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PRIVATE INTERNATIONAL LAW REGIME OF INTER VIVOS CONTRACTS WHOSE EFFECTS ARE POSTPONED TO THE DEATH OF THE CONTRACTING PARTY DISPOSING OF THE PROPERTY – DE LEGE LATA AND DE LEGE FERENDA

Abstract

In this paper the author analyses the conflict of law regime for inter vivos contracts whose effects are postponed to the death of a contracting party disposing of the property in Serbian private international law de lege lata and de lege ferenda. Starting from the facts that the effects of these contracts are relevant for succession law and that Serbian private international law does not contain special conflict rules for them, the paper focuses on the problem of their qualification (characterisation) in Serbian private international law. On the other hand, Serbian Draft of Private International Law Act of 2014 introduces the special conflict rules for these contracts which are analysed in this paper too.

Keywords: *inter vivos* contracts whose effects are postponed to the death of a contracting party; qualification problem in private international law; conflict rules for succession; conflict rules for contracts; Serbian Draft of Private International Law Act.

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1. Introduction

Contracts concluded *inter vivos* whose effects are postponed to the death of a contracting party may be defined as contracts which produce certain obligation law effects, but their essential (most important) effects occur after the death of one contracting party and influence the legal position of his/her heirs, beneficiaries and creditors[1]. From the point of view of comparative law, this category particularly comprises donation *mortis causa* (all its modalities), the contract waiving inheritance, the contract to make a will, the contract to the benefit of a third party in case of death, different *inter vivos* contractual arrangements (contracts, agreements) concerning disposition of one contracting party's property whose effects are postponed to his/her death (e.g. life annuity contract, lifetime maintenance contract, contract on assignment or distribution of property during lifetime etc.), as well as contracts relating to the disposition of estate of a third living person (whose effects are postponed to the death of this third person, and not of a contracting party)[2].

Although these contracts are known in Serbian civil law, they are not all allowed by it. The donation *mortis causa* is not expressly regulated by the law, but its conclusion is possible under the general rules of private autonomy of Serbian Obligation Law Act[3] and the rules which were in force before the World War II[4]. The special contractual dispositions of estate of one contracting party with succession law effects, such as lifetime maintenance contract and contract on assignment and distribution of property during one's lifetime, are in detail

[1] See H. Dörner, Art 25, Rn 353, J. von Staundinger, *Kommentar zum Bürgerlichen Gesetztbuch mit Einfürungsgesetzt und Nebengesetzen*, Art. 25, 26 EGBGB, Neubearbeitung von Heinrich, 2000 (henceforth Staundinger/Dörner); K. W. Lange, *Erbrecht*, München, 2011, 140.

[2] Compare Staundiger/Dörner, Art 25 EGBGB, Rn 353ff; A. Dutta, Art. 26 EGBGB, Rn 143ff, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 11, Internationales Privatrecht II, Internationales Wirtschaftsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 25-248), München, 2015 (henceforth Dutta/MünchKomm); D. Djurdjevic, *Nasledno pravo*, Beograd, 2010, 243ff.; O. Antic, *Nasledno pravo*, Beograd, 1994, 252ff; O. Antic, Z. Balinovac, *Komentar Zakona o nasledjivanju*, Beograd, 1996, 476ff.

[3] Zakon o obligacionim odnosima, *Sluzbeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ, *Sluzbeni list SRJ*, br. 31/93 i *Sluzbeni list SCG*, br. 1/2003 – Ustavna povelja.

[4] See Art. 4 of the Act on Non-validity of Laws Enacted Prior to April 6th 1941 and During Enemy Occupation *Sluzbeni list FNRJ*, br. 86/46.

regulated by Serbian Succession Law Act of 1995[5] (henceforth: Serbian SLA). These contracts are very frequent in Serbian practice and may be seen as substitutes for agreements as to succession (inheritance contracts, succession contracts) which are prohibited in Serbian law[6]. Considering the contract waiving inheritance, the contract to make a will and the contract relating to the disposition of estate of a third living person, Serbian SLA recognizes these as special contracts that strongly influence one's succession, but prohibits them all prescribing that they are absolutely invalid in Serbian legal system[7]. Finally, the contracts to the benefit of a third party in case of death, such as account agreement and life insurance contract to the benefit of a third party, are primarily regulated by Obligation Law Act[8].

The main characteristic of *inter vivos* contracts whose effects are postponed to the death of a contracting party is that they are somewhere between ordinary obligation law contracts and dispositions of property upon death (a will, succession contract)[9], because they contain elements of both obligation and succession law to a certain degree. Their dual nature may cause serious problems in the field of private international law, i. e. when a foreign element appears in this kind of legal relationships and raises the question which national law should apply to them.

The aim of the present paper is to look into the conflict of law regime for *inter vivos* contracts whose effects are postponed to the death of a contracting party in Serbian private international law *de lege lata* and *de lege ferenda*. Thereby, the paper is limited only to the contracts concerning the disposition of property of one of the contracting parties (in Serbian law these include contract on assignment and distribution of property during one's lifetime, lifetime maintenance contract and donation *mortis causa*), while other contracts (contract waiving inheritance, contract to make a will etc.) are left out of the scope of our

[5] *Sluzbeni glasnik RS*, br. 46/95, 101/2003-odluka USRS.

[6] See D. Zivojinovic, T. Djurdjic Milosevic, Inheritance Contract and Its Substitutes in European and Serbian Law, *Revija za evropsko pravo/Review of European Law* 2-3/2015, 69-88; S. Markovic, *Nasledno pravo u Jugoslaviji*, Beograd, 1978, 283. About these contracts see also D. Djurdevic, 247ff; O. Antic, 252ff; O. Antic, Z. Balinovac, 476ff.

[7] See Articles 180 and 181 SLA.

[8] See Articles 957-965, 149-153, 1035-1042 Obligation Law Act.

[9] K. W. Lange, 140.

research. Considering that Serbian private international law does not contain special conflict rules for these contracts, this paper focuses particularly on the problem of their qualification (characterisation) in Serbian private international law – whether they should be qualified as relations of succession law nature in which case the conflict rule for succession shall primarily apply or as ordinary *inter vivos* contracts which fall under the general conflict rules for contracts or as relations of dual nature which imposes both the application of conflict rules for contracts (to be applied to their obligation law elements) and conflict rules for succession (to be applied to their succession law elements)? On the other hand, Serbian Draft of Private International Law Act of 2014 (henceforth Draft PILA) contains the special conflict rules for contracts concluded *inter vivos* whose effects are postponed to the death of the contracting party disposing of the property which also deserve full attention in this paper.

2. Determining applicable law de legelata

2.1. Conflict rules for succession or conflict rules for contracts

It has been already pointed out that dual nature of *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property opens the question whether the conflict rules for succession or conflict rules for contracts should be applied. This issue is of great importance, because these conflict rules contain totally different connecting factors that refer to different national laws which may produce completely different substantial results influencing validity and effects of these contracts.

The main legal source of private international law in Serbia is The Law on Resolution of Conflict of Laws with Regulations of Other Countries (Zakon o rešavanju sukoba zakona sa propisima drugih zemalja, henceforth ZRSZ)[10] which was enacted in 1982 in the former Socialist Federal Republic of Yugoslavia (SFRY) and is, with minor amendments, still in force today. Conflict rules for succession are contained in Articles 30 and 31 ZRSZ, while those pertaining to contracts are stipulated in Articles 19-25 ZRSZ.

