UDK 341.932.3(497.11)
DOI: 10.5937/RKSPP2401009S

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CONTRACTS WITH NO GOVERNING LAW IN SERBIAN PRIVATE INTERNATIONAL LAW

This contribution is based on a national report for the XVIIth International Congress of Comparative Law written by the author in 2006. The text is accompanied by author's introduction and footnote commentary regarding further developments that have taken place in Serbian law since then. The author discusses the permissibility in Serbian Private International Law of clauses exempting the contract from the application of any law or subjecting it to the application of non-State rules of law. The analysis begins with the expression "le contrat sans loi" and the various meanings ascribed to it. The limits to party autonomy, namely, the possibility for the parties to select non-State rules of law or to exclude any law whatsoever, are outlined in Chapter 2. In this chapter the author discusses the permissibility of such agreements, the requirements for the formulation of choice, and possible limitations to the choice of non-State rules of law. In Chapter 3, the author examines the question of whether the courts and arbitrators can designate non-State rules of law in the absence of the parties' choice. The recognition of foreign judgments and arbitral awards based on the application of non-State rules of law is discussed in Chapter 4. The author draws certain conclusions as to the current state of Private International Law in Serbia regarding contracts with no governing law.

Key words: *law applicable to contracts, Private International Law, non-State rules of law, a-national law*

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INTRODUCTION

From July 16 to 22, 2006, I attended the XVIIth International Congress of Comparative Law held in Utrecht, the Netherlands. During the congress, I served as the national reporter for Serbia and Montenegro, focusing on the topic "Contracts with no Governing Law in Private International Law and Non-State Law – *Le contrat sans loi en droit international privé*". This topic, as highlighted by the American national rapporteur, Professor Symeon Symeonides, was "by no means self-explanatory".[1] Nevertheless, it was the topic of significance for Private International Law at the time, which likely contributed to its selection at the Congress.[2] The rapporteur général, Professor Léna Gannagé, sought to establish to what extent the long-standing efforts of advocates of internationalization of contracts bore fruit in national (municipal) laws.

In the early twentieth century, the prevailing legal assumption was that "[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country".[3] However, beginning in the 1950s,[4] this logical legal assumption faced challenges, undermining its authority through various legal constructs, including the doctrine on "le contrat

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[1] Symeon Symeonides, "Contracts Subject to Non-State Norms", *The American Journal of Comparative Law*, Vol. 54, American Law in the 21st Century: U.S. National Reports to the XVIIth International Congress of Comparative Law, Fall, 2006, 209.

[2] A cursory examination of recent academic literature shows that this topic is now relegated to the background. This might be the result of the emergence of investment arbitration and investment treaties, which have overtaken the spotlight from the previous discussions focused on the applicable law to State-investor contracts. The internationalization of investment contracts is now commonplace. It occurs through the application of treaty standards to conduct of State, both as a sovereign and as a party to a contract. The role of the host-State law is where the proponents of internationalization intended it to be – reduced to insignificance. See, Sanja Đajić, Maja Stanivuković, "Unutrašnje pravo u međunarodnoj investicionoj arbitraži: zaboravljeni i zapostavljeni izvor prava", *Anali Pravnog fakulteta u Beogradu*, 2017, No. 2, Vol. 65, 70–90; Petar Đundić, "Merodavno pravo za suštinu spora pred arbitražnim sudovima IKSID: član 41(1) IKSID Konvencije i uloga nacionalnog prava", *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 4, Vol. 51, 2017, 1627–1649.

[3] Case concerning the Payment of various Serbian Loans issued in France, PCIJ, Collection of Judgments, Series A., Nos 20/21, 1929, 41. This pronouncement concerned a loan contract concluded in Paris in 1902, by the Serbian Government with a group of French, Austrian, English, Swiss and German banks.

[4] Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, Cambridge University Press, 2015, 96. One of the first books that promoted the creation of a transnational law for international trade was P. C. Jessup's, *Transanational Law*, Yale University Press, New Haven, 1956.

sans lois". These theories aimed to exempt and insulate high-stake contracts, especially investment contracts in extraction industries, from the legal power and influence of host States.[5] The primary focus of these efforts was to protect contracts for the exploitation of oil, which foreign companies concluded with host States, their agencies, or State-owned companies – referred to as "State contracts". The push for their "internationalization" rested on the advocacy of the idea that, due to their unique characteristics, these contracts should be governed by legal rules external to the host States, such as general principles of international law. Another theory was that these international transactions were self-governing and exempt from the application of any State law.

An integral aspect of this internationalization process was the selection of a foreign-seated arbitral tribunal as the chosen forum.[6] The ultimate aim of these internationalization efforts was to grant arbitrators a wide latitude of discretion in resolving high-value contractual disputes.

The outcome of these efforts was summarized by Rodriquez:

> "Arbitrators enjoy greater decision-making freedom than public servant adjudicators. Gabrielle Kaufmann-Kohler characterizes this broad discretion as 'truly striking' due to its far-reaching impact on the case. This latitude derives from the broad powers granted to arbitrators in mainstream legislation, combined with the fact that most jurisdictions allow no review on the merits of their award."[7]

The theory that the contract itself represents an external legal order capable of governing certain kinds of contracts is attributed to Alfred Verdross.[8] He distinguished between State contracts, which are concluded between the foreign investor and the host country's government, and which refer to international arbitration, and other contracts. He labelled the former as "quasi-international agreements". According to his teachings, these contracts are neither governed by a law of any

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[5] The panoply of grounds used for justifying the avoidance of municipal courts and law was recently reiterated in the Hague Academy lectures. See, Jose Antonio Moreno Rodriguez, "Private (And Public) International Law in Investment Arbitration", *Recueil des cours*, Vol. 429, 1923, 478–479.

