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REFORM OF CONFLICT RULES FOR CONTRACTS IN SERBIA AND THE EUROPEAN UNION LAW MODEL

Abstract

The reform of the Serbian PIL Code (1982) has prompted the author to examine the existing conflict rules of the PIL Code in the area of Contract Law. The question treated in this article is whether the existing rules in this area need to be reformed and in what direction. The answer is sought in the EU law. The EU has recently modernized its rules regulating the applicable law in contractual matters after a comprehensive debate that lasted nearly ten years. Moreover, Serbia has pledged in the Stabilization and Association Agreement to gradually harmonize its own law with the law of the European Union. Fundamental rules of the EU PIL for contracts are considered as a model for the new Serbian Private International Law Code. These fundamental rules are now contained in Articles 3 and 4 of the Rome I Regulation on the Law Applicable to Contractual Relations.

The comparison of the fundamental rules of the Rome I Regulation and the existing Serbian conflict rules shows that their basic structure and connecting factors are similar. As far as the core provisions are concerned the Serbian conflicts law for contracts can be easily approximated to their Rome I counterpart. A few new contracts need to be added to the list, the law of the offeror for non-listed contracts should be replaced with the law of the party performing the characteristic obligation, it should be clarified that the closest connection is an escape clause and a residual rule, and the rule on the choice of law should be expounded. Certain solutions of the Rome I Regulation, such as the rule for contracts concluded within a multilateral system of trading in financial instruments, should however not be followed.

Key words: Contracts, Applicable Law, Serbian PIL Code, Rome I Regulation

The idea of legal reform that has pervaded the first decade of the twenty-first century in Serbia has finally reached the secluded chambers of the PIL scholars. A working group for the reform of the PIL Code (1982) has been set up and the work has been set in motion in October 2008.¹ One fundamental branch of Civil and Commercial Law regulated by the existing conflict and jurisdictional rules of the

PIL Code is the area of Contract Law. The question to be treated in this article is whether the existing rules in this area need to be reformed and in what direction. The answer will be sought in the EU law. The EU has recently modernized its rules regulating the applicable law in contractual matters after a comprehensive debate that lasted nearly ten years. Moreover, Serbia has pledged in the Stabilization and Association Agreement to gradually harmonize its own law with the law of the European Union. Fundamental rules of the EU PIL for contracts will therefore be considered as a model in this comparative law exercise dedicated to Dr. Christa Jessel-Holst, the driving force behind the Serbian Private International Law (PIL) reform. These fundamental rules are now contained in Articles 3 and 4 of the Rome I Regulation on the Law Applicable to Contractual Relations. 

I. THE CURRENT SERBIAN LAW

The PIL Code is the major statutory source of PIL in Serbia. It was enacted on 23 July 1982 and entered into force on 1 January 1983 in the former Yugoslavia. It was brought into compliance with the 1992 Constitution of the Federal Republic of Yugoslavia by amendments of October 1996. These amendments introduced some minor changes, including the shortening of the Code's name. In March 2003, when the State Union of Serbia and Montenegro was promulgated, this Code became the law of Member States, Serbia and Montenegro, respectively. Eventually, when the Member States separated in 2006, each of them retained the PIL Code. Thus, the Code remains fundamentally unchanged since it entered into force, i.e. for almost thirty years, except for Articles 97–100 that were abrogated in 2006 upon entry into force of the Arbitration Act.

The first chapter of the PIL Code (General Provisions, Arts. 1–13) defines the Code's scope, the manner of filling in gaps, the relationship of the Code to other federal laws and international conventions, basic terms, and the manner of determining and proving the content of foreign law. The first chapter also defines citizenship as a connecting factor in cases when a person has more than one or no citizenship. The second chapter (Applicable Law, Arts. 14–45) contains conflict rules determining the applicable law in various situations. Chapters three and four (Jurisdiction and Procedure, Arts. 46–85, and Recognition and Enforcement of Foreign Judgments, Arts. 86–101) deal with international civil procedure. Chapter three contains rules on jurisdiction and procedure in international cases, and chapter four defines the conditions for recognition and enforcement of foreign judgments and arbitral awards. Chapter five (Special Provisions, Arts. 102–106) regulates the activities of Yugoslav consular and diplomatic officials in succession and family law matters and in legalization of public documents. One article in this chapter regulates how information on the content of Yugoslav law is provided to foreign authorities. Finally, Chapter six (Transitory and Final Provisions, Arts. 107–109) defines the effect of earlier legal provisions and effective date of the Code.

