Revija za evropsko pravo: XXII (2020)

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UDK 341.922(497.11+4-672EU)
341.218.3(497.11+4-672EU)

str. 87-103.

APPLICATION OF RENVOI IN CROSS-BORDER SUCCESSION CASES CONNECTED TO EU MEMBER STATES AND SERBIA – SOME REMARKS FROM EU AND SERBIAN POINT OF VIEW

ABSTRACT

The aim of this paper is to assess the problems of the application of renvoi in cross-border succession cases connected to EU Member States and Serbia, which will be discussed from the perspective of both EU and Serbian private international law. As concerns EU private international law, the study begins with the presentation of the relevant conflict-of-law rules of EU Succession Regulation (ESR), which are primary based on the habitual residence of the deceased and follow the principle of the unity of succession, and continues with the analysis of the renvoi rule of Art. 34 of ESR which provides for the application of the conflict-of-law rules of Serbia as a third State provided Serbian law has been specified as applicable law by the conflict-of-law rules of ESR. When it comes to Serbian private international law, the study analyzes the conflict-of-law rules of Art. 30 of Serbian PIL Act, which are solely based on the nationality of the deceased and follow the principle of the unity of succession, together with the renvoi rule of Art. 6 of Serbian PIL Act, which imposes the application of the conflict-of-law rules of a foreign State (EU Member State) referred to by the rules of Art. 30 of Serbian PIL Act. Finally, in the absence of relevant case law on renvoi issues caused by the divergent conflict-of-law rules of ESR and the Serbian PIL Act, a few hypothetical cases involving such issues,

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created for the purposes of this paper, will be discussed from both the EU and Serbian point of view.

Keywords: EU Succession Regulation; renvoi rule of Art. 34 of EU Succession Regulation; conflict-of-law rules on succession of Serbian PIL Act; renovi rule of Art. 6 of Serbian PIL Act.

1. Introduction

In EU Member States the law applicable to cross-border succession cases is to be determined in accordance with the conflict-of-law rules of Regulation (EU) No 650/2012 of the European Parliament and of the Council of July 4th 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (so called EU Succession Regulation, henceforth: ESR).[1] The general conflict-of-law rule of ESR (Art. 21), which is based on the last habitual residence of the deceased (and supplemented by the escape clause), as well as the most of other conflict-of-law rules contained in ESR, follows the so called principle of the unity of succession, which means that these rules are formulated in such a way that they refer to one single national law as the law applicable to the succession as a whole,[2] irrespective of where the assets of estate are located and whether such law is the law of a Member State or the law of a third State (the principle of universal application).[3] However, Serbia, as a Non-EU (third) State,[4] has its own conflict-of-

[1] *Official Journal of the European Union*, L 201, 27.7.2012, p. 107. Pursuant to Recitals 82 and 83 all Member States, except United Kingdom (which stopped being EU Member State on January 31, 2020), Ireland and Denmark, are bound by Succession Regulation.

[2] See A. Dutta, Vor Artikel 20, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 6-7; D. Solomon, "Die allgemeine Kollisionsnorm (Art. 21, 22 EuErbVO)", in: *Die Europäische Erbrechtsverordnung* (Hrsg. A. Dutta, S. Herrler), C.H.Beck, München, 2014, 20-45; A. Köhler, Teil 1 EuErbVO, in: *Internationales Erbrecht, EuErbVO/IntErbRVG/DurchfVO/Länderberichte* (Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch), Baden-Baden, 2020, 18; P. Lagarde, Introduction, in: *EU Regulation on Succession and Wills* (eds U. Bergquist *et. al.*), Otto Schmidt KG, Köln, 2015, para. 21-22; H. Pamboukis, Introductory Remarks on Regulation No 650/2012 of 4 July 2012 on succession, in: *EU Succession Regulation No 650/2012 – A Commentary* (ed. H.P. Pamboukis), Nomiki Bibliothiki – C.H.Beck – Hart – Nomos, Athens, 2017, para. 13 *etc.*

[3] See Art. 20 of ESR.

[4] The term 'third States' contained in ESR embraces not only Non-EU Member States, but also EU Member States which are not bound by ESR (such as Ireland and Denmark; since January 31, 2020 UK is not EU Member State any more). See E. Lein, "Die Erbrechtsverordnung aus Sicht der Drittstaaten", in: *Die Europäische Erbrechtsverordnung* (Hrsg. A. Dutta, S. Herrler), C.H.Beck,

law rules on succession which are contained in Art. 30 of the Act on Resolution of Conflict of Laws with Regulations of Other Countries[5] (so called Serbian PIL Act; henceforth: abbr. SPILA). These rules are based on the nationality of the deceased as a main and sole connecting factor and also follow the principle of the unity of succession.[6] Since the conflict-of-law rules of ESR have nothing in common with those of SPILA, they may come into conflict and make a *renvoi* in cross-border succession cases connected to a Member State and Serbia. From the EU point of view, in cases where the conflict-of-law rules of ESR refer to the law of Serbia as a third State the provisions on *renvoi* of Art. 34 of ESR impose, under certain conditions, that the Member State court seised should apply Serbian conflict-of-law rules, which means *renvoi* can be made in such cases. From the Serbian point of view, the situation is rather similar because the *renovi* is, pursuant to Art. 6 of SPILA, established as a general principle of Serbian private international law:[7] where the conflict-of-law rules of Art. 30 of SPILA refer to the law of a Member State, Serbian courts have to apply the conflict-of-law rules on succession of that Member State, i.e. the conflict-of-law rules of ESR, which may refer back to the Serbian law (as *lex fori*) or forward to the law of another foreign State depending on the circumstances of the case.