[6] Ibidem.

[7] *Ibidem*, 474 (references omitted).

[8] Wolfgang Peter, Jean-Quentin de Kuyper, Benedict de Candolle, Arbitration and Renegotiation of International Investment Agreements: A Study with Particular Reference to Means of Conflict Avoidance Under Natural Resources Investment Agreements, 2nd edition, Kluwer Law International, 1995, 148 et seq.

specific State nor by international law. Instead, they create a *tertium genus*, a third category. Private rights established by these contracts are governed by the "new legal order" created by the concurring will of the parties.[9]

The status of the contract as the governing law is drawn from the general principle of *pacta sunt servanda*, an international law principle that reflects the municipal law notion of the sanctity of contracts.[10.]

While it may have been somewhat overshadowed in the field of investment arbitration, the topic of "a contract without a governing law" continues to raise interest in international commercial contracts. This is evidenced by its inclusion in the Principles on Choice of Law in International Commercial Contracts, which were approved on 19 March 2015, by the Hague Conference on Private International Law. Article 3, titled "Rules of law" stipulates that "[t]he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise".[11] This principle is intended to be applicable notwithstanding the forum, not just by arbitrators but also by State courts.[12]

The General Reporter for Private International Law at the 2006 Utrecht Congress formulated a set of questions for the national reporters, to which I attempted to respond, drawing from the prevailing law of Serbia and Montenegro at the time. Recently, while organizing my publications, I stumbled upon this text, which had been published at the website of the Netherlands Comparative Law Association before the Congress but never in print form. Given the passage of almost twenty years, I found it intriguing to revisit and present this text now. Notably, during that same summer, Montenegro separated from the State Union with Serbia. Consequently, I have amended the original text to remove references to Montenegrin law. Additionally, I have incorporated various "glosses" based on subsequent sources and my current perspectives, primarily found in the footnotes. I hope readers will find this approach and the text itself engaging.

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[9] See, Alfred Verdross "Quasi-International Agreements and International Economic Transactions", *Yearbook of World Affairs*, 1964, 230. For a critique see, M. Sornarajah, op. cit., 97.

[10] M. Sornarajah, op. cit.

[11] This was a compromise text adopted due to the initial refusal of the European Union delegation to accept non-State law in the Hague Principles. See, J. A. M. Rodriguez, op. cit., 352.

[12] Introduction to the Hague the Principles on Choice of Law in International Commercial Contracts, para. I.18. This was announced as a "novel solution". *https://www.hcch.net/en/instruments/conventions/full-text/?cid=135,* 22 March 2024.

THE EXPRESSION *LE CONTRAT SANS LOI*[13]

The concept of a "contract with no governing law" or "le contrat sans loi" is often discussed in Serbian legal writing, mainly in connection with the choice of the applicable law to merits of the dispute in arbitral proceedings,[14] including investment disputes.[15] This term is usually associated with the ability of parties involved in an international contractual dispute to select non-State rules of law, often termed "non-national", "a-national", or "transnational" rules, as the applicable law for their contract. This concept is also referred to as the parties' right to "internationalize" their contract or to opt for *lex mercatoria* as the applicable law.[16] The idea of allowing parties to choose non-State rules as the applicable law is frequently advocated by scholars specializing in international commercial arbitration. It is particularly relevant in contracts concluded between a State or one of its agencies on one side and a private party on the other.

The 1989 IDI Resolution,[17] suggests that parties in contracts between a State and a foreign company may have greater freedom to choose rules and principles derived from non-national sources of law, such as principles of international law, general principles of law, and usages of international commerce. On the other hand, the 1991 IDI Resolution[18] indicates that parties in international contracts between

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[13] This chapter was written in answer to the General Rapporteur's Questions 1–3. Question 1: Is the expression "contract with no governing law" known in your legal system? Is it used by judges or by scholars? Question 2: Which of the following definitions corresponds to the expression "contract with no governing law": (a) A contract not submitted to any rule of law (state or non-state) and governed exclusively by contractual clauses; (b) A contract not submitted to state law, but governed by non-state norms (such as usages, general principles of law, or *lex mercatoria*); (c) Both or neither of the above? Question 3: Given the different definitions discussed in Question 2, does the distinction between 2(a) and (b) seem relevant to you? Is this distinction made by scholars in your country?

[14] See, Miodrag Trajković, *Međunarodno arbitražno pravo*, Belgrade, 2000, 425–433; Maja Stanivuković, "Izbor pravnih pravila po kojima će arbitraža odlučiti o meritumu spora", *Arbitraža*, No. 1, 2000, 54–74; Aleksandar Jakšić, *Međunarodna trgovinska arbitraža*, Belgrade, 2003, 117–131; Mladen Draškić, Maja Stanivuković, *Ugovorno pravo međunarodne trgovine*, Belgrade, 2005, 79–83.

[15] See, Predrag Cvetković, "Međunarodnopravna zaštita stranih investicija od nekomercijalnih rizika", Doctoral Dissertation, Niš, 2005, 169–178. M. Draškić, M. Stanivuković, op. cit., 79–83;

[16] See, Milena Petrović, "*Lex mercatoria* i međunarodna trgovačka arbitraža", *Međunarodna privredna arbitraža, zbornik radova*, Belgrade, 1997, 215.

[17] Session de St. Jacques de Campostelle, *L'arbitrage entre États – entreprises d'État ou entités étatiques et entreprises étrangères*, Annuaire IDI, Vol. 63-II (1990), 215.

