

Наследование по соглашению о наследовании (наследственному договору) в Китае и России: сравнительно-правовое исследование The orientation and characteristics of the inheritance agreement in China and Russia: comparative legal research¹

Ли Фан,

доцент юридического факультета
Хэйлунцзянского университета,
научный сотрудник Центра исследований
русского языка, литературы и культуры
Хэйлунцзянского университета, China
1339166091@qq.com

Li Fan,

Associate professor of Law School
of Heilongjiang University,
Researcher of Russian Language,
Literature and Culture Research Center
of Heilongjiang University, China
1339166091@qq.com

© Ли Фан, 2021

DOI: 10.17803/2587-9723.2021.4.026-034

Abstract. Recently, great changes have taken place in the inheritance agreement system in China and Russia. Article 1140.1 of CCRF has recognized inheritance agreement in 2019 instead of prohibiting it previously. In China, bequest support agreement is stipulated in legislation, and inheritance attendance agreement is recognized in judicature. Article 464 of the Contract Book of CCPRC of 2020 opens up the legal application of inheritance agreement.

China's inheritance system has its unique characteristics, for example, there is no difference between estate and legacy, the distinction between testamentary succession and bequest is based on whether the subject has the status of legal successor rather than the disposition of estate or legacy, there is no difference between *successio in universum* and *successio in singulas res*, the heritage debt is the legal burden of positive heritage, heritage debt shall not be disposed of in a will, the bequest shall not be exempted from the heritage debt, there are only legal successors but no heir other than legal successors and testamentary successors are only legal successors who inherit by will, there is no forced share but an absolute necessary share for any successor who has neither the ability to work nor the source of income, and neither inheritance agreement nor gift contract is formal. All of those determine that its inheritance agreement must have many characteristics different from those of Europe.

For example, there is a strict distinction between the bequest support agreement with non legal successor as supporter and the inheritance attendance agreement with legal successor as supporter; there is no inheritance renunciation agreement with valuable consideration positively, but the one with negative consideration that a renunciation of the inheritance right is in exchange for exemption of the specific performance of attendance; it is sufficient that the *donatio mortis causa* has the effect of gift contract, and it is not necessary to act as the inheritance agreement.

China's orientation of the inheritance agreement is mainly with consideration and centered on support for the old, while Russia's orientation is mainly without consideration and centered on the disposition of inheritance right in the designated inheritance agreement. In particular, China and Russia have launched a challenge to the doctrine that the effect of inheritance agreement is prior to that of will.

Keywords: inheritance, division, heirs, agreement, preemptive rights.

¹ This paper is the phased achievement of the general project of the Plan of Philosophy and Social Sciences in Heilongjiang Province (No. 19FXB038), the key project of the 13th Five — Year Plan of Educational Science in Heilongjiang Province (No. GJB1320259) and Heilongjiang University's Special Project Related Russia (No. DEY1804).

Introduction

Recently, great changes have taken place in the inheritance agreement system in China and Russia.

Russia's legislation of inheritance agreement is full of twists and turns. In the Draft No. 275719-6 of 2013, the legislators follow the Ukraine Civil Code (UCC) to design inheritance agreement system, and they only recognize the inheritance agreement with consideration, so the rules of sale can be applied by reference. But the draft was withdrawn in 2015. In the Draft No. 821069-6 of 2015 incorporated into the Civil Code of the Russian Federation (CCRF)² after being modified in 2019, the legislators have changed its course, and they have mainly designed the inheritance agreement without consideration whose priority effect to that of will is weakened heavily. However, inheritance agreements were not recognized in the previous CCRF and the Soviet Union Civil Code at all.

The system of bequest support agreement has been set up according to Article 31 of the Succession Law of the People's Republic of China of 1985 and article 1158 of the Civil Code of the People's Republic of China (CCPRC)³ of 2020,⁴ and the inheritance attendance agreement whose subject of obligation is legal successors come into being in judicial practice. If in the European legislation of inheritance agreement, they would belong to the inheritance support agreement to indicate inheritance or bequest in exchange for support.

Article 464 of the Contract Book of CCPRC stipulates: "1. A contract is an agreement on the establishment, modification, or termination of a civil juristic relationship between persons of the civil law. 2. agreement on establishing a marriage, adoption, guardianship, or the like personal relationships shall be governed by the provisions of laws providing for such personal relationships; in the absence of such provisions, the provisions of this Book may be applied *mutatis mutandis* according to the nature of such agreements."

