Joint and several liability and separate liability of the heirs for hereditary obligations – short comparative and historical overview

V. Petrov

Sofia university "St. Kliment Ohridski", Sofia, Bulgaria

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Sofia university "St. Kliment
Ohridski", Sofia, Bulgaria

1504 Sofia, 15 Tsar
Osvoboditel blvd, cabinet
306

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The article researches the different approaches for regulation of the liability of the heirs for hereditary obligations. Historical and comparative researches were made. The European legislations can be divided in two big groups. The legislations form the first group set a separate liability of the heirs - each one of them owes only a part of the debt equal to his share of the estate. The legislations of France, Ukraine, Bulgaria, etc. are included in this group. The legislations from the second group govern joint and several liability for the heirs. A creditor of the estate has a right to demand an enforcement of the whole size of hereditary obligation from one of the heirs and this enforcement releases all of the heirs from their liability. This group includes the civil legislations of German, Switzerland, Spain, Russian federation, Macedonia, etc. The author position is that the separate liability is more proper for regulation of the heir's liability for hereditary debts. Historical, comparative and teleological methods are used for proof of this thesis. The historical development of this liability from Roman private law is traced and researched. A short overview of the aims of each one of the two kinds of liability is made in the article. The joint and several liability protects only the interest of the creditors of the estate. It is considered in the doctrine as a debt security. The separate liability protects the interest not only of the creditors, but of the heirs too. But only the liability for divisible obligations is separate. The liability for indivisible obligations is joint and liability. The separate liability can't be applicable for them because of the specific of this kind of obligations.

Keywords: joint and several liability; separate liability, hereditary debts, hereditary obligations, Roman Law of obligations.

Introduction

The estate of a person transmits to his heirs after his death. The procedure of this transmission is different in the different countries. In some of them the heirs acquire the inheritance at the moment of his death. This system is mentioned as "a system of renouncement". The other system of acquisition of inheritance is called "the system of acceptance" or "a system of entrance upon an inheritance". For it is typical that to adopt the inheritance, the heir should express a will to do this - explicitly or by implicit actions (for example, to sell an object from the inheritance or to put a claim for partition of the inheritance, etc). So the moment when the heirs acquire the inheritance is different and it depends on the applicable system of acquisition of the inheritance.

Independently from the applicable system, when two or more heirs acquire the inheritance, a hereditary community

arises over one part of rights and obligations, included in the estate. The other hereditary rights and obligations are in regime of separation.

The problem over which rights and obligations arises a hereditary community is solved differently by the legislators in the different countries. Traditionally it arises over the ownership and rights in rem over movables and immovables; over shares of limited liability company; over objects of industrial property (trade marks, patents for inventions, etc.). However there is no uniform approach about the liabilities, included in the inheritance.

Goals of article

The goals of this article are: to analyze which the different approaches are for the regulation of the liability of the heirs for hereditary obligations in historical and

comparative plan; to point which of the approaches is suitable and to argue this conclusion.

Theoretical foundations of research

The science methods, used in the research, are historical method, comparative method, systematic interpretation, legal dogmatic method, review of the opinions in law science, induction and deduction.

Results

As a result of the usage of the methods above in the article are generalized the known two models for the regulation of the liability of the heirs for hereditary obligations and is based and argued the more suitable and proper one.

Discussions

The heirs are liable for the obligations of the deceased according to all contemporary European legislations – in France (art. 870 and art. 1220 of Civil Code of France), Germany (art. 1967 of German Civil Code), Spain (Art. 659 of Civil Code of Spain); Russia (art. 1104 and art. 1112 of Civil Code of Russian federation); Ukraine (art. 1218 of Civil Code of Ukraine); Bulgaria (art. 60 of Bulgarian Law of inheritance); Macedonia (art. 33 of Macedonian Law of inheritance), etc. Of course, some of the obligations are *intuitu personae* and they acquit at the moment of the owner's death.

