Revija za evropsko pravo: XVII (2015) 2-3.

Dragica Živojinović*
Đurđić-Milošević**

UDK: 347.65./.68
UDK: 347.91/.95[(4-672EU)+(497.11
pp. 69-88

INHERITANCE CONTRACT AND ITS SUBSTITUTES IN EUROPEAN AND SERBIAN LAW

Abstract

The subject of this study was to compare the contract of inheritance with other legal instruments of disposition of future inheritance that exist in some European legal systems, as well as with the lifetime maintenance contract in Serbian law. The aim of the research was to determine whether these instruments are adequate substitutes for the missing contract of inheritance or there is a need for its broader introduction into European legislation.

In order to give an appropriate response to the imposed question, the coauthors briefly present the notion, legal nature and different normative concepts on inheritance contract in legal systems that recognize it. Afterwards, they consider alternatives to the contract of inheritance known in the Roman legal tradition (institution contrectuelle, donation-partage and patti di famiglia), which prohibit the inheritance contract, determining the main points of distinction, as well as similarities between them.

* Associate Professor at the Faculty of Law University of Kragujevac.

** Assistant at the Faculty of Law University of Kragujevac.

In the second part of the paper it was discussed whether the lifetime maintenance contract in Serbian law can be considered as a substitute for the contract of inheritance. By comparing their key characteristics, coauthors come to the conclusion that differences are obvious and crucial (primarily relating to the object of disposition, legal effects and causa) and that there is only an illusion about their compatibility. Finally, the results of research are presented in the end of the paper, with the conclusion that current European systems, including Serbian law, need more flexible instruments of estate planning. The authors propose broader implementation of the contract of inheritance into these systems through liberal normative approach.

Keywords: contract of inheritance, substitutes of contract of inheritance, disposition *mortis causa*, lifetime maintenance agreement.

1. Introduction

Inheritance contract is a very convenient instrument of succession planning. Nevertheless, the issue of its acceptability is not resolved in a harmonized manner among the EU countries - on the one hand, there are those that don't recognise it, and on the other, those that generally prohibit this contract, but with certain exceptions. Therefore, validity of the contract depends on the applicable law in the present case, which causes legal uncertainty and create a barrier to the use of inheritance contracts.

The impact of inheritance contracts on testamentary freedom is undeniable. Entering into some succession contracts, as it is the case with the inheritance contract (*Erbvertrag*, *pactes successoraux d'attribution*) restricts the freedom of bequest, although the restriction is imposed by the testator himself. Taking into consideration that this is the disposition in case of death, which is generally irrevocable, testator deprives himself of the opportunity to change the content of his last will, after the conclusion of contract.[1] This is certainly the reason why this contract was forbidden in Roman law from which derives the will and freedom of testation, and why it isn't allowed in many contemporary legislations, especially those belonging to the Roman legal tradition. Today, as the main

[1] Inheritance contract is considered to be so called "self-imposed" restriction, as it is the case with mutual will. See A. Braun, Testamentary Freedom and its Restrictions in French and Italian Law, in: *Freedom of Testation Testierfreiheit* (R. Zimmermann), Mohr Siebeck, Tübingen, 2012, p. 59.

reason for such prohibition, it is emphasized that inheritance contracts are not in complience with the basic principles of inheritance legal systems of these countries, because it infringes, primarily, the principle of equality between heirs, and derogate the rules of forced shares.

On the other hand, the countries of German legal tradition recognize inheritance contract. These legal systems, especially German law, is characterized by the most liberal legislative approach towards contractual inheriting, both in terms of persons entitled to conclude this contract and in terms of the content, revocation and modalities of its conclusion.[2]

In contrast to these contracts, contracts on renouncement of inheritance (*Erbverzicht, pactes de renunciation*) are functioning as an extension of testamentary freedom, since they provide effects of anticipatory renunciation of future inheritance.[3] They can be considered as consensual restrictions on the right to the compulsory share. In any case, what is common to all these inheritance contracts is the fact that they represent a manifestation of the will autonomy, whose scope is broadening, as it is evident that the number of instruments to dispose with inheritance is increasing.

Despite of different attitudes of the EU legislations towards inheritance contracts, the contractual inheriting becomes an important part of the law of inheritance in recent years, which, in this matter, leads to the establishment of the trend of contractualisation. Therefore, in jurisdictions which traditionally prohibit inheritance contracts, the prohibition is gradually weakening, which is evident, mainly, through the introduction of different instruments of disposition of the future inheritance. Through them some of the effects similar to those produced by the conclusion of the inheritance contract are achieved. These instruments are

---

[2] *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 6 – Erbrecht, München, 1982, the comment on art. 2274, p. 1409-1416; W. Burandt, D. Rojaha, *Erbrecht*, Verlag C. H. Beck, München, 2011, the commentaries on art. 2274-2302 (Abschnitt: 4 Erbvertrag), p. 679-751; D. Leipold, *Erbrecht-Grundzüge mit Fällen und Kontrollfragen*, Tübingen, 2002, p. 177-194; H. Lange, K. Kuchinke, *Erbrecht*, C. H. Beck, München, 2001, p. 467-536; R. Hausmann, G. Hohloch, *Handbuch des Erbrechts*, Erich Smidt Verlag, Berlin, 2010, p. 645-688; H. Bartholomeyczik, W. Schlüter, *Erbrecht,* München, 1975, p. 144-160.