[18] Session de Bâle, Annuaire IDI, *L'autonomie de la volonté des parties dans les contrats internationaux entre personnes privées*, Vol. 64-II, 1992, 383.

private persons or entities may have less freedom in choosing the applicable law. The Resolution provides that they can select the law of any State to govern their contract, while expressly reserving in the preamble the question whether they may choose the application of rules of law other than those of a particular State.

This distinction is generally accepted as legitimate in the writings of domestic scholars, but it is not reflected in the Serbian arbitration law. As will be seen, according to Serbian arbitration law, private (non-State) parties in an international commercial arbitration are free to subject their contract to non-State rules of law, irrespective of whether they are contracting with another private entity or with a State or its agency.

In an international commercial arbitration, it is also possible to remove a contract from the strict application of any law, whether it be State or non-State. This can be achieved through a contractual clause that stipulates the resolution of disputes based on justice and equity (*ex aequo et bono*, or as *amiable compositeurs*).[19] However, such a contract is typically not referred to as *contrat sans loi* in legal theory, even though it is essentially even more a "contract without a governing law" than the contract subjected to the application of non-State rules.[20]

One of the Yugoslav authorities on arbitration law wrote in the 1970s:

> "Arbitrating on the basis of the principle of equity (*amiable composition*, i.e. *ex aequo et bono*) means that *amiable compositeurs* are not bound to stick to regulations... Arbitrators in international commercial arbitration have the task to resolve the dispute not according to this or that law of a country, i.e. according to a state law (statute)... but according to rules that originate in the manner customary in the international business community. These rules constitute a type of true international commercial law or a-national law."[21]

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[19] Author's commentary: The decision-making *ex aequo et bono* is envisaged as an option under the 1961 European Convention, Article VII(2), UNCITRAL Model Law, Article 42(3) and the ICSID Convention, Article 42(3).

[20] Author's commentary: An example of a contract clause providing for *ex aequo et bono* decision-making is found in the *SEEE v. Yugoslavia*: "Les arbitres seront exempt de toutes formalites ils pourront juger en aimables compositeurs et les decisions des arbitres et du tiers arbitre, suivant les cas, seront definitives et obligatoires pour les deux parties". See, Maja Stanivuković, "Evropsko društvo protiv Jugoslavije: saga o najpoznatijoj patološkoj arbitraži XX veka", *Nomophylax: zbornik radova u čast Srđana Šarkića* (Tamara Ilić, Marko Božić, ur.), Beograd, Pravni fakultet Univerziteta Union, Službeni glasnik, 2020, 544.

[21] Aleksandar Goldštajn, *Međunarodna trgovačka arbitraža*, Zagreb, 1975, 24. See also, Aleksandar Goldštajn, The New Law Merchant Reconsidered, *Law and International Trade*, (ed. FS Schmitthoff), Frankfurt am Main, 1973, 171.

According to some views, it is important to differentiate the specific situation of a contract without a governing law from contracts submitted to non-State rules and those which provides for arbitrating based on the principle of equity. A contract without a governing law refers to a situation where the parties have expressly stated their intention that for the provisions of their contract to override any conflicting provisions of national law. In such contracts, the parties aim to avoid the control of any law over their contract and want their dispute to be resolved independently from the provisions of any laws, conventions or other legal sources.[22] This concept differs from deciding on the basis of justice and equity because it obliges arbitrators to give precedence to one instrument – the contract (which embodies the parties' intentions) over the provisions of any other potentially applicable rules.

THE LIMITS OF PARTY AUTONOMY[23]

Permissibility

The law in Serbia allows the parties to remove their international commercial contract from the application of any specific substantive law. If the parties wish, they can opt for the resolution of their dispute by arbitration based on justice and equity (*ex aequo et bono*). This clause is recognized as valid under the European Convention on International Commercial Arbitration (1961),[24] and under the Rules of Procedure before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce in Belgrade (hereinafter: the FTCA).[25] It is worth noting that the European Convention conditions the validity of such a choice upon permission from the *lex arbitri*: "if they may do so under the law applicable to arbitration".

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[22] See, M. Trajković, op. cit., 423; see also, A. Jakšić, op. cit., 126.

[23] Author's commentary: This chapter was written in response to Question 4: Does your legal system prohibit contracts with no governing law in the sense given in definition 2(a) or 2(b)?

[24] European Convention, Article VII(2).

[25] Rules of Procedure, Applicable Law, Article 46(4). This provision was first introduced to the FTCA Rules in their first amendment made in 1958. It was then formulated as follows: Article 39(2) and 39(4): "Arbitrators evaluate facts according to their free conviction and render awards on the basis of applicable laws and regulations and trade usages.... Arbitrators may render an award holding exclusively to the principle of equity only if the parties have given them such authority". Author's commentary: In 2016 the FTCA was replaced by a new institution named "Permanent Arbitration at Chamber of Commerce and Industry of Serbia". Its 2016 Rules retain the possibility for the parties to expressly agree upon an *ex aequo et bono* clause in their contract (Art. 42(4)). Similarly, the Belgrade Rules (Rules of the Belgrade Arbitration Center) provide for this possibility in Article 34(4).

The arbitration law in Serbia is presently undergoing a transition. The older provisions on arbitration, dating back to 1990 and found in the 1976 Code of Civil Procedure (CCP), have been kept in force despite the replacement of the CCP itself in 2004.[26] The new Arbitration Act is pending enactment before the Serbian Parliament since October 2005. According to the 1990 CCP provisions, "an arbitral tribunal may render an award on the basis of justice and equity only if the parties have explicitly vested it with such authority".[27] The Arbitration Bill contains a similar provision.[28]

The position of Serbian law regarding contracts submitted to non-State rules is more difficult to ascertain. In domestic PIL writing, it is widely acknowledged that parties' choice is limited to choosing a national legal system.[29] This limitation, however, does not explicitly stem from the wording of the 1982 PIL Code[30] provision on party autonomy, which refers solely to "law" (*pravo*, *droit, Recht*) without specifying that it must be the law of a State, unlike some other provisions of this Code (e.g., Arts. 21, 26, etc.).[31] In essence, it could be argued that the PIL Code allows a more flexible interpretation, potentially including a choice of non-State rules.[32] However, advocates for this argument are scarce.