The conflict rules of the Code apply to the status of persons, family and pecuniary legal relations, and to other substantive legal relations with an international element. The rules on jurisdiction and procedure apply when the equivalent type of legal relations that triggers the application of the conflict rules is heard and decided upon by a Serbian court. Similarly, the rules on recognition and enforcement of foreign judgments apply only to foreign judgments brought in these types of matters.

Conflict rules for contracts are found in the Second Chapter, Articles 19–25, and in General provisions, Articles 7 and 8. Specific jurisdictional rules for contracts are not provided, but there are, in addition to general jurisdiction, rules on

Article 12 of the Constitutional Law for Implementation of the Constitution of FRY also passed on 27 April 1992, all federal laws and other federal legislative enactments of the former Socialist FRY were to remain in force until they were brought into compliance with the new Constitution, unless they were expressly repealed by the Constitutional Law. The official name of the Code used to be: the Law on Resolution of Conflict of Laws with Regulations of Other Countries in Certain Relations. The last three words were omitted in 1996.

Arbitration Act (Zakon o arbitraži), Sl. glasnik, no. 46/2006, Art. 69, para. 2.

Those are: public policy, renvoi, evasion of the law, characterization, and reference to non-unified legal systems.

The PIL Code, Art. 1, para. 1.

The PIL Code, Art. 1, para. 2.

The PIL Code, Art. 46.
jurisdiction in disputes on pecuniary claims\textsuperscript{14} and rules on jurisdiction in disputes arising from obligations.\textsuperscript{15} The latter head of jurisdiction is in fact primarily intended for contracts.

Provisions of the PIL Code do not apply to legal relations referred to in the first Article of the Code, if these relations are regulated by another (federal) law or international treaty.\textsuperscript{16} There are several laws that include such special conflict rules for contracts: the Act on Bills of Exchange (1946),\textsuperscript{17} the Act on Cheques (1946),\textsuperscript{18} the Act on Maritime and Internal Navigation (1998),\textsuperscript{19} the Act on Obligations and Basic Property Relations in Aerial Navigation (1998),\textsuperscript{20} the Law on Protection of Consumers (Art. 62),\textsuperscript{21} etc. The conflict rules from these laws have precedence over the conflict rules contained in the PIL Code. The same is true of the jurisdictional rules contained in the Act on Maritime and Internal Navigation (1998),\textsuperscript{22} and the Act on Obligations and Basic Property Relations in Aerial Navigation (1998).\textsuperscript{23}

1. Primary Rule: Parties' Choice

The fundamental principle of party autonomy dominates in the field of contractual obligations. The parties freely decide whether they will enter into a contract and freely determine its content (materijalnopravna autonomija, materiellerechtliche Parteiautonomie). A specific expression of that principle in the ambit of PIL is the right of the parties to freely decide which law will govern their contract.\textsuperscript{24} This right is provided by Article 19 of the PIL Code:

'\textit{The law governing contract is the law chosen by the parties, unless provided otherwise by this law or an international treaty.}'

According to the prevailing view in literature, the autonomy of the parties in PIL means that the parties in contracts with an international element are free to choose the law applicable to their contract. The chosen law will be applied in its integrity including both its directory (non-mandatory) and mandatory provisions. This kind of autonomy is called conflictual (kolizionopravna autonomija, kollisionrechtliche Parteiautonomie), because the parties' choice serves as the connecting factor in the conflict rule which leads to the applicable legal order.

The Parties' choice of law should be expressed in the contract. Pursuant to the Draft that preceded the PIL Code tacit choice of law would have been recognized, too, provided that it could be inferred beyond doubt from the circumstances of the case. However, this part of the provision on autonomy of the parties was omitted from the final text of the Code.\textsuperscript{25} In a fairly recent decision, the Supreme Court of Serbia rejected the conclusion of the Higher Commercial Court that by submitting to jurisdiction of the Serbian court the parties have made a tacit choice of Serbian law.\textsuperscript{26} According to the Supreme Court, if there is no agreement of the parties, the applicable law should be determined pursuant to Article 20 of the PIL Code.