Pursuant to Art. 30(1) ZRSZ, which adopts the so-called principle of unity of the succession, the succession as a whole shall be governed by the law of the state

[10] Official Gazette of SFRY, No 43/82 and 72/82 – Amendment Official Gazette of FRY, No 46/96 and Official Gazzete of RS, No 46/2006 - oth Law.

whose nationality the deceased had at the time of his/her death. This conflict rule applies to all substantial issues of intestate and testate succession, except the question of the capacity of the testator to make a will which is, pursuant to Art. 30(2), governed by the law of the state whose nationality the testator had at the time of making the will[11]. Considering that ZRSZ adopts *renovi* as a general rule (Art. 6), reference of the conflict rules of Art. 30 ZRSZ to the national law of the deceased/testator includes the conflict rules of the given national law.[12].

When determining the scope of applicable law (i.e. *lex successions*) stipulated by Art. 30(1) ZRSZ, Serbian authors usually do not mention *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property[13]. The only exception among them is Jaksic who finds that donation *mortis causa* and contract on assignment and distribution of the property during one's lifetime fall under the scope of *lex successions*[14].

Which law applies to the formal validity of a will is determined by the rules of Hague Testamentary Disposition Convention of 1961 which are implemented in Art. 31 ZRSZ. Namely, Art. 31 ZRSZ only repeats the rules of Articles 1(1) and 2(1) of the Convention and introduces one more alternative conflict rule (application of *lex fori* – Serbian law) in accordance with the principle of *in favorem testamenti* contained in Art. 3 of the Convention. This means that the formal validity of testamentary dispositions is governed by the rules of Hague Testamentary Disposition Convention which are complemented by Art. 31 ZRS[15]. It is important to mention that the rules of this Convention apply only to the wills and joint wills (which are autonomously defined in Art. 4), but not to other

[11] About Art. 30(1) and (2) ZRSZ see in detail M. Stanivuković, M. Živković, 'Serbia' in Bea Verschraegen (ed), *International Encyclopedia of Laws*, vol 2, *Private International Law*, supp 21 (Kluwer Law International 2009), 216ff; M. Dika, G. Knezevic, S. Stojanovic, *Komentar Zakona o medjunarodnom privatnom i procesnom pravu*, Beograd, 1991, 101ff; T. Varady, B. Bordas, G. Knezevic, V. Pavic, *Medjunarodno privatno pravo*, Beograd, 2007, 343ff; A. Jaksic, *Medjunarodno privatno pravo*, Beograd, 2008, 425ff; M. Stanivukovic, P. Djundic, *Medjunarodno privatno pravo – posebni deo*, Novi Sad, 193ff.

[12] See more M. Dika, G. Knezevic, S. Stojanovic, 23ff, 101ff; T. Varady, B. Bordas, G. Knezevic, V. Pavic, 343ff.

[13] See *ibid*.

[14] A. Jaksic, 420-421.

[15] See in detail M. Stanivukovic, M. Zivkovic, 219; M. Dika, G. Knezevic, S. Stojanovic, 108-112.

dispositions of property upon death such as succession contracts[16]. Serbian legislator failed to stipulate that the rules of art 31 ZRSZ should also apply to other dispositions upon death.

When it comes to determining the law applicable to contracts, Art. 19 ZRSZ provides a very wide party autonomy as general conflict rule – the parties may choose any national law to govern their contract, unless provided otherwise by the ZRSZ or an international treaty. If parties do not make the choice, the applicable law shall be determined pursuant to Art. 20 points 1-19 ZRSZ, which provides conflict rules for 19 types of contracts predominantly following the principle of application of the law of domicile or seat of the party who performs the characteristic obligation. The applicable law for other contracts (not covered by these conflict rules) is determined by conflict rule contained in Art. 20 point 20 ZRSZ which refers to the law of the state in which the offeror was domiciled or had its seat at the time of receipt of the offer. This rule, which obviously deviates from the main principle implemented in above mentioned 19 conflict rules, would also apply to the *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property, if these were qualified as classical contracts of obligation law. The exception might be made in regard to donation *mortis causa* which could be governed by the law that applies to donation *inter vivos* – the law of the state in which the donor was domiciled at the time of receipt of the offer (art 20 point 15 ZRSZ). However, the law applicable under any conflict rule of Art. 20 ZRSZ shall not apply if the special circumstances of the case refer to another law, in which case that law is applicable (escape clause contained in the first line of art 20)[17].

The law applicable to formal validity of the contracts is determined by Art. 7 ZRSZ according to which the contract is valid as to form if it is valid either according to *locus regit actum* or to the law applicable to the content of contract (*lex contractus*). Considering that *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property usually deal with immovable, it is important to mention that Art. 21 ZRSZ contains a special

[16] See H. Batiffol, Rapport explicatif sur la Convention-Forme des testaments de 1961, Tiré à part des *Actes et documents de la Neuvième session (1960)*, tome III, *Forme des testaments*, 168; Staundiger/Dörner, Vorbem zu Art 25 EGBGB, Rn 74ff.

[17] About Articles 19 and 20 ZRSZ see in detail M. Stanivukovic, M. Zivkovic, 125ff; T. Varady, B. Bordas, G. Knezevic, V. Pavic, 374ff; M. Dika, G. Knezevic, S. Stojanovic, 72ff.

conflict rule for contracts relating to immovables. According to this rule, the law of the state in which the immovable is situated exclusively applies to all legal issues of the contract pertaining to this immovable (substantial and formal validity, content, effects and interpretation). Therefore, Art. 21 ZRSZ overrides the conflict rules of Articles 19, 20 and 7 ZRSZ[18].

When comparing the conflict rules for succession and conflict rules for contracts contained in ZRSZ, it becomes obvious that these are based on totally different principles and refer to different applicable national laws. Therefore, the question of qualification of the inter vivos contracts whose effects are postponed to the death of the contracting party disposing of the property is very significant: which conflict rules will be applied depends on how these contracts are qualified in Serbian private international law. The following subsections are dedicated to the qualification problem of these contracts.

2.2. Qualification problem

Serbian civil law does not recognize the general notion of contracts whose effects are postponed to the death of the contracting party, but regulates three types of contracts that may be subsumed under this notion. These are the contract on assignment and distribution of property during one's lifetime, lifetime maintenance agreement and donation mortis causa. Considering that the starting point in qualification process is *lex fori* (domestic/Serbian law), the discussion on qualification focuses on each of these contracts with the reference to the same or similar contracts in comparative law.

2.2.1. Contract on assignment and distribution of property during one's lifetime

Contract on assignment and distribution of property during lifetime (henceforth: the assignment contract) is nominate and gratuitous contract in Serbian civil law that is in detail regulated by Serbian SLA of 1995[19]. By this contract one person (assignor) assigns and distributes to all his descendants his property (the whole or part of it) existing at the time of the conclusion of the contract. The contract

[18] See in detail M. Dika, G. Knezevic, S. Stojanovic, 82-83.

[19] Articles 181-193 SLA. More about assignment contract see D. Djurdjevic, 247-254; O. Antic, Z. Balinovac, 478ff; S. Markovic, 283-286.

shall be valid only if all the descendants have agreed[20]. If a single consent is missing, the contract as such is invalid and shall be regarded as simple donation (gift) in relation to those descendants who gave the consent[21]. The main succession law effect of this contract is that the assignor's property that is subject to the contract shall not form part of his estate after his death and cannot be taken into account for calculation of shares reserved for mandatory heirs[22]. The conclusion of this contract must satisfy rigid formal requirements – the contract has to be concluded in the form of solemnized notary document where the notary is obliged to read the contract to the parties, carefully inform them about the succession law consequences of the contract, make a formal note that he informed them properly and, in the end, solemnize the contract[23]. After the contract has been concluded, the assignor cannot unilaterally terminate the contract, which means that it has a binding effect. However, there is an exception to this rule: he may revoke the contract in relation to the descendant who showed gross ingratitude towards him as well as to the descendant who fails to perform the duties (e.g. maintenance of assignor) imposed on him by the contract[24].