The prevailing view maintains that any reference to a non-State system or rules (such as general conditions, model-laws, uniform rules, non-ratified conventions) should be construed merely as a derogation from the directory rules of the

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[26] Author's commentary: The Bill was passed as Arbitration Act on 25 May 2006, and published in the *Official Journal of the Republic of Serbia*, No. 46/06 on 2 June 2006. It entered into force on 10 June 2006.

[27] The Code of Civil Procedure, 1976, as amended in 1990, article 479a. Author's commentary: The former federal Code of Civil Procedure has been repealed. The current law in force is Code of Civil Procedure enacted by the Serbian Parliament in 2011 (*Official Journal of the Republic of Serbia*, No. 72/11, with amendments).

[28] Arbitration Bill, Article 49(2). Author's commentary: The Arbitration Act provides in Article 49(2): "The arbitral tribunal may decide on the basis of justice and equity (*ex aequo et bono, aimable composition*) only if the parties have expressly agreed so.

[29] Author's commentary: For references see, footnote 33.

[30] The 1982 PIL Code, which was enacted in former Yugoslavia as a federal act, remains in force in Serbia. Author's commentary: This has not changed even 18 years later. The 1982 PIL Code remains in force in 2024.

[31] The PIL Code provides in Art. 19: "Contract is governed by the law chosen by the parties, unless provided otherwise in this Code or in an international treaty."

[32] See, Mirko Živković, Maja Stanivuković, *Serbia and Montenegro, International Encyclopaedia of Laws*, *Private International Law*, (ed. Bea Verschraegen), London, Kluwer Law International, 2006, 114–115.

otherwise applicable law ("incorporation"). According to this view, the parties' selection of a non-State system of rules should be treated as substantive choice rather than a conflictual one.[33] Consequently, by opting for non-State rules, parties may replace the directory rules of the otherwise applicable law only, while they cannot exclude the mandatory rules of that same law.

This view was exemplified in a case before the FTCA in Belgrade, where the parties selected the 1968 CMEA General Conditions as the applicable law. In this instance, the choice was treated as substantive one.[34] Although Czech law was determined as the applicable law, the arbitrators concluded that its rules concerning the limitation of actions (set at 3 years) were not mandatory. Given their directory nature, these rules could be replaced by the CMEA General Conditions, which provided for a shorter limitation period of 2 years.[35]

The question of choosing non-State rules is closely related to the question whether parties are allowed to select more than one State law to govern various aspects of their contract. If the latter is allowed, it would be difficult to justify why the former should be prohibited, since an amalgam of different State laws could potentially yield outcomes not attainable under any single law alone. The possibility and desirability of *dépeçage* have been subjects of disagreement in the Serbian PIL literature. Opinions are especially divided on whether parties are free to opt for multiple laws governing various aspects of their contract.[36] Although the PIL Code remains silent on this matter, some authors oppose *dépeçage* by arguing that the provision of Article 19 of the PIL Code is restrictive, because it only speaks of "law" and not of "laws".[37]

All assessments of permissibility thus far have focused on situations where disputes are adjudicated by competent State courts in Serbia. It is conceivable that

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[33] See, for example, Tibor Varady, "Spoljnotrgovinska arbitraža i internacionalističko koncipiranje autonomije volje", *Zbornik radova Pravnog fakulteta u Novom Sadu*, 1970, 149; Mihailo Dika, Gašo Knežević, Srđan Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Belgrade, 1991, 74, Tibor Varady, Bernadet Bordaš, Gašo Knežević, *Međunarodno privatno pravo*, Novi Sad, 2001, 368.

[34] Author's commentary: for better understanding, "substantive choice" can be replaced with "incorporation by reference".

[35] See, Tibor Varady, "Zastarelost i autonomija volje u međunarodnom privatnom pravu – beleške povodom jednog slučaja iz naše arbitražne prakse", *Prinosi*, No. 7, 1977, 3.

[36] See, in favor of *dépeçage*, Tibor Varady, *Međunarodno privatno pravo*, Forum, Novi Sad, 1990, 256; M. Draškić, M. Stanivuković, op. cit., 93; against *dépeçage*, M. Dika, G. Knežević, S. Stojanović, op. cit., 75.

[37] M. Dika, G. Knežević, S. Stojanović, op. cit., 75.

there would be obstacles to fully recognizing the choice of non-State rules as the governing law of contract before State courts. Such a choice would likely be recognized only as a choice of directory rules, with the chosen rules being overridden by any mandatory rules of the objectively applicable law.

A more receptive approach towards the selection of a non-State law is evident in Serbia's new arbitration law. The 2005 Arbitration Bill explicitly allows the internationalization of contract, with the following provision: "The arbitral tribunal in an international arbitration shall render its award by applying the *law* or *legal rules* determined by the parties' agreement. […]."[38] The inclusion of "legal rules" in addition to "law" reflects the conviction of the drafters of the Bill that parties in international commercial arbitration may have a legitimate interest in opting for a non-State set of legal rules to govern their contract. Such interest is anticipated, especially in scenarios involving multi-party contracts with parties from various countries, where identifying a neutral national law proves challenging; in unnamed contract that are unregulated or sparsely regulated in national legal systems; and in contracts stipulating that the *situs* of arbitration will be in the defendant's place of business, among others.[39]

The wording of Serbia's new arbitration law indicates the change in attitude towards the nature of the parties' selection of non-State rules. It signals an acknowledgment of the conflictual nature of such a choice.

