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# Harmonising Private International Law for Succession: Analysis of the European Union Succession Regulation and Its Impact on Montenegrin Private International Law

**ABSTRACT:** *This article presents a comparative analysis of the Private International Law (PIL) for succession in Montenegro and in the European Union (EU). Montenegro, as a candidate country for EU accession, has undertaken significant efforts to align its PIL rules on succession with the relevant EU legal framework. Despite significant degree of harmonisation in this area, certain discrepancies remain, particularly with regard to the rules on jurisdiction and applicable law. These differences provide the rationale for the present paper's analysis of both aspects, which enable to identification of potential coordination problems which may arise when discussing inheritance with foreign element. The first part of the research examines jurisdiction rules for succession matters with a foreign element in the EU Succession Regulation and in Montenegro and procedural mechanisms for prevention of jurisdictional conflicts. The analysis then focuses on the conflict-of-law rules applicable to succession matters and the mechanisms for determining the governing law, focusing on provisions that may cause coordination problems. Based on the conducted analysis, the study demonstrates that divergences of the rules on international jurisdiction and applicable law may complicate the resolution of cross-border succession cases involving Montenegro and Member States of EU, thereby undermining legal certainty and procedural efficiency. The findings highlight the need for greater coordination and harmonization of the relevant legal frameworks. In this regard, the research identifies potential legislative solutions aimed at reducing or eliminating the adverse effects of these differences, ultimately contributing to more predictable outcomes and more effective adjudication of international succession disputes.*

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**KEYWORDS:** *Succession Regulation, Montenegrin Private International Law, cross-border inheritance, international jurisdiction in probate proceedings, law applicable to succession.*

## 1. Introduction

This research presents a comparative analysis of the Private International Law (PIL) for inheritance in Montenegro and in the European Union (EU), with particular regard to the impact of the provisions of Succession Regulation on the Montenegrin PIL Act.

Montenegro is a candidate country for accession to the EU, and it has the obligation to harmonise its law with the EU *acquis*. Therefore, provisions of the Montenegrin PIL Act,<sup>1</sup> in the domain of inheritance, provide similar solutions as 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 (Succession Regulation).<sup>2</sup>

At the outset, the study examines probate proceedings and the role of notaries in managing cross-border succession cases within Montenegro and EU Member States. Next, a comprehensive analysis of jurisdiction rules for succession with foreign element is conducted, with emphasis on provisions that may cause positive jurisdictional conflicts between courts of EU Member States and Montenegro and procedural tools for their prevention. Subsequently, conflict-of-law rules are assessed, with particular reference to situations that may cause coordination problems.

The purpose of the study is to examine whether different provisions on international jurisdiction influence the distribution of succession matters between courts, and whether differences in legal norms on determining the applicable law can have an impact on the final inheritance legal result, and to propose solutions to overcome these issues in practice.

1 Private International Law Act, Official Gazette of Montenegro, Nos. 1/14, 6/14, 11/14, 14/14 and 47/15.

2 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 L 201, 27 July 2012, pp. 107–134, hereinafter: “Succession Regulation”.

## 2.

### Probate Procedure and the Role of Notaries

In Montenegro, probate proceedings are conducted in a non-contentious procedure and are initiated by the court *ex officio* as soon as it finds out that a person has died or has been declared dead. Then, the court examines whether procedural prerequisites are met (whether it has international jurisdiction, among others) and only when this criterion is satisfied, it proceeds to the stage of deciding on the substance of the case.<sup>3</sup>

The international jurisdiction of Montenegrin courts in succession matters is governed by the rules of the PIL Act,<sup>4</sup> whereas rules on material and territorial jurisdiction are provided by the Civil Procedure Act, in connection with the Non-Contentious Procedure Act.<sup>5</sup> The Basic Court in the area where the deceased had his residence at the time of his death is competent to discuss the succession (probate court).<sup>6</sup>

Amendments on the Non-Contentious Procedure Act from 2015 introduced the obligation of the notaries to act upon appointment of a court, as court commissioners in probate proceedings, and to issue a decision on succession.<sup>7</sup> Acts of the appointed notary are deemed as acts of the court. However, in the case that there is a dispute in relation to legal issues or the facts, the case is returned to the court for a decision.<sup>8</sup> The court will entrust the notary with conducting the probate procedure and deliver to him the death certificate and the proposal for initiation of the probate procedure.<sup>9</sup> When the notary carries out actions in the process of discussing inheritance as an commissioner of the court, he is authorised, as with the court, to take actions and make decisions; thus, he shall apply foreign applicable law *ex officio*.

3 Jakšić, 2021, p. 381; Stanivuković, Đundić and Đajić, 2022, p. 233.

4 Art. 2, para. 2 of the Non-Contentious Procedure Act, read in conjunction with Art. 29 of the Civil Procedure Act, stipulates that the rules on international jurisdiction for civil proceedings are accordingly applied to non-contentious procedure, that is, probate proceedings.

5 Arts. 29 and 30 of the Civil Procedure Act.

6 Art. 95 of the Non-Contentious Procedure Act.

7 Art. 94, para. 4 of the Non-Contentious Procedure Act provides that the notary cannot conduct the probate procedure in case it is necessary to appoint a temporary guardian of the estate, or a request has been made to separate the estate from the property of the heir, or it is necessary to determine measures to secure the estate.