Compared with the distinction mode of contract (obligation contract) and agreement (identity relationship agreement) in Article 2 of the Contract Law of the People's Republic of China (CLPRC) of 1999, due to the addition of "in the absence of such provisions, the provisions of this Book may be applied

mutatis mutandis according to the nature of such agreements", the contract legislation has become the difference mode of contract (obligation contract) and agreement (identity relationship agreement).

"Contract" has the same denotation as "agreement", which refers to the consensual act in civil juristic act. However, due to the division mode of CLPRC, "contract" and "agreement" are also used in a narrow sense, which respectively refer to "obligation contract" and "identity relationship agreement". Here, we use "contract (obligation contract)" and "agreement (identity relationship agreement)" respectively to indicate that the extension of the above "contract" and "agreement" is the same, while the narrow sense refers to "obligation contract" and "identity relationship agreement" respectively.

According to Article 2 of CLPRC, the provisions of CLPRC can only be applied to obligation contract, but not to the identity relationship agreement. The difference is that according to Article 464 of CCPRC, the provisions of the identity relationship firstly are applied to the identity relationship agreement, and if there are no provisions, the provisions of the Contract Book can be applied according to its nature.

In addition, according to Section 1 of Article 467 of the Contract Book, "For a contract not explicitly provided in this Code or other laws, the General Provisions of this Book shall be applied, and the provisions provided in this Book and other laws on a contract which is most similar to the said contract may be applied *mutatis mutandis*."

In the absence of the provisions of identity relationship, the general principles of contract (including the relevant rules of civil legal acts in the General Book) can be applied, and the provisions of the most similar identity relationship agreement and the provisions of the most similar contract can be referred to too. Inheritance support agreement belongs to the type of identity relationship agreement, which is mainly property relationship.

According to its nature, the Contract Book can be widely applied by reference. In the judicial practice of China, there are also inheritance agreements without consideration, but very few.

Apart from China and Russia, the main legislations of inheritance agreement in civil code include Austria, Germany, Switzerland, Hungary, Ukraine, Czech, Latvia and Estonia.⁵ These are the reference

² Civil Code of the Russian Federation, URL: <https://fips.ru/en/documents/documents.php>.

³ Civil Code of the People's Republic of China [05-28-2020] // URL: <http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c16489e186437eab3244495cb47d66.pdf>.

⁴ Article 1158 of CCPRC: A natural person may enter into an agreement on testamentary gift for inter vivos support with an organization or individual other than a successor. Such organization or individual assumes, in accordance with the agreement, a duty to support the said person during his lifetime, and attends to his interment after death, in return for the right to receive the testamentary gift under the agreement.

⁵ Among them, Estonia has the General Part of the Civil Code Act, Law of Obligations Act, Law of Property Act, Law of Succession Act, Family Law Act, but it has not synthesized a unified civil code, which is regarded by us as the legislative example of inheritance agreement in civil code. The English versions of some of them are as follows: Hungary Civil

for us to observe the inheritance agreement system in both China and Russia.

1. The uniqueness of China's inheritance system

In both Article 8 of the Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons⁶ and Article 3 of the EU Succession Regulations,⁷ inheritance agreement is defined as an agreement to dispose of future rights in estate or rights in estates. It is cleverly positioned on the freedom of heritage disposition beyond the freedom of will. Estates are also called legacy. Estate and legacy are the distinction according to the way of disposal of the heritage by the heritage-leaver. Estate includes both the positive heritage and the negative heritage, and can only be divided into shares, while legacy only includes positive heritage and can only point to specific heritage. It does not change the integrity of estate when the legacy bequeathed.

Heirs, whether legal or not, include legal heirs, testamentary heirs and agreement heirs (when inheritance agreement recognized). Accordingly, the heritage-leaver is the decedent. The party bequeathed is the legatee and not the heir whether he is the legal heir or not. Accordingly, the heritage-leaver is the legator. The deceased persons same as heritage-leaver in the Convention is the superior concept of the decedent and the legator. Successio in universum and successio in singulas res of Roman Laws are the sources of testamentary succession and bequest respectively.

China's inheritance system is very different from the above. Its unique features mainly include: there is no difference between estate and legacy, the distinction between testamentary succession and bequest is based on whether the subject has the status of legal successor rather than the disposition of estate or legacy, there is no difference between successio in universum and successio in singulas res, the heritage debt is the legal burden of positive heritage, heritage debt shall not be disposed of in a will, the bequest shall not be exempted from the heritage debt, there are only legal successors but no heir other than legal successors and testamentary successors are only legal successors who inherit by will, there is no forced share, and the inheritance agreement is informal.