Bearing the above in mind, the aim of this paper is to assess the *renvoi* issues in cross-border succession cases connected to EU Member States and Serbia from the point of view of both EU and Serbian private international law. With regard to EU private international law, after the brief presentation of the relevant

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München, 2014, 200-202; A. Dutta, Vorbemerkung zu Artikel 1, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 14-16; A. Köhler, note 2, 30; K. Radoja Knol, Odstupanja od načela jedinstva nasljeđivanja u Uredbi EU-a o nasljeđivanju, *Pravni vijesnik*, Vol. 35, No 2 (2019), 50-51.

[5] *Official Gazette of SFRY*, No. 43/82 and 72/82, *Official Gazette of the Federal Republic of Yugoslavia (FRY)*, No. 46/96 and *Official Gazette of the Republic of Serbia*, No. 46/2006 – other laws.

[6] See more M. Dika, G. Knežević, S. Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Nomos, Beograd, 1991, 106-107; M. Stanivukovic, P. Đundic, *Međunarodno privatno pravo, posebni deo*, Centar za izdavačku delatnost, Univerzitet u Novom Sadu, Pravni fakultet, Novi Sad, 2008, 196; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, *Međunarodno privatno pravo*, JP "Službeni glasnik", Beograd, 2012, 337; M. Stanivuković, M. Živković, Serbia, in: B. Verschraegen (ed.), *International Encyclopedia of Laws, vol. 2, Private International Law, supp. 21*, Kluwer Law International 2009, 216; S. Djordjevic, Länderbericht Serbien, in: W. Burandt, D. Rojahn (eds.), *Erbrecht*, 2. Aufl., C.H. Beck, München, 2014, 1622; S. Đorđević, Z. Meškić, "The Relations of Bosnia and Herzegovina, Serbia, North Macedonia and Montenegro with EU Member States", in: *European Private International Law and Member State Treaties with Third States - The Case of the European Succession Regulation* (eds A. Dutta, W. Wurmnest), Intersentia, Cambridge – Antwerp – Chicago, 2019, 212.

[7] See S. Đorđević, Z. Meškić, *Međunarodno privatno pravo I, opšti deo*, Kragujevac, 2016, 48.

conflict-of-law rules of ESR, the *renvoi* rule of Art. 34 of ESR will be analyzed. As concerns Serbian private international law, the analysis will primarily cover the conflict-of-law rule on succession of Art. 30(1) of SPILA as well as the *renvoi* rule of Art. 6 of SPILA. Finally, in the absence of relevant case law pertaining to *renvoi* issues caused by the ESR and SPILA conflict-of-law rules, several simplified hypothetical cases will be discussed and analyzed from both the EU and Serbian point of view.

2. EU Succession Regulation (ESR)

2.1. Conflict-of-law rules of ESR

The general conflict-of-law rules on succession are contained in Art. 21 of ESR and they, as mentioned above, strictly follow the principle of the unity of succession.[8] Pursuant to Art. 21(1) of ESR, the law applicable to the succession as a whole is the law of the State in which the deceased was habitual resident at the time of death. Having in mind that the rule of Art. 4 of ESR on general jurisdiction of Member State courts is also based on the last habitual residence of the deceased, it may be concluded that ESR strives to ensure the synchronisation of *ius* and *forum* within EU (so called *Gleichlaufsprinzip*) in most of the succession cases by choosing the same connecting factor for determining both the jurisdiction and the applicable law.[9] However, Art. 21(2) provides for the application of escape clause: where it is clear from all circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State of his/her last habitual residence, the law of that other State shall govern the succession as a whole. It means that escape clause of Art. 21(2) of ESR interrupts the so called *Gleichlaufsprinzip* which is established as a principle by the jurisdiction rule of Art. 4 and conflict-of-law rule of Art. 21(1) of ESR.

The objective conflict-of-laws rules of Art. 21 of ESR may be derogated by the choice of applicable law which is regulated by Art. 22 of ESR. A person may choose as the law applicable to his/her succession as a whole the law of the State of which he is a national at the time of making the choice or at the time of death

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[8] See the commentary of art 21 of ESR in detail A. Dutta, Artikel 21, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 1 *etc*.; D. Solomon, *op. cit*., 21-37; A. Köhler, *op. cit*. note 2, 54 *etc*.

[9] See A. Fuchs, *The new EU Succession Regulation in a nutshell*, ERA Forum 2015, 119-120; F. Eichel, Artikel 4 EuErbVO, in: *JurisPK-BGB*, Band 6 (Hrsg. Herberger, Martinek, Rüßmann, Weth), 7. Aufl., 2014, para. 4-6; A. Köhler, note 2, 18; A. Dutta, Artikel 4, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 2-3; K. Radoja Knol, *op. cit*. note 4, 52.

