

The Inheritance Pact

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Abstract

This article illustrates the institute of inheritance pacts. Firstly this article is focused to the origin and manner in which these agreements are treated in different legal systems, presenting a general classification of their types and manner as they were treated in different historical periods, focusing on the features they have.

Keywords: inheritance pact, law, theory.

Introduction

The inheritance pact may be defined as "an agreement that creates, modifies or revokes, the future inheritance rights of one or more persons party to this agreement".¹The category of inheritance pacts includes various types of negotiating instruments, which are merged with the fact of being an alternative and complementary arrangement to the testamentary disposition form, through which one or more individuals regulate their inheritance.²These pacts are based on the testator's autonomy to negotiate, so he can protect particular situations and interests in marital relationships, or in relationships created with his heirs, up to the moment of death.

Regulation 650/2012 in Article 3, paragraph 1, letter b, foresees the meaning of an inheritance pact by calling it "an agreement that is created by the free will of the parties which is capable of creating, changing or discard rights in the future inheritance of one or more of the same parties in the deal, with or without review"³.This definition is supported by the previously accepted definition of the 1989 Hague Convention. It has a wide scope of action and is able to include in its field of application the entirety of various institutes which are present in the legislation of the member states.⁴The regulation makes a very broad definition of the "inheritance pact" concept, referring to all mortis causa agreements, including those agreements resulting from a mutual will.

Since it is an agreement, the pacts have a contractual character, as a result, the parties are bound by the terms of this agreement since its signing, ie inter vivos.⁵As a general rule, these pacts are irrevocable, however, it should be noted, that on the one hand, the parties can negotiate on the reasons when it may be revoked for each party. Also, in the legislation that supports inheritance pacts, exceptional situations

¹ E. Calo, *Il progetto di Regolamento UE sull'legge applicabile alle successioni* 2010, page. 527.

² P. De Cesari "Autonomia della volontà", Padova, 2001, p. 99.

³ Regulation (Eu) No 650/2012 Of The European Parliament And Of The Council of 4 July 2012 on "Jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession".

⁴ Doctorate, Laura Vorpsi 2015.

⁵ Chapter III of the Hague Convention of the Year 1989.

are anticipated when the parties can quit. The irrevocable character of inheritance pacts is the most sincere element of these agreements, thus becoming the element that makes the main distinction with other ways of alienation of wealth (testament). But although irrevocability has been the element that has characterized inheritance pacts, the truth is that there is no question of an essential element, not only that there are always exceptional cases for the revocation of these agreements provided by law, but even the parties to the agreement may decide on the cases they consider reasonable when this agreement can be revoked.⁶

One of the other features of inheritance pacts lies in the commitment that is created between the parties. Through the link established in this agreement, the chances of successful closure increase, and among the most positive aspects is the confidence that is created between the parties that this agreement will be realized. Predictability and legal certainty for the parties is an indispensable principle for the choice of the law applicable to these pacts. This requirement is even more apparent given how heterogeneous this legal figure appears in different systems.

It should also be noted that inheritance pacts have a general character, an *ad solemnitatem* agreement, since usually the legislation that provides for this type of agreement requires intervention of a public authority, usually a notary, to give public character.

1.2 Inheritance pacts in Roman law

The social structure in Roman law was centered around the individual, and specifically in the growth of his personality individually. As a result of this personal personality, the individual could freely dispose of his property after death, a power that reflected through will. Consequently, the inheritance in Roman law was directed towards the will, a unilateral, *mortis causa* and revocable act, thus respecting the principle that the person could change his will at any moment before he passed away.

In Roman law, the form used for the inheritance was the universal inheritance, which consisted in the substitution of the *de cuius* in all its activities. Somehow we have a personality that occupies another personality, so it replaces it in all respects. It is generally assumed that Roman law was not *pro* inheritance pacts, which is apparent since at that time these were viewed as contrary to the moral order, it was not considered reasonable to have a contract at the center of which was the death of one of the parties. Also the use of these pacts was seen as an opportunity that could lead to the awakening of the so-called *votum mortis*. These pacts were also viewed as contrary to public order, the irrevocable nature of these pacts was considered directly contrary to the freedom the testator possessed, which was a fundamental principle in Roman law.⁷

One of the reasons justifying the absence of these pacts was the possibility that the beneficiary of the inheritance pacts would like the death of the testator, *votum captandae mortis*, although this view may seem to be contradictory because this desire is likely to be present in all kinds of inheritance *mortis causa*, and moreover in the case of

⁶ Doctorate, Laura Vorpsi 2015, page 95.