8 Korać, 2018, p. 262.

9 Art. 94, paras. 1 and 2 of the Non-Contentious Procedure Act.

Data on the PIL application in probate proceedings are publicly available, and last year, Montenegrin notaries resolved 185 succession proceedings with a foreign element.<sup>10</sup>

Thus, Montenegro's approach to probate procedures appears to align with practices within the EU. Even though the Succession Regulation does not affect the competence of the authorities of the Member States to deal with matters of succession,<sup>11</sup> it places emphasis on the role of notaries, who are, per the Regulation, considered to constitute the "court". Namely, in resolving specific disputes within the framework of the relevant procedure, where their decisions carry the weight of the decisions of a court, notaries may be regarded as a court under Art. 267, para. 2 of the Treaty on the Functioning of the EU (TFEU). Active legitimation of the notary to refer to the Court of Justice of the EU (CJEU) comes from the fact that they act upon appointment of a court as a court commissioner in succession matters.<sup>12</sup>

### 3. International Jurisdiction

The rules on international jurisdiction in Montenegro are similar to the rules contained in Succession Regulation. This section comparatively analyses the rules on general jurisdiction (Arts. 4 of the Succession Regulation and 127 of the PIL Act), subsidiary jurisdiction (Arts. 10 of the Succession Regulation and 128 of the PIL Act), necessity jurisdiction (Art. 11 of the Succession Regulation), as well as the rules on choice-of-court agreements (Arts. 5 of the Succession Regulation and 129 of the PIL Act).<sup>13</sup>

#### **3.1. General Jurisdiction**

Art. 127 of the Montenegrin PIL Act<sup>14</sup> mirrors Art. 4 of Succession Regulation, and provides that courts of the state where the deceased had his habitual residence at the

10 Ministry of Justice (2024) Report on the Application of Private International Law (July 2023–July 2024) [Online]. Available at: <https://www.gov.me/dokumenta/906b58d9-b643-431d-8115-585bc3dab902> (Accessed: 31 October 2024).

11 Art. 2 of the Succession Regulation.

12 Dutta, 2013, p. 2; Bogdan, 2016, p. 38.

13 Đorđević, 2020, p. 29.

14 Art. 127 of the PIL Act provides that the court of Montenegro has jurisdiction to rule on succession if the deceased had his habitual residence at the time of death in Montenegro.

time of death shall have jurisdiction to rule on the succession as a whole, regardless of the place where his property is located.

Unlike its predecessor, the Act on Resolution of Conflict of Laws with Regulations of other Countries,<sup>15</sup> the New PIL Act does not provide for exclusive jurisdiction of the court of Montenegro to rule on immovable property located in Montenegro. The Montenegrin legislator has taken this approach with the aim of establishing the essential conditions for maintaining the principle of unity of succession, while aligning domestic legislation with EU standards. Therefore, when the PIL Act was adopted, the rules on exclusive jurisdiction for immovable property were omitted from the Act on Resolution of Conflict of Laws with Regulations of Other Countries; thus, international jurisdiction for inheritance, whether of immovable or movable property, is determined according to the rules on elective jurisdiction.

The main reason for introducing the habitual residence as a connecting factor for successions in the Montenegrin legal system was the need for harmonisation with the Succession Regulation, which would satisfy the need for close connection with the given state and enhance legal certainty and predictability.<sup>16</sup> At the EU level, habitual residence is the most important objective connecting factor – that is, an integrative factor enabling that the same law is applied to all members of the international family. Further, by the application of habitual residence, the problem of classification under foreign law is avoided, whereas nationality is traditionally qualified by the *lex cause*.

Besides these commendable aspects, the habitual residence of the deceased was criticised in doctrine as a vague concept that leaves too much discretion to the courts when deciding and that it may lead to *forum shopping*.<sup>17</sup>

To determine the habitual residence, the court should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, considering all relevant factual circumstances, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned, taking into account the specific aims of this Regulation.<sup>18</sup>

Therefore, to establish that the deceased had a habitual residence in a particular country, it is necessary to demonstrate that he had been present there for a sufficient period of time.<sup>19</sup> Although it indicates the stability of residence, the time factor (regular presence) cannot be considered decisive in itself; other conditions should

15 Jurisdiction rules in cross-border succession cases were contained in Arts. 71, 72 and 73 of the Act on Resolution of Conflict of Laws with Regulations of Other Countries.

16 Kostić-Mandić, 2022, p. 570.

17 Aras Kramar, 2020, p. 100; Poretti, 2019, p. 14.

18 Recital 23 of the Succession Regulation.

19 Lamont, 1997, p. 137.

also be met, such as the family situation and the social integration of the deceased in a certain community, which would indicate a close connection with the country in question. If the habitual residence cannot be determined on that basis either, it will be determined based on the principle of closest connection.<sup>20</sup> It may be the case that there is an aspiration to establish a habitual residence in a short period of time, and the intention of the person concerned to establish the habitual centre of his or her interests in a particular place.<sup>21</sup> In this case, the relationship between the length of stay and the intention to stay in a certain place will have to be weighed.<sup>22</sup> Therefore, in this assessment, the shorter the period of residence, the more important the question of intention will be.<sup>23</sup>

In the *E.E.* case, the CJEU established that the deceased can have only one habitual residence at the time of death. This view is supported by the arguments of predictability, legal certainty, and prevention of contradictory decisions and the fact that the intention of the Regulation is to regulate succession as a whole to prevent its fragmentation.<sup>24</sup>

This decision is significant because the CJEU set a standard, that is, a hierarchy of terms for determining the habitual residence of the deceased in complex cases. First, to determine the habitual residence, the authority should carry out a comprehensive assessment of the circumstances of the deceased's life during the years preceding his death and at the time of his death, considering all relevant facts, in particular the duration and permanence of the presence of the deceased in the country in question and conditions and reasons for that presence. Next, the authority should check where the centre of interests of the deceased was his family and social life. Depending on the circumstances of the case, the deceased can still be considered to have his habitual

20 Nita, 2022, p. 269.

21 There is no minimum time required before a new habitual residence can be established; it depends on the facts of the particular case, but it may be acquired in as little as one day. See *AB v CD* [2018] EWHC 1021; HR (2018) Case no. C-512/17, ECLI:EU:C:2018:513.