(Art. 22(1) of ESR), and if the person possesses a nationality of several states, he/she may choose the law of any of them (Art. 22(2) of ESR).[10] Such choice of law shall be made expressly in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition (Art. 22(3)). It is obvious that the rules on choice of law of Art. 22 preserve the principle of unity of the succession, although they may interrupt the desirable synchronization of *forum* and *ius*.[11]

In addition, the ESR contains the special conflict-of-law rules for substantive issues of dispositions upon death and agreements as to succession (Art. 24-25) which are also based on the principle of habitual residence (observed at the time of the conclusion of agreement) corrected by escape clause and provided with the possibility of choosing the applicable law in accordance with Art. 22 of ESR,[12] as well as the conflict-of-laws rules for their formal validity (Art. 27) which are in line with those of Hague Testamentary Convention of 1961. There are also the rules on formal validity of acceptance or waiver of the succession (Art. 28), appointment of an administrator of the estate (Art. 29), restrictions of succession in respect of certain assets (Art. 30), adaptation of rights *in rem* (Art. 31), *commorientes* (Art. 32), estate without claimant (Art. 33), as well as the rules on general part of private international law (*renvoi* – Art. 34, public policy – Art. 35, states with two or more legal systems – Art. 36 and 37). In the following subsection the special attention is to be given to the rule on *renvoi* of Art. 34 which addresses the application of the conflict-of-law rules of a third State.

2.2. Renvoi rule of Art. 34 of ESR

The *renvoi* is introduced by the provisions of Art. 34 of ESR aiming to ensure the international harmony of decisions in cross-border succession cases.[13] These provisions read as follows:

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[10] See the commentary of art 22 of ESR in detail A. Dutta, Artikel 22, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 1 *etc.*; D. Solomon, *op. cit*., 37-45; A. Köhler, note 2, 61 *etc.*

[11] However, in case when the chosen law is the law of a Member State, the parties concerned may prorogate the jurisdiction of the courts of that Member State in accordance with Art. 5 of ESR in order to achieve this synchronization.

[12] See in detail A. Köhler, Agreements as to Succession under the New European Private International Law, *Revija za evropsko pravo*, no. 2-3/2015, 25-38; A. Dutta, Artikel 24 und Artikel 25, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015; A. Bonomi, A. Özturk, "Das Statut der Verfügung von Todes wegen (Art. 24 ff. EuErbVO)", in: *Die Europäische Erbrechtsverordnung* (Hrsg. A. Dutta, S. Herrler), C.H.Beck, München, 2014, 47 *etc.*

[13] See Recital 57 of ESR.

"1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in the force in that State, including its rules of private international law in so far as those rules makes a *renvoi*:

(a) to the law of a Member State; or

(b) to the law of another third State which would apply its own law.

2. No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of the Article 28 and Article 30."

Pursuant to the wording of Art. 34(1), the *renvoi* applies only to the cases in which the conflict-of-law rules of ESR refer to the law of a third State as the law applicable to the succession, where the term 'third State' embraces not only Non-EU States but also EU Member States which are not bound by ESR, such as Denmark and Ireland.[14] Further restrictions of *renvoi* are provided by Art. 34(2), which expressly excludes its application with respect to the laws of third States designated by the escape clause rule of Art. 21(2), choice of law rule of Art. 22, the rules on formal validity of dispositions upon death of Art. 27, the rule on validity as to form of a declaration concerning acceptance and waiver of Art. 28(b) as well as by the provision of Art. 30, which regulates the application of special restricting rules of *lex rei sitae* concerning the succession in respect of certain assets. Having this in mind, it can be concluded that *renvoi* is accepted only in the cases where the law of a third State has been determined as the applicable law by general conflict-of-law rule of Art. 21(1) as well as by other conflict-of-law rules referring to this rule (i.e. Art. 24 – dispositions of property upon death, Art. 25 – agreements as to the succession, Art. 28(a) – validity of acceptance or waiver), which means that the first condition for the application of Art. 34 is that the deceased had habitual residence in a third State.[15] It further means that in such cases the jurisdiction of Member State courts can solely be established in accordance with the rules of subsidiary jurisdiction of Art. 10[16] of

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[14] See E. Lein, *op. cit.*, 200-202; A. Dutta, Vorbemerkung zu Artikel 1, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 14-16; A. Köhler, note 2, 30; K. Radoja Knol, *op. cit.*, 50-51.

[15] See A. Köhler, General Private International Law Institutes in the EU Succession Regulation – Some Remarks, *Anali Pravnog fakulteta Univerziteta u Zenici*, 2015, 175; A. Dutta, Artikel 34 EuErbVO, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para 1, 3, 10; A. Davi, Article 34, in: *The EU Succession Regulation - A Commentary* (eds A-L. Caravaca Calvo, A. Davi, H-P. Mansel), Cambridge University Press, Cambridge, 2016, 475, 478.