[3] D. Živojinović, Ugovor o odricanju od nasleđa koje nije otvoreno, *Pravni život*, br. 10/2000, p. 405-419, A. Bonomi, Testamentary freedom or Forced Heirship-Balancing Party Autonomy and the Protection of Family Members, in: *Freedom of Testation - Testierfreiheit* (R. Zimmermann), Mohr Siebeck, Tübingen, 2012, p. 34.

institution contrectuelle and *donation-paratage* in French law, and *patto di fagmilia* in Italian law.[4]

This trend was in positively evaluated by the European Commission, which in recent decades points to the fact that the contracts are very suitable instruments for succession planning, particularly, when it comes to inheriting family businesses.[5] Nothing less, this tendency is present in other branches of civil law, such as Family Law.[6] Bearing in mind this state of fact, the first objective of our study is to analyze the key features of the inheritance contract. The main question is whether the newly introduced instruments of the future disposition in some European legal systems are adequate substitutes for the missing inheritance contract or, if this is not the case, there is a need for introduction of this contract in its original form?

In Serbian law, as a part of the European legal realm, any kind of contractual disposition of inheritance, and consequently, the inheritance contract itself, is prohibited. Although it was allowed in one period of Serbian legal history according to the Serbian Civil Code of 1844,[7] this practice was abandoned by passing the Law of Succession of Federal Republic of Yugoslavia in 1955.[8] Its abolition was accompanied by the simultaneous introduction of the lifetime maintenance contract, as a kind of substitute. Starting from the aforementioned tendencies of contractualisation of inheritance law in the European Union, but also taking into consideration current process of creating Serbian Civil Code, it is very important to define the position of Serbian law, in comparison to the European mainstream, but also to project the direction of further development of

---

[4] F. Ferrand, Comparative Law – France, Réserve héréditqire; ordre public et qutono,ie de lq volonté en droit français des successions, in: *Imperative Inheritance Law in a Late- Modern Society – five perspectives,* (C. Castelein, R. Foqué, A. Verbeke), Antwerp, Oxford, Portland, 2009, p. 195-20 ; Testamentary Freedom and its Restrictions in French and Italian L*aw,* in: *Freedom of Testation - Testierfreiheit* (R. Zimmermann), Mohr Siebeck, Tübingen, 2012, p. 70, 71; A. Braun, Towards a Greater Autonomy for Testator and Hiers: Some Reflections on Recent Reforms in France, Belgium and Italy*, Zeitschrift für Europäisches Privatrecht, Oxford Legal Studies Research Paper*, no. 51/2012, p. 463, 464, 469-472.

[5] Recommendation 1994/1069/EC of 7 December 1994.

[6] B. Atkin (ed.), *The international Survey of Family Law*, 2007, p. 154 (according to A. Braun, Towards a Greater Autonomy for Testator and Hiers…, fn. 9).

[7] *Građanski Zakonik Kraljevine Srbije*, Izvod iz Zbirke zakona, Gojka Niketića, Beograd, 1927.

[8] Zakon o nasleđivanju, *Službeni list FNRJ*, br. 20/55.

our inheritance system. In performing this analysis, which is the second objective of this paper, we will first consider whether the lifetime maintenance contract is an adequate substitute for the inheritance contract or, if not, whether the introduction of the inheritance contract into Serbian law is a necessity.

2. About Inheritance Contract

In general, inheritance contract is considered to be an instrument of *mortis causa* disposition that binds descendent (i.e. contractual disposition in case of death).[9] More specific, inheritance contract is an agreement by which one contracting party appoints the other to be heir, or they mutually appoint each other as heirs, or appoint as such a third party, with or without compensation.[10]

European law is characterized by different normative concepts on succession contracts, starting from an extremely flexible one, as is the case with German law and other countries of German legal tradition (Austria, Switzerland), to those that allow inheritance contract only restrictively, as an exception (eg. France, Italy, Spain).[11] The Hungarian law contains specific solution according to which

[9] "Nach allg. Meinung handelt es sich beim Erbvertrag um einem Vertrag, der den Erblasser an seine vertragmäßigen Verfügungen von Todes wegen bindet." W. Burandt, D. Rojahn, *Erbrecht*, Verlag C. H. München, 2011, p. 699; see also *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 6, Erbrecht, München, 1982, the comment for art. 2274, p. 1410; H. Brox, *Erbrecht*, Carl Heymanns Verlag, Köln-Berlin-München, 2004, p. 90; H. Bartholomeyczik, W. Schlüter, *Erbrecht,* München, 1975; T. Speckert, *Unterschied zwischen Testament und Erbvertrag,* Juris Verlag, Zürich, 1951, p. 9, 10.

[10] Н. Стојановић, *Наследно право*, Ниш, 2011, p. 354; "By inheritance contract one contracting party obliges him/herself to transfer to the other party the ownership over his/her bequest, or a part thereof, and the other party accept this diposition.", О. Антић, З Балиновац, *Коментар Закона о наслеђивању,* Београд, 1996, p. 476; Although the most liberal concept of inheritance agreement is accepted in German law where this agreement may be concluded in favor of the third person, in some legal systems it is not the case (such as in Austrian law). "Der Erbvertrag ist ein zweiseitiges Rechtgeschäft zwischen Ehegatten, wodurch der eine Ehegatte den anderen Ehegatten oder beide einander gegenseitig und einseitig unwiderruflich zu höchsten drei Viertel der Erbschaft berufen können.", S. Ferrari, G. M. Likar-Peer, *Erbrecht- ein Handbuch für die Praxis*, Wien, 2007, p. 249.