Chinese do not distinguish general succession from individual one. However, it shall not be considered that there is only individual succession in China. Heritage also includes both the positive and the negative.⁸ The positive heritage can be disposed of either by share or by individual. However, the negative heritage (heritage debt) is the legal burden of the positive one, which shall not be disposed of by will.

The will can only dispose of the positive heritage, so there is no general succession of disposing the positive estate and the negative one in proportion. In dividing a heritage, the heritage debts shall be paid off.⁹ However, this is not a front-end procedure, because after the division of the heritage, the heritage debts that have not been paid off shall be paid off by the legal successor within the scope of the inherited heritage through legal succession. If it is not enough to pay off, the testamentary successor and the legatee shall pay off according to the proportion of the acquired heritage.¹⁰

Code of 1959 (HCC1959) // URL: <https://gss.unicreditgroup.eu/sites/default/files/markets/documents/Civil%20Code%20effective%20on%2024%20July%202012.pdf>; Hungary Civil Code of 2013 (HCC2013) // URL: http://njt.hu/translated/doc/J2013T0005P_20180808_FIN.pdf; Ukraine Civil Code of 2003 (UCC) // URL: http://www.businesslaw.org.ua/wp-content/Civil_Code.pdf; Czech Civil Code of 1964 (CCC1964) // URL: https://is.muni.cz/el/1422/jaro2013/SOC038/um/Civil-Code_EN.pdf; Czech Civil Code of 2012 (CCC2012) // URL: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>; Latvia Civil Code (LCC) // URL: <https://likumi.lv/ta/en/id/225418-the-civil-law>; Estonia Succession Act (ESA) // URL: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/514012021002/consolide>; Estonia Obligations Act (EOA) // URL: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/512012021002/consolide>.

⁶ Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, URL: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=62>.

⁷ Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 // URL: https://eur-lex.europa.eu/legal-content/en/txt/?uri=uriserv%3AOJ.L_.2012.01.0107.01.ENG&toc=OJ%3AL%3A2012%3a201%3atoc.

⁸ Section 1 of Article 1122 of CCPRC: An estate refers to the property lawfully owned by a natural person upon death. "The property" includes both positive property and negative property (heritage debt).

⁹ Article 1159 of CCPRC: Upon partitioning an estate, the taxes and debts payable or owed by the decedent in accordance with law shall be paid out of the estate, provided that a necessary portion of the estate is preserved for any successor who has neither the ability to work nor the source of income.

¹⁰ Article 1163 of CCPRC: Where intestate succession, testate succession, and testamentary gift concurrently exist, the taxes and debts legally payable or owed by the decedent shall be paid by the intestate successor(s); such taxes and debts in excess of the actual value of the portion of the estate inherited by the intestate successor(s) shall be paid by the testamentary successor(s) and donee(s)-by-will in proportion to the shares of the estate each of them has received.

Chinese do not distinguish estate from legacy. In other words, testamentary succession and bequest have equal status. The legal succession has not only low effectiveness but also low status. As mentioned above, the heritage debt is first borne by the legal successors, and then equally borne by the testamentary successors and legatees. The basis of the distinction between testamentary succession and bequest is not to designate a successor for the estate or a legatee for the legacy, but the identity of the heritage-receivers. It is testamentary succession if the heritage-receivers are the testator's legal successors, and it is bequest if the heritage-receivers are not the testator's legal successors.

There is only legal successor but no heir other than legal successor. Even if he or she is appointed in a will or an inheritance agreement, only when he or she is a legal successor he or she could be a heir, otherwise he or she is only a legatee. Because of this, China's inheritance support agreement can be correspondingly divided into two basic types: bequest support agreement with non legal successor as supporter and the inheritance attendance agreement with legal successor as supporter.

Another particularity related to this is that the support in other legislations in China is also divided into peer-support (between spouses, elder brothers and sisters to younger brothers and sisters),¹¹ child-raising (parents to children, grandparents to grandchildren, younger brothers and sisters to elder brothers and sisters),¹² and old-attendance (children to parents, grandchildren to grandparents).¹³

There is no forced share system in China, only an absolute necessary share system for a successor who has neither the ability to work nor the source of income.¹⁴ As long as there is a positive heritage, even if it is not enough to pay off the heritage debts, it must firstly meet the requirement of the absolute necessary share. It is not only forbidden to deprive but also forbidden to renounce. This makes it possible to renounce legal inheritance right in advance, but impossible to renounce the right of forced share

because it doesn't exist or the right of absolute necessary share because it's forbidden.