[16] Pursuant to Art. 10(1) of ESR, where the habitual residence of the deceased at the time of death is located in a third State, the courts of a Member State in which assets of the estate are located

ESR or with the rule of necessity jurisdiction of Art. 11[17] of ESR.[18] In cases in which the jurisdiction of a Member State court is, pursuant to Art. 4 of ESR, established on the basis of the last habitual residence of the deceased, the Member State court seised can apply *renvoi* only with respect to dispositions upon death and agreement as to succession if the deceased had habitual residence in a third State on the day on which the disposition was made or the agreement was concluded.[19] Therefore, it is obvious that practical relevance of *renvoi* is significantly diminished.[20]

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shall have jurisdiction to rule on the succession as a whole in so far as: (a) the deceased had the nationality of that Member State at the time of death; or, failing that, (b) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed. If the requirements of Art. 10(1) are not fulfilled, the provision of Art. 10(2) enables the court of the Member State in which assets of estate are located to establish the jurisdiction to rule only on these assets. See the commentary of Art. 10 in detail G. Panopoulos, Article 10, in: *EU Succession Regulation No 650/2012 – A Commentary* (ed. H.P. Pamboukis), Nomiki Bibliothiki – C.H.Beck – Hart – Nomos, Athens, 2017, 145 *etc.*; F.M. Buonaiuti, Article 10, in: *The EU Succession Regulation - A Commentary* (eds A-L. Caravaca Calvo, A. Davi, H-P. Mansel), Cambridge University Press, Cambridge, 2016, 186 *etc.*; A. Dutta, Artikel 10, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para 1 *etc.*; F. Eichel, Artikel 10 EuErbVO, in: *JurisPK-BGB*, Band 6 (Hrsg. Herberger, Martinek, Rüßmann, Weth), 7. Aufl. 2014, para. 1 *etc.* See also S. Đorđević, Some Remarks on Prevention and Resolution of Positive Jurisdiction Conflicts Between Croatian (Member State) and Serbian Courts in Cross-border Succession Cases - From Croatian (EU) and Serbian Point of View, *Pravni vjesnik*, No. 2, 2020 (to be published).

[17] Pursuant to Art. 11 of ESR, if the last habitual residence of the deceased was in a third State and the jurisdiction of a Member State court cannot be established under any other jurisdiction rule of ESR, the courts of a Member State may, on an exceptional basis, have necessity jurisdiction to rule on the succession, provided the case has sufficient connection with the Member State court seised and the proceedings cannot be reasonably brought or conducted or would be impossible in a third State to which the case is closely connected. See the commentary of Art. 11 in detail G. Panopoulos, Article 11, in: *EU Succession Regulation No 650/2012 – A Commentary* (ed. H.P. Pamboukis), Nomiki Bibliothiki – C.H.Beck – Hart – Nomos, Athens, 2017, 154 *etc.*; F. Eichel, Artikel 11 EuErbVO, in: *JurisPK-BGB*, Band 6 (Hrsg. Herberger, Martinek, Rüßmann, Weth), 7. Aufl. 2014, para. 1 *etc.*; A. Dutta, Artikel 11, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 1 *etc.*; F.M. Buonaiuti, Article 11, in: *The EU Succession Regulation - A Commentary* (eds A-L. Caravaca Calvo, A. Davi, H-P. Mansel), Cambridge University Press, Cambridge, 2016, 199 *etc.*

[18] A. Köhler, note 15, 175; A. Davi, note 15, 476-477; Ch. Tsouka, Article 34, in: *EU Succession Regulation No 650/2012 – A Commentary* (ed. H.P. Pamboukis), Nomiki Bibliothiki – C.H.Beck – Hart – Nomos, Athens, 2017, para. 21.

[19] A. Köhler, note 2, 94.

[20] So A. Köhler, note 15, 175; A. Davi, note 15, 475-476.

Further conditions for the acceptance of *renvoi* are set out in Art. 34(1) lit. (a) and (b) of ESR. Firstly, the conflict-of-law rules of a third State specified by the provisions of ESR shall be applied if they refer to the law of a Member State (Art. 34(1) lit. (a)). Such reference means not only the reference to the law of the Member State court seised (referring back to the *lex fori*), but also the reference to the law of another Member State (referring forward to the law of another Member State). In both of these cases, the substantive law of the Member State referred to shall be applied. Secondly, the conflict-of-law rules of the law of a third State specified by ESR shall also be applied if they refer to the law of another third State, which would apply its own law (Art. 34(1) lit. (b)). In such cases the substantive law of another (second) third State is to be applied, if its conflict-of-law rules accept the reference of the conflict-of-law rules of a (first) third State specified by ESR. Strictly following the wording of Art. 34(1) of ESR, in all other situations the application of the conflict-of-law rules of a third State (*i.e. renvoi*) should be excluded, which means the reference of conflict-of-law rules of ESR is to be of substantive nature.

However, according to some opinions expressed in German literature, the reference of the conflict-of-law rule of the second third State should be followed in two specific situations, although it is contrary to the wording of Art. 34(1) lit. (b) of ESR.[21] The first one is when the conflict-of-law rule of the second third State refers to the law of a Member State, in which case the law of the Member State referred to shall be applied. The authors who support this view argue that this constellation is equivalent to that covered by Art. 34(1) lit. (a) of ESR, which enables more frequent application of the law of a Member State.[22] The second situation covers the cases where the conflict-of-law rule of the second third State refers to the law of the first third State. If this reference is of substantive nature, the substantive law of the first third State is to be applied. However, if the conflict-of-law rule of the second third State refers to the conflict-of-law rules of the first third State, the latter would refer back to the law of the second third State, whose substantive succession law is to be finally applied to the case.[23]

As concerns the cross-border succession cases involving a Member State and Serbia, the provisions on *renvoi* of Art. 34 of ESR come into play if the conflict-of-law rule of Art. 21(1) of ESR (as well as other conflict-of-law rules of ESR referring to Art. 21(1)) refers to the law of Serbia, which will be always the case where the deceased had last habitual residence in Serbia.