Although it is regulated by Succession Law Act (which could mean that it belongs to succession law), Serbian literature and judicial practice invariably consider the assignment contract as obligation law contract which has effects of succession law relevance and its regulation in SLA as a consequence of Serbian legislative policy[25] (e.g. in Montenegro this contract is regulated in Obligation Law Act[26] and its regulation is the same as in Serbian Succession Law Act). Besides that, the rules of Serbian Obligation Law Act apply to the issues of this contract that are not regulated by SLA[27].

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[20] See Art. 183(1) SLA.

[21] See art 187 SLA. However, if descendant gives the consent afterwards, the assignment contract is valid. (Art. 183(2) SLA).

[22] Articles 49 and 186 SLA.

[23] See Art. 184 SLA.

[24] See Art. 192 SLA.

[25] Compare D. Djurdjevic, 243; O. Antic, 247.

[26] Articles 1063-1074 of Obligation Law Act (Zakon o obligacionim odnosima), *Službeni list Crne Gore*, br. 47/2008.

[27] See D. Djurdjevic, 248ff.

The contracts which are the same as or similar to Serbian assignment contract may be found in comparative law. All successor states of former Socialist Federal Republic of Yugoslavia regulate this contract under the same term and with same effects as Serbian law[28]. In other European countries, assignment contract is usually not a nominate contract expressly regulated by the law. However, very similar contracts may be concluded in these countries under the general rules of private autonomy or other rules of obligation law. For example, in Germany the contract regarding delivery of property to family members (so called Übergabevertrag) by which the deliverer transfers the estate to one or several family members (future/potential heirs) during his lifetime usually in order to avoid the division of his estate after his death and the application of mandatory succession rules or to provide proper maintenance in his old age is very frequent[29]. Übergabevertrag is not expressly regulated in German Civil Code (BGB), but its conclusion is possible under the rule of par. 593a BGB and general rules of BGB on private autonomy[30]. The similar contract under the same name (Übergabevertrag) is also frequent in Austrian legal practice. It may be concluded as a gratuitous contract or as a contract imposing the obligation for estate recipients to maintain the deliverer, in which case the rules of Austrian Civil Code on life annuity contract apply[31]. However, characteristics and effects of every contract which comes from comparative law must be analysed and compared with those of Serbian assignment contract in order to determine their similarity.

[28] See Articles 1063-1074 Obligation Law Act of Montenegro; Articles 128-138 Succession Law Act (Zakon o nasljedjivanju) of Republic of Srpska, *Službeni glasnik Republike Srpske,* br. 1/09; Articles 135-145 Succession Law Act (Zakon o nasljedjivanju) of Federation of Bosnia and Herzegowina, *Službene novine Federacije BiH*, br. 80/14; Articles 111-121 Succession Law Act (Zakon o nasljedjivanju) of Republic of Croatia, *Narodne novine*, br. 48/03, 163/03, 35/05, 127/13, 33/15; Articles 1022-1028 Obligation Law Act (Закон за облигационите односи) of Republic of Macedonia, *Сл. Весник*, бр. 18/01.

[29] J. Appel, U. Appel, *International Vererben – Deutschland, Österreich, Schweiz*, 2011, 63.

[30] *Ibid*.

[31] Austrian law also recognizes the contract relating to the delivery of property to family members in the case of deliverer`s death which is based on donation (gift) or legacy as legal instruments (see D. Solomon, Länderbericht Österreich, *Burandt/Rojahn (Hrsg.), Erbrecht*, 2. Aufl., 2014, 1578).

As *lex fori* (domestic/Serbian law) treats assignment contract as classical obligation law (inter vivos) contract with effects of succession law relevance, this should be reflected in the rules of Serbian private international law. This means that conflict rules for contracts contained in Articles 19, 20 point 20 or 21 ZRSZ apply to admissibility, substantive and formal validity, binding effect and content (obligation law effects) of assignment contract, while conflict rule for succession contained in Art. 30(1) SLA applies to its effects on succession. The same should apply to contracts coming from foreign legal systems which have same or similar characteristics as Serbian assignment contract.

However, a closer look at substantial regulation of assignment contract in Serbian law reveals that its aim and ratio are primarily situated in the sphere of succession law. Namely, the assignor as a future deceased wants to distribute his/her property during his/her lifetime to his/her descendants as future heirs (to give them something that will belong to them anyway after his/her death) and at the same time to dispose of his/her property with the instrument (i.e. assignment contract) which guarantees that the disposition cannot be influenced by succession law rules of SLA. Therefore, by this contract the assignor not only assigns and distributes his property *inter vivos* to his descendants, but also arranges the effects on his estate which will be in force after his death (i.e. *mortis causa* effects). From this aspect, one could say the assignment contract is functionally similar to the disposition of property upon death and serves as a substitute for succession contract in Serbian law. We have shown above that the similar contracts in comparative law pursue, more or less, the same aim and have the same function. If legal categories of "succession" and "testament" as the parts of conflict rules for succession of Articles 30 and 31 ZRSZ embrace all legal issues and institutes which, in the functional meaning of lex fori, have succession law function (functional qualification), it could be claimed that assignment contract is functionally similar to disposition of property upon death and should be subsumed under the legal categories of these conflict rules. The functional qualification becomes especially important when the legal issues or institutes cannot be undoubtedly and precisely classified according to the existing categories of domestic civil law (which is basically the case with assignment contract) as well as when it is necessary to determine the applicable law for legal relationships unknown to domestic law[32].

[32] Staundinger/Dörner, Art 25 EGBGB, Rn 18. About functional qualification in private international law see J. Kropholler, *Internationales Privatrecht*, 4. Aufl., Tübingen, 2004, 122ff.; G.

Therefore, the assignment contract, together with same or similar contracts coming from abroad (comparative law), may be functionally qualified in Serbian private international law as succession law issue which functions as disposition upon death. Consequently, Articles 30 and 31 ZRSZ would apply to almost all issues concerning these contracts – the admissibility, material and formal validity, binding effect, content and effects. Only the descendant`s capacity to act shall be governed by the law determined in accordance with Art. 14(1) ZRSZ that contains the conflict rule for this issue[33].

However, the result of the qualification above, though attractive, may not be achieved by strict interpretation of conflict rules for succession contained in ZRSZ without endangering legal certainty and interests of the parties. Actually, it remains to be determined whether the legal categories "succession" and "testament" of conflict rules of Articles 30 and 31 ZRSZ can embrace these contracts. Therefore, it is necessary to analyse the conflict rules for succession of ZRSZ more closely in order to finally establish the conflict of law regime for assignment contracts. The subsection 2.3.is dedicated to this analysis.

2.2.2. Lifetime maintenance contract

The lifetime maintenance contract is also a nominate contract in Serbian civil law regulated in detail by SLA[34]. By this contract, the maintenance debtor is obliged to support and take care of the maintenance creditor and to organize his/her funeral after his death, and maintenance creditor has to transfer to the debtor the ownership over his immovables, movables or/and other proprietary rights which are subject to the contract, where this transfer is postponed to the moment of the death of the debtor[35]. It is commutative, aleatory and intuitu personae contract, very frequent in Serbian legal practice. Its succession law effects are that

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Kegel, K. Schurig, *Internationales Privatrecht*, 8. Aufl., München, 2000, 296ff; B. von Hoffmann, K. Thorn, *Internationales Privatrecht*, 9. Aufl., München, 2007, 229ff; M.Schwimann, *Internationales Privatrecht*, 2. Aufl., Wien, 1999, 17; H-C.Heyn, *Die „Doppel-„ und „Mehrfachqualifikation" im IPR*, Frankfurt am Mein, 1986, 29; G. Danneman, *Die ungewollte Diskriminierung in der internationalen Rechtsanwendung*, Tübingen, 2004, 464ff; A. Jaksic, 76.