[11] As for German Law see above fn. 2; as for Austrian Law: S. Ferrari, G. M. Likar – Peer, *Erbrecht – Ein Handbuch für die Praxis,* Wien, 2007, p. 247-259; W. Zankl, *Erbrecht*, Wien, 2008, p. 65, 66; as for Swiss Law: T. Speckert, *Unterschied zwischen Testamen und Erbvertrag*, Juris. Verlag, Zürich, 1951, p. 9-10; P. Breitschmid, *Testament und Erbvertrag,* Bern:Stutgart:Haupt, 1991; as for Spanish Law: E. Arroyo I Amayuelas, M. Anderson, Between Tradition and Modernisation, in: *The Law of Succession: Testamentary Freedom* (M. Anderson and E. Arroyo i Amauelas),

the elements of lifetime maintenance contract are incorporated into the inheritance contract as compulsory.[12] As far as countries of Former Yugoslavia are concerned, only the Federation of Bosnia and Herzegovina has introduced the contract of inheritance into inheritance law trough adoption of the new Law of Succession.[13] Macedonian law generally prohibits contract of inheritance, unless the inheritance or a part thereof is used as compensation for lifelong maintenance service provided.[14]

As the contract of inheritance derives from German law, it is not surprising that the German law has adopted rather liberal concept of its regulation, both in terms of the circle of persons who are entitled to conclude it and can be found in the role of the beneficiaries and in terms of content, revocability and modalities in which it can appear (such as unilateral or reciprocal agreement, a contract in favor of a third party), while the restrictions are prescribed only in terms of content and form.[15]

European studies in Private Law, 2011, p. 65-68; as for Italian law: A. Braun, Towards a Greater Autonomy for testators and Hiers - Some Reflections on Recent Reforms in France, Belgium and Italy, in: *Zeitschrift für Europäisches Privatrecht*, 3/12, p. 461-484; A. Fusaro, Testamentary Freedom in Italy, in*: The Law of Succession: Testamentary Freedom* (M. Anderson and E. Arroyo i Amauelas), European studies in Private Law, 2011, p. 198, 199; A. Braun, Testamentary Freedom and its Restrictions in French and Italian Law, in: *Freedom of Testation / Testierfreiheit* (R. Zimmermann), Mohr Siebeck, Tübingen, 2012, p. 76, 77; as for French Law: Testamentary Freedom and its Restrictions in French and Italian Law, in: *Freedom of Testation / Testierfreiheit* (R. Zimmermann), Mohr Siebeck, Tübingen, 2012, p. 70, 71; A. Braun, Towards a Greater Autonomy for testators and Hiers - Some Reflections on Recent Reforms in France, Belgium and Italy, in: *Zeitschrift für Europäisches Privatrecht*, 3/12, p. 463-465; F. Ferrand, Comparative Law –France, Réserve héréditqire; ordre public et qutono,ie de lq volonté en droit français des successions, in: *Imperative Inheritance Law in a Late- Modern Society – five perspectives*, (C. Castelein, R. Foqué, A. Verbeke), Antwerp, Oxford, Portland, 2009, p. 195-205.

[12] Z. Csehi, The Law of Succession in Hungary, in: *The Law of Succession: Testamentary Freedom* (M. Anderson and E. Arroyo i Amauelas), European studies in Private Law, 2011, p. 186.

[13] Art. 126-132. of the Law of Succession of the Federation of Bosnia and Herzegovina (Zakon o nasljeđivanju FBIH, *Službene novine Federacije BiH*, br. 80/14).

[14] See art. 7. of the Law of Successon of the former Yugoslav Republic of Macedonia (Закон за наследувањето, *Службени Весник на Република Македонија*, бр. 47/96), *www.pravo.org.mk*, November 2015.

[15] H. Brox, *Erbrecht*, Karl Heymanns Verlag KG, Köln-Berlin–München, 2004, p. 89-197; H. Lange, *Erbrecht*, München, 2001, p. 467-532, (see art. 2274-2302 BGB).

In Austrian law, the contract of inheritance is reserved only for spouses without the possibility of conclusion in favor of a third party, and the scope of assets that can be disposed is limited to three-quarters of the total estate value.[16] In Swiss law, the contract of inheritance regulation is similar to its German paragon.[17]

The complexity of the inheritance contract arises from its dual legal nature.[18] At the same time it is both a *mortis causa* agreement and a contract.[19] With the respect to former, arises the similarity with testament, especially regarding its legal effect and causa. Likewise, the rules pertaining to the testament are applied to the unilateral dispositions contained in this agreement.[20] On the other hand, inheritance contract is a real contract which binds contractual parties due to its contractual legal nature, and therefore it cannot be unilaterally revoked.

Since a contractual appointment of a successor is binding for a contractual testator, he will not be able to make any valid, subsequent dispositions *mortis causa*, if they substantively contradict an inheritance agreement, since he is binded by his declaration of a last will in the contract.[21] Its generally unilateral irrevocability presents a point of distinction comparing to the testament, wherefrom derives its limiting effect on testamentary freedom.[22] Specific legal effect of the inheritance contract which is primarily of inheritance legal nature, classifies this agreement as a succession pact.

In comparative law, especially in the countries of Germanic legal tradition, inheritance contract is often analyzed in comparison to joint will, because of their numerous similarities and common origin.[23] Both legal institutes derive from a

---

[16] S. Ferrari, G. M. Likar-Peer, *Erbrecht – Ein Handbuch für die Praxis,* Wien, 2007, p. 247-258, (see art. 602, 1249 ABGB).

[17] P. Breitschmid, in: *Basler Kommentar zum schweizerischen Privatrecht*, art. 494 ZGB, Basel, Helbing Lichenhahn Verlag, 2011, p. 214.