Just as the autonomy of parties provided in the law of contracts is never unlimited, the autonomy of parties in PIL also has its limits. However, the cited conflict rule is not very specific on the scope of autonomy. Freedom of choice is excluded by an express statutory provision for contracts having as their object rights in immovables. They are exclusively governed by the law of the country where the immovables are situated.\textsuperscript{27}

Certainly, the contractual relationship must have an 'international element'. That requirement arises from Article 1, paragraph 1, a provision on the scope of application of the conflict rules of the PIL Code. The 'international element' can be anything that is relevant to the contractual relationship, but it is not specifically defined in the Code. For that reason, it is not easy to determine what triggers the application of the relevant choice of law rule. For example, can two domestic insurance companies in Serbia, wholly-owned by foreign shareholders, agree that English law will govern their contract, i.e. can foreign control over the parties to a contract provide the necessary international element? A further question is whether the parties in a contract having an international element can choose only a 'national' legal order (emanating from a sovereign authority, such as a nation State or a federal unit in the case of federal State),\textsuperscript{28} or whether they may also opt for non-national body of rules. The answer to the latter question, generally provided in the literature, is that the choice is limited to a national legal order. Every reference to a non-national body of rules (such as general conditions, model-laws, uniform rules, non-ratified conventions), is to be construed only as a derogation from the directory rules of the otherwise applicable law.\textsuperscript{29} In other words, the parties' choice of a non-national system of rules, should

\begin{itemize}
  \item \textsuperscript{14}\textsuperscript{14} The term 'pecuniary law' was used in the period from 1946–1989 to describe the part of private or civil law that regulates pecuniary rights and interests, i.e., the rights and interests that may be expressed in terms of money. The term was an euphemism for the ideologically unacceptable terms 'civil law' and 'private law.' Today, the doctrine considers this term inadequate and recommends a return to the terms 'private law' and 'civil law.' See O. Stanković, ed., \textit{Leksikon građanskih prava \{Lexicon of Civil Law\}} (Belgrade, 1996) pp. 230–231.
  \item \textsuperscript{15}\textsuperscript{15} The PIL Code, Arts. 54 and 55.
  \item \textsuperscript{16}\textsuperscript{16} The PIL Code, Art. 3.
  \item \textsuperscript{17}\textsuperscript{17} Arts. 94–100.
  \item \textsuperscript{18}\textsuperscript{18} Art. 23, para. 1, item 15, that refers to application of the conflict rules of the Act on Bills of Exchange.
  \item \textsuperscript{19}\textsuperscript{19} Arts. 1037–1042, and 1046–1048.
  \item \textsuperscript{20}\textsuperscript{20} Arts. 185–187.
  \item \textsuperscript{21}\textsuperscript{21} The Law on Protection of Consumers [\textit{Zakon o zaštiti potrošača}], Sl. glasnik No. 79/2005.
  \item \textsuperscript{22}\textsuperscript{22} Art. 1051.
  \item \textsuperscript{23}\textsuperscript{23} Art. 191.
  \item \textsuperscript{24}\textsuperscript{24} B. Noljde, \textit{Osnovi Međunarodnog privatnog prava \{The Foundations of Private International Law\}} (Belgrade, Knjizarnica Gece Kona 1928) p. 89.
  \item \textsuperscript{25}\textsuperscript{25} D. Mitrović, 'Ugovori sa stranim elementom' [Contracts with a Foreign Element], in \textit{Enciklopedija imovinskog prava i prava udržuvenog rada}, II tom [Encyclopedia of Property Law and the Law of Associated Labour, second volume] (Belgrade, Sl. list SFRJ 1987) p. 72.
  \item \textsuperscript{26}\textsuperscript{26} Ruling of the Supreme Court of Serbia [\textit{Rešenje Vrhovnog suda Srbije}], Prev. 54/2006 of 31 May 2006, 4 Sudska praksas trgovinskih sudava - Bilten (2006), Paragraf lex.
  \item \textsuperscript{27}\textsuperscript{27} The PIL Code, Art. 21.
  \item \textsuperscript{28}\textsuperscript{28} P. Nygh, \textit{Autonomy in International Contracts} (Oxford, Clarendon Press 1999) p. 172.
  \item \textsuperscript{29}\textsuperscript{29} M. Stanivuković, 'Contracts without a Proper Law in Private International Law and Non-State Law in Serbia and Montenegro' XVIIIth Congress of the International Academy of Comparative Law in Utrecht, 16/22 July 2006, p. 4.
\end{itemize}
be treated as incorporation by reference. Such an interpretation, however, does not necessarily arise from the wording of the cited provision which only speaks of law (pravo, Recht), and does not specify that it has to be the law of a country or State, like some other provisions of the PIL Code do. Furthermore, the Arbitration Act (2006) expressly introduces the possibility for the parties who have agreed upon arbitration to choose 'legal rules' as the applicable law. How can it be justified that the parties who have not opted for arbitration would not have the same freedom in their contract? A related question is whether the parties are allowed to choose more than one law to apply to their contract. Opinions on this issue are divided. Some authors justify their opposition to dépêcage by the restrictive wording of Article 19 of the PIL Code, because it only speaks of 'law' and not of 'laws'.