22 A. (2009) Case no. C-523/07, ECLI:EU:C:2009:225.

23 Rogerson, 2000, p. 96.

24 A citizen of Lithuania married a German citizen, and from the moment of her marriage until her death, she lived in Germany with him and her minor son from an earlier relationship, E.E. While living in Germany, she travelled back to Lithuania, where she drew up a will at a notary's office, in which she left all her inheritance to her son E.E. After the death of his mother, E.E. contacted the notary's office in Lithuania with a request to start the inheritance procedure and issue a certificate of inheritance rights. The notary refused to initiate probate proceedings, arguing that, according to the Succession Regulation, the deceased's habitual residence at the time of death was in Germany and that the German authorities were competent. The deceased's spouse clearly stated that he waives the inheritance and consents to the jurisdiction of the Lithuanian courts. One of the questions raised in the proceedings was whether, for the purposes of the Regulation, a person can have more than one habitual residence. See *E.E.* (2020) Case no. C-80/19, ECLI:EU:C:2020:569.

residence in his State of origin in which the centre of interests of his family and his social life was located.

Only if this is still not sufficient to establish habitual residence, in cases where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them, a secondary set of criteria should be considered – the nationality and place where the assets are located. If the deceased was a national of one of those States or had all his main assets in one of them, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.<sup>25</sup>

Even if the PIL Act makes it clear that courts, and notaries as commissioners of the court, have elective jurisdiction to rule on inheritance as a whole, in practice, a certain number of notaries continue to generally assume exclusive jurisdiction over matters involving immovable property situated in Montenegro. For instance, this was the case in the succession procedure that was discussed in front of a notary from Podgorica, who provided us with information for the purposes of this research. The deceased was a citizen of Croatia, where he also had habitual residence at the time of his death in 2018. Inheritance consisted of immovable property located in the municipalities Labin (Croatia) and Danilovgrad (Montenegro). The Croatian notary refused to rule on the immovable property located in Montenegro and instructed the heirs to address the notary in Montenegro.<sup>26</sup>

This practice remained because the Act on Resolution of Conflict of Laws with Regulations of Other Countries, which was applied for a long time before the New PIL Act was introduced, provided exclusive jurisdiction for immovable property. However, currently, there is no positive law provision that would allow such an interpretation. To prevent similar practices in the future and provide detailed instructions for notaries, guidelines for the application of the PIL in the practice of notaries were formulated.<sup>27</sup>

### **3.2. *Subsidiary Jurisdiction***

In some cases, general jurisdiction rules may be insufficient – for instance, when the deceased has had a habitual residence outside EU, in a third State, but there is still a need for jurisdiction of the court of the EU Member State, because the case is closely connected with that Member State.<sup>28</sup> However, it should be emphasised that

25 Recital 24 of the Succession Regulation; E.E. (2020) Case No. C-80/19, ECLI:EU:C:2020:569, para. 40.

26 Kostić-Mandić, 2022, p. 595.

27 Ibid., p. 28.

28 Dutta, 2013, p. 2.

Art. 10 cannot be applied in situations when the last habitual residence cannot be determined, because the Succession Regulation rests on the assumption that every deceased person has a habitual residence.

Rules on subsidiary jurisdiction apply if the habitual residence of the deceased at the time of death is not located in a Member State, and has as a criterion the place where the assets are located. Namely, in this case, Art. 10, para. 1 of the Succession Regulation provides that the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as the deceased had the nationality of that Member State at the time of death; or, failing that the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed. This provision is in accordance with the principle of unity of succession, because it provides jurisdiction for the inheritance as a whole.

However, the same cannot be said for Art.10, para. 2, which represents an exception from the principle of the unity of succession. The jurisdiction provided by this paragraph is limited to the assets located in the territory of the court.<sup>29</sup> This article provides that where no court in a Member State has jurisdiction pursuant to Art. 10, para. 1, the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

This provision is criticised in doctrine for possibly causing positive conflicts of jurisdiction between courts of the member states and courts of third states.<sup>30</sup> Further, it is suggested that motives of the lawmaker for deviating from the principle of unity of succession are not clear, while it does not take into account the possibility that courts of the third states may also have jurisdiction to rule on inheritance as a whole.

The rules on subsidiary jurisdiction contained in Art. 128 of the PIL Act differ to some extent from those in Art. 10 of the Succession Regulation, which provides: 'if the deceased did not have a habitual residence in Montenegro at the time of death, the court of Montenegro will have jurisdiction based on the fact that the assets are located in Montenegro and that the law of Montenegro is chosen as applicable in accordance with Art. 72 of the PIL Act; or the deceased was a Montenegrin citizen at the time of death; or the application of this article applies only to those assets'.<sup>31</sup>

The possibility that courts of Montenegro have jurisdiction to decide on assets located in Montenegro when Montenegrin law is chosen as applicable is what makes this article somewhat different from the rule contained in the Succession Regulation.

29 Radoja, 2019, p. 53.

30 Ibid., p. 56.

31 Art. 128 of the PIL Act; Kostić-Mandić, 2017, p. 136.

It is also criticised in doctrine that it may cause a scission of succession and positive conflicts of jurisdiction.

### **3.3. Choice-of-court Agreement**

There are notable distinctions between the provisions of the Succession Regulation and those of the Montenegrin PIL Act regarding the prorogation of jurisdiction.

Namely, Art. 5 of the Succession Regulation provides: ‘when the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter’.

To ensure the close connection between the deceased and the chosen law, it is provided that the deceased may choose the law of his nationality at the time of making the choice or at the time of death.<sup>32</sup>

Parties may agree on jurisdiction through formal choice-of-court agreement, which shall be expressed in writing, dated, and signed by the parties concerned;<sup>33</sup> or through informal acceptance of jurisdiction, or a court previously seized has declined jurisdiction in the same case, because it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, considering the practical circumstances of the succession, such as the habitual residence of the parties and location of the assets.<sup>34</sup>

This provision has faced doctrinal criticism for imposing severe limitations on party autonomy.