Therefore, there is no inheritance renunciation agreement with the positive consideration like the one regulated by Article 495 of Swiss Civil Code (ZGB), but the inheritance agreement with negative consideration that a renunciation of the inheritance right is in exchange for exemption of the specific performance of attendance. Moreover, we can not only renounce the whole right of inheritance in advance, but also renounce the right of inheritance to specific property in advance.

In China, both inheritance agreement and gift contract are informal. So, the rules related to the forms of the two in Europe do not exist in China.

The order and scope of legal successors in China is also influenced heavily by the Soviet Union. The first successors in order include spouses, children and parents, and the second successors in order include siblings, grandparents and grandchildren. They are same as those of the Soviet Union, but both the orders and the scopes have been greatly expanded in Russia.

2. The orientation of the inheritance agreement in China and Russia

Different legislations of inheritance agreements have different orientations, which mainly focus on with or without consideration, support or disposition of inheritance rights.

2.1. Legislative orientation of inheritance agreement in civil code outside China and Russia

The Austrian General Civil Code (ABGB) only stipulates the spouse mutual agreement (Article 602). ABGB provides that will, inheritance agreement and legal succession are the basis of succession (Article 533), but it avoids the priority of between inheritance agreement and will. However, because it stipulates that the inheritance agreement should have the el-

¹¹ Section 1 of Article 1059 of CCPRC: Both spouses have the duty to support each other.

Section 2 of Article 1075 of CCPRC: Younger brothers or sisters who have been brought up by their elder siblings and who are financially capable have the duty to support such elder siblings who lack both the capacity to work and the means to support themselves.

¹² Section 1 of Article 1067 of CCPRC: Where parents fail to fulfill their duty to raise their children, a minor child or an adult child who is incapable of supporting himself has the right to claim child support payments against his parents. Section 1 of Article 1074 of CCPRC: Paternal or maternal grandparents, if financially capable, have the duty to raise their minor grandchildren whose parents are deceased or are incapable of such raising.

Section 1 of Article 1075 of CCPRC: Elder brothers or sisters, if financially capable, have the duty to raise their minor siblings whose parents are deceased or are incapable of such raising.

¹³ Section 2 of Article 1067 of CCPRC: Where an adult child fails to fulfill the duty to support his parents, his parents who lack the capacity to work or are in financial hardship have the right to claim support payments against the adult child. Section 2 of Article 1074 of CCPRC: Paternal or maternal grandchildren, if financially capable, have the duty to support (attend) their grandparents whose children are deceased or are incapable of providing such support (attendance).

¹⁴ Article 1141 of CCPRC: Reservation of a necessary portion of an estate shall be made in a will for a successor who has neither the ability to work nor the source of income.

ements of a written will (Article 1249), so it has the same effect as the spouse common will¹⁵ (Article 1248).

Article 2292 of the German Civil Code (BGB) stipulates that the spouse mutual inheritance agreement can also be cancelled by their common will, which formally indicates that the spouse mutual inheritance agreement has the same effect as the spouse common will. This rule is accepted by the legislation which stipulates both the spouse common will and the spouse mutual inheritance agreement,¹⁶ and becomes an exception of the rule that the effect of the inheritance agreement is prior to that of will. The mutual restriction between the spouses in the mutual inheritance agreement can produce a similar effect of consideration, but it is not subject to evaluation with or without consideration.

BGB defines mainly inheritance agreement as the one without consideration, focus on the disposition of inheritance rights, and recognizes the possibility of designated inheritance agreement with support as consideration (Article 2295). Article 495 of ZGB explicitly recognizes that inheritance renunciation agreement may be with or without valuable consideration. So far, designated inheritance agreement and inheritance renunciation agreement can be with or without consideration. The legislative orientation of inheritance agreement in Czech and Latvian is generally between them. In Latvia, it is particularity that common will and mutual inheritance agreement are not limited to spouses.¹⁷

However, there are also different legislations of inheritance agreement, some are without consideration wholly and centered on the disposition of inheritance rights, some are with consideration mainly and centered on support, or some are with consideration wholly and centered on support.

It is Estonia, where inheritance agreement is without consideration wholly and centered on the disposition of inheritance rights. Section 1 of Article 95 of the Estonian Succession Act (ESA) provides that an inheritance agreement is either an agreement that the heritage-leaver instructs to inherit or bequeath and the receiver accepts it; or an agreement between the heritage-leaver and his intestate heirs (legal heirs) to renounce inheritance right.

The Section 2 of this article stipulates that an agreement, which prescribes the obligation of a person who is a party to a inheritance agreement, on the basis of which an estate, legacy, testamentary

obligation or testamentary direction is received or an inheritance is renounced is not part of a s inheritance agreement and the provisions concerning inheritance agreement do not apply thereto.