Other international legal instruments in force in Serbia also indicate the legislature's willingness to accept the application of a non-State law as the governing law in the arbitration contexts. These primarily include multilateral and bilateral investment treaties. For instance, the ICSID Convention provides in Article 42, that the "tribunal shall decide a dispute in accordance with such *rules of law* as may be agreed by the parties" (emphasis added).[40] Furthermore, Serbia is a party to over forty bilateral investment agreements,[41] many of which include provisions on the

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[38] The Arbitration Bill, Art. 50(1). Author's commentary: Identical wording is found in Article 50(1) and 50(3) of the Arbitration Act (2006).

[39] A. Jakšić, op. cit., 128.

[40] The former Yugoslavia was a member state of the ICSID. However, State succession to this Convention has not been recognized. Serbia and Montenegro signed the Convention in 2002, and ratified it in 2006 (*Official Journal of Serbia and Montenegro – International treaties*, No. 2/06). Author's commentary: According to the ICSID database, Serbia signed the Convention and deposited the ratification instrument on 9 May 2007, and the ICSID Convention entered into force for Serbia on 8 June 2007, *https://icsid.worldbank.org/sites/default/files/ICSID%203/ICSID-3--ENG.pdf*, 12 March 2024.

[41] Author's commentary: Currently, Serbia has 46 BITs in force. See in detail: *https://investmentpolicy.unctad.org/international-investment-agreements/countries/187/serbia*, 13 March 2024.

resolution of disputes between an investor of one contracting party and the other contracting party, some of which also specify the applicable law to such disputes.[42]

While these disputes are typically non-contractual in nature, stemming from breaches of a treaty rather than a contract, it is still noteworthy that the applicable law to such disputes can be non-State law. The prevailing solution in the BITs that contain a choice-of-law clause is the application of: a) the provisions of the BIT itself, b) the law of the Contracting Party in the territory of which the investment was made (the host State), including its provisions on the conflict of laws, and c) generally accepted principles of international law.[43] None of these agreements establish the order of priority among these sources.[44]

The Agreement with Greece stands out as unique,[45] in that it provides for the full internationalization of disputes between the host State and the investor based on breaches of obligations under the Agreement by the host state. Pursuant to its arbitration clause: "The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law."[46]

While there is a readiness in domestic legislation and legal writing to accept the application of a-national legal rules, there exists a different attitude towards situations where parties attempt to create a self-sufficient contract by covering all possible issues and stating their intention that the provisions of their contract should

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For a detailed analysis of the choice of law provisions contained therein see, Milena Galetin, "Merodavno pravo u međunarodnim investicionim sporovima, Doctoral Dissertation, Novi Sad, 2019.

[42] These are the Agreements with China (Art. 9(7)), Spain (Art. 11(3)), Albania (Art. XI), Kuwait (Article 9(6)), Greece (Art. 9(4)), and India (Article 9(3)(v)(iii)). Author's commentary: The 2003 BIT with India was terminated. The following can be added to the list of BITs that include provisions on the applicable law: BIT with Lithuania (Article 8(5)), Egypt (Article 8(5)), Azerbaijan (Article 11(5)), Algeria (Article 9(7)), Canada (Article 33) and Qatar (Article 10(3)(c)).

[43] The Agreement with Kuwait, in addition to the above stated options, mentions the party autonomy as the primary principle for the designation of the applicable law.

[44] Author's commentary: An exception is the relatively recent Serbia-Qatar BIT, which provides the following order: "first the provisions of this Agreement, and second the principles of international law". This provision applies only in ad hoc arbitrations regulated in Article 10(3).

[45] Author's commentary: The Agreement with Greece is no longer unique in this respect. The application of the law of the host State is omitted in Article 8(5) of the Serbia-Lithuania BIT, Article 8(5) of the Serbia-Egypt BIT, Article 33 of the Serbia-Canada BIT, as well as Article 10(3) of the Serbia-Qatar BIT.

[46] The Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Hellenic Republic on the Reciprocal Promotion and Protection of Investments, Article 9(4).

supersede any contrary provisions of any national law. The prevailing scholarly view is that the concept of a contract defined in such a manner cannot be theoretically or legally sustained.[47] There must be supporting legal rules, whether national or transnational, that uphold the validity and binding nature of the contract, while also setting limits to the parties' autonomy.

The formulation of choice[48]

The choice of non-State rules should not be presumed or implied easily from the wording of the contract; it should be expressly stated. The literature on this topic discusses several possibilities regarding parties' choice of non-State rules as applicable law, including the choice of international law,[49] general principles of law or *lex mercatoria*, referencing simultaneous application of national law and general principles of law, selecting principles and rules common to several State legal systems, and more.[50] However, domestic parties are not encouraged to make such choices. On the contrary, they are cautioned that, according to the opinion of prominent legal scholars,[51] considerable uncertainty is implied in such choices.

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[47] Author's commentary: see references in footnote 22. See also, A. Jakšić, op. cit., 144.

[48] This chapter was written in response to Question 7: If the parties were allowed to choose non-state norms: (a) Should the choice be required to be express? (b) Should it be limited to norms that have been "codified"? (c) Could it encompass different bodies of non-state norms for different part of the contract (dépeçage) or should it respect the mandatory rules that are contained in certain bodies of non-state norms?