[33] Art. 14(1) ZRSZ: "The law governing legal capacity of a natural person and his capacity to act is the law of the State whose citizen he is."

[34] See Articles 194-205 SLA. About lifetime maintenance contract see in detail D. Djurdjevic, 255ff; O. Antic, 255ff; O. Antic, Z. Balinovac, 493ff; S. Markovic, 286ff.

[35] See Art. 194 SLA.

the property that is subject matter of the contract shall not be part of creditor's estate after his death and cannot be taken into account for calculation of the shares reserved for mandatory heirs[36]. The requirements for formal validity of this contract are the same to those prescribed for assignment contract[37].

Serbian literature and judicial practice also characterize this contract as obligation law contract that produces the effects of succession law relevance (i.e. succession law effects)[38]. Thereby, it is a commutative contract with long term performance of debtor's obligations, which strengthens its obligation law character[39]. Some Serbian authors, who consider this characteristic as prevailing, claim that the law governing the substantial validity, formal validity and the content of lifetime maintenance contract should be determined by conflict rules pertaining to contracts, and that only the succession law effects of this contract should be governed by the law determined by in accordance with Art. 30(1) ZRSZ[40].

Comparative law recognizes contracts identical or similar to Serbian lifetime maintenance contract. All successor states of former Socialist Federal Republic of Yugoslavia regulate the lifetime maintenance contract under the same term and with same effects as Serbian law[41]. In other European countries it is hard to find the nominate lifetime maintenance contract that is expressly regulated by law, but the conclusion of same or similar contracts is usually possible under the general rules of private autonomy or other rules of obligation law of these countries which apply to some other nominate contracts[42]. For example, if the contract similar to Serbian lifetime maintenance contract is concluded in

[36] See Art. 195(2) SLA.

[37] See Art. 195 SLA.

[38] See D. Djurdjevic, 243; O. Antic, 247.

[39] A. Jaksic, 421.

[40] A. Jaksic, 421.

[41] See Articles 1075-1086 of the Obligation Law Act of Republic of Montenegro; Articles 139-145 Succession Law Act (Zakon o nasljedjivanju) of Republic of Srpska, *Službeni glasnik Republike Srpske,* br. 1/09; Articles 146-154 Succession Law Act (Zakon o nasljedjivanju) of Federation of Bosnia and Herzegowina, *Službene novine Federacije BiH*, br. 80/14; Articles 122-127 Succession Law Act (Zakon o nasljedjivanju) of Republic of Croatia, *Narodne novine*, br. 48/03, 163/03, 35/05, 127/13, 33/15; Articles 1029-1035 of the Obligation Law Act (Закон за облигационите односи) of Republic of Macedonia, *Сл. Весник*, бр. 18/01.

[42] See O. Antic, 255-258.

Germany or France, the rules of their civil codes that regulate life annuity contracts could apply accordingly to this contract too[43]. However, every single case requires the examination of characteristics and effects of contracts coming from foreign legal systems in order to determine whether they are same as or similar to those of Serbian lifetime maintenance contract.

It can be argumentatively claimed that the lifetime maintenance contract and similar contracts produce strong succession law effects, which could lead to the conclusion that their aim and ratio belong to the sphere of succession law. From the point of view of Serbian civil law, this argument becomes more obvious if one bears in mind that lifetime maintenance contract serves as a substitute for succession contract that is forbidden in Serbian law. Therefore, the question may be raised whether this contract may be functionally qualified as succession law issue, i.e. disposition of property upon death? In our opinion the answer to this question requires closer analysis of conflict rules for succession of Articles 30 and 31 ZRSZ, which is presented in subsection 2.3.

2.2.3. Donation (gift) mortis causa

In Serbian civil law donation *mortis causa* may be concluded in accordance with the general rules of private autonomy contained in Obligation Law Act. According to Serbian civil law literature and judicial practice, donation *mortis causa* represents *inter vivos* contract concluded on the basis of mutual agreement of the donor and the donee where the delivery of the gift to the donee, i.e. the transfer of ownership over the thing which is subject matter of donation, is postponed to the death of the donor[44]. This contract binds both contracting parties, the donor and the donee, and cannot be terminated unilaterally by the

[43] See §§ 759-761 BGB (German rules on life annuity contract); Articles 1968-1983 Code civil (French rules on life annuity contract). However, there are differences between German and French life annuity contract (see in detail K. Spiegel, Die vertraglich begründete Leibrente – Untersuchung zum deutschen im Vergleich zum französischen und österreichischen Recht, Dissertation zur Erlangung der Doktorwürde und Einreichung bei der Juristischen Fakultät der Universität Passau, 2014, 13ff., 83ff. (https://opus4.kobv.de/opus4-uni-passau/frontdoor/index/index/docId/206).

[44] Compare M. Djurdjevic, Ugovor o poklonu za slucaj smrti, Zbornik radova Pravnog fakulteta u Novom Sadu 1/2011, 249-251; S. Perovic, *Obligaciono pravo*, Beograd, 1986, 608; D. Pantic, *Donatio mortis causa – Rimsko pravo i Srpsko pravo*, doktorska disertacija, Kragujevac, 2014, 299ff.

donor (except in special predefined cases)[45]. Considering these characteristics, it is obvious that this kind of donation of *mortis causa* differs from classical donation *mortis causa* of Roman law which had to be given under the condition that the donee must outlive the donor and was revocable at any time during the donor's lifetime[46]. Therefore, the donation *mortis causa* in Serbian law represents the *inter vivos* (obligation law) contract with suspensive time clause (the transfer of gift will be performed at the time of donor's death) so that it should be termed as donation *post mortem*[47].

It is disputable whether Serbian law recognizes the donation *mortis causa* similar to that known in Roman law[48]. Namely, par. 568 of Serbian Civil Code 1844, whose rules may be also applied today on the basis of Art. 4 of the Act on Non-validity of Laws Enacted Prior to April 6th 1941 and During Enemy Occupation, mentions the donation *mortis causa* stating that it should be regarded as legacy, which means it is subjected to the rules on testamentary dispositions. The text of par. 568 does not specify the condition that the donee must outlive the donor. Because of that, Serbian authors before World War II took the view that par. 568 exclusively regulates legacy and testament as unilateral legal act, and does not pertain to donation *mortis causa*, which has typical contractual nature and should be treated as donation *post mortem*[49]. However, in our opinion, there is no obstacle in Serbian law for the conclusion of donation *mortis causa* under the condition that the donee must outlive the donor[50]. This modality of donation *mortis causa* must also be concluded on the basis of mutual agreement of the donor and the donee which means it is irrevocable and also represents the obligation law (*inter vivos*) contract, although with two special clauses, i.e. suspensive time clause and suspensive condition clause. If the promise of

[45] M. Djurdjevic, 249.

[46] *Ibid*., 251. About donation mortis causa (donatio mortis causa) of Roman law see S. Vladetic, Prvobitni oblik poklona za slucaj smrti (donatio mortis causa), u: B. Vlaskovic (ur.), *Uskladjivanje pravnog sistema Srbije sa standardima Evropske unije*, knjiga 1, Kragujevac, 2013, 33ff; D. Pantic, 50ff.

