

## THE CONDITIONS OF THE DOCUMENTS (CONTRACTS) ON AN UNOPENED HERITAGE

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**Abstract:** *Inheritance agreements have been defined in reference books as those contracts concluded between two or more successors or third parties intended to govern definitively and in advance, one or more successions still unopened, or those conventions through which possible rights over an unopened legacy are totally or partly assigned. The reason to ban legal documents (contracts) on an unopened legacy concerns several aspects. Thus, it was initially argued that the basis of this ban would be one of legislative policy, but also a moral problem because these acts contravene the rules of social coexistence since they may trigger in the contracting party's mind the desire for the death of the one who bequeaths.*

**Key words:** *inheritance, law, contract, legal act.*

### 1. The conditions of the documents (contracts) on an unopened heritage

Rules governing succession are mandatory, so you can not abdicate from them. However, the rules which regulate testamentary succession are facultative, being linked to the exclusive will of *de cuius*.

The law established the principle of testamentary freedom in the sense that any person, as he may dispose by acts *inter vivos*, he may as well, freely, dispose by *acte mortis causa* of his own patrimony.

The principle regarding the autonomy of will may not be regarded as incompatible with the public order of succession, as it allows the deceased to change the legal succession rules only within certain limits and only by will, therefore the rules governing inheritance form

an intermediate class located between imperative and suppletive legal regulations.

Thus, testamentary freedom is subject to the following limits:

The testator can only dispose of his own property by inheritance in the solemn form required by law, by will and not by contract.

The disposition *mortis causa* is a legal document that can only take the form of legal acts that are essentially revocable.

A person can dispose of his property in the hypothesis of death, all substitutions that are called „*fideicomisare*” being prohibited.

Legal acts regarding future, unopened inheritance are prohibited.

The testator can, in principle, make any liberalities, on the condition of not violating the inheritance reserve.

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## 2. General notions on documents (contracts) on an unopened heritage

Inheritance agreements have been defined in reference books as those contracts concluded between two or more successors or third parties intended to govern definitively and in advance, one or more successions still unopened [25], or those conventions through which possible rights over an unopened legacy are totally or partly assigned. "The commitments involving the whole or part of a future inheritance are, in principle, unlawful whenever they are irrevocable, i.e. when determining the actual relationship between creditor and debtor.

The contract between them represents the natural conditions in which the acceptance of the right by the creditor makes the debtor's commitment become irrevocable [18]."

Article 956 of the New Civil Code stipulates that "unless the law provides otherwise, the legal documents involving the contingent rights on an inheritance still unopened are null and void (unlike the French law, where, following the reform in 2006, the absolute nullity sanction was completely given up on in favour of the ineffectiveness of such contracts concerning unopened inheritances), as well as the documents which accept or renounce this inheritance before opening it or documents which alienate or promise the alienation of certain rights which could be acquired when opening the inheritance".

The same prohibition is found in the French law, being regulated by the provisions of articles 722 and 1130 of the French Civil Code; as in the domestic law, the French law knows two types of documents on a future inheritance, i.e. legally authorized contracts among which family contracts are included and the association or impartible contracts, and the ones prohibited by law.

Therefore, the text of art.956 of the New Civil Code, which incorporates the proposed definitions of the doctrine aimed at two categories of legal documents:

- documents through which the inheritance is accepted or renounced before opening it
- documents that alienate or promise alienation of rights which could be acquired when opening the inheritance.

The civil legal act is defined generically in the doctrine as a manifestation of will made with the intention of producing legal effects, meaning to give birth, modify or extinguish a specific legal relationship [24].

The concept of *legal act* has a double meaning and requires an explanation in both ways.

Thus, by legal act we understand both "the act of law itself, which entails a right for another, made with the intent to produce the effects the right consists in" [4], [5], [8], [12], as well as the written acknowledgement of the operation performed, meaning the material support comprising the manifestation of will. Regarding these two senses of the notion of legal act, the doctrine refers to "*negotium juris*" to describe the operation itself and the "*instrumentum*" when referring to the evidentiary instrument of the legal operation.