First, these provisions allow only the choice-of-court of the Member States. If the deceased has chosen a law of the third state of his nationality, parties will not be able to prorogate jurisdiction to courts of that state.<sup>35</sup> The Regulation does not consider the possibility that courts of third countries, such as Montenegro, could have jurisdiction to rule on inheritance as a whole. The harmonisation of legal rules for jurisdiction and applicable law should not be at the detriment of the parties.

From the perspective of a court of a Member State, if the deceased was a Montenegrin citizen, with habitual residence in Germany for example, the general rule in Art. 4 of the Succession Regulation provides that German courts have jurisdiction to rule on succession as a whole. If the deceased left a testament with a choice of Montenegrin law, German courts will still have jurisdiction and heirs (parties in

32 Art. 22, para. 1 of the Succession Regulation.

33 Art. 5, read in conjunction with Art. 7(b) of the Succession Regulation.

34 Art. 7 of the Succession Regulation.

35 Radoja, 2019, p. 57.

probate procedure) will not have the opportunity to prorogate jurisdiction to the Montenegrin court.<sup>36</sup>

The second critique regarding restrictions of party autonomy in Art. 5 relates to the fact that the deceased does not have the option to unilaterally choose a competent court that will decide upon his inheritance.<sup>37</sup> In the best-case scenario, the deceased can conclude agreement on inheritance with future heirs, but he cannot prevent parties from annulling that agreement after his death.

It may be inferred that amendments to Art. 5 of the Regulation are necessary. In cases where the deceased has chosen the law of a third state to govern his succession, *de lege ferenda*, the parties concerned should be enabled to agree that the courts of third states of the chosen law have jurisdiction to rule on succession and allow the courts of the Member States to decline their jurisdiction in favour of the courts of third states, provided that these courts are competent to decide on succession as a whole.

Additionally, the deceased should be allowed to unilaterally prorogate jurisdiction for his property to the courts of the Member States, as well as to the courts in third countries, provided that these courts are competent to rule on inheritance as a whole.<sup>38</sup> If adopted, these solutions appear likely to prevent the fragmentation of succession at the procedural level, thereby upholding the principle of unity of succession when a choice-of-court agreement is in place.

Meanwhile, Article 129 of the PIL Act provides that the deceased may, by disposing of the property in the event of death, determine that the courts of the country of his nationality or habitual residence at the time of choosing the applicable law or of death (the court or courts of the State whose law may be chosen as applicable to succession in accordance with Art. 72), shall also be competent to discuss all or part of the inheritance.<sup>39</sup> For the inheritance of immovable assets, the testator can choose to prorogate jurisdiction to the courts of the country where assets are located, whose law is also applicable per Art. 72. The jurisdiction of the chosen court is exclusive.

The possibility of the testator choosing a competent court for part of the inheritance leads to a scission of succession and opens space for positive conflicts of jurisdiction with the courts of the EU Member States.<sup>40</sup> Further, a question concerns whether such a choice of the court is valid from the perspective of courts of Member

36 Ibid.

37 Dutta, 2013, p. 12.

38 Radoja, 2019, p. 61.

39 Kostić-Mandić, 2017, p. 369.

40 Đorđević and Meškić, 2019, p. 218.

States, when it does not entail succession as a whole.<sup>41</sup> In essence, it is a question of whether courts of the Member States would accept jurisdiction in this situation.<sup>42</sup>

Art. 129 is inadequately formulated and ambiguously phrased, with three main arguments supporting the assertion that it represents an editorial error.

First, one of the basic rules of international civil procedural law is that the domestic legislator cannot provide rules on the international jurisdiction of foreign courts and *vice versa*.<sup>43</sup> Therefore, the Montenegrin PIL Act cannot provide for the jurisdiction of foreign courts, and even if it does, foreign courts would not accept it.

Second, this provision comes from the Commentary on the Draft Succession Regulation by the Max Planck Institute,<sup>44</sup> but it was not adopted in this form in the Succession Regulation. The words 'any succession matter' in Art. 5 are criticised in doctrine as ambiguous and it is not clear if they imply ruling on the succession as a whole. However, there is consensus that the choice-of-court agreement concluded in favour of the court of the Member State may cover any issue related to succession as a whole,<sup>45</sup> that is, the chosen court can decide on the entire property.<sup>46</sup>

Third, given that Art. 129 of the PIL Act stipulates that the chosen jurisdiction of the court is exclusive, problems may arise if the testator chooses a law of the third country for which there is an exclusive jurisdiction of a foreign court. For example, if the testator prorogates jurisdiction to the court of another country for immovable property located in Serbia, for which the Serbian court has exclusive jurisdiction,<sup>47</sup> the decision made by the chosen court will not be recognised in Serbia.

Finally, it appears that this provision is not in accordance with the purposes of the Succession Regulation, including to ensure the unity of succession, establish clear guidelines for jurisdiction and the applicable law, harmonise legal rules and ensure the protection of heirs' rights, and to set forth criteria for the recognition and enforcement of decisions.<sup>48</sup>

41 Radoja, 2019, p. 53.

42 For instance, it could be questioned whether a German court would accept that it has exclusive jurisdiction to rule on immovable assets located in Germany. From the perspective of the German court, where a choice-of-court agreement is concluded, the chosen court has jurisdiction to rule on the inheritance as a whole.

43 Jakšić, 2019, p. 154.

44 Max Planck Institute for Comparative and International Private Law (2010) 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession', 74, pp. 522–720 [Online]. Available at: <https://www.europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf> (Accessed: 31 October 2024).

45 Frimston, 2013, p. 108.

46 Đorđević, 2020, p. 30.