[47] M. Djurdjevic, 251.

[48] Compare M. Djurdjevic, 248ff; O. Antic, 199-201; D. Pantic, 283ff;

[49] See L. Markovic, *Nasledno pravo*, Beograd, 1930; D. Arandjelovic, M. Begovic, *Nasledno pravo po Gradjanskom zakoniku Kraljevine Srbije sa kratkim pregledom serijatskog prava*, Beograd, 1940, 152ff; M. Djurdjevic, 248.

[50] See also D. Pantic, 334-335.

donation *mortis causa* has been given unilaterally by the donor who can revoke it at any time, it should be treated as legacy (will) in Serbian law providing it fulfils the substantial and formal requirements needed for a will (testament).

Therefore, it may be concluded that Serbian law (lex fori) recognizes two modalities of donation *mortis causa*, i.e. a typical donation *post mortem* and donation *post mortem* with suspensive condition clause. However, these contracts are very rare in Serbian legal practice because Serbian law does not provide significant succession law effects for these contracts. As their effects are not substantially different from those of a will, potential donors and donees are not particularly motivated to conclude them. In other words, the will performs practically the same function as donation *mortis causa* whose regulation in Serbian law is not completely clear. The most important succession law relevance of any donation (gift), including the donation *mortis causa*, is contained in the following questions: (1) Are the donations calculated in the shares of a donee who is also the heir? Are they taken into account for calculation of the value of the deceased's estate and should they be returned in order to satisfy the mandatory heirs?

On the other hand, in comparative law donation *mortis causa* is treated differently. Austrian law, for example, treats it as legacy (a will) which is unilaterally revocable, if it satisfies the substantial and formal conditions required for a legacy (will)[51]. However, if the donation *mortis causa* is contained in a notary document in which the donor waived his right of revocation and the donee has agreed with that and received this document, it shall be treated as *inter vivos* contract with suspensive time clause which has some effects that are similar to those of succession contract[52]. German law recognizes the donation *mortis causa* given under the condition that the donee must outlive the donor stipulating that the rules of BGB regulating the dispositions of property upon death (i.e. the rules on succession contracts) apply accordingly to this contract[53]. It also recognizes donation *post mortem* (without the aforementioned condition) which is

[51] § 956(1) ABGB (General Civil Code) of Austria.

[52] § 956(2) ABGB (General Civil Code) of Austria. See D. Solomon, 1578.

[53] § 2301 BGB. See W. Burandt, § 2301 BGB, *Burandt/Rojahn (Hrsg.), Erbrecht*, 2. Aufl., 2014, 821-827; K. W. Lange, 141ff.

regulated by the rules for donation *inter vivos*[54]. Swiss law regulates donation *mortis causa* which is considered to be a type of succession contract[55]. To sum up, comparative law recognizes donations *mortis causa*, which have binding effect and are treated as succession contracts (i.e. contractual disposition upon death) or as *inter vivos* donations with suspensive time clause (i.e. donation *post mortem*), and donations *mortis causa*, which are unilaterally revocable and equal to legacies and wills.

Taking into account the standpoint of Serbian law (lex fori) that donation *mortis causa* (both modalities) is *inter vivos* (obligation law) contract with special clauses, the law governing almost all issues of this contract (i.e. admissibility, substantial and formal validity, binding effect and obligation law effects) should be determined by the conflict rules for contracts (Articles 7, 19, 20, 21 ZRSZ). Only its relevance for succession (e.g. the question of whether the donation should be taken into account when heirs' shares are calculated) would be governed by *lex successionis* determined by Art. 30(1) ZRSZ. These rules would apply to all modalities of donation relating to the death of the donor (i.e. typical donation *mortis causa*, donation *post mortem*, donation given in a case of life threatening danger etc.).

However, one may raise the question: Can the donation *mortis causa*, regardless of its substantial regulation, be qualified in Serbian private international law as succession law issue that functions as disposition of property upon death? If we set aside the fact that donation *mortis causa* is created under the rules of Serbian obligation law and consider the aim and ratio of its existence in Serbian legal system (as well as in foreign legal systems), we could find out that donation *mortis causa* primarily performs function of succession law relevance. Considering that it is a legal transaction by which the donor as a future deceased disposes of parts of his property for the time after his death, it may be argumentatively claimed that donation *mortis causa* has succession law elements that prevail, so it performs the function of disposition of property upon death[56]. Therefore, all modalities of donation *mortis causa*, regardless of whether they

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[54] Compare K. W. Lange, 141ff.; Staundiger/Dörner, Art 25 EGBGB, Rn 355; J. Kropholler, BGB, Studienkommentar, 8. Aufl., München, 2005, 1072; W. Burandt, 821-822.

[55] Art. 247 OR (Obligationsrecht/Obligation Law). See D. Solomon, Länderbericht Schweiz, *Burandt/Rojahn (Hrsg.), Erbrecht*, 2. Aufl., 2014, 1607.

[56] In this manner for German private international law Staundige/Dörner, Art. 25 EGBGB, Rn 359.

come from Serbian or comparative law, could be treated as dispositions upon death (similar to succession contracts) in Serbian private international law which is governed by the law determined by conflict rules for succession of Articles 30 and 31 ZRS[57].

But, similarly to assignment contract and lifetime maintenance contract, it should be carefully examined whether the donation *mortis causa* may be functionally qualified as disposition upon death in accordance with conflict rules of Articles 30 and 31 ZRSZ. The next subsection is dedicated to the analysis of these conflict rules in order to determine which law applies to these three contracts.

2.3. Inadequacy (inappropriateness) of applying the conflict rules for succession

To determine the scope of legal categories contained in conflict rules of Articles 30 and 31 ZRSZ in a functional way, it is necessary to start from substantial prohibition of succession contracts in Serbian law.

We have already pointed out that Serbian substantial succession law forbids succession contracts (i.e. any contractual disposition upon death) prescribing their absolute invalidity in order to protect the freedom to make a will[58]. Having this in mind, should the assignment contract, lifetime maintenance contract and donation *mortis causa* be functionally qualified as a will or as a succession contract? According to rigid *lex fori* qualification, one could say these contracts can be regarded neither as wills (because they are agreements of two parties) nor as succession contracts (because Serbian law clearly differentiates them from succession contracts which are prohibited).

However, functional qualification in private international law means extensive interpretation of legal categories of conflict rules, i.e. flexible approach which would embrace all legal issues and concepts which are in accordance with their aim and function, regardless of whether the legal issue or institute is unknown to or forbidden by domestic substantial law. That's why the assignment contract, lifetime maintenance contract and donation mortis cause could be functionally qualified as dispositions upon death that correspond to succession contracts. There are no obstacles for this, because domestic courts might have to rule on

[57] See also A. Jaksic, 421.

[58] See D. Djurdjevic, 246.

succession contracts concluded abroad, in which case they have to determine the applicable law to these contracts and they would do that by applying Articles 30 and 31 ZRSZ (although these contracts are prohibited in Serbian law)[59]. Therefore, it seems that these three types of contracts whose effects are postponed to the death of a contracting party could be subsumed under the categories of conflict rules for succession of Articles 30 and 31 ZRSZ.

However, this conclusion is seriously contested by aforementioned argument that Serbian civil law clearly differentiates between a will and succession contract, on the one hand, and *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property, on the other. It is exactly because it prohibits succession contracts as contractual dispositions upon death that Serbian law insists on these differences. It also seems that this argument, i.e. clear difference between these three instruments in Serbian substantial law, has been fully implemented in Serbian private international law, which becomes more obvious if one tries carefully to determine the scope of the conflict rules of Articles 30 and 31 ZRSZ.