Seeing the definition and the essential features of the legal act, it is established that this represents a complex legal category of great importance.

The complexity of the legal document results from the fact that "it is built on a large number of components, each of them, in turn, being considered individually, forming a legal institution" [13]; it selects in its content only the essential and common elements of the various categories of components, "being the result of a process of selection and generalization of

the elements of the characters common to all categories of such documents" [9].

The legal act *that* should not be confused with *legal, lawful or unlawful fact*, can be defined as any phenomenon producing legal effects.

From the definition given, we may conclude that the legal act is also a legal fact. This conclusion is however inaccurate, the relationship between a legal fact and a legal act being a gender - species relationship.

Thereby, the legal fact represents the gender, and within the gender there is the legal act as species. In other words, legal acts bring about legal effects under the law, regardless of whether they are intentional or not, while legal documents bring about intentional legal effects, expected following the conclusion of the act [8].

The essential condition of the legal act is the existence of intent which conditions the generation of anticipated legal effects, effects which cannot occur according to the law unless such an intention existed [6].

Regarding the legal provisions and the issues highlighted by the doctrine, we conclude that the civil legal act represents "the instrument that helps the modelling to take shape" [21], meaning the manifestation of will which aims at producing legal effects consisting in the birth, modification or termination of legal relationships, and has the following characteristics:

- it is the manifestation of will
- the manifestation of will is expressed with the intention of producing legal effects, so that if any legal act is a manifestation of will, not every manifestation of will represents a legal document [22].
- the legal effects intended involve the birth, termination or modification of a specific legal relationship.

From reading the provisions of the New Civil Code it is established that neither this nor the Civil Code of 1864 provide a definition of the legal act and a regulatory framework of this institution, only regulating certain types of generic or specific legal acts, namely contracts and unilateral legal acts

From the wording of the legislature, it can be concluded that the ban is aimed at both people who would be entitled to any right to the inheritance (legal heirs or legatees), and also at the deceased, whose dispositions *mortis causa* can basically take the form of essentially revocable wills.

In this sense, even if the act of renunciation [10] or acceptance of the inheritance is a unilateral act of the successor, it is not valid before opening the inheritance because as long as the inheritance is not open, the act of choice is pointless.

Also, even if according to art. 1228 of the New Civil Code, contracts may carry on future [26] goods, the unopened legacies are not listed in the category of such goods, so the deceased can not conclude legal documents that alienate or promise to alienate an unopened legacy, a fraction of this or an asset from an unopened heritage. In the same sense, the HCCJ prosecution department, in December 2003 established "Among the future goods, the inheritance only may not be the object of a contract.

This cannot be retained in case the defendant, as sole heir, had already started the notarial proceedings related to the inheritance.... and in the contractual clauses, the defendant had considered only the land with an area of 8 ha out of 50 ha, for which ownership was to be reconstructed, in no way did they aim at the universality of the rights and obligations incumbent upon her as the heir of the deceased.

The unaccomplishment of future obligations does not affect the validity of the contract, the seller being obliged, besides the loss of price settlement, to the payment of damages for not carrying out the assumed obligations, if a different cause is not proven, which exonerates them from liability"

The rule of banning agreements on an unopened inheritance is not new, being also found in the Civil Code of 1864, or even earlier, in ancient Roman law. Thus, Roman law prohibited the following pacts on a future inheritance:

- those regarding the legacy of a third party still alive, initially deeming them as void for lack of subject, and then on grounds of immorality
- the renunciation to an unopened inheritance, on the grounds that one can not give up something that could not be accepted
- contractual provisions of heirs

In the feudal law, such contracts on an unopened succession were allowed as they ensured the preservation of the important assets within the same family. Later, with the advent of capitalist relations, the solution of prohibiting such contracts was adopted again [19].

In contemporary law, although the rule stipulates the prohibition of such contracts, there are numerous legislations that allow the contractual organization of successional devolution.