As to time of choice, there is general agreement, confirmed by judicial and arbitral practice, that the choice of applicable law can be made or altered after conclusion of the contract, and even at the time when the lawsuit has already begun. No connection between the contract and the chosen law is required. It is recognized that the parties may have an interest in choosing a neutral law that would not put any of the parties in a position to make concessions to the other.

The exceptions of public policy and evasion of the law may be invoked when the applicable law is determined by the parties' choice, as in the case when the applicable law is determined by an objective connecting factor. There are, furthermore, certain mandatory rules that cannot be excluded by party autonomy even if sufficient international element is present (Eingriffsnormen, los d'application immediate). Although the PIL Code does not recognize the existence of this limitation, it is acknowledged in the literature and judicial practice.

2. Subsidiary Rule for listed Contracts: the Law of the Party performing the Characteristic Performance

When the parties have failed to choose the law that will apply to their contract, the lex contractus will be determined by application of a firm connecting factor. The connecting factors are enumerated in Article 20 of the PIL Code for nineteen types of contracts. Predominantly, the law of domicile or seat of the party that is performing the 'characteristic' obligation of the contract will govern. This applies to the following contracts: sale of movables, hire of labor and services (locatio operis), construction contract, contract on mandate, contract on brokerage, commission contract, freight forwarding, tenancy, loan, loan for use (commodatum), deposit, contract on storing the goods in a warehouse, contract of carriage, insurance contract, contract on transfer of copyright, gift inter vivos, and contract on independent bank guarantee. It is not left to the judge to determine who bears the 'characteristic' obligation, but the determination is made in the law in advance: it is always the party that does not have the payment obligation, or in case of insurance, loan and bank guarantee, the party that pays the main monetary obligation (insurer/lender/the bank). There are several exceptions to the general rule, however, in which the choice of the legislator shifted towards a law other than the law of the party performing the 'characteristic' obligation. For instance, stock/commodities exchange transactions are governed by the law of the seat of the stock/commodities exchange; transfer of technology contracts (such as license contract, etc.) are governed by the law of the seat of the party that is receiving the technology; employment contract is governed by the law of the country in which the work is carried out, or was carried out. In order to avoid the occurrence of conflict mobile the connecting factors are fixed in time – the domicile or seat of the relevant party 'at the time of receipt of the offer' is taken into account. Domicile (prebivalište) refers to natural persons, and seat (sedište) to legal persons.


There is a residual rule in Article 20, paragraph 1, item 20, that applies to all other contracts not listed in preceding items and not regulated by other federal statutes or international conventions. Every other contract is governed by the law of domicile or seat of the party that made the offer (Art. 20, para. 1, item 20). Obviously, this can be either the party performing the 'characteristic' obligation or the party performing the 'non-characteristic' obligation, depending on the circumstances of the case. The connecting factor is also fixed 'at the time of receipt of the offer'. This connecting factor comes close to the presumed place of making of the contract. Pursuant to Article 31 of the Serbian Code of Obligations, it is considered that the contract was concluded at the place in which the offeror had his seat or domicile at the time of making of the offer.

4. The Escape Clause: the Law that is the Most Closely Connected

In all cases governed by Article 20, the court may apply some other law (and not the law that was determined by the firm connecting factor) if this other law is more closely connected to the contract. More precisely, the opening sentence of Article 20 reads:

31 E.g., Art. 21, Art. 26, etc.
32 Art. 50, para. 1.
33 M. Dika, G. Knežević and S. Stojanović, op. cit. n. 30, at p. 75.
34 G. Knežević, Merodavna pravo za trgovski ugovor o medunarodnoj prodaji robe [Applicable Law to Contract on Commercial Sale of Goods] (Belgrade 1987) p. 188.
35 See contra in relation to the evasion of the law, M. Dika, G. Knežević and S. Stojanović, op. cit. n. 30, at p. 76.
36 See D. Mitrović, 'Odlučujuće činjenice' [Connecting Factors], in loc. cit. n. 19, p. 43.
If the parties have not chosen the applicable law and if the special circumstances of the case do not refer to another law, the law to be applied is [emphasis added].