Namely, if all these three contracts were qualified as succession law issues, according to Art. 30(1) ZRSZ, the *lex nationalis* of the contracting party disposing of the property at the time of his/her death would govern their admissibility, substantial validity, binding effect, content and effects. Only the capacity to make such dispositions would be, pursuant to Art. 30(2) ZRSZ, governed by *lex nationalis* of the same contracting party at the time of the conclusion of the contract. We can see at a glance that conflict rule of Art. 30(1) ZRSZ has serious deficiency, which suggests that this rule is inappropriate for application to these contracts. Considering that Art. 30(1) ZRSZ provides the application of *lex nationalis* of the contracting party disposing of the property at the time of his/her death (i.e. his/her last *lex nationalis*), the question is whether it is justified to apply this conflict rule in a situation when the contracting party disposing of the

[59] The fact that Serbian succession law prohibts the succession contracts does not mean that such contracts validly concluded abroad automaticly violate Serbian public policy. Whether the public policy is violated by applying the foreign law must be determined in each particular case taking into consideration all necessary circumstances of the case (e.g. the extent to which the situation is connected with the Serbian legal order; the significance of the consequences that would be produced by application of the foreign law etc.). About public policy in Serbian private international law see M. Stanivukovic, M. Zivkovic, 103-105; M. Dika, G. Knezevic, S. Stojanovic, 14-19; T. Varady, B. Bordas, G. Knezevic, V. Pavic, 15ff.

property was a national of two different states at the time of the conclusion of the contract and at the time of his/her death? In such a situation the last *lex nationalis* would apply not only to succession law effects of the contract, but also to its substantial validity, content and obligation law effects, regardless of the fact that the contracting party at the time of the conclusion of the contract possessed nationality of another state. It is obvious that it leads to the retroactive application of last *lex nationalis* of the contracting party disposing of the property which violates the principle of justice in private international law, the interest of legal certainty and interests of the parties. Therefore, one may claim that it is completely inappropriate to apply Art. 30(1) ZRSZ to contracts whose effects are postponed to the death of the contracting party disposing of the property and Serbian legislator certainly did not have these contracts in mind when creating this conflict rule. The only way to make it possible to apply *lex nationalis* at the time of conclusion of contracts could be to create the special conflict rule on the basis of Art. 2 ZRSZ which serves for filling the legal gaps in this Act[60]. However, the Article 2 applies only to those legal relationships with foreign element for which there are no conflict rules at all, which is not the case here. Besides, it should be stressed that the application of last *lex nationalis* of the deceased is also inappropriate for substantial validity of a will and other dispositions upon death, which leads to the conclusion that Serbian legislator has made a serious oversight.

The determination of the law applicable to formal validity of these contracts is accompanied by similar problems, because the Hague Testamentary Convention 1961, whose basic conflict rules are repeated in Art. 31 ZRSZ, cannot be applied to this issue at all. We have already mentioned that the rules of this Convention apply only to wills and joint wills (defined pursuant to Art. 4 of this Convention). The scope of this Convention does not cover the contractual disposition upon death (succession contracts) and certainly not the *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property. Unlike succession contracts, where it is possible (and also desirable) to cite numerous arguments for extending the application of art 31 ZRSZ, it is very challenging to do the same for *inter vivos* contracts whose effects are postponed to

[60] Art. 2 ZRSZ: "If there is no provision in this law on the applicable law with respect to a relation mentioned under Article 1, paragraph 1 above, the provisions and principles of this law, the principles of the legal order of the Federal Republic of Yugoslavia and the principles of Private International Law, shall be applied by analogy."

the death of the contracting party disposing of property without disrespecting the aim and ratio of art 31 ZRSZ and the clearly stance of domestic substantial law that these contracts should be seen as classical *inter vivos* contracts for which the conflict rules for formal validity already exist in ZRSZ. Bearing this in mind, the creation of special conflict rule for formal validity of these contracts on the basis of Art. 2 ZRSZ fails too.

However, even if we decide that it is possible to qualify these contracts substantially as dispositions upon death (governed by the law determined by Art. 30 ZRSZ) and formally (i.e. in respect of their formal validity) as typical obligation law contracts, the problems of determining the law applicable to formal validity will not go away. In that case, the conflict rule of Art. 7 ZRSZ would apply to formal validity which provides alternative application of the law of *locus regit actum* or the law applicable to the content of legal relationship (in this case it is *lex successionis* determined by Art. 30(1)ZRSZ). However, considering that these contracts usually have immovables as their object, the question of applying the *lex rei sitae* to their form arises. It has been shown that Art. 21 ZRSZ contains the conflict rule for contracts relating to immovables which stipulates exclusive application of *lex rei sitae* to all issues of these contracts, i.e. to their substantial and formal validity, content and effects. Having this in mind, the question is whether it is possible to limit the application of the conflict rule of Art. 21 ZRSZ only to the issue of formal validity of the *inter vivos* contracts relating to imovables whose effects are postponed to the death of the contracting party disposing of these immovables (excluding all other issues – i.e. their substantial validity, content and effects which would be governed by *lex successionis* determined in accordance with Art. 30(1) ZRSZ)? The positive answer to this question would mean that we want at any price to insist on succession law nature of these contracts which does not correspond to the aim and ratio of the conflict rules contained in ZRSZ and endangers the proper determination of their scope of application.

Therefore, it may be concluded that the conflict rules for succession contained in Articles 30 and 31 ZRSZ are inappropriate (inadequate) for the contracts whose effects are postponed to the death of the contracting party disposing of the property (assignment contract, lifetime maintenance contract, donation *mortis causa* and similar contracts), because they are designed under the strong influence of Serbian substantial succession law, which clearly differentiates between these contracts and will and succession contracts and insists on these differences. It seems one may simply say that these contracts do not correspond to the aim and function of legal categories of Serbian conflict rules for succession

(category "succession" from Art. 30 ZRSZ and category "will" from Art. 31 ZRSZ), although they have strong influence in the sphere of succession law.

2.4. Conclusion – Application of two statutes (depecage)

As can be seen from the foregoing discussion, the standpoint of Serbian civil law that *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property are typical obligation law contracts which also produce succession law effects is completely reflected in the application of the rules of Serbian private international law. This means that the conflict rules for contracts apply to contractual issues while conflict rules for succession apply to succession law effects of these contracts.

Therefore, the law governing admissibility, substantial validity, binding effect, content and obligation law effects of these contracts should be determined by the conflict rules for contracts contained in Articles 19 and 20 ZRSZ, while the law governing formal validity of these contracts should be determined by the conflict rule of art 7 ZRSZ. However, if these contracts have immovables as their object, all aforementioned issues shall be governed, pursuant to Art. 21 ZRSZ, by lex rei sitae. On the other hand, the effects of these contracts which arise after the death of the contracting party disposing of the property and influence his/her succession are governed by the law applicable to succession determined by Art. 30(1) ZRSZ.

3. Determining applicable law de lege ferenda (Serbian Draft PILA)

Although the ZRSZ was a modern codification of private international law at the time of its enactment, it is indisputable that contemporary private international law has significantly changed in the last thirty years, particularly in the EU. Against this background, the Serbian Ministry of Justice formed a Working Group of Experts in 2009 to draft a reformed private international law act[61]. This group has since completed its task and delivered its final draft (Draft of Private International Law Act of Republic of Serbia, henceforth Draft PILA) to the

[61] See in detail M. Zivkovic, Rad na novom Zakonu o međunarodnom privatnom pravu Republike Srbije – početne dileme i aktuelno stanje, in: Bernadet Bordas and Maja Stanivuković (eds), *Collected Papers from the VIIth Private International Law Conference-Enlargement of the European Judicial Area to CEFTA Countries*, Faculty of Law of the University of Novi Sad, Novi Sad, 2010, 175ff.

