and to establish the community of goods and inheritance contract relationships” [15].

In turn, succession contract in Swiss Civil Code fixed as follows: “the testator may, by contract of succession, undertake to another person to bequeath his or her estate or a legacy to that person or a third party. He or she is free to dispose of his or her property as he or she sees fit. However, testamentary dispositions or gifts that are incompatible with obligations entered into under the contract of succession are subject to challenge” [16].

In cross-border situations under the presence of the element of the inheritance obligation legal regulation implemented under mentioned above formulations, before the parties to the agreement appears a dilemma: which state legal order should be fixed in the contract and which subsequently will be applied by the law enforcement body in the situation of the executing of contract. It is necessary to mention that the choice of law by the parties may be inappropriate in regard to real situation.

Eric Jamie (Jaime, Erik) points to three procedural system for determining the applicable law: in the first case, the courts and other judicial authorities are obliged to establish foreign law in all cases, in the second case the foreign law apply if it is proved by the parties, in turn, a third type of determination of eligibility includes the features of the first two types [17].

Substantive categories determining the applicable law, contained in the Austrian Act on Private International Law and reads as follows: “factual situations, with foreign contacts, shall be
judged, in regard to private law, according to the legal order to which the strongest connection exists” [18]. It should be noted that the Austrian Act on Private International Law mediates substantive legal relationship with a foreign national law ruled with the term and principle “closest relationship” refers to the substantive law. In turn, Switzerland's Federal Code on Private International Law introduces the principle of the establishment of foreign law using a third type simultaneously introducing procedural aspect: “the content of the applicable foreign law shall be established ex officio. The assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties. Swiss law shall apply if the content of the foreign law cannot be established” [19].

It seems reasonable to raise the question – how denote and set the applicable law?

Conflict rule has the following components – amount of the conflict rule and its binding. Volume indicates the range of public relations, subject to the legal regulations, in turn binding contains an indication to the applicable law [20]. Analyzing paragraph 1217 of the Civil Code of Austria through the prism of conflict binding concepts of the volume seems to conclude that the terms of the legal relationship included by legislator before 1 July 2014 in the disposition of this provision is extremely broad and in order to determine the applicable law requires reasonable constriction – it is impossible to imagine that one denominator will denote both relationships – hereditary relationships and relationship, arising from the maintenance obligation – according pandect law doctrine, these relations situated in different sections of law regulation rules and they have no common features.

Undoubtedly, paragraph 1217 of the Civil Code of Austria required qualification, which “carried out on the initial stage of overcoming the conflict of laws (hidden conflicts resolving process) and allows by the correlating the factual composition of a concrete relationship with the relevant rules of a particular legal system, identify conflict rule, by which the applicable law should be determined, and then define the law and the statute of relations” [21]. Sure to affirm that after the change of the norm produced on 1 July 2014 the legal relationship established by the inheritance contract gained more precise character.

Exactly evidence of the parties and effective search of the legal regulation by the court will be a response to the question of the statute of relations, which reveal the close relationship and proper law with the law order of a particular state, this action requires mentioned above provision of the Austrian Act on Private International Law. But how will expressed strong
connection relationship with the legal discipline under the situation in the particular state in the situation of the application of the agreement, concluded with respect to immovable property is not clear – paragraph 31 of Austrian Act on Private International Law states that “acquisition and loss of property rights in corporeal things, including possession, shall be judged according to the law of the state in which the things are located at the time of completion of the factual situation, underlying acquisition or loss” [22]. The factual situation the law recognizes a set of legal facts positive and negative nature, which is necessary for the occurrence of a particular relationship.

And in this case, the problem of finding the applicable law in section 1217 of the Civil Code of the Austria before 1 July 2014 confronted with legal uncertainty. For the occurrence of inheritance law legal regulation requires a set of legal facts of a negative character, which is associated with the concept of “death of the testator”. In turn, the relationships associated with the concept of “lifelong maintenance obligations of a spouse” associated with a set of legal facts of a positive nature. Switzerland's Federal Code on Private International Law» in terms of regulatory issues related to the emergence and implementation of property rights are not real estate, introduces a clear enough norm – “contract, which contain the right to immovable property, subject to the law of the State on whose territory the this property” [23]. Additionally, this article states that “the choice of law by the parties is allowed” [24], but freedom of choice refers to the form of the contract and the limit is indicated by the law of another state [25].

