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THE SPECIFICS OF ESTABLISHING JURISDICTION IN HEREDITARY CASES WITH A FOREIGN ELEMENT

This article is dedicated to the research of the specifics of establishing the jurisdiction of Ukrainian courts in inheritance cases with a foreign element. The correlation of the terms of international, patrimonial and territorial jurisdiction is developed and their sequence of application in practice is given. The author has analyzed the domestic legislation of Ukraine that governs rules of establishing jurisdiction in civil law cases (in particular, cases on inheritance) with a foreign element. The conditions precedent are described for admitting inheritance cases for proceedings and consideration of such cases involving a foreign element.

Special mention in the research is given to defining the priority of applying international legislation before domestic legislation in matters of jurisdiction. Norms of multilateral international agreements the mandatory nature of which has been approved by the Verkhovna Rada of Ukraine, and bilateral international agreements on legal assistance between Ukraine and other States, which establish jurisdiction rules of civil cases (in particular, cases on inheritance) with a foreign element are analyzed.

Ukraine has bilateral international agreements on legal assistance in civil, family, commercial and criminal cases in effect with twenty some states. In view of the above, it is proposed to divide such agreements into three categories: agreements, which do not contain norms regulating matters of international jurisdiction in inheritance cases with a foreign element; agreements, which contain norms, defined as general rules of jurisdiction for cases with a foreign element, and special rules of international jurisdiction for inheritance case with a foreign element, and agreements, which contain norms that define only special rules of international jurisdiction for inheritance cases with a foreign element. The author concludes that the establishment of the admissibility of a statement of claim in disputed relations of inheritance with a foreign element is not possible without applying a special order of actions, described in the research.

Key words: jurisdiction of Ukrainian courts, inheritance cases, foreign element, principle of national treatment, opening of proceedings.

Problem statement. With active migration of the population and the increasing number of persons, who reside in countries other than their countries of origin, the acquisition of movable and immovable property out of the country of their permanent residence or stay, the issue of regulating and establishing inheritance procedures has become crucial. Often disputed cases arise in cross-border succession, inter alia, concerning the choice of jurisdiction, the establishment of the competent authority for their consideration and application of the relevant state's legislation. In such context, the issue of the choice of court becomes a topical issue. For domestic court instances, it is important to establish the priority of applying domestic and international legislation on the jurisdiction of inheritance cases with a foreign element, the order of sequence of actions when finding jurisdictional competence and ensuring

unimpeded access of Ukrainian citizens, foreign citizens and stateless persons to justice.

Analysis of the latest research and publications. Theory and practice issues of determining the jurisdiction for inheritance cases with a foreign element have not been researched to a full extent. In this light, major emphasis is made on the analysis of general rules of applying international jurisdiction, in particular, in the scientific works of M. M. Bohuslavskiy, A. S. Dovhert, V. I. Kysil, S. H. Komarov, L. A. Kuzmenko, L. A. Lunts et al. Researchers, such as O. O. Karmaza, L. V. Kozyar-Skok, L. M. Kosovskyi, Ye. Ye. Fursa, S. Ya. Fursa, H. A. Tsirat, Yu. V. Chernyak and others have circumstantially researched theory and practice aspects of inheritance cases' jurisdiction involving a foreign element in the context of considering jurisdictional rules for civil law cases with a foreign element.

The **purpose** of this publication is to find the specifics of establishing jurisdiction in inheritance cases with a foreign element subject to general and special jurisdictional rules, established by international and domestic laws.

Summary of the basic material. In international civil law proceedings, jurisdiction shall be understood as the competence of courts of a certain State to consider and determine civil law cases and execute specific procedural acts involving a foreign element [1, p. 271]. Therewith, the competence of courts is based on the domestic legislation of a specific country and international law treaties.

It should be noted that norms of international jurisdiction do not distinguish a specific judicial body, which considers a dispute, but establish the competence of the judicial system of a specific State to consider disputes [2, p. 214]. In fact, the immediate judicial instance that will determine the dispute and the procedural order of considering a dispute can be established only when such competence is asserted.