Ministry, which was officially published on the Ministry of Justice website in June 2014[62] and currently awaits enactment by the Serbian Parliament. The content and the structure of the Draft PILA differ completely from the ZRSZ, since it is harmonised with EU private international law.

The jurisdiction rules and conflict rules in inheritance matters are contained in Articles 114-122 Draft. They partly correspond to the rules of the EU Succession Regulation[63]. One of the significant novelties is introduction of the special conflict rules for contracts whose effects are postponed to the death of the contracting party disposing of the property (Art. 120 Draft PILA). The creators of the Draft PILA recognized the need for special treatment of these contracts in Serbian private international law, bearing in mind their functions and effects of succession law relevance. In order to properly interpret the conflict rules for these contracts, it is necessary to shortly discuss the general conflict rules of Draft PILA for succession.

3.1. Conflict rules for succession in Draft PILA

The general conflict rules for succession are contained in Articles 116 and 117 Draft PILA and they are based upon the rules contained in Articles 21 and 22 of the EU Succession Regulation.

As the law applicable to his/her succession as a whole, a person may choose the law of the state of which he/she is a national at the time of making the choice, and if the person is a national of several states, he/she may choose the law of any of them (Art. 116 Draft PILA). In the absence of choice, the law governing the succession as a whole is the law of the state in which the deceased was habitually resident at the time of death, unless the deceased was manifestly more closely connected with another state, in which case the law of that state applies (Art 117 (1) and (2) Draft PILA). However, if the law of the habitual residence of the deceased is the law of a foreign state whose conflict rules refer back to Serbian law, then Serbian substantive law will be applied (*renvoi*, Art. 117(3) Draft PILA).

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[62] http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php, Dezember 25, 2015.

[63] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 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, OJ n. L 201, 107.

In respect of wills and disposition upon death, Art. 118 (1)-(3) Draft PILA stipulates that the conflict rules of Articles 116 and 117 also apply to the substantive validity of the will, with the difference that the connecting factors have to be observed on the day on which the will was made. In respect of the form, a will is valid if the formal requirements are fulfilled in accordance with any of the laws that are determined on the basis of the provisions of the Hague Testamentary Dispositions Convention 1961 (Art. 118(3) Draft PILA). The capacity to make a will is governed by the law of testator's habitual residence or their national law (Art. 119 Draft PILA). The Draft PILA contains no special choice-of-law rule for inheritance contracts[64].

As can be seen, the primary connecting factor is habitual residence of the deceased and not his nationality. Also, it is provided that the law of habitual residence of the deceased at the time the will was made (but not at the time of death) applies to the substantive validity, content and interpretation of the will.

3.2. The law applicable to contracts whose effects are postponed to the death of a contracting party disposing of the property

3.2.1. Conflict rules of Art 120 Draft PILA

Art 120 Draft contains the special conflict rules for the contracts concluded *inter vivos* whose effects are postponed to the death of the contracting party disposing of the property:

1. The material validity, interpretation, effects and the termination of inter vivos contracts concerning dispositions of the property whose effects are postponed to the death of the contracting party disposing of the property shall be governed by the law of the State where that contracting party is habitually resident at the time of conclusion of the contract.
2. The contracting parties may agree to choose the applicable law pursuant to Article 116 of this Act.

[64] Despite several proposals for such a conflict rule made during the legislative proceedings, the prevailing opinion was that they are unnecessary because Serbian inheritance law prohibits such contracts.

3. The formal validity of contract disposing of the estate inter vivos shall be governed by the law referred to in Article 159 of this Act.
4. The validity, interpretation, effects and the termination of the lifetime maintenance agreement concluded before the competent authority of Serbia shall be governed by the law of Serbia, provided that the agreement concurrently includes the property located in Serbia, or that the maintenance creditor is habitually resident in Serbia at the time of the conclusion of agreement.
5. If the law of Serbia is applicable to succession, a legal transaction validly entered into abroad shall be regarded as a lifetime maintenance agreement, provided that the requirements for its formal and material validity are equivalent to those attached to the lifetime maintenance agreement regulated by the legislative Act of Serbia.
6. Paragraphs 4 and 5 of this Article apply correspondingly to the contract on assignment and distribution of property during one's lifetime.

The first paragraph of Art. 120 contains the general conflict rule for substantial issues of these contracts which provides the application of the law of habitual residence of the contracting party disposing the property. It is important to emphasize that term "effects" mentioned in this rule covers only obligation law effects of these contracts and not their effects of succession law relevance. The second paragraph (Art. 120(2)) provides the possibility for contracting parties to choose the applicable law in accordance with rules (Art. 116) that apply to the deceased's choice of law – this means that the choice is limited and represents an exception to general conflict rule. Paragraph 3 applies to formal validity of these contracts, referring to the application of conflict rules that generally apply to the formal validity of contracts. Finally, the paragraphs 4-6 contain special conflict rules for lifetime maintenance contract and assignment contract.

It should be emphasized that conflict rules of Art 120 rely on the conflict rules for succession and override the general conflict rules for contracts laid down in Articles 145-146 Draft PILA (which correspond to Articles 3 and 4 of Rome I Regulation). This means that the creators of the Draft recognized the specificity of these contracts and their succession law relevance. However, all these conflict rules (i.e. for succession and contracts) operate with habitual residence as a primary objective connecting factor,which means that the divergences in applicable law determination will not be so wide as is now the case with application of conflict rules of ZRSZ.

Considering that Art. 120 does not define the notion of *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property, we should first define this notion and then discuss the conflict rules contained in this article.

3.2.2. Defining inter vivos contracts whose effects are postponed to the death of the contracting party disposing of the property – interpretation (qualification)

As has been already mentioned, Serbian civil law does not recognize the general notion of contracts whose effects are postponed to the death of a contracting party. It expressly regulates only lifetime maintenance contract and contract on assignment and distribution of property during one's lifetime, and provides the conclusion of donation *mortis causa* within the framework of general substantial rules on private autonomy. In order to determine the notion belonging to the legal category of the conflict rules contained in Art. 120 Draft PILA, it is necessary to identify the main general characteristics and functions of above mentioned contracts regulated in Serbian civil law (*lex fori*). The notion should be defined widely enough to embrace the similar contracts that exist in comparative law, too. At the same time, we must bear in mind that these contracts differ not only from the classical obligation law contracts, but also from succession contracts.

In our opinion, the following characteristics are essential for defining the category of *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property:

1. The contract is concluded *inter vivos* which means it has regular obligation law effects.
2. The subject matter of the contract must concern directly or indirectly the disposition of the property of one of the contracting parties.
3. The essential effects of the contract must be postponed to the death of the contracting party disposing of the property and they are of succession law relevance, which means they influence the succession of the contracting party disposing of the property (i.e. the rights of heirs, beneficiaries and creditors; the property that is object of the contract is not part of the deceased's estate, etc.).
4. The contracting party should dispose of the property that exists at the time of the conclusion of the contract. If the disposition relates to the property at the time of a death of the contracting party making such disposition, it

should be rather treated as succession (*mortis causa*) contract and not as *inter vivos* contract whose effects are postponed to the death of the contracting party disposing of the property.

5. The binding effect is not a necessary condition for defining this notion in the first stage of qualification. Whether the contract has binding effect is decided by the law applicable to this contract determined by Art. 120 Draft PILA.