[18] R. Hausman, G. Hochlich, *Handbuch des Erbrechts*, Erich Schmidt Verlag, Berlin, 2010, p. 645.

[19] *Münchener Kommentar Bürgerliches Gesetzbuch*, Band 6 - Erbrecht, the comment on art. 1941, p. 2120; R. Frank, *Erbrecht,* München, 2000, p. 162, 163; D. Ozlen, *Ebrecht,* Berlin – New York, 2001, p. 162; for opposite oppinion see: А. Ђорђевић, *Наследно право у Краљевини Србији,* Београд, 1903, p. 64-65.

[20] Since it is about unilateral disposition the rules pertaining to revocation of testament are applied, (2253 of German Civil Code).

[21] H. Lange, K. Kuchinke, *Erbrecht,* München, 2001, p. 502.

[22] See art. 2289. of German Civil Code.

[23] G. Hohloch, *Handbuch des Erbrechts*..., p. 689-694.

gift in case of death and are *mortis causa* dispositions. They are used for unilateral or mutual appointment of cotestators or contractors as heirs. The key point of distinction between these legal instruments refers to their essential characteristics. In fact, joint will consists of two independent declarations that are regularly formally binding, while inheritance agreement is created by mutual consent of the parties. (As far as joint will is concerned, formal unity of declared wills is not prerequisite for its validity. The declared wills are correlated only in terms of content, which reflects the previous consent on how to distribute inheritance.) [24] The close relationship between these two institutes was the reason to initiate the discussion in legal theory about the justification of their parallel existence and to impose a question whether the flexible formal requirements of a joint bequests are a sufficient reasoning in favor of its separate regulation.[25]

3. Substitutes of Inheritance Contract in European law

In most of the countries that belong to the Roman legal tradition a prohibition of the contractual inheriting is in force. Due to the influence of socio-economic changes, and especially property law relations, inheriting process is also beeing modified, and gradually these legislations are introducing different alternatives to the inheritance contract. In that way the real need of potential successors are met, as well as the wishes of the testator whose autonomy hereby is extended, which broadens the freedom of disposition *mortis causa*.

The prohibition of the conclusion of contracts relating to future inheritance is proclaimed as a principle in French law. However, a significant exception was made by introducing *institution contrectuelle* and *donation-paratage,* as substitutes for inheritance contract, as well as other forms of disposition of future inheritance, such as the contract *renunciation anticipée.* [26]

Institution contrectuelle is the oldest type of inheritance contract constituted in the interest of family, in practice known as a gift of future things. It is a contract relating to the future inheritance and has many similarities with the inheritance contract. It represents a legal transaction *mortis causa* and can be made by the ancestors, collateral relatives or third parties, in favor of the future spouses and

[24] E. Schulz-Zabel, der Dissertation: *Das Verhältniss des Erbvertrags zum Gemeinschaftlichen Testament*, Universität zu Köln, 1969, p. 46-48.

[25] *Ibid*., p. 73-75.

[26] Art. 1130 (2), 722, 1389, 943 Code Civil.

their children.[27] It can be made between future spouses, as a part of the prenuptual agreement, as well as between married partners during marriage.[28] Therefore, regardless of the modality of the contract, its important feature is matrimonial property character.

Unlike traditional inheritance contract, which generally can be onerous and lucrative, *institution contrectuelle* is always a non-profit legal act. As far as its legal nature is concerned, it is between the traditional gift and bequest. The donor remains the owner of the donated items until the moment of his death, like testator. At the same time this legal transaction represents an irrevocable gift. It is forbidden to dispose with the object of the contract by the means of some new donations, which is typical for each inheritance contract.

Another exception to the prohibition of the contractual inheriting is *donation-partage*.[29] This agreement allows ancestors to conclude a contract with their descendants and to some extent with third parties, in order to determine their shares in ancestor's inheritance.[30] In this way, an exception from the prohibition of future inheritance is made, because the distribution of the assets that will enter into inheritance is made during life of donor (ancestor). The contract refers to assets that will belong to the doner (ancestor) in the moment of death, and this contract is generally irrevocable. It is also important to note the time when the distribution of assets has been made, and the value of gifts that at the time of the division of property, in accordance with Art. 1078 of the French Civil Code.

The *donation-partage* during donor's lifetime produces the same effect as the donation *inter vivos*. It is, however, an irrevocable transfer of certain items from the donor to the donee in the form of gift, without producing the same legal consequences as succession. Namely, all the gift recipients are actually *co-partagés* in relation to the donation and not in relation to the inheritance of the donor. Only when the donor's death occurs and *donation-partage* assumes the character

[27] Art. 1081. Code Civil.

[28] A. Braun, Towards a Greater Autonomy for Testator and Hiers: Some Reflections on Recent Reforms in France, Belgium and Italy, *Zeitschrift für Europäisches Privatrecht, Oxford Legal Studies Research Paper*, no. 51/2012, p. 463 and 464.

[29] Art. 1075. Code Civil.

[30] A. Braun, Towards a Greater Autonomy..., p. 464.

acte de partage on appropriate donor's assets the donee enters into the legal position of a successor.[31]

Particularly important is the *donation-paratage transgénérationnelle* which enables the transfer of the assets to the members of a distant generations.[32] Specifically, this contract allows the ancestor's assets to be left to the future generations of descendants, meaning that children give up their inheritance rights following the will of the donor.[33] General opinion is that the reason for introducing this type of contract into French law is not to favor the descendants of the testator, but to stimulate the economy by encouraging more rapid transfer of assets to younger generations. [34]

Donation-partage is by its legal nature lucrative disposition, because it refers to distribution in the form of gift. As it is the case with the inheritance contract, the subjects of this contract are future assets, that will be found in the inheritance of the donor. Since this is a lucrative legal transaction, until the moment of donor's death, this agreement shall have effect of the gift *inter vivos*, which is irrevocable. In the moment of death of the donor, inheritance law effects of such disposition occur, and donees acquire inheritance rights towards the donor.