Researcher Yu. V. Chernyak dwells on the details of the above position, stating the existence in the doctrine of international, patrimonial and territorial jurisdiction [3, p. 108]. Firstly, a judge shall establish international jurisdiction, because this will determine whether the resolution of a dispute falls under the competence of domestic courts as a whole [4, p. 89]. In fact, the choice of the competent judicial order of one of the States is made. Such conclusions can be reached subject to regulations of the domestic legislation and norms of effective international agreements. Patrimonial jurisdiction resolves the issue of which judicial authority is competent to determine a case on its merits. Territorial jurisdiction means the establishment of a specific court, to which a plaintiff or his/her representative should turn.

In Ukraine the domestic law, which governs rules of establishing jurisdiction in civil cases with a foreign element, is the Civil Procedure Code of Ukraine (the "CPC of Ukraine") and the Law of Ukraine "On Private International Law".

The effective international legislation also contains the establishment rules of jurisdiction for civil law cases with a foreign element, inter alia, the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases dated 22.01.1993, inter alia, the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases dated 07.10.2002, bilateral international agreements on legal assistance in civil, family and criminal cases, which have been ratified by Ukraine with other foreign states.

It is worth noting that the principle of national treatment is applied in Ukraine,

meaning that the right of foreign citizens and stateless persons to turn to Ukrainian courts and enjoy civil procedural rights equally with Ukrainian citizens is enshrined in the legislation [5, p. 402]. This principle is implemented in the Constitution (Art. 26) and on a narrower level in Art. 96 of the CPC of Ukraine, under which foreign citizens, stateless persons, foreign legal entities, foreign states (their authorities and officials) and international organizations are entitled to turn to courts of Ukraine for the protection of their rights, freedoms or interests [6], and enjoy procedural rights and duties, which Ukrainian individuals and legal entities enjoy, save for cases stipulated by the said Constitution and laws of Ukraine, international treaties, the mandatory nature of which has been approved by the Verkhovna Rada of Ukraine.

In section XI titled "Proceedings in cases with the involvement of foreign citizens", Art. 497 of the CPC of Ukraine, it is stated that the jurisdiction of civil law cases with a foreign element shall be established by the mentioned Code, by law or international agreement, the mandatory nature of which has been approved by the Verkhovna Rada of Ukraine [6]. For the purpose of accurate research, one should note what the Ukrainian legislator refers to the civil law cases category and consideration in civil proceedings. Pursuant to Art. 19 of the CPC of Ukraine courts shall consider in civil proceedings cases, which arise from civil, land, labor, family, housing and other legal relations, save for cases, which are considered in other proceedings [6]. As can be seen from this definition, the norm does not contain any direct reference to consideration in civil proceedings of disputes concerning legal relations of inheritance. Such reference of inheritance cases to civil proceedings is made in the Decree of the Supreme Court of Ukraine Plenum "On court practice in inheritance cases" under No.7 dated 30.05.2008 and the Letter of the Higher Specialized Court of Ukraine for civil and criminal cases "On court practice of considering civil cases on inheritance" under No. 24-753/0/4-13 dated 16.05.2013. Therefore, inheritance cases are definitely considered in civil proceedings based on court practice.

For a court to establish international jurisdiction of civil law cases (including inheritance cases) with a foreign element, it should refer to the provisions of the Law of Ukraine "On Private International Law". Pursuant to Art. 75 of the said Law of Ukraine the jurisdiction of Ukrainian courts for cases with a foreign element is established at the opening of proceedings in a case, notwithstanding that in

the course of the proceedings in the case grounds for such jurisdiction become irrelevant or change, save for cases stipulated by Art. 76 of the same Law [7]. However, there is a different, broader definition in sub-par. 2 par. 3 of the Letter of the Higher Specialized Court of Ukraine for civil and criminal cases “On court practice of considering civil cases on inheritance” under No. 24-753/0/4-13 dated 16.05.2013, which states the option of courts to resolve the matter of jurisdiction for cases with a foreign element both at the opening of proceedings in a case and in preliminary (currently – preparatory) court hearing as well.