This wording has prompted some authors to argue that the courts should apply the closest connection as the primary connecting factor in the absence of choice, while the firm connecting factors for the listed contracts, as well as the residual connecting factor for unlisted contracts, should apply as a subsidiary rule, only after a careful search for the most closely connected law has turned to be futile. Obviously, the difference between these two interpretations and approaches is just a matter of degree. The former puts more emphasis on the principle of legal certainty, while the latter is more inclined towards the principle of flexibility, but they should in most cases lead to the same result. Nevertheless, the very possibility of two different interpretations shows a flaw in the structure of Article 20.

5. Scope of the Applicable Law

The PIL Code does not define the scope of the chosen law nor of lex contractus in general. It expressly provides only that the law applicable to the contract applies to the following issues: determining the moment from which the party that acquired the possession or ownership of a movable is entitled to its producers and fruits and the moment from which this party bears the risk of damage to or destruction of the movable. Furthermore, the rule for limitation of actions calls for the application of the same law that is applicable to the content of the contract, i.e., lex contractus.

The scope of the applicable law determined pursuant to Article 20 is similar, but not exactly the same as the scope of the law chosen by the parties. Notably, in the absence of the parties’ choice of the applicable law to the contract of sale, the manner of delivery of goods and steps to be taken in the event the delivery is rejected are not governed by the objectively determined lex contractus, but by the law of the place where the delivery must be made.

The lex contractus applies to rights and obligations of the parties under the contract (the substance of the contract), but it does not apply to the capacity of the parties or to the effects that the contract may have on the property. Formal validity of the contract is governed alternatively by this law or by the lex loci actus, whichever of these laws renders the contract valid. This rule does not apply if there is a contrary provision in the PIL Code or another relevant statute: for example, it does not apply to formal validity of contracts relating to immovables which are exclusively governed by the lex rei sitae.

6. Gaps

In Article 2, the PIL Code provides a solution to the problem of potential gaps that may arise in its conflict rules. If a conflict rule is missing for any legal relationship referred to in Article 1, paragraph 1 of the Code, the rule should be derived by analogy from the provisions and principles of the Code, the legal order of the FRY (now Serbia), and principles of Private International Law. However, the PIL Code does not expressly state any such principles.

7. Jurisdiction

The application of the above outlined rules depends on jurisdiction of Serbian courts. General jurisdiction of Serbian courts for civil and commercial matters with an international element is based on the domicile of the defendant in Serbia if the defendant is a natural person, or on the seat of the defendant in Serbia, if the defendant is a legal entity. In disputes with multiple defendants, Serbian courts will have jurisdiction if at least one of them is domiciled or has its seat in Serbia, but the defendants must be in a legal community as to the subject matter of the dispute, or their rights and obligations must be arising from the same factual and legal basis. Serbian courts also have general jurisdiction if the defendant is resident in Serbia in two alternative cases: first, if the defendant has no domicile, and second, if the defendant is domiciled abroad, but is currently residing in Serbia and both parties are citizens of Serbia.

Specific heads of jurisdiction are provided in disputes on pecuniary claims and in disputes concerning obligations. Jurisdiction of Serbian courts for the former category exists if the defendant's property or the object claimed is found in the territory of Serbia, and for the latter, if the obligation was created at the time when the defendant was present in Serbia. Furthermore, in disputes for obligations that were created in Serbia or that have to be performed there, Serbian courts will have jurisdiction if the defendant has a representative office or an agency in this territory or if he has conferred the conduct of his business to a legal entity having its seat in this territory.

The forum selection agreement in favor of a domestic court will be enforced if at least one of the parties is a citizen of Serbia or a legal entity having its seat

39 The principle of the 'closest connection' had been endorsed in the practice of domestic courts before the enactment of the PIL Code. See Judgment of the High Commercial Court, Sl. 93/65–3 dated 18 Jun. 1965: 'In the absence of the parties' agreement on application of a specific substantive law, we should in principle apply the substantive law of the country which could be described as the most closely connected to the contract, or to the legal relationship from which the dispute arose, judging in each particular case on the basis of various connecting factors.


41 The PIL Code, Arts. 22 and 23.

42 The PIL Code, Art. 8.

43 The PIL Code, Art. 23.

44 D. Mitrović, loc. cit. n 19, p. 72.

45 The PIL Code, Art. 7.
II. THE EU MODEL: ROME I REGULATION

1. Primary Rule: Parties' Choice

The EU rule on freedom of choice gives impression of a detailed and comprehensive legal norm. Article 3 of the Rome I Regulation consists of five paragraphs, which in the English language version comprise eight sentences – in comparison to only one sentence-paragraph of Article 19 of the PIL Code. It seems that the European legislator has thought of almost every question that may arise in connection with this subjective connecting factor. Issues that are treated by Article 3 may be subdivided under the following headings: a) expression of choice; b) subject of choice; c) time of choice; d) 'internationality' of contract as a condition for choice; and e) the existence and validity of choice.