[49] In an analysis of ICC cases in 1987 in which the parties have chosen the applicable law, it was found that among some 270 contracts, there was only one arbitral clause which provided for internationalization of the contract. This was the arbitral clause in a contract between a Yugoslav and a Kenyan party, which directed the arbitrators to bring the decision on the basis of "international law". See, M. Trajković, op. cit., 415, citing Stephen R. Bond, "How to Draft an Arbitration Clause", *Journal of International Arbitration*, Issue 2, Vol. 6, 1989, 68–78.

[50] See, M. Draškić, M. Stanivuković, op. cit., 83–86. Author's commentary: See also, Maja Stanivuković, Petar Đundić, Sanja Đajić, *Međunarodno privatno pravo*, posebni deo, Beograd, Službeni glasnik, 2022, 183–184.

[51] See, W. Laurence Craig, William W. Park, Jan Paulsson, *Annotated Guide of the 1998 ICC Arbitration Rules with Commentary*, New York, 1998, 111, Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. London, 2004, 120. Author's commentary: However, the newer edition of Redfern/Hunter, is more open to the choice of public international law or "general principles of law" as the applicable law. After warning that these bodies of law "may lack sufficient detail to address all the complexities of contractual relations", the authors advise that if used, "they should be used as a concurrent law, rather than on their own". See, Nigel Blackaby, Constatine Partasides, Alan Redfern, *Redfern and Hunter on International Arbitration*, 7th edition, Kluwer Law International, Oxford University Press, 2023, para. 3.151.

A reference to the concurrent application of several national legal systems may also complicate and prolong the resolution of the dispute, making it more expensive.[52] Therefore, the recommended course of action is to choose a national law to govern the contract.

On the contrary, the choice of a specific set of rules, such as the Geneva general conditions, FIDIC rules,[53] ICC customs and rules, etc., has been encouraged and fully recognized in judicial and arbitral practice thus far. However, such a choice has not been interpreted as a choice of applicable law, but rather as a substantive choice (incorporation), replacing the directory (suppletive) rules, as previously explained.[54]

The statements of general principles of international contract law by UNIDROIT and by the Commission for European Contract Law in the preceding decade have been regarded as a novelty by the domestic academic writers. Both sets of Principles have been translated into Serbian and discussed by legal scholars.[55] Their significance for the future development of international contract law is by no means underestimated. However, they are primarily recognized as an academic effort and are not truly considered part of *lex mercatoria.*[56] They are not deemed

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[52] Author's commentary: However, in investment contracts, the choice of concurrent legal systems (national law of the host State and rules of international law) is acceptable as shown by the conflict rule of the ICSID convention and some BITS. See also, N. Blackaby, C. Partasides, A. Redfern, op. cit., 3.160.

[53] Author's commentary: On the Geneva general conditions and standard form contracts and FIDIC standard form contracts see, Slobodan Vukadinović, "Opšti uslovi poslovanja u obligacionom i međunarodnom trgovinskom pravu: pojam, zaključenje, tipične klauzule i kontrola", doktorska disertacija, Beograd, Pravni fakultet Univerziteta Union u Beogradu, 2019, 71–87.

[54] Author's commentary: In arbitration taking place in Serbia, the choice of these legal rules might be treated as the choice of law. See, M. Stanivuković, P. Đundić, S. Đajić, op. cit., 140.

[55] See, Radovan Vukadinović (ed.), *Načela evropskog ugovornog prava i jugoslovensko pravo – zbornik referata*, Kragujevac, 2001, Radovan Vukadinović, Irena Banovčanin, "Poruquoi construire un droit européen des contrats", *Revija za evropsko pravo*, No. 1, Vol. IV, 2002, 41, Maja Stanivuković, "An Attempt to Eliminate Conflict of Laws: European Contract Law", *Zbornik prispevkov "Evropski sodni prostor"*, Maribor, 2005, 115. Jelena Vilus, "Načela međunarodnih trgovinskih ugovora – UNIDROIT 1994", *Pravni život*, No. 11, 1998, 413, Maja Stanivuković, "Primena Načela međunarodnih trgovinskih ugovora (UNIDROIT) u postupku pred arbitražom", *Pravo i privreda*, No. 5–8, 1999, 422, etc.

[56] See, Jan Dalhuisen, *Dalhuisen on International Commercial, Financial and Trade Law*, Oxford and Portland, 2000, 198. Author's commentary: For an opposite view in domestic academic literature see, Antonije Simović, "*Lex mercatoria* kao izvor međunarodnog trgovinskog prava u praksi Spoljnotrgovinske arbitraže pri PK Srbije", *Arbitraža*, 2008, 68–69. Simović laments over the rare application of UNIDROIT Principles in the practice of the FTCA.

potentially applicable by judges or arbitrators unless expressly chosen by the parties. If a contractual clause were to designate any of these sets of rules as the applicable rules to a particular contract, one could expect arbitrators to recognize such choice as valid and to give it effect in an arbitral proceeding taking place in the territory of Serbia.[57] Considering the wording of the new Arbitration Act and the comprehensive nature of the Principles, it may be anticipated that the choice of such rules would, in the future, be treated as equivalent to the choice of an applicable (municipal) law.[58]

The limitations on the choice of Non-State rules[59]

The starting principle is that arbitrators are bound to respect the parties' choice of the applicable rules of law. However, this duty is not absolute. The necessary limits on the choice of any legal system, including a set of non-State rules as the applicable law, should be found in the *ordre public* exception, which may be invoked by judges and arbitrators alike when resolving a dispute with an international element. Although the arbitration law of Serbia, which includes provisions on the governing law, fails to mention the *ordre public* exception, it may nevertheless be assumed that arbitrators sitting in Serbia could rely on this exception found in the general provision of the PIL Code.