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[21] See A. Köhler, note 15, 178; A. Dutta, note 15, para. 5.

[22] *Ibid*.

[23] A. Köhler, note 15, 178-179; A. Köhler, note 2, 98.

3. Conflict-of-law rules on succession and *renvoi* rule in Serbian private international law

3.1. Conflict-of-law rules

The general conflict-of-law rule on succession is contained in Art. 30(1) of SPILA and is (as opposed to Art. 21 of ESR) based on the nationality principle: the law applicable to the succession is the law of the State of which the deceased was a national at the time of his/her death and it governs all substantive issues of intestate and testamentary succession (including the agreements as to the succession, although these are null and void in Serbian inheritance law).[24] Serbian authors unanimously share the opinion that this conflict-of-law rule follows the principle of unity of succession, *i.e. lex successionis* applies to the succession as a whole irrespective of whether the movable or immovable assets of the estate are located in Serbia or in a foreign State.[25] However, having in mind that the Serbian courts, pursuant to the jurisdiction rules of Art. 71-73 of SPILA, rarely have the jurisdiction to rule on the succession as a whole when one or more (especially immovable) assets of the estate are located in a foreign State, it may be noticed that the jurisdiction will be often split between Serbian and foreign courts, which will separately determine *lex successionis* with regard to respective assets of the estate.[26] This means that the principle of the unity of succession cannot be truly achieved in such cases.[27]

In addition, Art. 30(2) of SPILA contains the special conflict-of-law rule on the capacity of a person to make a will, which designates that the law of the State whose nationality the testator possessed at the time of making the will is applicable to this issue. With respect to the formal validity of a will, the applicable law is to be determined by the conflict-of-law rules of Hague

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[24] See T. Varadi *et al*., *op. cit*., 337, 341; S. Đorđević, note 16; M. Dika, G. Knežević, S. Stojanović, *op. cit*., 101-103, 105-107; M. Stanivukovic, P. Đundic, *op. cit*., 196, 198; S. Đorđević, Z. Meškić, note 6, 212.

[25] See *ibid*.; M. Stanivuković, M. Živković, note 6, 216.

[26] S. Đorđević, note 16; about the problems of splitting the jurisdiction in succession matters see S. Đorđević, "O problemima nekoordiniranog raspravljanja zaostavstine jednog lica u razlicitim pravnim porecima", in: *Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope* (ur. S. Bejatović), Pravni fakultet u Kragujevcu, Kragujevac, 2010, 380-398.

[27] See S. Đorđević, Z. Meškić, note 6, 213-214. The principle of unity of succession can be certainly carried out if all immovable and movable assets of the estate are located in Serbia, in which case Serbian courts may have jurisdiction to rule on the whole estate and, pursuant to art 30(1) of Serbian PIL Act, apply a single national law to the succession as a whole (S. Đorđević, note 16).

Testamentary Disposition Convention of 1961, which are implemented in Article 31 of SPILA.[28]

It should be stressed that testator cannot choose the law applicable to the succession in accordance with SPILA. However, the so called 'indirect' choice of law, made in accordance with the private international law of a foreign State referred to by Art. 30(1) of SPILA, could be effective. Namely, if the law of the State of which testator was a national at the time of death contains the rule that empowers the testator to choose applicable law to succession and he/she made such choice, the chosen law shall be applied by virtue of *renvoi* of Art. 6(1) PIL Act.[29] This could happen in the cases where Art. 30(1) of SPILA refers to the law of a Member State bound by ESR, provided that a testator has chosen the applicable law in accordance with Art. 22 of ESR.

3.2. The rule on renvoi of Art. 6 of SPILA

In Serbian private international law the institute of *renvoi* is governed by Art. 6 of SPILA which reads as follows:

"If according to the provisions of this Act the law of a foreign State should be applied, its rules on the choice of applicable law shall be taken into consideration.

If the rules of a foreign State on the choice of the applicable law refer back to the law of Serbia, the law of Serbia shall be applied, without taking into consideration the rules on the choice of the applicable law."

Pursuant to Art. 6(1) of SPILA, if conflict-of-law rule of SPILA refers to the law of a foreign State, the conflict-of-law-rules of that foreign State have to be taken into

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[28] The provision of Art. 31 of SPILA repeats the rules of Arts. 1(1) and 2(1) of the Hague Convention of 1961 and introduces one more alternative conflict-of-law rule (application of lex fori) in accordance with the principle of in favorem testamenti contained in Art. 3 of the Hague Convention (see Đorđević, Meškić, note 6, 213 fn. 5; M. Stanivuković, M. Živković, note 6, 219; M. Dika, G. Knežević, S. Stojanović, *op. cit*., 108–112). Considering the scope of the application of Hague Convention as well as the wording of Art. 31 of SPILA, these rules only apply to wills and joint wills (which are autonomously defined in Art. 4 of Hague Convention), but not to other dispositions of property upon death, such as agreements as to succession. However, their application may be extended to other dispositions of property upon death by way of analogy in accordance with Art 2 of SPILA, which regulates filling the gaps in SPILA (S. Đorđević, *Utvrđivanje i popunjavanje pravnih praznina u Zakonu o rešavanju sukoba zakona sa propisima drugih zemalja*, Kragujevac, 2020, 25-26, 45-46).