⁷ Juliano, Dig. XLV, I, 61.

testamentary inheritance, where revocation by the testator is allowed at any time. Indeed, in Roman law, the pact of inheritance was not recognized as a general figure, nor was it able to systematize/regulate it.⁸ The use of inheritance pacts was isolated and limited to specific figures, for example; *mortis causa* donations, which, in certain cases when they had special characteristics and when they met the main condition to be irrevocable, took the form of inheritance pacts. Other cases are mentioned, for example, the possibility to enter into agreements with the party, the so-called '*divisio parentis inter liberos*' equality promises, through which the contractual distribution of family goods was made possible and extended effects from the time of death of the head of the family.

As a conclusion, we can say that the inheritance pact was not systematically well know figure in Roman law, despite the fact that there was no explicit ban on the use of general inheritance pacts, there was no specific adjustment of this figure.⁹

1.3. The Germanic system

The Germanic system, on the other hand, places at the center of the social structure the family, unlike the Roman law that places emphasis on the individual. The family community was a compact structure with a strong connection between them, headed by the head of the house followed by other members who were legally equal in terms of rights in the family community. Indeed, it was about a patrimonial society linked to an agrarian economy, including both immovable and personal property. The head of family had the right to enjoy family wealth. Other individuals did not have the opportunity to dispose of their possessions. Children were entitled to inheritance for the fact that they were born in that family. The German family, from the legal point of view, and the rights it gave to its members, did not consider the mother and other women of the family at its beginnings, and gave rights only to the father and the male children who were the only ones who possessed the right to benefit from the inheritance.¹⁰

Only at a later time, it was possible to a small extent freely disposition of goods, in particular; in Visigoth, the father had to distribute the family property, giving equal parts to the male members of the family, thus saving only one-fifth of his personal disposition. Indeed, in the one-fifth of the wealth owned by the head of the family, according to the documentation of the time it was considered that the woman and the children were also entitled.

With this social structure, which focus was family, the testament seen as the maximum expression of individual personality, had no support in the Germanic system. But heritage pacts were used in some way to organize the inheritance transmission while

⁸ Nevertheless, it is thought that in the Justinian era, for the first time, it was noticed a ban on inheritance pacts, namely a number of norms of that time similar, but not a general theory of inheritance pacts. *Congres des notaries de France*, 197, page. 543.

⁹ M.P. Garcia Rubio/M. Herrero Oviedo 2011, page. 1262.

¹⁰ The Germanic legal system, based on the rights it generates for its members, was a system in which only the father and the male children participated (at least in principle), while the mother and the girls had no rights over the family community and therefore did not had the right to inherit the material goods of this community. *Marin Padilla* (1992), page 93.

the person was alive.¹¹

Inheritance pacts therefore had limited use in the transfer of ownership during the time that the head of the family was alive, *inter vivos*. In this way, various figures of contractual, inheritance nature were developed through the customs of the time, which was also the main source of the right in the Germanic system.

1.4. The dual nature of inheritance pacts

One of the most discussed issues regarding inheritance pacts is to clarify the legal nature of these pacts, whether they are contractual acts or inheritance acts. It is often said that one of the characteristics of this legal figure is that on one hand the pacts appear as *mortis causa*, but on the other are contracts that create rights and obligations to the parties and create effects since the time of its signing. The contractual nature of these pacts is noted in the fact that to conclude this agreement requires the mutual and constant will of all parties included in this pact. By the dual nature of these pacts, many controversies arise because the doctrine does not agree to qualify these pacts as *mortis causa* or *inter vivos* acts .