One of the modalities of this type of contractual inheriting is *donation-partage transgénérationnelle* aimed at the succession in favor of the next generation of descendants.[35] It is about the future succession with *mortis causa* effect, as it is the case with inheritance contract, provided that this agreement contains anticipatory renunciation from future inheritance by the children of future testator, in favor of the next generation of descendants.

Inheritance contract, as well as other succession pacts, are prohibited in the Italian inheritance law. However, when it comes to the succession of small and medium-sized enterprises, the need for contractual succession of family business

[31] H. Dyson, French Property and Inheritance Law: Principles and Practice, p. 297-298.

[32] Art. 1075 (1), 1078 Code Civil.

[33] F. Ferrand, Réserve héréditqire, ordre public et autonomie de la volonté en droit frnacais des successions; in: *Imperative Inheritance Law in a Late Modern Society- five perspectives*, C. Castelein, R. Foqué, A. Verbeke, Antwerp-Oxford-Portland, 2009, p. 199.

[34] S. Huyghe, Rapport AN, no. 2850 of (February 2006, p. 284), *www.assemblee-nationale.fr*.

[35] F. Ferrand, Rèserve hèreditqire; ordre public et qutono, ie de lq volontè en droit francais des successions, in: *Imperative Inheriatnce Law in a Late-Modern Society* (C. Castelein, R. Foquè and A.Verbeke), p. 199.

became the subject of the legal discussion. The recommendation of the European Commission of 1994 on the transfer of small and medium-sized enterprises is that there is a need in the EU member states to allow agreements on future succession, which would be aimed at the succession of these companies.[36] In this sense, the Italian legislature sought to find a legal instrument which would satisfy these requirements.[37]

As a result of this effort, in 2006, the Italian law introduces a new legal instrument *patto di famiglia* (the so-called model of family contract), which represents an exemption from the prohibition on agreements on future inheritance, established by Article 458. of the Italian Civil Code. [38]

Patto di famiglia is actually a contract on succession where an owner or a shareholder of a company transfers, during lifetime, his rights on the company to one or more descendants, with the consent of other hiers entitled to the forced shares, as well as the spouse.[39] The rules of succession were changed in a way that the right of ownership on the company or shares that were previously transferred to the heirs after the decedent's death, are now being passed immediately, after the conclusion of this contracts, thus preventing the fragmentation of the family business.

Heirs who have agreed to this transaction, usually get as compensation certain portion of the assets (usually real estate or shares), but can also waive their rights.[40] Of course, there is a possibility to postpone the effects of the agreement to a certain date or circumstance (e.g. death of the testator).[41]

Introduction of the new contract into inheritance law contributes to the extension of testator's freedom to dispose of their own companies, contrary to the rules of forced shares. The dispositions relating to the transfer of company shares, may not be contested by successors who took part in the conclusion of the contract upon the death of the assignor. Thus, this agreement enables the decedent to

---

[36] Recommendation 1994/1069/EC of 7 December 1994, Article 5.

[37] A. Fusaro, Freedom of Testation in Italy, in: *The Law of Succession, Testamentary freedom*, M. Anderson and E. Arroyo i Amayuelas, p. 198.

[38] A. Braun, Towards a Greater Autonomy..., p. 473.

[39] Art. 768. Code Civile.

[40] A. Braun, Towards a Greater Autonomy..., p. 471.

[41] A. Fusaro, Freedom of Testation in Italy..., p. 199.

transfer his business as a whole to one of the descendants excluding the other heirs from inheritance.[42]

It is undisputable that through introduction of *patto di famiglia* the exeption from the prohibition on the conclusion of the inheritance contract has been made, and the question arises whether *patto di famiglia* can be considered as a substitute for inheritance contract or represents a *sui generis* instrument of property disposition?

Patto di famiglia is a legal transaction *inter vivos*, with immediate proprety law effect, which is the main point of distinction from the inheritance contract as *mortis causa* disposition.[43] The cause of *patto di famiglia* is to ensure the continuity of the family business through the lifelong regulation of relations between potential successors of a company, and the ultimate objective is the protection of general economic interest.

Patto di famiglia is quite restrictively regulated, since the object of disposition is limited to the family business or shares therein. Likewise, the circle of persons who are entitled to conclude this agreement is also limited. This contract contains elements of the anticipated waiver of inheritance, while potential forced heirs waive their future inheritance rights on assets in question, which reflects the inheritance effect of the contract. All pointed features, make the determination of the legal nature of this contract very complex.[44]

4. Substitutes of Inheritance Contract in Serbian Law

As it is mentioned in the introduction, the Serbian law does not allow any kind of contractual succession (inheritance contract, a contract on future inheritances or legacy, contract on the content of testament). According to the Law on Inheritance[45] contract of inheritance means a contract by which some person

[42] A. Braun, Testamentary Freedom and its Restrictions in French and Italian Law: Trends and Shifts, in: *Freedom of testation –Testierfreiheit*, R. Zimmermann, Salzburg, p. 77.

[43] G. Petrelli, La nuova disciplina del "patto di famiglia", 60 *Rivista del Notariato* (*Riv. Not*) 2006, p. 401, 408 ff (according to A. Braun, Testamentary Freedom and its Restrictions in French and Italian Law..., fn. 61).