An expression of choice can be tacit, but it must be 'clearly demonstrated'. The idea behind this provision is 'that the will of the parties should always be sought and upheld whenever possible. Factors to be taken into account in determining whether a choice of law has been clearly demonstrated may be found in the terms of the contract or in the circumstances of the case. One such factor is expressly mentioned in Recital 12 of the Regulation: the agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract. The wording from Recital 12 was originally part of Art. 3, para. 1 of the Proposal. The principle 'qui elegit iudicem elegit ius', propounded in this interpretative provision, has been qualified as 'rather outdated'. Also, the restriction to 'the jurisdiction of courts or tribunals of a Member State' has met with criticism and a universal wording has been recommended. The formulation of this principle is indeed parochial, but it is probably based on the presumption that it will be the court whose jurisdiction has been selected (i.e. a Member State court) that will apply this provision in determining the tacitly chosen law. This does not always have to be so, however. One exception would be the situation when the parties have submitted themselves to the forum jurisdiction, notwithstanding the foreign jurisdiction clause in their contract. Would the foreign jurisdiction clause, so abandoned, lose its persuasiveness as a factor clearly demonstrating the will to choose the particular foreign law? The restriction seems to suggest so. In any case, the question for the Serbian legislator is whether to accept tacit choice at all. The acceptance would be in contradiction with the holding of the Supreme Court cited earlier, but it would be very much in line with the practice of the lower courts and arbitral tribunals. In any case, if the provision on tacit choice is to be included in the future Serbian PIL Code, it should take a definitive position with respect to the importance of principle 'qui elegit iudicem' as a factor in determining the existence of choice, to dispel any uncertainties connected therewith.

The subject of choice is 'the law applicable to the whole or to part only of the contract'. There are almost no restrictions on freedom of choice. Any partial choice of law is allowed. The choice may refer to any law even one unrelated to the transaction. However, a reference to a set of international rules, such as UNIDROIT Principles of International Contract Law, will not be treated as a choice of applicable law even if the parties had different plans. Such reference will be treated as incorporation of chosen rules as contractual provisions. The law chosen must be a law that is in force in a country, a 'State body of law'.

The Proposal of the Rome I Regulation included the option for the parties to choose 'internationally recognized principles and rules of substantive law of contract' as the applicable law. This option was endorsed by legal experts, and the decision to abandon it was criticized. One of the reasons for criticism is valid and relevant in the Serbian case, too: undesirable discrepancy in determining the law applicable to commercial transactions between the courts and arbitral tribunals. If the current Rome I Regulation position towards the choice of non-national law is accepted, such discrepancy will be maintained in the Serbian law, as well. However, if the Serbian legislator decides to allow the choice of non-national rules, he should make sure that only a sufficiently comprehensive set [or body] of rules can be chosen as the governing law.6

54 The PIL Code, Art. 49, para. 2.
55 The PIL Code, Art. 49, para. 1.
57 The Rome I Regulation, Art. 3. para. 1.
59 This is the principle that is observed by German and English courts. M. Wilderspin, loc. cit. n. 2, pp. 263–264.
60 Ibid., p. 25.
64 The Rome I Regulation, Recital 13.
65 Proposal, Art. 3, para. 2.
67 K. Boele-Woelki and V. Lazić, loc. cit. N. 48, pp. 28–29. According to M. Wilderspin, loc. cit. n. 2, p. 260, the Council was opposed to this provision.
Time of choice and effects of any change in the applicable law made after the conclusion of the contract are dealt with in Article 3 paragraph 2 of the Rome I Regulation. Basically, the parties can make a choice of the applicable law or change the previously made choice at any time. This rule is also followed in the Serbian judicial and arbitral practice. Nevertheless, it would be helpful to incorporate the rule from the Rome I Regulation, because it clarifies that any such change of applicable law made after the conclusion of the contract may not prejudice the rights of third parties or cause formal invalidity of the contract.