According to the rules given in Art. 186 of the CPC of Ukraine, a court, within five days from receiving a statement of claim shall determine the matter of opening proceedings in a case [6]. Upon the results of the consideration of the application to court, the latter shall decide either to admit the statement of claim for consideration and open proceedings, or leave the statement without action, or return the statement of claim or deny the opening of proceedings.

To admit a statement of claim for consideration and open proceedings, a national court instance should establish whether the disputed legal relations are within its competence subject to certain general and exceptional grounds for Ukrainian courts’ jurisdiction regarding cases stipulated in the Law of Ukraine “On Private International Law”.

Pursuant to Art. 76 of the Law of Ukraine “On Private International Law”, courts may admit and consider any cases with a foreign element (*author’s note-only those cases that may relate to inheritance cases complicated by a foreign element are given*): 1) if the parties have stipulated the jurisdiction of the case with a foreign element as the jurisdiction of the courts of Ukraine, save for cases of exclusive jurisdiction; 2) if on the territory of Ukraine the defendant has his/her place of residence or location, or movable or immovable property, on which it is possible to impose a levy, or a branch or representative office of a foreign legal entity-defendant is located; 3) if in the case on inheritance the testator at the time of death was a citizen of Ukraine or his/her last place of residence was in Ukraine; 4) an action or event that gave rise to the claim, took place on the territory of Ukraine; 5) if in the case of recognition as missing or announcement as deceased the person had his/her last known place of residence in Ukraine; 6) in other cases determined by the law of Ukraine and an international treaty of Ukraine [7].

Further, Art. 77 of the same Law of Ukraine establishes the cases for applying exclusive

jurisdiction to disputes with a foreign element, referring to such cases: 1) where property, which is the subject of a dispute, is located on the territory of Ukraine, save for cases concerning the execution, amendment, termination and performance of contracts concluded within the framework of a public-private partnership, in particular concession contracts, under which such property is the object of such partnership, i.e. the object of the concession, and the dispute does not concern the emergence, termination and registration of property rights to such object; 2) where in the case, which concerns relations between children and parents, both parties have their place of residence in Ukraine; 3) where in the case of inheritance, the testator is a citizen of Ukraine and had his/her place of residence in Ukraine; 4) if the dispute concerns the registration of intellectual property rights that require registration or the issue of a certificate (patent) in Ukraine; 5) where the dispute is associated with the registration or liquidation of foreign legal entities, physical persons – entrepreneurs in the territory of Ukraine; 6) where the dispute relates to validity of records in the state register, cadaster of Ukraine; 7) wherein bankruptcy cases, the debtor was established under the Ukrainian legislation; 8) in the case of issue or destruction of securities, issued in Ukraine; 9) cases concerning adoption, which was carried out or is carried out on the territory of Ukraine; 10) other cases specified by laws of Ukraine [7].

In addition, in the presence of international treaties, the mandatory nature of which has been approved by the Verkhovna Rada of Ukraine, or a bilateral international agreement of Ukraine on legal assistance, the provisions of which may establish the rules of jurisdiction for civil law cases with a foreign element, it is necessary also to analyze their content and applicability regarding disputed legal relations.