Therefore, these criteria have to be taken into account in order to determine which contracts may be subsumed under the category "*inter vivos* contracts concerning dispositions of the property whose effects are postponed to the death of the contracting party disposing of the property" of the conflict rule of Art. 120(1) Draft PILA.

3.2.3. The law governing the substantive law issues – Art. 120 (1) and (2) Draft PILA

Pursuant to general conflict rule contained in Art. 120(1) Draft PILA, the law governing substantive validity, interpretation, effects and termination of the contract is the law of the state in which the person (party) disposing of the property is habitually resident at the time of conclusion of that contract. However, Art. 120(2) Draft PILA enables the contracting parties to choose the national law of the person disposing of the property as the law applicable to these issues in accordance with the general rule on choice of law for succession contained in Art. 116.

Obviously, these conflict rules are very similar to those of Art. 118 Draft PILA that regulate substantial validity and content of a will, which means the succession law relevance of these contracts has come to the fore in the Draft PILA. On the other hand, the general conflict rule of Art. 120(1) Draft PILA corresponds to the objective conflict rules for contracts contained in Art. 146 Draft PILA, because both adopt the principle of applying the law of habitual residence of the contracting party performing the characteristic obligation. However, introduction of very limited party autonomy for *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property (Art. 120(2) Draft PILA), that is the same as for succession and wills, suggests that these should be treated as specific dispositions of property upon death rather than as classical contracts of obligation law.

It is very important to emphasize that the scope of Art. 120(1) and (2) Draft PILA does not cover the effects of these contracts which influence the succession of the

party disposing of the property. These effects belong to the scope of *lex successions* that is determined by Articles 116 and 117 Draft PILA. However, the same law may be *lex succession* and the law applicable to these contracts determined by Art. 120(1) Draft PILA: if a contracting party disposing of the property had the same habitual residence at the time of conclusion of the contract and at the time of death, the same law (i.e. the law of the state of habitual residence) applies to succession and to these contracts. The application of the same law may be also achieved by using the possibility to choose the law in accordance with Art. 116 Draft PILA, which applies to these contracts as well as to the succession. For example, a person may, pursuant to this article, choose as the law applicable to his/her succession as a whole the law of his/her nationality and, when concluding the *inter vivos* contract in order to dispose of his/her property with effects postponed to the moment of death, he/she may (together with the other contracting party) choose the same law (his/her *lex nationalis*) pursuant to Art 120(2) Draft PILA. The application of one (the same) national law to succession and to this contract is very desirable, because it regulates all issues of succession law relevance, especially the influence of the effects of this contract on the basic principles of substantial succession law relating to the freedom of disposition of the property upon death, protection of intestate heirs, mandatory heirs and legatees, treatment of donations and liability for the debts under succession. On the other hand, the application of one law to the effects of the contract and another law to the succession may cause the adaptation problems, if these two contain the rules which contradict each other[65].

3.2.4. The law governing formal validity – Art 120(3) Draft PILA

Pursuant to Art 120(3) Draft PILA, the law applicable to the formal validity of the contracts concluded *inter vivos* whose effects are postponed to the death of the contracting party disposing of the property is determined by the conflict rules contained in Art. 159 Draft PILA, which generally apply to the formal validity of contracts.

The rule of Art. 120(3) Draft PILA solves the problem that currently exists in ZRSZ. Namely, Art. 119 Draft PILA provides the application of rules of Hague Testamentary Convention to the formal validity of testamentary dispositions which apply only to wills and joint wills. Therefore, it was necessary to create the

[65] See Staundiger/Dörner, Art. 25 EGBGB, Rn 359.

special rule for formal validity of these contracts. It has been done such a way that Art. 120(3) refers to Art. 159 Draft PILA that contains general conflict rules for formal validity of contracts.

The conflict rules of Art. 159 Draft PILA are basically identical to those of Art. 11 of Rome I Regulation. Considering the *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property usually have immovables as their object, the provision of Art. 159(5), which stipulates application of *lex rei sitae* to all contracts relating to immovables, shall frequently be applied.

3.2.5. Special rules for lifetime maintenance contract and assignment contract (Art. 120 (4)-(6) Draft PILA)

The lifetime maintenance contract and assignment contract produce strong succession law effects in Serbian legal system and usually have immovables as their object. That was the reason why Serbian legislator has prescribed very rigid form for their conclusion.They have to be concluded in the form of solemnized notary document where the notary is obliged to read the contract to the parties, carefully inform them about the succession law consequences, make a formal note that he informed them properly and, in the end, solemnize the contract. Considering that similar contracts may be concluded in foreign states whose laws do not require so rigid formalities for conclusion as Serbian law, the creators of the Draft PILA have found it necessary to provide the special rules in order to make it clear whether such contracts may produce effects in Serbian legal system (e.g. lifetime maintenance contract has been concluded in the USA where American notary only authorized the signatures of the parties – the problem is whether this contract can produce the same effects of succession law relevance as Serbian lifetime maintenance contract under the Serbian law which is *lex successionis* in this case).

According to the first rule contained in Art. 120(4), the law applicable to the validity, interpretation, effects and termination of these contracts concluded with a Serbian authority (court or notary) is Serbian law if these contracts deal with property situated in Serbia or if a person that disposes of the property is habitually resident in Serbia (Art. 120(4) Draft). This rule determines the circumstances under which Serbian law applies to substantial and formal validity of lifetime maintenance contract and assignment contract. At the same time it determines the jurisdiction of Serbian authorities (notary) for conclusion of these contracts. Therefore, if the property to which the contract pertains is situated in Serbia or the person disposing of the property has habitual residence in Serbia,

these contracts may be concluded before Serbian authorities (notary or judge) in accordance with Serbian law (i.e. SLA).

The second rule contained in art 120(5) Draft PILA regulates the situation in which the contract, similar in its characteristics and effects to Serbian lifetime maintenance contract or assignment contract, has been validly concluded abroad (in accordance with general conflict rules of Art. 120(1)-(3) Draft PILA) while the law governing the succession is Serbian law (determined by Articles 116 and 117 Draft PILA). In such situation, the contract concluded abroad may be deemed as a lifetime maintenance contract or assignment contract, if it was concluded under substantive and formal requirements equivalent to those prescribed by Serbian Succession Law Act. This means that the rule of art 120(5) Draft PILA introduces the so-called method of substitution which should provide that similar contracts concluded abroad produce the same effects as Serbian lifetime contract.

4. Conclusion

From a *de lege lata* perspective, *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property cannot be qualified as succession law issues in Serbian private international law, because they do not correspond to the legal categories of "succession" and "will" contained in the conflict rules of Articles 30(1) and 31 ZRSZ. Therefore, the standpoint of Serbian substantial civil law that these contracts are typical obligation law contracts which also produce effects of succession law relevance (and clearly differ from dispositions upon death, i.e. wills and succession contracts) is strictly reflected in the application of the conflict rules of ZRSZ. This means that the law governing the admissibility, substantial and formal validity, binding effect, content and obligation law effects of these contracts is determined by conflict rules for contracts of Articles 19, 20 and 7 ZRSZ or of Art. 21 ZRSZ, while the law governing their effects of succession law relevance is determined by the conflict rule for succession of Art. 30(1) ZRSZ.

From a *de lege ferenda* perspective, the law governing *inter vivos* contracts whose effects are postponed to the death of the contracting party disposing of the property will be determined by special conflict rules contained in Art. 120 of Serbian Draft PILA which is currently awaiting enactment by the Serbian Parliament. These conflict rules to a certain extent rely on the conflict rules for succession and override the general conflict rules for contracts laid down in Draft PILA. This means that the Draft creators have recognized both their specificity and their succession law relevance.