Similarly, the third paragraph of Article 3 of the Rome I Regulation could prove to be a useful addition in the future Serbian PIL Code. This provision demonstrates that the condition for exercising freedom of choice of the applicable law is that the contract has an international element. The choice of foreign law is no more a rare occasion in the practice of Serbian courts. Inevitably, a situation will arise in which the judge will have to decide whether the contract including a choice of law clause had sufficient international element to trigger the application of the rule on freedom of choice of the applicable law. In case the examination shows that the only foreign element in that contract was actually the choice of law clause, and that 'all other elements relevant to the situation at the time of the choice were located in Serbia, the judge would have firm guidance on what to do. The European rule, if incorporated, would instruct him to apply the mandatory rules of Serbian law to such contract and to restrict the parties' choice to directory (non-mandatory) rules only. The wording of the provision of Article 3, paragraph 3 is not unilateral, as it may sound from this example – it would also encompass a situation (which is, however, more unlikely) in which foreign parties have opted for application of Serbian law (and jurisdiction of a Serbian court), although all other elements of their contract are located in another country. In such a case the Serbian court would be bound to apply the 'provisions of the law of that other country which cannot be derogated from by agreement.'

For the existence and validity of the consent of the parties as to the choice of the applicable law, Article 3, paragraph 5 of the Rome I Regulation refers to provisions of Articles 10, 11 and 13. These rules are worthy of consideration, but will not be discussed in this contribution which is limited to provisions of Articles 3 and 4 of the Rome I Regulation.

69 In contrast, paragraph 4 of Article 3 is not relevant for Serbian reform, at least not for the moment.

70 This is evidenced by a question posed a few years ago by lower commercial courts to the Higher Commercial Court in Belgrade, which begins as follows: More and more often in practice there are contracts in which a choice has been made of German or English law as the applicable law...[Sve češće se u praksi pojavljuju ugovori u kojima je ugovorena primena nemackog i engleskog prava...]. Odgovori na pitanja trgovinskih sudova koji su utvrđeni na sednica Odeljenja za privredne sporove, održanim dana 5.10, 25.10, 7.11. i 14.11.2006. godine i na Sednici Odeljenja za privredne pretpuste i upravno-računske sporove, održanoj dana 20.9.2006. godine, 3 Sudačka praksa trgovinskih sudova, Bilten (2006) p. 20

H. Heiss, loc. cit. n. 63, p. 3.


In the absence of the parties' choice, the subsidiary rule for determining the applicable law to contracts is placed in Article 4 of the Rome I Regulation. Article 4 'is the expression of the central idea which law is best suited to apply to contracts with a foreign element.' It is based on the general principle that the law of the closest connection should govern a contract and that the closest connection is generally best determined by the conflicts concept of characteristic performance. The most closely connected law is the law that is in force at the place where the party which is to effect the characteristic performance of the contract is habitually resident. For natural persons acting in the course of their business, the connecting factor is the principal place of their business, and for legal persons, the place of their central administration. Where a branch, agency or any other establishment concludes the contract or is responsible for performance of the contract, it is the place where the branch, agency or other establishment is located. The characteristic performance means the performance for which the payment is due, which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction. On the basis of the aforementioned general principle, Article 4 identifies in paragraph 1 a list of contracts for which a rigid conflict of laws rule is adopted for the determination of the applicable law. These contracts, identified in points (a)–(h), are: sale of goods, provisions of services, contract relating to a right in rem in immovable property or tenancy of immovable property, tenancy of immovable property concluded for temporary private use, franchise, distribution, sale of goods by auction, and contract concluded within a multilateral system of trading in financial instruments. For all other contracts, [Article 4] sets forth a rigid rule based on the habitual residence of the party which is required to perform the characteristic obligation:

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.


73 Ibid., p. 28.

74 The Rome I Regulation, Art. 19, para. 1.


78 Ibid.
It was pointed out with respect to the manner of determining the best suited law, that a real link between the contract and the applicable law would have been ensured if the law of the country in which the characteristic performance was to be carried out was designated rather than the law of the habitual residence of the party effecting the characteristic performance. Conversely a question has been put forward, whether it was appropriate to renounce a priori an approach aimed at making forum and jus coincide.\(^8^0\) The lack of coincidence arises very often because special jurisdiction lies with the court of the place of performance of the contractual obligation, while the applicable law is determined pursuant to the habitual residence of the party performing the characteristic obligation. As may be noted, the Serbian law does not differ from the EU law in giving precedence to the personal law of the party over the place of performance of the characteristic obligation. However, the two systems are not identical.