47 Art. 71, para. 1 of the Act on Resolution of Conflict of Laws with Regulations of Other Countries.

48 Golobardes, 2015, p. 22.

Consequently, amendments to Art. 129 of the PIL Act seem necessary. Even in the absence of amendments, this article should be interpreted systematically, in accordance with Arts. 72 and 128 of the PIL Act, in such a way that the deceased may, by disposing of the property in the event of death, determine that the court of Montenegro will be competent if the law of Montenegro is chosen as the applicable law for part or all of the inheritance.

The Succession Regulation, as well as the PIL Act, leave some questions open – for instance what happens when the heirs agree on jurisdiction of the court, but an unknown heir appears at a later stage? The solution to this dilemma would be that if an unknown heir does not contest jurisdiction in front of the chosen court, that court may have jurisdiction. Meanwhile, if an unknown heir contests jurisdiction, then the general jurisdiction rule from Arts. 4 and 10 of the Succession Regulation and Arts. 127 and 128 of the PIL Act should be applied.

### **3.4. *Forum Necessitates***

According to Art. 11 of the Succession Regulation, if the habitual residence of the deceased was in a third state and it is impossible to establish the jurisdiction of any other Member State court under jurisdiction rules of the Succession Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession, if proceedings cannot reasonably be brought or conducted or it would be impossible in a third State with which the case is closely connected.<sup>49</sup>

The case must have a sufficient connection with the Member State of the court seized. Rules on necessary jurisdiction deal with the assets of the estate that are located in a third state.<sup>50</sup>

Meanwhile, the PIL Act does not contain rules on *forum necessitates* in succession proceedings, but rather a general provision contained in Art. 113 of the PIL Act. Similarly, it stipulates that when PIL Act does not provide for the jurisdiction of a court or other authority in Montenegro, and the procedure cannot be initiated in another state or cannot reasonably be expected to be initiated in another state, jurisdiction to decide the case has court in Montenegro with which the case has a sufficient connection.

49 Đorđević, 2020, p. 29.

50 Ibid., p. 30.

#### 4.

### Preventing Positive Conflicts of Jurisdictions

Even though rules on jurisdiction in Montenegro are based on the same criteria as the Succession Regulation and follow the principle of unity of succession, there are several provisions which may cause a scission of succession at the procedural level. Based on the analysis, it can be concluded that among the provisions presenting the greatest challenges in this regard is Art. 10, para. 2, which represents a deviation from the unity of succession in the Succession Regulation and increases the possibility of parallel proceedings. Further, the choice-of-court rules have been subject to substantial criticism. Art. 129 of the PIL Act, allowing a testator to designate exclusive jurisdiction of the courts of the country where immovable assets are located, introduces the potential for a positive jurisdictional conflict with the courts of EU Member States, which may result in decisions that will not be recognised at a later stage.

The Regulation recognises that there is an unavoidable possibility of parallel proceedings before different authorities in Member States relating to the same succession, which may result in the division of the estate as regards the management of succession and in contradictory decisions that will not be recognised in another state.

However, positive conflicts of jurisdiction are anticipated to arise more frequently when assets are situated in third countries that adhere to the principle of scission of succession and provide exclusive jurisdiction of their courts for rulings on the immovable assets.

The primary mechanism for resolving positive conflicts of jurisdiction encompasses rules on *lis pendens* contained in Art. 17 of the Succession Regulation and Art. 114 of the PIL Act.

Pursuant to Art. 17 of the Succession Regulation, where proceedings involving the same cause of action and between the same parties are brought to courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

The rules on *lis pendens* contained in Art. 114 of the Montenegrin PIL Act are somewhat different compared with those in the Succession Regulation. Namely, the notary public in Montenegro does not consider *ex officio* whether proceedings are already being conducted before a foreign court on the same matter and between the same parties, but only upon request of the party. The notary will suspend the domestic procedure if the following conditions are cumulatively fulfilled: 1) that there is a party's request; 2) that the proceedings for that dispute were first initiated before

a foreign court; 3) that there is no exclusive jurisdiction of the court of Montenegro; 4) that it can be reasonably expected that the decision of a foreign court will be eligible for recognition and enforcement in Montenegro.

Additionally, Art. 12 of the Succession Regulation contains a rule on the limitation of proceedings as an effective tool for preventing positive conflicts of jurisdictions with third state courts. The Montenegrin legislator, at the time of the adoption of the PIL Act, had the text of the Proposal of the EU Succession Regulation from 2009 as the model, which did not anticipate the limitation of proceedings – the main reason why this institute is omitted from the PIL Act.<sup>51</sup>

The limitation of proceedings represents an inherent limit from the principle of the unity of succession that empowers the Member State courts to decide not to rule on one or more of assets of the deceased located in the third state, if it may be expected that its decision in respect of those assets will not be recognised and where applicable, declared enforceable in the third state.<sup>52</sup>

There are four conditions that need to be fulfilled for the court of the Member State seized to limit its proceedings. First, the court of the Member State should have jurisdiction (pursuant to Art. 4 or Art. 10 of the Succession Regulation) to rule on the estate comprising the assets located in a third country. Scholars have varying views about situations where the jurisdiction is established in accordance with a choice-of-court agreement. The prevailing opinion is that the parties have the right to request the limitation of proceedings in accordance with Art. 12 in this situation.<sup>53</sup> Second, assets shall be located in a third country. Third, it must be determined that there is an expectation that the decision of the Member State court seized will not be recognised in a third country in respect of the assets located there, taking into consideration all the grounds for refusal of recognition established by the laws of that third state. However, exclusive jurisdiction of a third state court seems to be the most frequent

51 Kostić-Mandić, 2017, p. 367; Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final, No. 2009/0157 (COD) [Online]. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0154:FIN:EN:PDF> (Accessed: 31 October 2024).