However, according to Item 4 of Section 1 of Article 103, the inheritance agreement is concluded after considering the situation that the other party bears the obligation mentioned in Section 2 of Article 95, and the obligation includes performing the regular obligation, especially ensuring the support before the life of the heritage-leaver. If the obligor intentionally and substantially violates the obligation, the heritage-leaver has the right to unilaterally withdraw from the inheritance agreement. The consideration crack of Article 2295 of GBG has been eliminated by making them as statutory one. However, this is only the elimination of ideas rather than substance.

It is Hungary, where inheritance agreement is mainly with consideration and centered on support. Article 7:48 of Hungarian civil code (2013) (HCC 2013) takes the inheritance support agreement as a typical inheritance agreement. It stipulates that in an inheritance agreement, the heritage-leaver names the party contracting with him as his heir to inherit his property, a certain part of it or specific assets against maintenance, life annuity or care provided for the heritage-leaver or a third party indicated in the agreement; and the other party commits himself to perform support, life annuity or care. Thus, the designated inheritance agreement can be divided into inheritance support agreement with consideration and expected inheritance disposition agreement without consideration (article 7:54). This opens up the small consideration crack of Article 2295 of GBG so that the inheritance support agreement with consideration occupies half of the designated inheritance agreement.

It is Ukraine, where inheritance agreement is wholly with consideration and centered on support. Article 1302 of the Ukrainian civil code (UCC) provides that according to an inheritance agreement, one party (the recipient) is obligated to fulfill the orders of the other party (the alienator) and acquires the right to inherit the alienator's property after his or her death.

"Ukrainian law also has such an agreement: the inheritance contract. This notion is relatively new to the Ukrainian legal system since the legislation before 2004 (the year of coming into force of the Civil Code of Ukraine) did not provide for it. The inher-

¹⁵ The reason why we use "spouse common will" is to hope that the concept can cover mirror wills, joint wills and mutual Wills (the same as spouse mutual agreement) in common law system, because in China's judicial practice, the scope of spouse common will is basically the same as that in common law system.

¹⁶ Generally, those who recognize the spouse mutual agreement also recognize the spouse common will. Only CCC (2012) provides for a spouse mutual inheritance agreement (Article 1592), but prohibits a spouse common will (Article 1496).

¹⁷ Article 604 of LCC: A will, whereby two or more persons in the form of one joint document reciprocally appoint each other as heir, is termed reciprocal. But, if in such a will the appointment of one person as heir has occurred with the

itance contract has several advantages over similar legal notions. For instance, the transfer of ownership under the inheritance contract occurs only after the death of the transferor. Thus, a transferor under an inheritance contract is more protected than the transferor under a life care contract. Conversely, the rules concerning reserved portions in inheritance do not extend to the estate, which is transferred under the inheritance contract. Therefore, a transferee is in a better position than an heir under a will. Thus, despite Ukrainians being more accustomed to wills and life care contracts than to inheritance contracts, one can predict the increasing use of the latter.”¹⁸

It can be seen that the main legislative purpose of Ukrainian inheritance agreement is to provide a new solution to the pension problem between the life care contract and the will with the support obligation.

Although the designated inheritance agreement is widely recognized by the legislation of inheritance agreement in civil code, there are huge differences over whether either inheritance renunciation agreement or *donatio mortis causa* is an inheritance agreement or not.

Although Article 551 of ABGB and Article 2346 of BGB provide for the inheritance renunciation agreement, they are not recognized as inheritance agreement because it is not considered as *actes à cause de mort*. Hungary, Czech and Latvia follow them. Both designated inheritance agreement and inheritance renunciation agreement are defined as inheritance agreement according to Articles 494-495 of ZGB, thus the former is called a positive inheritance agreement and the latter is called a negative inheritance agreement.

Estonia follows it (Article 98 of the ESA). The reason why Germany does not recognize the inheritance renunciation agreement as *actes à cause de mort* is the legal obstacles that depriving the inheritance right is excluded from the inheritance agreement. As a matter of fact, it can only be seen from the perspective of the heritage-leaver whether it is *actes à cause de mort* or not. From the perspective of the heir, the inheritance renunciation agreement must not be *actes à cause de mort*, but from the perspective of the heritage-leaver, it is the inheritance agreement to deprive inheritance right. Therefore, like other inheritance agreements, the inheritance renunciation

agreement is also a combination of the act of death and the act before death. The inheritance renunciation agreement is not stipulated and recognized in UCC or CCRF.