Ukraine has bilateral international agreements on legal assistance in civil, family, commercial and criminal cases in effect with twenty some states [8, p. 229]. Given the significant number of such acts, we agree with the opinion of H.A. Tsirat on the need to classify them according to the criteria of presence, nature and methods of regulating issues of international jurisdiction for cases with a foreign element [9, p. 198]. Therefore, bilateral agreements should be divided into three categories: the first category are agreements that do not contain rules governing international jurisdiction in inheritance cases with a foreign element (e.g., the agreement on legal assistance in civil cases concluded between Ukraine and the People’s Republic of China); the second category are agreements that contain norms, defined as general rules

of jurisdiction for cases with a foreign element, and special rules of international jurisdiction in inheritance cases with a foreign element (e.g., the agreement on legal assistance in civil cases between Ukraine and the Republic of Georgia); the third category are agreements, which contain provisions that define only special rules of international jurisdiction in inheritance cases with a foreign element (e.g., the agreement on legal assistance in civil cases between Ukraine and the Republic of Poland).

Such bilateral agreements on legal assistance between the States contain both general grounds (e.g., the “location of the defendant” rule or the use of provisions on contractual jurisdiction) for determining international jurisdiction, and special rules (e.g., the “last permanent place of residence” rule).

After performing certain actions, the Ukrainian court, the competence of which to consider an inheritance case with a foreign element is already established (meeting the criteria for the international jurisdiction of the case), should decide the following: which court in Ukraine precisely has jurisdiction over the dispute? And this is a question of no less importance.

To answer this question, one should unconditionally refer to the effective civil procedure law (the CPC of Ukraine). The first criterion that one should verify is the subject-matter and personal jurisdiction of the dispute. It is defined in Art. 19 of the CPC of Ukraine, according to which courts of general jurisdiction consider cases arising from civil (including inheritance), land, labor, family, housing and other legal relations, save for cases that are considered in other legal proceedings [6].

Thus, inheritance cases with a foreign element are subject to consideration by courts of general jurisdiction. At the same time, in accordance with part 2 Art. 19 of the CPC of Ukraine, the consideration of this category of cases is possible in the order of ordinary proceedings (general or simplified) and separate proceedings [6]. It should be added that whereas disputes, directly or indirectly, related to legal relations of inheritance with a foreign element, can be considered in ordinary proceedings, a separate proceeding has as its subject the establishment and confirmation of indisputable facts that can implicitly affect the legal relations of inheritance with a foreign element.

Writ proceedings cannot be applied to inheritance disputes, as it is not stipulated by the provisions of Art. 160 of the CPC of Ukraine [6], which contain an exhaustive list of cases that are considered in writ proceedings.

The next qualification criterion that is used by the court to determine the patrimonial

jurisdiction of a case with a foreign element is the instance jurisdiction. Under the general rule, defined in part 1 Art. 23 of the CPC of Ukraine, all cases subject to resolution in civil proceedings (*inheritance cases with a foreign element can also be determined in civil proceedings*), shall be considered by local general courts as courts of first instance, except for cases stipulated by the CPC of Ukraine. Such exception is the establishment by the Supreme Court of the jurisdiction for cases involving citizens of Ukraine, who both live outside the territory of Ukraine, as well as cases of divorce between a citizen of Ukraine and a foreign citizen or a stateless person, who live outside of Ukraine (Art. 29 of the CPC of Ukraine) [6].

The last criterion for verifying the jurisdiction of a case in a particular court instance is the establishment of territorial jurisdiction. The rules for such establishment are contained in paragraph 3 Chapter 2 of the CPC of Ukraine. So, a plaintiff can file a lawsuit against an individual in the court, which is located at the registered place of residence or stay of the defendant for determination of inheritance cases with a foreign element, save for exceptional cases stipulated by Article 30 of the CPC of Ukraine. If the lawsuit is filed against a legal entity, it is filed with the court at the location of the legal entity in accordance with data, available in the official register (Art. 27 of the CPC of Ukraine) [6].

Also, the jurisdiction of the case may be determined by the choice of the plaintiff, however, if the case falls under this category of choice. Article 28 of the CPC of Ukraine establishes the following possible instances of appealing to the court of the plaintiff's choice in inheritance cases with a foreign element: 1) claims against the defendant, who does not have his/her place of residence or stay in Ukraine, may be filed at the location of his/her property or his/her last known registered place of residence or stay in Ukraine; 2) claims against several defendants who live or are located in different places are filed at the place of residence or location of one of the defendants at the plaintiff's choice; 3) the plaintiff is entitled to choose between several courts that have jurisdiction for the case under this article, except for exclusive jurisdiction established by Article 30 of the said Code [6].