Independently of this similarity, there are different approaches in the European legislations, concerning the character of the hereditary obligations and more precisely – the character of the liability of the heirs to the creditors of the deceased. It is possible to divide the European legislations in two groups according this criterion. The existence of two types of regulation of the heir's liability is noted in the law doctrine (Mateeva, 2012).

The national legislations, belonging to the first group, set a separate liability of the heirs for the debts of the deceased – each coheir is liable for the payment of the debts included in the estate in proportion, equal to his share (portion). The creditor can require from him a payment not for the whole size of the debt, but only for his share of the debt. This approach is widely accepted in the contemporary legislations. It is set in art. 870 of the Civil Code of France. According it "Coheirs contribute between themselves to the payment of the debts and liabilities of the succession, each one in proportion to what he takes from it". In art. 1282, par. 1 of Civil Code of Ukraine is set separate liability of each coheir too, which size is equal to the size of the heir in the inheritance. Bulgarian Law of inheritance governs the same type of liability in art. 60, par. 1.

The legislations, which assume the other approach, state that co-heirs are joint and separate liable for the obligations, included in the inheritance. A solidarity arises between them. This approach is used in the German legislation. According to art. 2058 of Civil Code of Germany "the heirs are liable for the joint obligations of the estate as joint and several debtors". After the partition of the inheritance however each co-heir is liable only for the part of a

hereditary obligation that corresponds to his share of the inheritance, according to art. 2060 (Palandt, 2002). According to art. 603, par. 1 of Swiss Civil Code the heirs are joint and several liable for the debts of the deceased.

The same approach is assumed in art. 1175, par. 1 of Civil Code of Russian federation; in art. 1084 of Civil Code of Spain; in art. 83, par. 3 of Macedonian Law of the ownership and the other rights in rem and in other civil codes and acts of European countries.

Obviously each of these two approaches is widespread in Europe. Each of them has its own advantages. To conclude which one is more proper and just than the other one, it must be researched what the development of liability for hereditary debts was in historical plan and after that to find which interest protects each one of these two approaches.

1. In the Roman law the heirs were considered as continuers of the person of the deceased. They occupied his place in his patrimony (Girard, 1915; Garrido, 2005), so they received not only the rights of the deceased, but his obligations too. The heirs are defined as "successor per universitatem" (Bazanov, 1940, 200). This notion is in the base of the contemporary conception for the universal succession, which is typical for each contemporary law system.

The Roman jurists established that the obligations of the deceased transmit to each one of his heirs according to his share of the estate. The liability of the heirs was separate (Andreev, 1992). The Roman law doesn't settle joint and several liability for the heirs in no one of its historical periods.

The Roman tradition remains its significant trace in the legislations from the Continental law family, especially in the countries from Roman law family. Following the Roman conception, the French legislation governs separate liability of co-heirs for the hereditary debts. Thus the old usage which prescribed a joint and several liability for the heirs was overcome (Planiol, 1921). A lot of European legislations, which were influenced by Code Civil, perceive the same conclusion. Bulgarian Law of inheritance is one of them. According to art. 60, par. 1 the heirs, who have accepted the inheritance, are liable for the obligations with which it is burdened, according to the shares they receive.

So the intermediate conclusion is that the joint and several liability of the heirs for hereditary debts has no longer tradition; it wasn't known in Roman private law and it appeared long after. On the contrary, the separate liability of the heirs is traditional for the Roman law and through it – for more contemporary European legislations.

2. The second criterion for comparison between the researched two approaches is the interest, which is protected by each one of them. The legislator often takes legislative decision, solving a conflict of interests of different groups of persons – the conflict of interest between the deprived original owner of movables and the good faith acquirer (Stoyanov, 2015); the conflict of interests between the creditors and the successor of the debtor in the hypothesis of *Actio Pauliana*, etc.