Article 2301 of BGB, Article 7:53 of HCC2013 clearly treat *donatio mortis causa* as inheritance agreement. It is Ukraine where *donatio mortis causa* is impossible to exist. According to Section 1 of Article 722 of UCC, the ownership of the donee to the gift shall take place from the date of acceptance of the gift by the donee. Section 3 of Article 723 of UCC also states that the gift contract shall terminate if either party dies.

Therefore, there is no room for *donatio mortis causa*. It is Latvia where *donatio mortis causa* only produces the effect of contract law. Section 3 of Article 1915 of LCC stipulates that if the donee agrees to accept the gift, the donee, as well as the heirs of the donee, shall have the right to claim the delivery of the gift from the donor, as well as from the heirs of the donor. The separation model of the two is that in some cases bequests are applicable, and in some cases, gift contracts are applicable. According to Article 956 of ABGB, if *donatio mortis causa* meets the conditions of validity of the will, it shall be treated as bequeath; if the gift meets two substantive requirements and the corresponding formal elements, it shall be treated as gift contract. Article 2063 of CCC (2012) follows it.

2.2. The orientation of the inheritance agreement in Russia

The inheritance renunciation agreement is not recognized and *donatio mortis causa* is forbidden in CCRF. Section 3 of Article 572 of CCRF provides *donatio mortis causa* is invalid from the beginning, and the relevant provisions on inheritance shall be applied.¹⁹

Therefore, in terms of type orientation, the inheritance agreement recognized in CCRF is limited to the designated inheritance agreement.

As far as the designated inheritance agreement is concerned, the three patterns have been formed in Europe, including spouse mutual inheritance agreement which is not subject to evaluation with or without consideration, inheritance agreement without consideration, and inheritance support agreement with consideration.

condition that the appointment of the other person must exist and must be valid, such that one appointment may be or not be valid only jointly with the other, then the will is termed mutual.

Article 639 of LCC: Contractual inheritance shall be founded by contract pursuant to which one party grants the rights to his or her future inheritance or its part to another party, or several parties grant such rights to each other. Such a contract is termed an inheritance contract.

¹⁸ *Dikovska I.* Conflict of laws regulation of contractual dispositions upon death: should Ukraine follow the EU's approach? // *Zbornik PFZ*. 2019. Vol. 69. N 3. P. 378.

¹⁹ Section 3 of Article 572 of CCRF: 3. The contract stipulating the transfer of a gift to the donee after the death of the donor shall be null and void.

The rules of civil legislation on inheritance shall be applied to this kind of donation.

As for Russia, Article 1140.1 of CCRF recognizes all three. What is very special is that, as mentioned above, the orientation of its inheritance agreement has undergone a subversive change. First, it is positioned with consideration wholly and centered on support, and then it is positioned without consideration mainly and centered on inheritance disposition. This dramatic transformation is worth pondering.

2.3. The orientation of the inheritance agreement in China

China is a country with the tradition of respecting the elderly and the complex of providing for the aged. The inheritance agreement is centered on the inheritance support agreement with consideration that heritage in exchange of support.

Chinese is used to providing for the aged at home. Having no children or having children but no ability to provide for them means that we can only take alternative ways to provide for the aged at home. Therefore, China has established the five guarantees system. Article 6 of the Regulations on the Work of the Five Guarantees in Rural Areas stipulates that the villagers who are old, disabled or under the age of 16, of them who without legal support obligors or with legal support obligors having no ability to support have neither the ability to work nor the source of income, shall enjoy the treatment of the five guarantees in rural areas.

The so-called "Five Guarantees" mainly include the following items: food protection, clothing protection, medical protection, preservation protection and burial protection. For the elderly, it means being cared for while they are alive and being properly buried after death. A similar system applies in cities. The above is the administrative relief system, and the corresponding civil relief system is the bequest support agreement.

As the object of the five guarantees for the elderly is characterized by the lack of legal support obligors, and the legal support obligors are close relatives,²⁰ and close relatives are legal successors,²¹ Article 1158 of CCPRC stipulates that the supporter are organizations or individuals "other than the legal successors". After the supporter has been fulfilled the obligation of attendance and burial for the supported elderly (heritage-leaver), in return the supporter has the right to receive the heritage of the supported elderly under the agreement.

Because Chinese is used to family attendance and pays attention to family harmony, people are used to dealing with inheritance and attendance as a whole, so as to properly deal with the old people's

attendance and heritage. Therefore, the inheritance attendance agreement came into being. Inheritance attendance agreement is actually a kind of family inheritance agreement with the cores of attendance and heritage.