[44] A. Braun, Testamentary Freedom and its Restrictions in French and Italian Law..., p. 470, 471.

[45] The Law of Succession of the Republic of Serbia (RS) - Закон о наслеђивању, *Сл. гласник РС*, бр. 46/95, 101/2003 – одлука УСРС и 6/2015.

leaves the whole property or the part thereof, as inheritance to its contractor or any third party, and its conclusion is considered to be null.[46]

It is interesting to mention that the inheritance contract had been permitted in Serbian law according to the Serbian Civil Code from 1844. It was abolished by the Law of Succession of Federal Republic of Yugoslavia in 1955, introducing at the same time a lifetime maintenance contract that was up to that moment very common in practice, but yet not regulated. One gets an impression that the intention of the legislator, when introducing of the lifetime maintenance contract, was to fill the gap created by abolishing the inheritance contract, which excluded from Serbian law the option of contractual *mortis causa* disposition.

According to the initial definition of the lifetime maintenance contract in the Law of Succession of Federal Republic of Yugoslavia from 1955, the provider of care assumes the obligation to take care for life for the other contracting party, the receiver of care, who is obliged to leave to the provider his or her property, or the part thereof, as a compensation for service provided.[47]

Taking into consideration this definition, it is not clear enough whether the *causa* (object) of this agreement is to secure lifelong care or to dispose of the assets in the case of death. There from, arises a problem to determine the legal nature of this contract.

In order to prevent the interpretative problems, the legislator clarifies in the same article that this contract is not an inheritance agreement, but a contract on transfer of property with compensation, which classifies it as a contract of classical obligatory legal nature.[48] The compensation consists only of the assets that belong to the receiver of care at the time of the conclusion of the contract, whose transfer to the provider was postponed until the receivers' death).

It is interesting to mention that according to this law, it was possible to dispose by virtue of lifetime maintenance contract with all assets, not only those already existing, but future as well, if contracting parties were living together.[49] In this respect, the life care contract was considerably similar to the inheritance agreement, but this possibility was afterwards abolished.

---

[46] See art. 179 of the Law of Succession of RS.

[47] Art. 122. of the Law of Succession of Federal Republic of Yugoslavia from 1955.

[48] *Ibid*.

[49] Art. 122(6) of the Law of Succession of Federal Republic of Yugoslavia.

The definition of lifetime maintenance contract was insignificantly modified by adoption of the currently applicable Law of Inheritance from 1995. The law specifies that instead of leaving as inheritance, the receiver of care assumes obligation to convey on the provider the ownership on specific assets upon his death, as a compensation for service provided.[50] Although the intention of the law makers was to make clear a distinction from the inheritance contract, that objective was not achieved since inheritance succession is nothing else but the transfer of property upon death.

Bearing in mind what is considered to be the object of the contract for lifetime maintenance according to the Law of Succession, before giving an answer to the question whether the contract could be considered as a substitute for the contract of inheritance, it is necessary to define at which points these institute overlaps, and at which they differ between each other.

The false impression about similarity of these institutes could be eliminated through appropriate interpretation of the relevant norms. The starting point in interpretation should be common intention of contracting parties which determines the legal objective to be achieved by the conclusion of such agreement. Therefore, *causa* of these legal affairs defines their legal nature.

Causa of inheritance contract is the disposition of property in case of death, which places this contract in a group of *mortis causa* legal affairs wherefrom derives its primary inheritance legal effect.[51] Its contractual legal effect is reflected in the fact that this contract binds contracting testator as it is considered to be a succession contract *sui generis*.[52] Therefore, he cannot unilaterally change or revoke this contract by some other disposition *mortis causa* (neither by testament nor inheritance agreement).[53] The freedom of *inter vivos* disposition remains untouched (except when it comes to gifts made with the intention to cause the damage to the contracting heir that can be contested).[54]

---

[50] Art. 194. of the Law of Succession RS.

[51] По предавањима Жив. М. Перића, *Специјални део Грађанског права, Наследно право*, Београд, 1923, p. 59.

[52] D. Leipold, *Erbrecht-Grundzüge mit Fällen und Kontrollfragen*, Tübingen, 2002, p. 178.

[53] *Ibid*.

[54] Art. 2287. of the German Civil Code.

As far as the lifetime maintenance contract is concerned, its *causa* is to ensure life care for adequate compensation. It is an *inter vivos* contract that produces obligatory legal effects from the moment of conclusion, while its property law effects come to play in the moment of death of the care receiver.[55] This means that the care provider acquires the property on the assets as the object of contract at the moment of receiver's death, which is a linking point of this contract with inheritance. The property which is the object of the contract will not be taken into account when establishing the value of the inheritance or in the case where compulsory shares have been violated. [56]

It is important to mention that the death of the testator in inheritance agreement is *causa* for acquisition, while the death of the recipient is a deadline until transfer of property rights as compensation for service provided is postponed. Therefore, this agreement is in legal theory denoted as a contract which makes an illusion to be linked with an inheritance contract (*quasi-inheritance contract*).[57]

Another point of distinction between inheritance contract and lifetime maintenance support agreement is reflected in the type of legal succession. Namely, in legal systems that allow the contract of inheritance, it is the basis for universal succession and represent the strongest legal base for inheriting.[58] The contractual successor as universal successor enters into all the rights and obligations of the contracting testator as legal predecessor, and the interests of creditors of the decedent are protected. It is important to note that the rights of forced heirs remain protected, which stands out as its major characteristic. [59]

Unlike the inheritance contract, lifetime maintenance agreement is the basis for singular succession. Provider of service as a singular successor is not liable for the debts of the dependent, unless otherwise agreed, when he is only responsible

[55] In legal theory it is stipulated that maintenance agreement is a mixed legal business (*inter vivos* in a term of providing care, and *mortis causa* in a term of aquirinig ownership on the assets as a compensation for received service (O. Stanković, V. Vodinelić, *Uvod u građansko pravo*, Beograd, 1995, p. 166).