It should be said that these pacts appeal more to a mixed nature, because on the one hand there are bilateral *inter vivos* agreements and create obligations for the parties, but on the other hand the main effects of this agreement come at the moment when the devisor passes away. Given that the objects of these pacts are inheritance rights (one or more parties), the true effects of this pact come after the death of the future inheritor, but this does not contradict the fact that we are dealing with one *inter vivos* act and that brings obligations to the parties at the moment of its connection.¹²

One of the most discussed hypotheses relates to the object of the pact, whether this object would be a fortune or a sum of money, and would be available at the moment of the pact signing, in this case we would have a deviation from the rule of disposition of this property *mortis causa*. But despite the availability of this *inter vivos* property, this pact continues to have the key features of an inheritance pact..¹³

Inheritance pacts and testament

Testament is a unilateral act that can be revoked and modified easily. A testamentary gives the devisor the opportunity to make some changes and modify the parties benefiting from his wealth, with the exception of certain legal reserves. While the inheritance pact is an authentically valid act, signed between the devisor and future inheritor, and as in the case of all contracts, it can not be unilaterally revoked. The inheritance pact is a property planning tool, and for people who use it properly, in a proper way, can turn into a very useful instrument. However, due to its irrevocability, it is preferable to use it cautiously. As advantages of the pacts, we can mention the stability of the choice made and guarantees the inheritor better information, as they have previously agreed upon the contractual conditions of the future heritage.

¹¹ J. CastanTobenas 1944, Page. 689.

¹² G. Giampiccolo (1954) about the nature of *inter vivos* / *mortis causa*, the inheritance pacts.

¹³ M. Herrero Oviedo (2009) page 201.

1.5. Types of inheritance pacts, classification criterion

The first group, relates to the types of inheritance pacts, starting from their object;

- Positive pacts, or *de succedendopacts*, are those kinds of agreements that have as their object the inheritance of a property in favor of another person, inheritance contracts,
- Negative pacts, or otherwise known as pacts for relinquishing the inheritance, are those pacts that have the object of relinquishing any inheritance rights that a person may be benefiting in the future. In German law are known as *Erbverzicht*,
- Third-party inheritance pacts are the pacts in which the parties make definitions relating to the inheritance of a third party that is not part of this agreement. Indeed, it is about mutually *inter vivos* pacts referring to the inheritance of a third.¹⁴

The second group is based on the number of inheritance objects included in these pacts;

- The inheritance pacts that have the object of a single person's heritage are the pacts in which the *de cuius* is one and only and the object of this pact is also one; future inheritance of *de cuius*.
- Inheritance pacts that have as a main subject the heritage of more than one person are the pacts in which more than one heritage is involved, so there are two or more dispositions.

The third group has as a criterion the ability to inherit;¹⁵

- Matrimonial Inheritance Pacts are the pacts in which the ability to inherit is given to spouses,
- Family inheritance pacts are the pacts in which the first-rank members have the ability to inherit, depending on the various legislation this inheritance circle may be wider or more limited,
- The free inheritance pacts are the pacts in which the circle of legitimized persons to inherit is open, no limitations, and anyone can inherit.

In the fourth group, we have the classification of pacts; in pacts with reward, and pacts without reward;

- In pacts with reward are included those pacts in which one party must perform various tasks in order to benefit the wealth of the pact, for example; take care of *de cuius* during the period that he continues to be alive.
- Pacts without any reward are the pacts in which *de cuius* permits to leave his inheritance without seeking anything in return from the beneficial person.

As it is seen the types of pacts vary and are different, this makes it difficult to recognize the pacts from different legislation as this legal figure appears very heterogeneous.

1.6. Systems that have a positive attitude towards inheritance pacts¹⁶

¹⁴ M.P. Garcia Rubio/M. Herrero Oviedo, 2011 "Pactos sucesorios en el Código Civil en la ley de Derecho de Galicia", Caccavale, C. 1994, "Ildivietodeipattisuccessori", page 1261.

¹⁵ Garcia Rubio/M. Herrero 2009, Faqe. 465. Garcia Rubio M.P./Herrero Oviedo, M. (2009), "Las disposiciones generales, sobre pactos sucesorios en el Libro IV del Código Civil de Cataluña.