Pursuant to Article 4 of the PIL Code, the law of a foreign State shall not be applied if its effect would be contrary to the fundamentals of the social system as embodied in the Constitution. Although the provision specifically refers to the law of a foreign State, it could be applied by analogy in the case of a choice of non-State rules that fail to comply with fundamental domestic legal values. Additionally, arbitration scholars emphasize that the parties' intentions cannot prevail if the chosen rules prove to be against international public policy.[60]

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[57] Author's commentary: The application of a-national rules under the heading of "*Lex mercatoria*" was already accepted, although not very common, in the international arbitration practice of the FTCA before the enactment of the Arbitration Act. See, A. Simović, op. cit., 71–74.

[58] Author's commentary: In arbitration taking place in Serbia, the choice of these legal rules might be treated as the choice of law. See, M. Stanivuković, P. Đundić, S. Đajić, op. cit., 185.

[59] Author's commentary: This chapter responds to Question 9: What should be the limits set up by state law to the application of non-state norms chosen by the parties: (a) The mandatory rules of the law applicable to the contract in the absence of choice (i.e., the rules that cannot be derogated from by contract)? (b) The mandatory rules of the forum (lois de police du for), and in some cases, foreign mandatory rules (lois de police étrangers)? (c) The public policy of the forum? or (d) No limits?

[60] See, M. Trajković, op. cit., 432.

Should a choice of non-State rules be considered by a State judge, the limits are likely to be even stricter. As previously indicated, judges might give effect to such a clause, but they would surely treat it as a substantive choice (incorporation by reference). This means that the applicable law would be ascertained regardless, and its mandatory provisions – those that cannot be derogated from by contract (even if they are not considered overriding mandatory provisions in the sense of Private International Law) – would take precedence over any chosen non-State rules.

DESIGNATION OF NON-STATE RULES AS THE APPLICABLE LAW BY JUDGES OR ARBITRATORS[61]

It is highly unlikely that a judge would decide to apply non-State rules to a contract with an international element in which the parties have not made such a choice. Judges, according to Constitution, adjudicate on the basis of the Constitution, statute, and other general legal acts.[62] The PIL Act directs them to recognize party autonomy in contracts with an international element. In the absence of choice made by the parties, the PIL Act instructs judges to apply the law of the State designated by the provisions of this Act. Typically, this will be the law of the State of the bearer of the characteristic performance, unless the circumstances of the case indicate the application of another law.

An arbitral tribunal seated in Serbia would also be unlikely to designate non-State rules as applicable to a contract unless expressly provided by the parties' agreement. The legislator has limited the arbitrator's freedom in the absence of parties' choice to the designation of a State law as the governing law.[63]

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[61] Author's commentary: This chapter responds to Question 10: If the parties did not choose any appliable law for their contract, could the judge submit the contract to non-state norms? If so, under what conditions and for what types of contract?

[62] Author's commentary: Article 144(1) of the Constitution of the Republic of Serbia (2006) provides that "Judges adjudicate on the basis of the Constitution, ratified international treaties, statutes, generally accepted rules of international law and other general legal enactments, enacted in accordance with the statutes."

[63] See, the Arbitration Bill, Article 49(3): "If the parties have not designated the applicable *law*, the tribunal in international arbitration determines it on the basis of conflict rules it deems appropriate." (emphasis added). Author's commentary: This provision of the Bill, originally incorporated from the UNCITRAL Model Law, Article 28(2), has been amended in the final text of the Arbitration Act. In Article 49(1) of the Arbitration Act, there is a general interpretative norm which states that "[t]he arbitral tribunal decides by applying law, that is, *rules of law*, *contract and custom*" (emphasis added). In Article 50(3) of the Arbitration Act the legislator invested the arbitrators in an

Nonetheless, there is some leeway for the internationalization of contracts by arbitrators in Serbia based on provisions that direct the arbitral tribunal to always consider (trade) usages.[64] The term "usages" is typically understood narrowly, referring to customary business practices in the specific industry to which the parties in the dispute belong. However, it could be interpreted more broadly to encompass general principles of law or *lex mercatoria*.[65] In such a case, these general principles could serve as a supplement of the applicable State law.

However, relying on these principles as a corrective measure for "substandard" national law or as a way for arbitrators to circumvent the express choice of applicable State law is strongly rejected by domestic scholars.[66]

RECOGNITION OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS BASED ON THE APPLICATION OF NON-STATE RULES AS SUBSTANTIVE LAW[67]

The substantive limits to the recognition of foreign judgments and arbitral awards are defined by the content of domestic *ordre public.* The question of whether domestic *ordre public* opposes the application of non-State rules as the sole source of decision in contractual disputes has not yet arisen in the practice of domestic courts.

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international arbitration with the freedom to determine rules of law as applicable in the absence of parties' choice. At the same time, it instructed them to designate those legal rules by the application of conflict of laws rules they deem appropriate. The conflict of laws rule does not have to be one promulgated by a State. Although it is rarely the case that conflict of laws rules designate non-State law, this is not entirely impossible. For instance, two unilateral conflict of law rules found in the Preamble of the UNIDROIT Principles (paragraphs 3 and 4) can be invoked to apply the UNIDROIT Principles as the applicable law pursuant to Article 50(3) of the Serbian Arbitration Act. M. Stanivuković, P. Đundić, S. Đajić, op. cit., 188. On the compatibility of UNIDROIT Principles with domestic law see, J. Perović, *Ugovor o međunarodnoj prodaji robe – Komparativna studija rešenja Bečke konvencije o međunarodnoj prodaji robe i Zakona o obligacionim odnosima,* Sl. glasnik, 2021.