52 Art. 12 of the Succession Regulation.

53 Đorđević, 2020, p. 21; Dutta, 2013, p. 24. The other opinion is based on a different interpretation of the wording “any succession matter” in Art. 5 of the Succession Regulation. It holds that the parties had the opportunity to exclude assets located in a third state from their choice-of-court agreement but did not do so; the omission should be interpreted as an implicit waiver of their right to request the application of Art. 12(1). See Panopoulos, 2017, p. 101.

reason for invoking the Art. 12.<sup>54</sup> Finally, its application depends on the request of the parties.

This raises the question of the relationship between the rules on *lis pendens* and the limitation of the proceedings. Are the *lis pendens* provisions in the Montenegrin PIL Act sufficient to prevent positive jurisdictional conflicts between courts of Montenegro and other third countries and is it necessary to incorporate the institute of limitations of proceedings into Montenegrin law? Namely, if there is a possibility to apply rules on *lis pendens* in every situation where positive conflicts of jurisdiction arise, that would make the institute of limitations of proceedings superfluous.

Both institutes may be applied in instances where proceedings concerning immovable property situated in a third country were initially commenced within that jurisdiction. However, the purpose of the institute of limitation of proceedings is to prevent decisions that will not be recognised in third states. That is, rules on the limitation of proceedings do not limit the jurisdiction of member state courts, but instead they restrict the scope of the proceedings by excluding its assets situated in a third state.<sup>55</sup> Further, the application of the institute of limitation of proceedings is left to the discretion of the courts; yet, the courts of Member States still have jurisdiction to rule on those assets, but they may decide not to do so in a particular case.

Hence, there are situations where proceedings before the court of Member States cannot be suspended in accordance with *lis pendens* rules, which is where rules on the limitation of proceedings come into play. The application of Art. 12 may be considered reasonable, as the decision to exclude immovable assets situated in a third country from the proceedings of the Succession Regulation effectively prevents any subsequent determination by the court of the Member States to continue the proceedings, which may occur when proceedings are suspended because of international *lis pendens*.<sup>56</sup>

The findings from the analysis indicate that rules on *lis pendens*, even though an effective tool for prevention of positive conflicts of jurisdiction, cannot prevent contradictory decisions in every situation. Therefore, as a recommendation, the Montenegrin PIL Act should incorporate provisions on the limitation of proceedings in alignment with Art. 12 of the Succession Regulation in future legislative interventions.

54 If the court of a Member State is seized to rule on the inheritance of immovable assets located in a third country that provides for the exclusive jurisdiction of its courts to rule on immovable assets, the exclusive jurisdiction of a court of that third state may represent a ground for non-recognition under the law of the third state. See Đorđević, 2020b, p. 34.

55 Đorđević, 2020, p. 31; Panopoulos, 2017, p. 106; Radoja, 2019, p. 59.

56 For instance, when the procedural rights of the defendant were clearly violated in the procedure before the courts of the third country, such that the decision will not be recognised before the courts of the Member States, the courts of the Member States may decide to continue with the proceedings initiated before them. See Đorđević, 2020b, p. 36.

## 5. Conflict-of-law Rules

When determining the applicable law for succession, Montenegrin courts, similar to courts of EU Member States, apply the principle of unity of succession on both levels and provide habitual residence of the deceased as the main connecting factor.

The principle of the unity of succession is often advocated for its advantages in minimising coordination issues and facilitating the distribution of inheritance.<sup>57</sup> However, the current research illustrates that this does not always have to be the case and that due to the existence of choice-of-court agreement, the estate can be divided at the procedural level, which may ultimately result in two decisions that are not compatible with each other and may not be recognised in another country.

Even if the principle of the unity of succession is implemented consistently, there are situations where laws of different countries might be applied, either due to rules on international jurisdiction (because the same law applies only to that part of the inheritance for which the court has jurisdiction) or due to the application of one of the general institutes of PIL (*renvoi*, escape clause, adjustment, prior question, qualification problem), which may lead to splitting of the applicable law and application of the law of another state.<sup>58</sup> Further, there are mandatory rules of *lex fori*, which may provide some limitations when it comes to ownership rights of foreign citizens.

For instance, in cross-border succession cases, a situation may arise when it is unclear which institute of private law should be applied. This was observed in the

<sup>57</sup> Kostić-Mandić, 2017, p. 356.

<sup>58</sup> *Ibid.*, p. 357.

recent CJEU decision in the *T.N.* case,<sup>59</sup> where the question arose whether the waiver of inheritance before the competent court could be qualified as a matter of form (and not of substantive law), which would make the law of the Member States in which waiver was made applicable. However, if this question is qualified as one of substantive law, substitution could be applied.

The CJEU held that a declaration concerning the waiver of succession made by an heir before a court of the Member State of his habitual residence is regarded as valid as to form in the case where the formal requirements applicable before that court have been complied with. That is, for the declaration on the waiver of inheritance to be valid, it is not necessary for the declaration to meet the formal conditions prescribed by *lex successionis*.<sup>60</sup>

Finally, although the intention of the Montenegrin legislator was to align rules on cross-border inheritance with solutions in EU, the PIL Act does not contain a provision, as is the case for contractual and non-contractual obligations,<sup>61</sup> that domestic authorities shall interpret and apply the provisions of PIL for inheritance in accordance with EU law.<sup>62</sup>