However, the limit of affordability and choice of law is regulated not only by normative acts of individual states – EU legal construction also regulates the scope of applicable law and is regulated by directives which have direct effect and called to complement the gaps in legal regulation in problem situations and simultaneously intended to play main part in sources of law system, including the law applicable to inheritance by contract.

acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession” [28] (hereinafter – Regulation 650/2012), Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 “On jurisdiction and the recognition and enforcement of judgments in civil and commercial matters” [29] (hereinafter – Regulation 1215 / 2012). At first glance, the number of regulations and their titles indicate that the law applicable in the situation of inheritance by contract should be established and its scope should be defined in accordance with the specific situation. However, analysis of this regulatory instrument allows concluding about absence of proper regulation. For example, despite the fact that article 11 of the introduction to Regulation 4/2009 states that “the scope of this Regulation should cover all maintenance obligations arising from a family relationship, parentage” further stated that “marriage or affinity, in order to guarantee equal treatment of all maintenance creditors. For the purposes of this Regulation, the term ‘maintenance obligation’ should be interpreted autonomously” [30]. In other words Regulation 4/2009 relates interpretation essential conditions of the applicable law to the rules of the statute of the free will of the parties of the contract or agreement. In other words, this means that regulation 4/2009 suitable for the regulation of the law applicable to the contract, which would have been concluded under paragraph 1217 of the Civil Code of Austria before 1 July 2014. Despite the fact that regulation 4/2009 is a good tool for establishing rights in relation to the contract arising under section 1217 of the Civil Code of Austria, if this agreement will be qualified as a tenancy agreement [31] – qualification according to the imperatives of this legal relationship would make the process of determining of the applicable law certain and transparent. Simultaneously, using Regulation 4/2009 dispositions interested person cannot establish the applicable law in the situation of the contract, concluded with the essential terms and conditions fixed in article 494 of Swiss Civil Code.

In the case of identifying of the law applicable to contractual inheritance is also not possible to use the provisions of Regulation 593/2008 because item “c” article 2 states that «obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession» [32].

A similar situation with respect to the law applicable to contractual inheritance is present in other regulations listed above.
In view of these circumstances, the applicable law and the corresponding legal regime established and mediating institutions of the inheritance by contract has not been fully elucidated, and their regulation by the European Union legislation does not allow for agreement parties to find the correct way for equitable and impartial legal regulation. Appellation to acts of national law system is also problematic due to the lack of a unifying and common for all jurisdictions inheritance contract definition, as an institution.

Perhaps the answer to the problem located in precedent “Slater v. Mexican Nat. R. Co.” [33] – according to this decision applicable law is determined by the place of the acts’ perpetration [34], but by this moment this choice will be effective in the situation, when the parties to the contract should have citizenship of the Austrian Republic and Switzerland. For inheritance by contract another model of the applicable law should be developed. This statement is also supported by the reform of the Civil Code of Austria, described above – the model of the applicable law should be developed taking into account the fact that feasible changes in the sources of legal regulation over time legislator made changes that could lead to plausible intertemporal collisions – currently Austrian Act on Private International Law article 35 states, that “in the absence of a valid choice for such obligations, they shall be judged according to the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence” [35]. In legal literature pointed out an opinion, that in the process of establishing of the applicable to testamentary succession law and objective binding creation in regard to the objective situation observed “two principles confrontation – the principle of nationality (citizenship) opposition to the principle of domicile” [36]. In addition to these principles in a situation of the inheritance by contract additional categories opposed to each other: construction “an estate is a legal person [37] (or, sometimes, legal entity)” [38] and the subject matter of the law of obligations “obligation – action (or inaction) of the authorized person” [39] creates conflicting legal situation. Common for the subject matter of inheritance law and law of obligations is their orientation to acquire the object of property law, and, in some situations, future object formation. This situation quite clearly described in Sale of Goods Act 1893 [40]: “the goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this act called as “future goods” [41].

Due to this fact definition of the law applicable for the inheritance by contract institution
when succession law is complicated by the obligatory component under circumstances, existing at the present moment is difficult to establish.

1. In a situation of succession of movable property
2. Звеков, В.П., Коллизии законов в международном частном праве. – В.П. Звеков. – М.: Волters Клувер, 2007. – 416 с. – С.355
3. Ibid.
5. Testamentary succession and succession “ab intestatio” – succession of property after its previous owner dies without a valid will
6. Convention on the conflicts of 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 the 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 the 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. Concluded 5 October 1961. Entry into force: 5 January 1964
Into force 27 February 1812. Published: StF: JGS Nr. 946/1811. With amendments.


20. Международное частное право/ Под ред. Г.К.Дмитриевой, М., 2001, С. 98


26. Official Journal of the European Union. L 7/1

27. Official Journal of the European Union. L 177


29. Official Journal of the European Union. L 351/1


31. Otherwise – tenancy agreement. A tenancy agreement is a contract between you and a landlord. This agreement lets you live in a property as long as you pay rent and follow the rules. It also sets out the legal terms and conditions of your tenancy. Source:


34. Characterization of applicable laws. The decision in Slater v. Mexican Nat. R. Co. as stated by Born is that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined by the law of the country where the act is done”. Source: Law Teacher. The Law Essays Professionals. www.lawteacher.net/international-law/essays/characterization-of-applicable-laws-international-law-essay.php. Access: 7 August 2014. Time: 12:00


39. The Civil Law of the Republic of Latvia. Section 1412. The subject-matter of a lawful transaction may be not only an action, but also an inaction, or also an action the purpose of which is to establish or to restore a property right, as well as an action with some other purpose. The Civil Law of the Republic of Latvia. Part four. Obligations Law. Enacted 28 January 1937. Into force 1 March 1993. Published: “Valdības Vēstnesis”, 46, 26.02.1937. With amendments.