Some of these authorize only the provisions on certain goods individually determined, such as Austria and Denmark, others admit the universal devolution or that with a universal title, either by contract or by joint will [27]. These systems that allow the contracts on a legacy on an unopened inheritance fall into two categories: those that qualify the document as a genuine agreement which cannot be revoked without the consent of both parties, and those that allow the

deceased to unilaterally dispose of his/her assets until death [28].

The Austrian law allows, for example, the succession agreement signed between spouses, in original form, and which can not be revoked unilaterally. Parties are free to dispose by acts *inter vivos* of the assets that are subject to the contract throughout their lifetime, but only to a maximum of three-fourths of their wealth - art. 1249 ABGB; a similar provision is to be encountered in the German law, where also the testator, a party in the succession agreement, retains his/her right to dispose of his/her property during life.

The difference from the Austrian law is that the German testator may also revoke unilaterally the contract of succession, but only if the beneficiary commits an act of indignity.

Regarding the existence of these exceptions from the rule of interdiction on the agreements on unopened inheritances, the practical question was if the validity of an agreement that refers to property within the territory of a state which prohibits such conventions can be raised.

If, initially, international practice and doctrine ruled in favour of the prohibition of such contracts, a solution based on the international public policy character of the prohibition, it was subsequently appreciated that this character of public policy cannot be justified, so the freedom of action should be respected, and, to the extent to which the pact was validly concluded according to the foreign law which the parties have agreed to submit, the execution should be possible even in the state that prohibits such agreements [16].

A judicial document having as object contingent rights over an inheritance still unopened implies any legal document, free of charge or for consideration, unilateral, bilateral or multilateral, universal, with universal or particular title that carries over

the legal or testamentary heritage, ruling over a still unopened heritage, as the documents which accept or renounce it before opening it, or the documents which alienate or promise the alienation of certain rights which could be acquired when opening the heritage, whether it is signed by the deceased or by the eventual heirs.

From this point of view, the documents on a future inheritance were deemed in the doctrine as being positive acts, namely those which aim at acquiring a right, or negative acts, i.e. those containing a waiver of a right [11].

### 3. The conditions of the documents (contracts) on an unopened heritage

In order to constitute an act on a future inheritance and to be banned, it is necessary for it to fulfil the following conditions:

- **the legal document is to concern the inheritance law**, i.e. a contingent right to concern an inheritance, a part of an inheritance or only certain individually determined goods. The right has a potential character from the date of opening the inheritance, at which point it becomes current and born. With this pact, the deceased does not restrict his/her right to dispose through documents among inter vivos of his/her assets, but restricts his/her right to transfer them through documents on account of death. In other words, these contracts never compel the deceased but always compel his/her inheritance [18].

If in the hypothesis of alienating a universality or parts of a universality no difficulties occur, in the hypothesis of alienating an individual right, determined through a document of a private person, it is necessary to clearly establish whether it is a pact on a future inheritance disallowed by law, or a document affected by the standstill period or a suspensive condition, which is valid.

Thus, the document affected by the precondition of a person's death (a future event and ultimately a certitude) is perfectly valid, as the contingent right is the one which lacks both the object and the subject, not being known if the object would exist or if the right would belong to another person in the future [20].

Moreover, in case of realization, contingency does not retroact, unlike the condition that causes retroactive effects from the date when the document is concluded. The contingent right differs from the standstill period in the sense that the contingent succession right is unclear regarding its birth, unlike the term that implies a future and sure to be fulfilled event.

To the same effect, in doctrine and practice, the question of validity in case of the tontine clause was raised, this being the agreement among two or more people who acquire the same asset and stipulates that the one who survives the other or others, will become retroactively the sole owner of the property, considering that this case is just about a transaction affected by a purely causal condition of the death of either party, which does not mean a deal on an unopened heritage [19].

Also, the reference books [14] considered that, under the New Civil Code, the precipitated clause also establishes a genuine agreement on a future succession, because the statutory provision states the right of the surviving spouse to take possession of the property owned or co-owned in condominium before the division of the heritage. Therefore, the *preciput* clause is regarded as a contract establishing heirs that refers only to the surviving spouse;

- **the document to be completed before the opening of the heritage**, which

represents the object, before the death of the one who endows, such as the documents concluded after opening the heritage are valid.