There are mainly two modes: one is to stipulate that all legal successors take turns to attend their parents, and how to distribute the heritage after their parents' death; the other is to stipulate that some legal successors are responsible for directly attending their parents, and after their parents' death, the heritage is distributed to them, while other legal successors do not directly attend their parents, who do not bear the cost of maintenance and renounce the inheritance right to their parents.

Section 1 of Article 15 of the Law on the Protection of the Rights and Interests of the Elderly of the People's Republic of China stipulates, a supporter shall not refuse to perform his attendance obligations on the ground of renounce his inheritance right or other reasons. According to this provision, the legal attendance obligors can renounce the inheritance right in advance, and can be exempted from the specific performance of attendance. However, the legal attendance obligations shall not be renounced or exempted.

In China, the bequest support agreement with non legal successors as the subject of obligation and the inheritance attendance agreement with legal successors as the subject of obligation are formed in this way. Both parties of the two kinds of agreement have the right to rescind the contract at will and shall apply or refer to the rules of Article 40 of the Interpretation 1 of the Supreme People's Court on the Application of the Succession Book of the Civil Code of the people's Republic of China: "After an organization or individual other than the successor has signed a bequest support agreement with a natural person, if the supporter fails to perform the agreement without justifiable reasons, resulting in the rescission of the agreement, the supporter shall not enjoy the right to receive the heritage, the maintenance expenses paid by the supporter shall not be compensated generally; if the bequeather fails to perform the agreement without proper reasons, resulting in the termination of the agreement, the bequeather shall repay the maintenance expenses paid by organizations or individuals other than the successor."

Therefore, in terms of type orientation, China mainly adopts inheritance agreement with consideration centered on support. However, in judicial practice, judges also recognize the inheritance agreement without consideration, but usually do not recognize

²⁰ Section 2 of Article 1045 of CCPRC: Spouses, parents, children, siblings, paternal and maternal grandparents, and paternal and maternal grandchildren are close relatives.

²¹ Section 1 of Article 1127 of CCPRC: The estate of a decedent shall be succeeded in the following order:

(1) first in order: spouse, children, and parents ;

(2) second in order: siblings, paternal grandparents, and maternal grandparents.

that it has the effect prior to that of will as that of the inheritance support agreement.

As mentioned above, in China's judicial practice, the inheritance renunciation agreements with negative consideration or without consideration are recognized, but the inheritance renunciation agreements with positive consideration does not exist at all because of no forced share system in China.

In China, *donatio mortis causa* only produces the effect of contract law, but not the effect of inheritance law. In particular, bequest shall not be exempted from heritage debt at all. On the contrary, the heritage debt generated by contract law has the priority of validity, and there is no need to recognize *donatio mortis causa* as an inheritance agreement. This is determined by the uniqueness of China's inheritance system.

In China's judicial practice, the spouse mutual inheritance agreement is not recognized. Just like the common law spouse common wills can be divided into mirror wills, joint wills and mutual wills, it is recognized as the contractual binding mutual wills.

3. The Characteristics of the Inheritance Agreement in China and Russia

3.1. The Characteristics of the Inheritance Agreement in Russia

The biggest feature of Russian succession agreement is that it shakes the dogma that the effect of inheritance agreement is prior to that of will. It is mainly reflected in Paragraph 2 of Section 8, Section 10 and Section 12 of Article 1140.1 of CCRF.²²

Almost without exception, the legislation of inheritance agreement in European continental law system holds that the effect of inheritance agreement is prior to that of will.

In German, inheritance agreements makes all the contradictory wills whether prior or subsequent shall be null and void.

Section 3 of Article 389 of the LCC and Article 9 of ESA clearly stipulate that an inheritance agreement

takes precedence over a will, and the two take precedence over the legal succession.

However, this priority is not applied to between the spouse mutual inheritance agreement and the spouse common will, which can be withdrawn from each other and have the same effect.

Although the effect of inheritance agreement is almost without exception higher than that of will, the priority is different.

It has the strongest priority of inheritance agreement in Hungary. Section 1 of Article 7:50 of HCC2013 stipulates that unless agreed otherwise by the parties, the arrangement of the testator that alienates or encumbers, *inter vivos* or for the event of his death, an asset that is subject to an inheritance agreement shall be null and void.

On the contrary, it has the weakest priority of inheritance agreements in Russia. Inheritance agreement not only can't restrict the act before death or the cause of death, but also can't restrict other inheritance agreements or wills. Section 12 of Article 1140.1 of CCRF is its declaration. Paragraph 2 of Section 8 of Article 1140.1 of CCRF clearly provides that the heritage-leaver may enter into several inheritance agreements with different persons in respect of a property, except that the earlier inheritance agreement shall be applied when they accept the property. Section 10 of article 1140.1 of CCRF stipulates the right of revocation of succession agreement at will for both parties.