[29] See S. Đorđević, Länderbericht Serbien, in: *Internationales Erbrecht, EuErbVO/IntErbRVG/DurchfVO/Länderberichte* (Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch), Baden-Baden, 2020, 814.

account. The prevailing opinion in Serbian literature,[30] which is also confirmed in Serbian judicial practice,[31] finds that 'taking into account the conflict-of-law rules of a foreign State' is to be interpreted as an obligation for Serbian courts to apply the conflict-of-law rules of a foreign State referred to by the provisions of SPILA, which means that *renvoi* has been established as a general principle of Serbian private international law (although some exemptions from this principle have been recognized; *e.g. renvoi* is excluded with respect to party autonomy, the conflict-of-law rules that contain alternative and cumulative connecting factors as well as the conflict-of-law rule containing the closest connection as a connecting factor).[32] It also means that Serbian private international law adopts both the reference back to the law of Serbia and the reference forward to the law of another (second, third *etc.*) foreign State.

If the conflict-of-law rules of the law of a foreign State refer back to the law of Serbia, the provision of Art. 6(2) of SPILA clearly imposes the direct application of Serbian substantive law. In addition, Serbian substantive law is to be directly applied not only where the law of a foreign State referred to by SPILA refers back to the law of Serbia, but also where such reference (*i.e.* to the law of Serbia) comes from conflict-of-law rule of any foreign State which appears in the chain of further reference (*i.e.* from the conflict-of-law rule of the second foreign State referred to by the conflict-of-law rule of the first foreign State designated by the rules of SPILA, the conflict-of-law rule of the third foreign State referred to by the conflict-of-law rule of the second foreign State *etc.*).[33]

However, with respect to the reference forward, *i.e.* where the first foreign State designated by the conflict-of-law rule of SPILA refers forward to the law of a second foreign State, which also refers forward to the law of a third foreign State (the reference forward may be hypothetically unlimited) or refers back to the law of a first foreign State, no solution can be found in the provisions of Art. 6 of SPILA. Serbian authors have proposed three different solutions for these

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[30] See and compare S. Đorđević, Z. Meškić, note 7, 48-49; T. Varadi *et al.*, *op. cit.*, 146; M. Stanivuković, M. Živković, *Međunarodno privatno pravo, opšti deo*, Beograd, 2008, 279-281; M. Dika, G. Knežević, S. Stojanović, *op. cit.*, 29.

[31] See Odgovori na pitanja privrednih sudova koji su utvrđeni na sednici Odeljenja za privredne sporove Privrednog apelacionog suda održanoj dana 26.11.2014. i 27.11.2014. godine i na sednici Odeljenja za privredne prestupe i upravno-računske sporove održanoj dana 3.12.2014. godine - Sudska praksa privrednih sudova - Bilten br. 4/2014 (henceforth: Odgovori).

[32] See and compare S. Đorđević, Z. Meškić, note 7, 52-55; M. Stanivuković, M. Živković, note 30, 281; Odgovori, Bilten br. 4/2014.

[33] M. Dika, G. Knežević, S. Stojanović, *op. cit.*, 28; S. Đorđević, Z. Meškić, note 7, 49; M. Stanivuković, M. Živković, note 30, 280-281.

situations. According to the first solution, the so called 'single *renvoi*' should apply in order to end this chain of referrals. It means that in any case in which the conflict-of-law rule of a foreign State referred to by the rules of SPILA refers forward to the law of a second foreign State the substantive law of that second foreign State is to be applied.[34] The second solution introduces the so called 'foreign court theory' in Serbian private international law which is, supposedly, imposed by Art. 9 of SPILA. Namely, the conflict-of-law rules of the law of the first foreign State, including its rule on *renvoi*, have to be, pursuant to Art. 9 of SPILA, applied according to their own sense and terms, *i.e.* in the same manner as they would be applied by the courts of that foreign State.[35] It means that a Serbian court has to put itself in 'the shoes' of the court of a first foreign State and to end the chain of referring forward in accordance with the conflict-of-law rules and the rule on *renvoi* of that foreign State.[36] Finally, according to the third solution, the chain of referring forward is to be ended when the conflict-of-law rule of any foreign State in this chain accepts the reference or refers back to the law of another foreign State which has appeared prior in the chain (*i.e.* the law of a foreign State that is referred to for the second time in the chain of referrals).[37] In our opinion, the third solution should be accepted as a rule because it is in line with the principle of international harmony of decisions. Namely, if the third foreign State refers back to the second foreign State in the chain whose substantive law, pursuant to this solution, is to be applied, it is obvious that the conflict-of-law rules of both the first foreign State and the third foreign State in the chain refer to the application of the law of the second foreign State, which means they agree about its application (*i.e.* between them international harmony of decisions is achieved).[38] Also, where the third foreign State accepts the reference from the second foreign State in the chain, in which case the substantive law of the third foreign State is to be applied, the international harmony of decisions is achieved between these two foreign States because they both agree on the application of substantive law of the third foreign State.

As concerns the cross-border succession cases connected to Serbia and EU Member State, the provisions on *renvoi* of Art. 6 of SPILA come into play if the conflict-of-law rule of Art. 30(1) of SPILA refers to the law of a Member State

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[34] See T. Varadi, *Međunarodno privatno pravo*, Novi Sad, 1990, 77-78.