The date of opening the inheritance is that of the death of the one who endows. The death of a person can be physically ascertained or declared by court.

The proof of death and the date of opening the inheritance fall on those who want to inherit him/her and is done either by the death certificate issued by the Civil Service of the locality where the death occurred, on the basis either of the declaration of family members and of the medical certificate which ascertains the death, or by the court declaration of death.

Regarding the possibility of declaring the death by court, under the provisions of the New Civil Code, there are two cases in which such a procedure can be followed: if a person is missing and there are indications that he/she died, in which case the declaration of death can be made by court order at the request of any interested person if at least two years have passed since last receiving information or clues showing that he/she was alive; or when a person disappeared in special circumstances such as floods, earthquakes, rail or air disasters, shipwreck, during war or in any other similar situation and at least six months had passed from the date on which the disappearance occurred.

Another exceptional situation is considered to be the one in which, although the body cannot be found or identified, it is certain that death occurred, in which situation, death can be declared without waiting for any term fulfilment.

In the absence of a definitive declaration of death, according to art. 53 of the New Civil Code, the missing person is assumed to be alive so that any act ruling on the inheritance will be void, even if the parties have been mistaken to this point.

The exception from this rule is the cancellation of the decision concerning the declaration of death, as the one being declared dead proves to be alive or the death certificate is discovered, in which case, notwithstanding the principles of nullity effect, the document remains valid.

- **the document should not be among those permitted by the law**, such as the continuation of a civil society after the death of one of the associates with his/her heirs [29], the testamentary parental partition inter vivos, the *preciput* clause, the return of the given goods or the post-mortem contract. As it was correctly noted in the doctrine, modern legislature is constant in giving prevalence to personal will in detriment of successional public order.

The reason for banning legal documents (contracts) on an unopened legacy concerns several aspects.

Thus, it was initially argued that the basis of this ban would be one of legislative policy, in the sense that the admissibility of such contracts would affect the rules regarding the transfer on succession.

The doctrine held that, in the legal policy concerning family organization, the admissibility of such pacts would lead to changing the order of succession, meaning that the inheritance would come to other people than the ones imperatively established by law or by the will of the deceased, or a single heir would collect the inheritance, thus creating an imbalance of succession [23].

There are some authors who consider this opinion unfounded, considering that it does not correspond to the principles of legal transfer of the conditions regulating the institution of successional reserve [15].

Then it was considered that, morally, these acts contravene the rules of social

coexistence since they may trigger, in the contracting parties' mind, the wishing for the death of the one who bequeaths (*votum mortis captandae*).

Moreover, the ban also contravenes morality from the point of view of the prospective heirs, as they speculate on a still unopened legacy whose content they do not know, risking to conclude an injurious act. In this respect, a psychological reason can also be found.

The reason for this ban is based on the fact that it would remove the possibility for the bequeather to revoke testamentary dispositions, in the event that it is part of the contract. We estimate that, by recognizing the validity of such documents, it would violate the principle regarding the solemnity of the provisions in case of death, in that it would allow the possibility of concluding some legal documents concerning the estate outside the solemn forms provided by the law under the penalty of absolute nullity.

Finally, the doctrine appreciates that the ban of succession contracts is a negative aspect which generates a positive aspect: the obligation to submit the successional reserve [3].

The sanction applicable to the documents on an unopened inheritance is, as expressly provided in the New Civil Code, absolute nullity. This is subject to the common conditions, meaning that it can be invoked by any interested person at any time and cannot be covered in any way.

With regard to the latter aspect, the doctrine has not shared a unitary point of view, meaning that opinions were expressed in the sense of being possible for the mortis causa document to be confirmed by the heirs after the death of the testator, but the opinion of the majority is in favour of the impossibility of confirmation or ratification [1], [2], [7], [15], [17], [20].

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