This makes the priority of the inheritance agreement mainly reflected in that the an inheritance agreement can directly withdraw a will whose former contents conflict with each other, but a will cannot directly withdraw the inheritance agreement whose former contents conflict with each other. Because of the weak sense of existence of inheritance agreement, it is difficult for heirs to trust it. It has been pointed out that in the inheritance support agreement, if the heritage-leaver sells the property listed in the inheritance agreement to a third party, the heir who faithfully performs the inheritance agreement will get nothing when the heritage-leaver dies.²³

²² Paragraph 2 of Section 3 of Article 1140.1 of CCRF: If one piece of the testator's property has been the subject matter of several inheritance contracts concluded with different persons then in cases when the inheritance is accepted by them the inheritance contract concluded earlier shall be applicable.

Section 10 of Article 1140.1 of CCRF: The testator has the right to unilaterally waiver at any time the inheritance contract by means of notifying all the parties to the inheritance contract about such waiver. The notice of waiver by the testator of the inheritance contract is subject to notarisation. The notary that has attested a notice of waiver by the testator of the inheritance contract shall send a copy of that notice within three working days to the other parties to the inheritance contract in the procedure envisaged by the legislation on the notarial profession and notarialactivity.

Section 12 of Article 1140.1 of CCRF: After the conclusion of the inheritance contract the testator has the right to conclude any transactions in respect of the property belonging the reto oro the rwise dispose of the property that belongs here to by his/her own will andin his/her own interest, even if such disposalis going to deprive a person who can be called upon to inherit of the rights to the testator's property. An agreement to the effect of otherwise is null and void.

²³ Гребенкина И. А. Совершенствование наследственного права: все ли предлагаемые изменения обоснованны? // Lex russica. 2016. № 11. С. 138.

However, in any case, it must be admitted that the Russian legislation of inheritance agreement shows the irrationality that the effect of inheritance agreement without consideration is prior to that of will.

3.2. The Characteristics of the Inheritance Agreement in China

As mentioned above, due to the unique characteristics of China's inheritance system, there are many characteristics in terms of inheritance agreement. However, what we want to discuss here is the breakthrough of the dogma that the effect of inheritance agreement is prior to that of will.

There is no doubt that the effect of bequest support agreement and inheritance attendance agreements is prior to that of wills. Article 1123 of CCPRC clearly stipulates the priority effect of the bequest support agreement,²⁴ while the rule can be applied to inheritance attendance agreements by reference.

However, in judicial practice, it is not recognized that the effect of inheritance agreement without consideration is prior to that of will. This is not difficult to understand, because it may not generally constitute a reasonable restriction on the freedom of will. It is reasonable that through the inheritance agreement with consideration, especially the inheritance support agreement, the heritage-leaver can realize the interests more fully, and the heritage-leaver limit his or her will freedom for his or her own benefit.

However, through the inheritance agreement without consideration the heritage-leaver will not increase his or her interests, so it is unreasonable that the heritage-leaver's will freedom is restricted by anyone through the inheritance agreement without consideration. However, there is no need to prohibit it, as it is also a way that the heritage-leaver can choose freely. In order to respect both of the freedoms, the best way is to give the inheritance agreement without consideration the same effect as the will. In this case, Section 12 of Article 1140.1 of CCRF will have nothing to blame.

Conclusion

As a relatively recent legislation or judicature, it has different orientation and characteristics of inheritance agreement in China and Russia. China's orientation is mainly with consideration and centered on support, while Russia's orientation is mainly without consideration and centered on the disposition of inheritance right of designated inheritance agreement. China has more characteristics of inheritance agreement because of its unique inheritance system.

In particular, China and Russia have launched a challenge to the doctrine that the effect of inheritance agreement is prior to that of will. Inheritance agreements are more and more recognized and their problems are more and more observed yet.

REFERENCE

1. Гребенкина И. А. Совершенствование наследственного права: все ли предлагаемые изменения обоснованны? // Lex russica. — 2016. — № 11.
2. Dikovska I. Conflict of laws regulation of contractual dispositions upon death: should Ukraine follow the EU's approach? // Zbornik PFZ. — 2019. — Vol. 69. — N 3.

²⁴ Article 1123 of CCPRC: After succession opens, it shall be processed as an intestate succession, or where there is a will, as a testate succession by the successor(s) or donee(s)-by-will ; or be processed in accordance with the agreement on testamentary gift for inter vivos support, where there is such an agreement.