[35] M. Dika, G. Knežević, S. Stojanović, *op. cit*., 29; T. Varadi *et al*., *op. cit*., 149.

[36] *Ibid*.

[37] See S. Đorđević, Z. Meškić, note 7, 49, and compare with an opinion expressed by M. Stanivuković, M. Živković, note 30, 281.

[38] S. Đorđević, Z. Meškić, note 7, 49-50.

bound by ESR, which is always the case where the deceased was a national of a Member State at the time of death.

4. Analysis of *renvoi* issues in hypothetical succession cases connected to EU Member States and Serbia

Considering that the *renvoi* issues may arise in a number of succession cases connected to EU Member States and Serbia (due to divergent conflict-of-law rules on succession of ESR and SPILA) and that the relevant case law on such cases is still missing, we have created two groups of hypothetical cases of that kind, which will be discussed in this section. The first group of cases will be analyzed from the EU and the second group of cases from Serbian point of view.

4.1. Analysis of hypothetical cases from EU point of view (application of Art. 34 of ESR)

From the EU point of view, the rule on *renvoi* of Art 34 of ESR will be applied in the cases in which Art. 21(1) of ESR refers to the law of Serbia as the law of the third State, whose conflict-of-law rule on succession of Art. 30(1) of SPILA has to be applied (under conditions set out in Art. 34(1) of ESR) by a Member State court seised. Three hypothetical cases of such kind are going to be briefly analyzed.

The facts of the case, which will be first discussed, are as follows: the deceased, a Bulgarian national who had last habitual residence in Serbia, possessed immovable and movable assets in both Bulgaria and Serbia. The law of which State shall the Bulgarian court as a Member State court seised to rule on the immovable and movable assets located in Bulgaria, as well as on movable assets located in Serbia (pursuant to Art. 10(1) lit a of ESR)[39] apply to the succession? In this case the Bulgarian (Member State) court seised determines the law applicable to succession in accordance with the conflict-of-law rule of Art. 21(1) of ESR which refers to the law of Serbia as the law of the deceased's last habitual residence. Considering that Serbia is a third State, the Bulgarian court should examine whether one of the further conditions for accepting *renvoi*, which are set out in the provisions Art. 34(1) lit. (a) and lit. (b) of ESR, are fulfilled. Pursuant to

[39] The Bulgarian court can, under Art. 10(1) lit a of ESR, have jurisdiction to rule on succession as a whole, because the deceased had the nationality of Bulgaria (as a Member State) at the time of death. However, having in mind that Serbian courts have exclusive jurisdiction to rule on succession of immovable assets located in Serbia, the Bulgarian court seised will probably, in accordance with Art. 12 of ESR, decide not to rule on these assets, which means it will limit its succession proceedings to the immovable and movable assets located in Bulgaria as well as to movable assets located in Serbia (about Art. 12 of ESR see more S. Đorđević, note 16).

these provisions (as has been explained above), the *renvoi* is to be accepted if the conflict-of-law rule of the law of Serbia refers (either back or forward) to the law of a Member State (Art. 34(1) lit. (a)) or to the law of another third State which would apply its own law (Art. 34(1) lit. (b)). Since Serbian conflict-of-law rule on succession (Art. 30(1) of SPILA) provides for the application of the law of a State whose nationality the deceased possessed at the time of death, it refers back to the law of Bulgaria as the law of a Member State which applies to the case.

The next case is based on the following facts: the deceased, a Serbian national who had last habitual residence in Serbia, possessed immovable and movable assets in both Bulgaria and Serbia. The question is the same: Which law shall the Bulgarian court seised to rule on the assets located in Bulgaria (pursuant to Art. 10(2) of ESR)[40] apply to the succession of these assets? In this case Art. 21(1) of ESR also refers to the Serbian law whose conflict-of-law rule on succession of Art. 30(1) of SPILA refers neither to the law of a Member State nor to the law of another third State which would apply its own law, but rather accepts the reference from Art. 21(1) of ESR. Since Art. 30(1) of SPILA makes no *renvoi* to the laws specified by Art 34(1) of ESR, it means that the reference of Art. 21(1) of ESR to the Serbian law is of substantive nature – Serbian substantive succession law applies to the case.

Finally, the last case to be discussed in this subsection consists of the following facts: the deceased, a national of Bosnia and Herzegovina (henceforth: BH) who had last habitual residence in Serbia, possessed immovable and movable assets in Croatia and Serbia. Which law shall the Croatian court as a Member State court seised to rule on succession of the assets located in Croatia (in accordance with Art. 10(2) of ESR) apply to the succession? In this case the Croatian court applies Art. 21(1) of ESR, which refers to the law of Serbia, whose conflict-of-law rule of Art. 30(1) of SPILA refers forward to the law of BH, whose nationality the deceased possessed at the time on death. Since the conflict-of-law rule on succession of BH Private International Law Act also provides for the application of the deceased's last *lex nationalis*,[41] it is not hard to conclude that BH as the second third State in the chain accepts the reference from Serbian law, *i.e.* it 'declares' the application of its own law, which means that the condition for

[40] In this case the jurisdiction of Bulgarian court can only be established in accordance with the provision of Art. 10(2) of ESR and covers only the assets located in Bulgaria.