¹⁶ We can include here those countries which have a Germanic nature in their legislation, like Germany, and Switzerland, as well as in some of the local legislation in Spain as Galia's civil law, the

Two of the concrete examples of states that consider testamentary pacts as acceptable are the German and Swiss legal systems that derive from the Germanic legal system. Inheritance pacts are widely accepted in the German legal system, although at the time of drafting the German Civil Code (BGB) ("BürgerlichesGesetzbuch"),¹⁷ there were voices against the inclusion of these pacts, arguing that; there was a risk inherent in the conclusion of this contract given the impossibility of adapting the provisions of the inheritance to the circumstances that could change. On the other hand, they also argued about the false safety that brought these pacts, because the inheritor did reserve the right to dispose the *inter vivos*.¹⁸

Despite rumors against the inheritance pacts, the BGB accepted these pacts from the beginning. A great deal in taking that decision played legal traditions, especially the legal habits of the Middle Ages, a period in which inheritance pacts were frequent and necessary.

Inheritance pacts were therefore widely accepted in the German system, namely; institutional pacts (Erbvertrag), renunciation agreements (Erbverzicht), while third-party legacy agreements were banned (§ 311 b paragraph 4 BGB).

The BGB deals in particular with the renunciation pacts of future hereditary rights, which have a detailed arrangement in Article 2346 and following of the German Civil Code. The content of inheritance renunciation can be varied. A person may renounce property rights which belong legally to him (Article 2346 BGB), he may also renounce property rights that may come from a testamentary act. Renunciation of these rights will of course be considered by *de cuius*, and will be accompanied by compensation in favor of the recipient of the wealth.

Swiss legislation is another example of legislation that has a positive approach to inheritance acts. Article 498 of the Swiss Civil Code provides in general terms the possibility of signing inheritance pacts. There is no restriction on the persons legitimated to conclude such a pact. The doctrine states that the agreement can be free and agree on the opinion that it may be *inter vivos* or *mortis causa*. Also in the case of Switzerland, the arrangement of renunciation agreements is more detailed than the regulation of the agreements of institution inheritance.

References

- E. Calo, *Il progetto di Regolamento UE sulla legge applicabile alle successioni 2010*, Faqe. 527.
P. De Cesari "Autonomia della volontà", Padova, 2001, p. 99.
Regulation (EU) No 650/2012 Of The European Parliament And Of The Council of 4 July 2012 on "Jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession".
Laura Vorpsi *Doktoratura* 2015.
Chapter III of the 1989 Hague Convention.

Basque countries, which have a developed tradition in relation to these acts of will, and have made a significant contribution to the inclusion of these pacts in European legislation.

¹⁷German Civil Code: Deutschen Bürgerliches Gesetzbuch, Aufgebotsverfahren.

¹⁸R. Kanzleiter 2006, page. 153, "Erbvertrag".

Juliano, Dig. XLV, I, 61.

Nevertheless, it is thought that in the Justinian era, was noticed for the first time, a ban on inheritance pacts, namely a number of norms of that time similar, but not a general theory of inheritance pacts. *Congres des notaries de France*, 1975pg. 543.

Marin Padilla (1992), *The Germanic legal system*, based on the rights it generates for its members, was a system in which only the father and the male children participated (at least in principle), while the mother and the girls had no rights over the family community and therefore did not had the right to inherit the material goods of this community. Page 93.

J. CastanTobenas 1944, pg. 689.

G. Giampiccolo (1954) about the nature of inter vivos / mortis causa, inheritance pacts.

M. Herrero Oviedo (2009) pg 201.

M.P. Garcia Rubio/M. Herrero Oviedo, 2011 "Pactos sucesorios en el Código Civil en la ley de Derecho de Galicia", Caccavale 1994, "Il divieto di patto successorio", page 1261.

Garcia Rubio/M. Herrero Oviedo 2009, Page. 465. "Las disposiciones generales, sobre pactos sucesorios en el Libro IV del Código Civil de Cataluña.

Kodi Civil Gjerman: *Deutsches Bürgerliches Gesetzbuch*, *Aufgebotsverfahren*.

R. Kanzleiter 2006, page. 153, "Erbvertrag".