Exclusive jurisdiction is applied by courts in a limited manner and only in cases stipulated by Art. 30 of the CPC of Ukraine. Therewith, one may refer the following in regard to inheritance cases with a foreign element, as including: 1) claims arising from property, filed at the location of the property or its main part. If related claims are filed simultaneously in respect of several property objects, the dispute is considered at the location

of the object, the value of which is the highest; 2) claims of the testator's creditors filed before the inheritance is accepted by the heirs, filed at the location of the inherited property or its main part [6].

Conclusions

Therefore, after a statement of claim is received by a court concerning disputed legal relations of inheritance from an applicant, a competent Ukrainian court should resolve the matter of the international jurisdiction of the dispute, namely, whether the dispute falls under the competence of the domestic court at all or whether it falls under the jurisdiction of a foreign court. To do so, the court should apply the following instruments subject to their order of sequence: 1) identifying of complications in an inheritance dispute in the form of a foreign element; 2) analyzing the norms of domestic legislation and international acts (including bilateral agreements on legal assistance) to determine the rules of international jurisdiction and the choice of appropriate jurisdictional rules; 3) if there is an international regulation for disputed relations, determining of the priority of applying the rules in relation to domestic legislation; 4) after clarifying the issues of international jurisdiction of an inheritance dispute with a foreign element by the Ukrainian courts, the patrimonial and territorial jurisdiction of the case to a specific court in Ukraine in accordance with the norms of the CPC of Ukraine should be established; 5) if the inheritance dispute with a foreign element meets all jurisdictional criteria, the court passes a ruling on opening proceedings in the case

or a ruling on the termination of preparatory proceedings and assigning the case for trial.

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Стаття присвячена дослідженню особливостей визначення підсудності українським судам спадкових справ з іноземним елементом. Сформовано співвідношення понять «міжнародна», «родова» та «територіальна» підсудність, визначено послідовність їх застосування на практиці. Автор аналізує внутрішнє законодавство України, що врегульовує правила визначення підсудності цивільних справ (зокрема, спадкових) з іноземним елементом. Описуються необхідні умови прийняття до провадження і розгляду спадкових справ, ускладнених іноземним елементом.

Окрема увага у дослідженні присвячена з'ясуванню пріоритетності застосування міжнародного законодавства стосовно вітчизняного у юрисдикційних питаннях. Аналізуються норми багатосторонніх міжнародних договорів, згода на обов'язковість яких надана Верховною Радою України, та двосторонніх міжнародних угод про правову допомогу, укладених між Україною та іншими державами, що визначають правила підсудності цивільних справ (зокрема, спадкових) з іноземним елементом.

Чинними для України двосторонніми міжнародними договорами про правову допомогу в цивільних, сімейних, комерційних та кримінальних справах є договори близько з двадцятьма державами. У зв'язку із зазначеним пропонується розділити такі договори на три категорії: договори, які не містять норм, що врегульовують питання міжнародної підсудності у спадкових справах з іноземним елементом; договори, які містять норми, що визначається як загальні правила підсудності справ з іноземним елементом, так і спеціальні правила міжнародної підсудності щодо спадкових справ з іноземним елементом та договори, які містять норми, що визначають лише спеціальні правила міжнародної підсудності щодо спадкових справ з іноземним елементом. Автор доходить висновку, що визначення прийнятності позовної заяви щодо спірних спадкових відносин з іноземним елементом неможливе без застосування спеціального порядку дій, визначеного у дослідженні.

Ключові слова: підсудність українським судам, спадкові справи, іноземний елемент, принцип національного режиму, відкриття провадження.