[56] A. Perkušić, B. Hrvoje-Kačer, (Ne)dopušteni nasljednopravni ugovori, ili ugovori nasljednog prava ili paranasljedni ugovori u hrvatskom pozitivnom pravu, *Pravni vjesnik*, br. 22, 1-2, Osijek, 2006, p. 103-167.

[57] N. Gavella, *Nasledno pravo,* Zagreb, 2008, p. 435.

[58] A. Oliver, Z. Balinovac, *Komentar Zakona o nasleđivanju*, Beograd, 1996, p. 476.

[59] See par. 2281 in a relation to par. 2079 of German Civil Code.

for the existing, but not future debts, as it is the case with the agreement on inheritance.[60] In this sense, the interests of the creditors of the maintenance receiver could be violated, if all receiver's assets are included in the maintenance contract. On the other hand, the rights of the forced heirs are usually protected as far as inheritance contract is concerned, which is considered to be the most significant difference in comparison to the life maintenance agreement. [61]

When it comes to the effect of these contracts, specific characteristic of the inheritance contract, as an instrument for inheritance disposition, is precisely its binding character *(Binduswirkung*) which differentiate this agreement from other dispositions in case of death (e.g. legacy).[62] Binding character derives from its primarily contractual nature, but due to the primary effect of this contract – universal succession *mortis causa*, this connection refers only to dispositions in case of death, while freedom of disposition *inter vivos* remains untouched. [63]

As a disadvantage of the inheritance contract it is stipulated that the contracting testators through *inter vivos* disposition of the object of the contract, may dispose of their property and thus lose their contractual obligations, leaving nothing to inherit for future successors.[64] Thereby, similar legal consequences to those following the termination of the contract come to play. In this sense we can say that there is a tacit revocation of the contract of inheritance and therefore the irrevocability of this contract is not absolute.[65] This character of the contract is

---

[60] Н. Стојановић, Однос уговора о доживотном издржавању и осталих наследноправних уговора, у: *Уговор о доживотном издржавању*, Ниш, 1997, p. 111.

[61] See art. 195 (1) of Serbian Civil Code.

[62] For broaden explanation on binding effect of inheritance contract and its legal nature see: D. Leipold, *Erbrecht-Grundzüge mit Fällen unf Kontrollfragen*, Tübingen, 2002, p. 177-179; H. Brox, *Erbrecht,* Köln-Berlin-München, 2004, p. 91; H. Lange, *Erbrecht,* Verlag C. H. Beck, München, 2001, p. 508.

[63] R. Hausman, G. Hochlich, *Handbuch des Erbrechts...*, p. 28; H. Lange, *op. cit.*, p. 478-479; Н. Стојановић, Наследноправни уговори у будућој кодификацији грађанског права, у: *Грађанска кодификација - Civil Codification,* Ниш, 2003, p. 370.

[64] H. Brox, *Erbrecht,* Karl Heymanns Verlag KG- Köln-Berlin–München, 2004, p. 98; About advantages and disadvantages of inheritance contract, see N. Stojanović, Zašto je ugovor o nasleđivanju zabranjen u našem pravu?, *Pravni život*, br. 10/2003, p. 175-178; D. Đurđević, *Anali pravnog fakulteta u Beogradu*, br. 2/2009, p. 206-2010.

[65] M. Povlakić, M. Softić Kadenić, Da li je potrebno uvesti nove forme raspolaganja mortis causa u nasljedno pravo BiH, Zbornik radova *Aktuelnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, br. 10, Mostar, 2012, p. 189.

dispositive, because contracting parties may agree on the prohibition of disposing of the object of the contract by the contracting testator, and thus further ensure their legal positions as contractual successors.

When it comes to the effect of a lifetime maintenance contract, since it is a regular contract of law of obligation, it obliges counterparties so that the maintenance support provider is limited in his freedom of disposition *mortis causa* and *inter vivos* and the contract cannot be unilaterally revoked. As the maintenance receiver is the owner of the assets that are the subject to the contract until the moment of death, the maintenance support provider can protect his rights under this agreement by entering it into public records or by using collateral and thus prevent being played out.[66] In contrast, the contractual heir may not acquire any rights under the contract of inheritance, so there is nothing to ensure, but acquires only legal hope that he will become the successor of contractual testator.[67] In this sense, its property law position is less certain than the position of the provider.

Although between these two contracts there are undoubtedly similarities in terms of form, aleatory features, compensation, and crucial motivation for disposition, the differences are more than obvious (in terms of object of the disposition, legal effects and causa).

The contract of inheritance is an instrument of great flexibility, and therefore very suitable for succession planning, which correspond to the requirements of modern legal transactions - this can not be said for the lifetime maintenance contract.[68] The contract of inheritance can appear in different modalities, and its content can be adapted to the needs of the parties. In this regard, the parties may retain the right to unilateral revocation or modification of the contract, and thus determine the scope of its binding effects, which is not the case with lifetime maintenance contract. This agreement may be combined with other *inter vivos* agreements, for example lifelong maintenance contract, whose application becomes more significant because it enables older people to simultaneously aquire lifelong care and to dispose of their property in case of death. There are various protection mechanisms that are available to the contracting parties,

[66] See art. 199 (1) of the Law of inheritance RS.