The joint and several liability traditionally is defined in the legal theory as a debt security (Kalaydjiev, 2016). It is one of the oldest means in this aspect and its origin is in the Roman law of obligation. In Rome it was described as "two (or more) obligations directed to one and the same juristic

end, but not identified, and thus extinguished only by solution", unlike the correality (Zimmermann, 1996). Independently from the changes in the institute of the solidarity (joint and separate liability, it remains its law character as a debt security and a remedy for a defense of the creditors. So the conclusion can be made that the joint and several liability of heirs defenses only the interest of creditors of the estate.

On the other hand is the interest of the heirs. They are persons who usually receive the patrimony of the deceased for free (except the heir who receives the estate by contract of inheritance, which is typical for German law family, but which is not governed in the countries from Roman law family (Mateeva, 2012); and except the testament with precatory). According to the old maxim that one who received something for free is protected less than a person who received something onerous. This argument is in favour of a joint and several liability in Germany and the other countries from this group. But is this solution just? It protects only the creditors. However it puts the debtors in very hard position. Each one of the joint and several debtors owes the whole size of debt – art. 1197 of Civil Code of France; par. 421 of Civil Code of Germany; art. 1137 of Civil Code of Spain; art. 543 of Civil Code of Ukraine; art. 323 of Civil Code of Russian federation; art. 122, par. 1 of Law of obligations and contracts of Bulgaria, etc. If one of the heirs

has 1/10 from the inheritance, he could be required to pay the full size of the debt, as a consequence of joint and several liability. This solution arises a danger for the patrimony of the heir. The creditors are protected enough without the defence of the solidarity. They can demand an enforcement of the debt from each of the heirs for his part if the liability of the heirs is separate. Thus they can be satisfied by every one of the heir for his part of the obligation. The solidarity leads to not equivalent consequence for the heir – he receives only one part of the rights of the deceased but a full size of all debts included in the estate.

Of course, separate liability of the heirs is possible only for divisible obligations. The heirs should be obligated as joint and several debtors if the obligation is indivisible – art. 431 of Civil Code of Germany; art. 1222 of Civil Code of France; art. 128, par. 2 and art. 129, par. 2 of Bulgarian Law of obligations and contracts, etc.

Conclusions

There are two approaches in historical and comparative plan for regulation of the heir's liability for hereditary debts – for their solidarity (joint and several liability) and for their separate liability. Due to the arguments above the regulation of the separate liability of the heirs is more proper. It must be preferred in future legislative amendments.

References

- Andreev, M. (1992) *Roman private law*. Sofia: Sofi-R. [in Bulgarian]
Bazanov, Iv. (1940) *Course by Roman law*. Part II. Sofia. [in Bulgarian]
Girard, P. F. (1915) *History and system of Roman Law*. Part III. Sofia. [in Bulgarian];
Garrido, M. J. G. (2005) *Roman private law*. Translation from Spanish. Moscow. [in Russian]
Гаридо, М. Х. Г. (2005) *Римско частно право*. Превод от испански. Москва, 640
Kalaydjiev, A. (2016) *Law of obligations*. General part. Sofia. [in Bulgarian]
Mateeva, Ek. (2012) *The German Succession Law as Applicable Law on Successions Concerning Immovable Property in Bulgaria*. Sofia. [in Bulgarian]
Palandt, O. *Commentaries on the German Civil Code*. 61 rev. edition. Munich, Verlag C. H. Beck. [in German]
Palandt, O. *Beck'sche Kurz-Kommentare. Band 7. Palandt Bürgerliches Gesetzbuch*, 61., neubearbeitete Auflage, Verlag C.H.Beck, München,
Planiol, M. (1921) *Elementary Treatise of Civil Law*. Part VII. Inheritances. Sofia. [in Bulgarian]
Stoyanov, D. (2015) *The conflict between the legal interests of the original owner and the good faith acquirer of movables – a comparative overview of the solutions. Challenges of the Knowledge Society*, Bucharest. [in English]
Zimmermann, R. (1996) *The Law of Obligations. Roman Foundations of the Civilian Tradition*. New York, Oxford university press. [in English]