59 The deceased was a Dutch citizen who died in Bremen, where he was habitually resident. His heirs were his widow and the two children of his predeceased brother. His widow applied for a joint certificate of inheritance before the court in Bremen, which would grant her three quarters of the inheritance and one eighth to each of the heirs. However, the two heirs declared before the court in The Hague, where they had their habitual residence, that they were waiving their inheritance. In the proceedings before the court in Bremen, T.N. and N.N. were heard and, in a letter in Dutch, submitted copies of their declarations of renunciation of inheritance. The German court replied that it would not take these documents into account until it had received a German translation. The court in Germany issued a decision recognising them as heirs, together with the widow of the deceased, because the period prescribed by German civil law, six weeks after learning of the inheritance, had expired, and within that period they had not submitted a declaration of renunciation in German. The court does not state whether this interpretation was achieved through substitution or qualification as a matter of form, but, given that it generally followed the approach of the Advocate General, it seems that it accepted that this qualifies as a matter of form. Further, the court found that it is sufficient to meet the conditions prescribed in the country of habitual residence of the heir, as long as the court called upon to decide on the succession is aware of the existence of such a declaration of renunciation [49]. The threshold for this awareness appears to be very low, but, 'in the absence of a single system in EU law providing for the communication of declarations' referred to here, the person submitting the declaration must ensure that it is brought to the attention of the court [48]. The aim of the Regulation is to enable heirs to make declarations of renunciation of inheritance in the Member State of their habitual residence, meaning that the heirs are not required to take further formal actions before the courts of other Member States other than those provided for by the law of the Member State in which such a declaration was made, as such declarations would be considered valid. See *T.N. and N.N.* (2022) Case No. C-617/20, ECLI:EU:C:2022:426.

60 *T.N. and N.N.* (2022) Case No. C-617/20, ECLI:EU:C:2022:426, paras. 35 and 37.

61 Arts. 49 and 67 of the PIL Act.

62 Kostić-Mandić, 2022, p. 567.

### **5.1. General Rule**

Art. 71 of the Montenegrin PIL Act mirrors Art. 21 of the Succession Regulation and provides that the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death. The Succession Regulation provides for universal application and stipulates that any law specified by this Regulation shall be applied regardless of whether it is the law of a Member State.<sup>63</sup> The same conclusion can be drawn regarding the PIL Act.

The Succession Regulation also contains the escape clause and states that where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State, other than the State whose law would be otherwise applicable, the law applicable to the succession shall be the law of that other State.

Given the broadness of the concept of habitual residence, it is surprising that the European legislator considers that additional fairness in individual cases can be achieved by providing for the escape clause. However, the purpose of this escape clause is to allow the court to apply foreign law, with which the testator is closely related, but to leave out of question its own international jurisdiction, which is based on the habitual residence of the deceased.<sup>64</sup>

### **5.2. Choice-of-law**

Aligned with contemporary trends in comparative inheritance law, the Succession Regulation and PIL Act provide rules on party autonomy for inheritance. However, this autonomy is constrained with the requirement for a substantial connection between the deceased and the chosen law.

Namely, Art. 22 of the Succession Regulation provides that a person may choose, as the law to govern his succession as a whole, the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

However, Art. 72, para. 2 of the PIL Act differs from Art. 22 of the Succession Regulation, which provides that the testator may choose, as the law to govern his succession as a whole, the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities

<sup>63</sup> Art. 20 of the Succession Regulation.

<sup>64</sup> Dutta, 2013, p. 14.

may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.<sup>65</sup>

For the inheritance of immovable assets, the deceased can choose the law of the country where the immovable assets are located. In this case, *dépeçage* is an exception to the regime of unitary succession.<sup>66</sup>

The choice of law must be explicit or clearly derived from the circumstances of the case and in the form provided for the disposal of property in the event of death (will, joint will, or inheritance contract). The existence and material validity of the choice of applicable law is assessed according to the chosen law.<sup>67</sup>

However, it should be stressed that the existence and material validity of will are assessed either in accordance with the chosen law or with the law of habitual residence. The legal capacity to create a will is also governed by the law that is applicable for the existence and validity of the last will. If the applicable law has been changed at a later stage, it will not have an influence on the capacity to create a will.<sup>68</sup>

The rights of intestate heirs on their compulsory share represent mandatory rules and are protected by the Succession Act of Montenegro.<sup>69</sup> Therefore, the testator cannot exclude these rules by choosing another applicable law, because the court will, at the request of the parties, find that the right on compulsory share is violated by testament.<sup>70</sup> The only exceptions to this rule would be those rare cases where conditions, provided by the Succession Act, on exclusion of the right to the compulsory share are met.<sup>71</sup>

A similar issue was discussed before the German Federal Court of Justice, which held that the choice of English law for the succession of a British citizen, with habitual residence in Germany, was not valid, because it was contrary to German Public Policy. In this case, the testator has completely excluded his son from the will and has chosen English law as applicable. The court emphasised that the son, a German national, had a constitutional right to a compulsory share under German law, which was part of German Public Policy.<sup>72</sup>

65 Art. 22, para. 1 of the Succession Regulation.

66 Kostić-Mandić, 2022, p. 81.

67 Dika, Knežević and Stojanović, 1991, p. 75.

68 Kostić-Mandić, 2017, p. 370.

69 Arts. 27, 28 and 29 of the Succession Act of Montenegro.

70 Kostić-Mandić, 2017, p. 370.

71 Art. 46 of the Succession Act of Montenegro.

72 BGH, Case No. IV ZR 110/21, Decision of 29 June 2022.

### 5.3. Scope of Applicable Law

When dealing with cross-border successions, a problem of characterisation may arise. This problem is usually solved by acceptance of the characterisation *lex fori*, meaning that a court dealing with an inheritance case will, in most situations, opt for characterisation by the law of the country of the court. The only generally accepted exception to this rule is the designation of things as movable or immovable, which should be characterised *lex causae*. For instance, in some situations, the jurisdiction of the probate court may depend on the characterisation of assets, and applying this rule, the characterisation should be carried out according to the place where the matter is located.<sup>73</sup>

In the context of the EU's PIL, the characterisation problem is often manifested in defining the boundaries of applicability among various legal instruments, because EU law is contained in diverse legal instruments. Specifically concerning the Succession Regulation, there are many bordering areas, which remain outside the scope of European choice-of-law rules, so the question of their characterisation may arise.<sup>74</sup>

On the level of European choice-of-law rules, the characterisation problem shall be resolved autonomously – that is, applying the principle of autonomous interpretation of the EU law.<sup>75</sup>