[41] BH PIL Act is the same as SPILA (Serbian PIL Act): Act on Resolution of Conflict of Laws with Regulations of Other Countries, *Official Gazette of SFRY*, Nos. 43/82 and 72/82 and *Official Gazette of Republic of Bosnia and Herzegovina*, No. 2/1992. The general conflict-of-law rule on succession is contained in Art. 30(1) of BH PIL Act and it is the same as that of SPILA.

application of Art 34(1) lit. (b) of ESR is fulfilled. Therefore, in this case the substantive law of BH is to be applied pursuant to Art. 34(1) lit. (b) of ESR.

4.2. Analysis of hypothetical cases from Serbian point of view (application of Art. 6 of SPILA)

From the Serbian point of view, the *renvoi* issues occur in the cases in which Art. 30(1) of SPILA refers to the law of a Member State bound by ESR whose conflict-of-law rules have to be applied by Serbian courts (pursuant to Art. 6 of SPILA). In order to explain how the *renvoi* rule of Art. 6 SPILA 'functions' in such cases, we created the hypothetical case with several variants which reads as follows:

The deceased of Croatian nationality died intestate and left movable and immovable assets located in Serbia. Which law shall the Serbian court, which is pursuant to Art. 72 of SPILA[42] seised to rule on the mentioned assets, apply to the succession if the deceased had last habitual residence in: (a) Serbia; (b) Croatia; (c) Austria; or d) Bosnia and Herzegovina?

In this case the Serbian court determines the law applicable to succession by applying the conflict-of-law rule of Art. 30(1) of SPILA, which refers to the law of Croatia as a Member State law. Considering that Art. 6(1) of SPILA establishes *renvoi* as a general principle of Serbian private international law, the reference to the Croatian law includes its conflict-of-law rules on succession, which are contained in ESR. It means the Serbian court has to apply the conflict-of-law rule of Art. 21(1) of ESR, which refers to the law of the deceased's last habitual residence. In the variant (a) of the case, the deceased had last habitual residence in Serbia, which means that Art. 21(1) of ESR refers back to the law of Serbia, whose substantive law, pursuant to Art. 6(2) of SPILA, is to be applied to the succession. In the variant (b) of the case, the deceased had last habitual residence in Croatia, which means Art. 21(1) of ESR accepts the reference from Art. 30(1) of SPILA and the Croatian substantive law applies to the succession.

In the variant (c) of the case, Art. 21(1) of ESR refers forward to the law of Austria as the law of another Member State. With regard to the reference forward, we support (as stated above) the interpretation of Art 6(1) of SPILA, which claims that the chain of referring forward is 'broken' when the conflict-of-law rule of the second or any further foreign State in this chain accepts the reference or refers

[42] Pursuant to Art. 72(1) of SPILA, Serbian courts have exclusive jurisdiction to rule on immovable assets located in Serbia which belonged to the deceased who was a foreign national. As concerns movable assets that belonged to the deceased of foreign nationality, Serbian courts have, pursuant to Art. 72(2) of SPILA, elective jurisdiction to rule on such assets (see S. Đorđević, Z. Meškić, note 6, 213-214; S. Đorđević, note 16).

back to the law of a foreign State which has prior appeared in the chain (for the second time in the chain of referrals). It means that Serbian courts should follow this autonomous solution for 'breaking' the chain of referrals and ignore the solution of Art. 34(1) of ESR. Therefore, since the deceased had last habitual residence in Austria (another Member State), Art. 21(1) of ESR refers to the law of Austria. Although the referral to the law of another Member State is, from the point of view of ESR, of substantive nature (*i.e.* does not include *renvoi*), the Serbian court will not follow that directly, but will rather apply the conflict-of-law rule of Art. 21(1) of ESR again (which means that the Austrian law accepts the referral from the Croatian law) and come to the same result: the substantive law of Austria shall be applied to the succession as the law of the last habitual residence of the deceased.

Finally, in the variant (d) of the case, in which the deceased had last habitual residence in Bosnia and Herzegovina, Art. 21(1) of ESR refers to the law of BH, whose conflict-of-law rules, following the accepted interpretation of Art. 6(1) of SPILA, apply to the case. Since the Private International Law Act of BH contains the conflict-of-law rule on succession which is the same as that of Art. 30(1) of SPILA (the application of the last *lex nationalis* of the deceased), BH law refers back to the Croatian law, which appears for the second time in the chain of referrals, which means Croatian substantive succession law applies to the case.

5. Concluding remarks

From EU point of view, the foregoing analysis has shown that the provisions on *renvoi* of Art. 34 of ESR are reliable enough to resolve the *renvoi* issues arising in the succession cases connected to EU Member States and Serbia and to provide for predictability. As concerns the Serbian point of view, the difficulties relating to *renvoi* arise because the provisions on *renvoi* of Art. 6 of SPILA contain no solution for the situations in which the conflict-of-law rules of the foreign State referred to by conflict-of law rules of SPILA refer forward to another foreign State. In order to overcome such difficulties we supported the solution (one of the several proposed by Serbian authors) which suggests that the chain of referring forward is to be ended when the conflict-of-law rule of any foreign State in this chain accepts the reference or refers back to the law of another foreign State which has appeared prior in the chain. Following this solution in the analyzed hypothetical succession cases connected to EU Member States and Serbia all *renvoi* issues have been successfully resolved.