[64] See, the Arbitration Bill, Article 50(4) in Serbia. See also, the Foreign Trade Court of Arbitration in Belgrade, Rules of Procedure Applicable Law, Article 46(3). Author's commentary: This provision is now found in Article 50(4) of the Serbian Arbitration Act. Equivalent provisions are found in the Rules of the Permanent Arbitration, Article 42(3), and the Belgrade Rules, Article 34(3). These provisions which originate from the UNCITRAL Model Law, Article 28(4), also deal with non-State law, such as trade usages. See, J. A. M. Rodriguez, op. cit., 351.

[65] For an argument in favor of such interpretation see, M. Trajković, op. cit., 427; A. Simović, op. cit., 68; against this interpretation, see, A. Jakšić, op. cit., 127.

[66] *Ibidem*.

[67] Author's commentary: This chapter was also written in response to Question 4: Does your legal system prohibit contracts with no governing law in the sense given in definition 2(a) or 2(b)?

It is a majority view of scholars that domestic courts should not deny recognition of a foreign award or judgment solely because the decision was based on non-State substantive rules if those rules were agreed upon by the parties to the dispute.[68] This view stems from the fact that parties would be allowed to make such a choice before domestic arbitral tribunals as well.

For denial of recognition, there would need to be something more – namely, the substantive result reached by the application of the non-State rules to the particular case would have to be contrary to domestic public policy.

More stringent scrutiny is recommended in cases when the arbitral tribunal or foreign court applied non-State rules on its own initiative, without express authorization from the parties, or even against the parties' explicit wishes. In such cases, caution and reserve would be necessary because the determination of non-State rules as the applicable law by arbitrators in the absence of parties' choice is not recognized by domestic arbitration law,[69] and is not widely accepted internationally either. Such a determination of applicable law could automatically be considered as against domestic public policy.[70]

CONCLUSION

The parties to an international commercial transaction have the option to subject their contract to the application of non-State rules or to remove their contract from the application of any legal rules altogether. To ensure the effectiveness of such a choice, they should combine the choice-of law clause with an arbitration clause.

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[68] Author's commentary: See, A. Jakšić, op. cit., 421, 529. M. Draškić, M. Stanivuković, op. cit., 85.

[69] As stated above, such determination would be recognized by the domestic arbitration law currently in force.

[70] Author's commentary: However, as pointed out by Symeonides, Article V of the New Your Convention does not include the choice of the applicable law among grounds for the non-recognition of the award. S. Symeonides, op. cit., 213. Neither does the Arbitration Act do so. Furthermore, the public policy exception should be applied restrictively. Therefore, the assumption taken in my 2006 contribution for the Congress that the foreign awards applying non-State rules or based on principles of justice and equity in the absence of the Parties' express choice would be denied recognition based on public policy may be unrealistic. Notably, Mayer grounds the validity of the self-sufficient State contract on an enforceable arbitral award. As most states recognize the arbitral award under the New York Convention, this award would indirectly confer to "le contrat sans lois" its biding authority. Pierre Mayer, "La neutralisation du pouvoir normative de l'Etat en matiere de contrats d'Etat", *Journal du droit international*, 1986, 25; W. Peter, J-Quentin de Kuyper, B. de Candolle, op. cit., 150.

An arbitral tribunal sitting in Serbia is likely to honor such a choice. According to arbitration law in Serbia, if non-State rules are chosen, such a choice would be given effect as the choice of governing law, rather than incorporation by reference. The non-State rules will be applied as applicable law, with the possible limitation of the *ordre public* exception. Foreign awards applying non-State rules or awards based on principles of justice and equity are likely to be recognized by domestic courts, provided that the designation of the applicable rules of decision or the equitable decision-making was based on the parties' agreement.

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UGOVORI BEZ MERODAVNOG PRAVA U SRPSKOM MEĐUNARODNOM PRIVATNOM PRAVU

Rezime

Ovaj rad zasniva se na izveštaju za Međunarodni kongres uporednog prava u Utrehtu, koji je autor napisao 2006. godine. Originalnom tekstu je dodat uvod i komentar autora u fusnotama o daljem razvoju događaja i o trenutno važećim izvorima prava u Srbiji. Autor razmatra dopuštenost klauzula kojima se ugovor izuzima od primene bilo kog prava ili se podvrgava primeni nedržavnog prava u srpskom međunarodnom privatnom pravu. Analiza polazi od izraza *le contrat sans loi* i različitih značenja koja mu se pridaju. Granice autonomije ugovornih strana u ugovorima sa međunarodnim elementom, odnosno mogućnost da strane izaberu nedržavno pravo ili isključe primenu bilo kog prava, predmet su drugog poglavlja. Autor raspravlja o dopuštenosti takvih sporazuma, uslovima za formulisanje izbora i mogućim ograničenjima izbora nedržavnih pravnih pravila. U trećem poglavlju ispituje se da li sudovi i arbitri mogu odrediti nedržavna pravna pravila kao merodavna u odsustvu izbora ugovornih strana. O priznavanju stranih presuda i arbitražnih odluka zasnovanih na primeni nedržavnog prava raspravlja se u četvrtom poglavlju. Autor izvodi zaključke o trenutnom stanju međunarodnog privatnog prava u Srbiji u vezi sa ugovorima bez merodavnog prava.

Ključne reči: merodavno pravo za ugovore, međunarodno privatno pravo, nedržavna pravna pravila, anacionalno pravo

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Article history
Received: 28.02.2024.
Accepted: 29.03.2024.

ORIGINAL SCIENTIFIC PAPER