To avoid problems of characterisation, in Art. 76 of the PIL Act, as in Art. 23 of the Succession Regulation, the Montenegrin legislator provides that law determined by these rules shall govern in particular:

*'(a) the causes, time, and place of the opening of the succession; (b) the determination of the beneficiaries, of their respective shares, and of the obligations that may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner; (c) the capacity to inherit; (d) disinheritance and disqualification by conduct; (e) the transfer to heirs and, as the case may be, to the legatees of the assets, rights, and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy; (f) the powers of the heirs, the executors of the wills, and other administrators of the estate, in particular as regards the sale of property and payment of creditors, without prejudice to the powers referred to in Arts. 29(2) and (3); (g) liability for the debts under the succession; (h) the disposable part of the estate, the reserved shares,*

73 Stanivuković and Živković, 2023, pp. 259–261.

74 Solomon, 2016, p. 193.

75 Bogdan, 2010, pp. 134–147.

*and other restrictions on the disposal of property upon death, as well as claims that persons close to the deceased may have against the estate or heirs; (i) any obligation to restore or account for gifts, advancements, or legacies when determining the shares of the different beneficiaries; and (j) the sharing-out of the estate’.*<sup>76</sup>

#### 5.4. Renvoi

The renvoi is provided in Art. 34 of the Succession Regulation with the aim of promoting international harmony of decisions in cross-border succession cases.<sup>77</sup>

The renvoi applies only to cases where the applicable law determined by the Succession Regulation refers to the law of a third State as the law applicable to the succession, including its rules of PIL in so far as those rules make a *renvoi* to the law of a Member State or to the law of another third state that would apply its own law.<sup>78</sup>

Further restrictions are provided in Art. 34, para. 2, which excludes the application of renvoi with respect to the laws of third states designated by the escape clause,<sup>79</sup> or in the case of the choice of law,<sup>80</sup> formal validity of dispositions of property upon death made in writing,<sup>81</sup> and special rules imposing restrictions concerning or affecting the succession with respect to certain assets.<sup>82</sup>

In contrast to its predecessor, the Act on the Resolution of Conflict of Laws with Regulations from other Countries, which led to different interpretations of this institute,<sup>83</sup> the PIL Act has opted for selective renvoi in one step.<sup>84</sup>

Under the PIL Act, where reference is made to foreign law, it includes foreign conflict-of-law rules and those rules shall also apply, unless otherwise provided for by the PIL Act or some other Act.<sup>85</sup> If it reverts to Montenegrin law, domestic substantive law shall apply, and if a foreign conflict rule redirects to the law of a third country, the substantive law of a third country shall apply.<sup>86</sup>

Therefore, the law foresees the mandatory application of renvoi, except in the cases that are exhaustively listed in Art. 4, para. 2 of the PIL Act, when renvoi is

76 Art. 23 of the Succession Regulation.

77 Recital 57 of the Succession Regulation; Đorđević, 2020a, p. 91.

78 Art. 34, para. 1 of the Succession Regulation; Đorđević, 2020a, p. 92.

79 Art. 21, para. 2 of the Succession Regulation.

80 Art. 22 of the Succession Regulation.

81 Art. 27 of the Succession Regulation.

82 Art. 30 of the Succession Regulation.

83 Dika, Knežević and Stojanović, 1991, pp. 25–30.

84 Kostić-Mandić, 2017, p. 87.

85 Art. 4 of the Private International Law Act.

86 Art. 4, para. 3 of the Private International Law Act.

not allowed, specifically when it comes to: '1) the legal position of legal entities and forms of organisation that do not have legal status; 2) forms of legal affairs; 3) choice of governing law; 4) maintenance; 5) contractual relations; and 6) non-contractual relations'.

It is generally considered that it is not justified to apply *renvoi* in a situation where the parties themselves have chosen the applicable law (because the parties chose the substantive law of that country, not the conflicting norms) or the goal of the conflicting norm is to keep a certain legal transaction in force or protect a weaker contractual side.<sup>87</sup>

## 6. Conclusion

This study comparatively analysed the PIL rules for inheritance in the EU and in Montenegro. Rules on international jurisdiction, from the perspective of prevention of positive conflicts of jurisdiction were examined, followed by a comparative analysis of choice-of-law rules. Even though jurisdiction rules are based on the principle of unity of succession, there are situations where they may lead to a scission of succession. This is particularly so in cases involving third countries or situations involving choice-of-court agreement.

This may lead to fragmentation of succession at the procedural level and can cause parallel proceedings with different outcomes, that is, divergent decisions that will not be recognised in another state. Coordination problems can also arise due to different conflict-of-law rules, which in the final outcome, can have an impact on the distribution of the inheritance and significantly influence the inheritance result.

Examples include a decision according to which the same person is the heir per the law of one state but not of another state, or a decision in which one of the heirs will obtain a larger or smaller share of inheritance than he would receive if the entire inheritance was discussed only before the authorities of one legal order.

When the court of one country declares itself competent to decide on a probate matter, then the parties have the right to be treated equally in the same situations. That is, the interest of the parties is that the substantive legal solution is the same, regardless of the court of which country the decision is made, and failure to meet this standard may prevent the legitimate expectations of the parties from being realised.<sup>88</sup>

The problem of uncoordinated cross-border successions between EU and third countries, such as Montenegro, can only partially be mitigated through the

<sup>87</sup> Kostić-Mandić, 2022, p. 139.

<sup>88</sup> Jakšić, 2017, p. 537.

recognition of foreign judgments, the application of *lis pendens*, and institute of limitation of procedures. However, achieving this remains an ideal that is, to a large extent, aspirational even between countries that have substantially harmonised rules on PIL with EU law.

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- Succession Act, Official Gazette of Montenegro No. 74/08 and 75/17.