[67] H. Brox, *Erbrecht...*, p. 91.

[68] For comparative overview of inheritance contract and lifelong mainetanance agreement, see: D. Đurđević, *op. cit.*, p. 204-206.

besides strict forms, such as the posibility to stipulate clauses on the prohibition of the disposition of the subject of the lifetime maintenance contract.

5. Conclusion

The modern law of succession is characterized by the need for more flexible instruments of succession planning. This results in the increasing presence of different contractual mechanisms for managing the inheriting process, and leads to contractualisation of inheritance law. This fact is confirmed by the ongoing reform of EU legislation in the field of inheritance law. Therefore in France and in Italy the alternative forms of *inter vivos* disposition are introduced in the form of *institution contractuelle, donation-partage, patto di famiglia* etc.

When it comes to the *institution contrectuelle*, taking into consideration its basic features, we come to the conclusion that it represents a modality of inheritance agreement. It is a legal affair *mortis causa* that refers to future inheritance, which is generally irrevocable. Its specificity is reflected in the character of matrimonial property disposition, because it is always concluded in favor of a spouse or between spouses. On the other hand, in comparative law the typical contract of inheritance is of different, much broader scope, although in some jurisdictions it is also reserved exclusively for spouses (e.g. in Austria).

Due to its basic characteristics, primarily *causa* and object of disposition, we believe that the *donation-paratage* can be an adequate substitute for the contract of inheritance, provided that in the case of *donation-paratage transgénérationnelle* it is modified and adjusted to the practical needs. As it is the case with the contract of inheritance, the object of disposition are assets that will be found in the inheritance of the donor. Lucrative character of *donation-paratage* is in accordance with the tradition of the French inheritance legal system, and the anticipated disclaiming by the *donation-paratage transgénérationnelle* is in function of fulfilling the purposes for which this agreement was introduces.

With the introduction of *patti di famiglia* in Italian law there is no doubt that an exception to the general prohibition of the conclusion of the contract of inheritance has been made. Taking into consideration its basic characteristics, the deviations from the contract of inheritance are so obvious that for *patti di famiglia* may not be said to represent the type of inheritance contract, nor can it be considered as a substitute thereto. It represents a specific instrument of legal disposition with limited scope of application and the indirect effect on inheritance, created in order to achieve a certain goal, which is to ensure intergenerational transmission of companies.

The Serbian law does not allow the inheritance agreement – any such agreement would be considered null - and does not provide other adequate alternative contractual means for inheritance disposition. The only instrument of lifetime disposal of assets that can be brought into connection with the distribution of inheritance is the lifetime maintenance agreement, whose property law effects are linked to the fact of death. However, as lifetime maintenance agreement represents a contractual disposition *inter vivos*, it cannot be viewed as having the same function as the contract of inheritance only on the basis that its legal effect is linked to the moment of death of the care receiver. The death is not the cause of acquisition in this contract, but represents an extended period of time to which the property-law effects of the contract are attached.

Since a contractual disposition of inheritance has become a necessity, we consider justifiable the decision of the writers of the Draft of Serbian Civil Code to introduce the contract of inheritance into Serbian inheritance law. However, we do not support its limitation to spouses only. One more time, the legislators have actually unnecessarily brought into connection the contract of inheritance with the lifetime maintenance contract, because alongside the introduction of the inheritance agreement the abolishment of the lifetime maintenance contract between spouses has been proposed.

In spite of a very common comparison of these two legal institutes, we share the opinion that the question of the scope of applicability of maintenance agreement should be considered separately from the inheritance contract. This does not diminish the need for the usefulness of their comparative analysis, especially in a functional sense. Therefore, we hold that the inheritance agreement shouldn't be considered as a mean of eliminating disadvantages of a maintenance agreement, but as a new instrument of estate planning, which, due to its multyfunctionality, stands out of other instruments present in our law.

Relating to this issue, we believe that the regulation of the inheritance agreement in the Draft of Civil code is rather poor. Since it is the strongest base for acquiring inheritance, it should be more precisely regulated in the Draft, starting with its content, the modalities of conclusion, the right to terminate the agreement, and especially the protection of forced shares.[69] Proscribed limitations on persons

[69] Vlada Republike Srbije, Komisija za izradu Građanskog zakonika, *Prednacrt Građanskog zakonika Republike Srbije*, četvrta knjiga, Nasleđivanje, Beograd, 2011, p. 87, 88.

entitled to conclude this agreement, in our opinion, narrows unjustifiably its scope of application, limiting private autonomy, as well.

Which type of inheritance agreement should be accepted, depends on the economic and social circumstances of a society and its inheritance legal tradition. There is no doubt that accepted model have to be in accordance with the main principles of the inheritance law of the country in question. In any case, different approaches to contractual inheriting should not endanger unification of the law of inheritance, which must be reasonably based on testamentary freedom, as it is considered in modern legal doctrine.[70]

However, the experience of the countries that have been applying this instrument could be guidelines toward the most convenient legal concept of this agreement for one country. Because of the restrictive legislative approach to inheritance agreement, in Austrian legal practice the inheritance contract is not commonly applied. On the other hand, because of its flexibility, it is dominant mean of estate planning in German legal practice. Therefore, we consider that in Serbian law should be introduced more liberal normative approach to the inheritance agreement, comparable to German and Swiss law, in order for the inheritance agreement to make the desired effect.

[70] S. N. Navaro, Freedom of Testation Versus Freedom to Enter into Succession Agreement and Transaction Costs, in: *The Law of Succession, Testamentary freedom* (M. Anderson and E. Arroyo i Amayuelas), p. 126.