The first difference that strikes the attention of the observer is that of connecting factors. Under Art. 4 of the Rome I Regulation the 'habitual residence' i.e. 'the place of central administration' of the relevant party at the time of conclusion of the contract is the principal territorial connecting factor,\(^8^1\) while under Art. 19 of the Serbian PIL Code it is the 'domicile' i.e. the 'seat' of the relevant party at the time of receipt of the offer. The advantage of the Serbian solution is that it uses the same personal connecting factor for determining general jurisdiction and the applicable law in contractual matters, i.e. domicile. Notwithstanding any criticism that may be addressed to domicile as the connecting factor, it is hard to justify departure from domicile in the field of applicable law if it is at the same time to be retained in the field of jurisdiction. The discrepancy between the the Rome I and the Brussels I regulations in that respect has already been criticized in literature:

'It can be regarded as coherent where the conflict of laws rules are based on habitual residence and the rules on jurisdiction are based on domicile! And where the notion of domicile is defined in Brussels I Regulation only as to legal persons, by a definition which does not coincide but in part with the definition of habitual residence in the Rome I Regulation...[A] reference to the same general connecting factor would certainly be desirable...\(^8^2\)

Choice of the most appropriate connecting factor in both fields should be uniform and based on the same criterion: whether in modern terms, it adequately reflects the real and present connection existing between the natural person and the particular country.

The relevant moment in time is also different, and, as it seems, chosen better by the Serbian rule. This is so because 'the time of the conclusion of the contract' is a legal category that may depend on the applicable law, which is yet to be determined at the moment of application of the conflicts rule. On the other hand, the Serbian rule relying on the 'time of the receipt of the offer' can be criticized for imprecision,
real estate for temporary use to other Serbians). Allowing the parties to choose the applicable law in contracts relating to ownership or other rights in rem concerning immovables is another matter. It should not be adopted without reflection, because the exclusive application of the law of the situs provides one big advantage: the unity of the law applied to contractual and property rights matters that are intertwined in this type of contract. Finally, the wording of the rule deserves a few words. The wording of the EU rule is much more precise than the PIL Code version. It uses the words ‘a contract relating to a right in rem in immovable property’, which is clearer than ‘contracts relating to immovables’. For example, a construction contract may be a contract relating to immovables, but it is definitely not a contract relating to a right in rem. Certainly, this type of contract should be governed by the law of the party responsible for the characteristic performance (the contractor) rather than by the law of the situs. Nevertheless, a judge can make a wrong classification of this contract under Article 21, because it is, after all, a contract relating to immovables.

The PIL Code list is more traditional than the Rome I list, in that it enumerates some older, commercially less significant types of contracts, such as loan for use (commodatum), while failing to mention some of the contracts that became quite common and commercially important nowadays, such as distribution and franchise. Under the Rome I Regulation in the absence of choice, these two contracts are governed by the law of the distributor and franchisee, respectively. Perhaps the same outcome could be reached for franchise under the Serbian PIL Code, if it was classified under the contracts on transfer of technology, or license, but the business of classification is always uncertain. As for the distribution contract, it cannot be classified under any of the listed contracts of the PIL Code. The inclusion of these two categories of contracts in the future PIL Code list is therefore desirable. Likewise, the equivalent connecting factors should be chosen for determining the applicable law to these contracts. The same is true of the contract on sale of goods by auction, which is listed in the Rome I Regulation, Article 4, paragraph 1(g), and governed by the law of the country where the auction takes place, if such a place can be determined. The law of this country usually contains special rules for the protection of buyers at auctions. In addition, the seller does not have to be aware of the buyer’s habitual residence in such auctions. In contrast, the inclusion of the rule from Article 4, paragraph 1(h) for the contract concluded within a multilateral system of trading in financial instruments is not to be recommended. This rule has been characterized as ‘too complicated’. The existing rule of the PIL Code – the law of the seat of the stock exchange – seems preferable, possibly with an addition ‘if that seat can be determined’. There are still other contracts, however, such as financial leasing, foreign investment, and joint-venture (consortium) contracts, that are not listed in the Rome I Regulation, but that also need to be added in the new PIL Code.

Three contracts expressly mentioned in the PIL Code list are treated as special contracts in the Rome I Regulation: the contract of carriage, the insurance contract, and the individual employment contract. The conflict rules for these three contracts in the PIL Code are simple (the law of the carrier, the law of the insurer, and the law of the country where the work is or was performed), while the rules of the Regulation concerning especially the first two contracts are quite complex and require more space for elaboration than is available in this contribution. The sole remark that will be made is that the need for such specialized rules for contracts on transport and insurance should be carefully examined by the Serbian legislator on the basis of Serbia’s proper needs and circumstances.

As outlined above, if the contract is not covered by the list, the Rome I Regulation sticks to the principle of the characteristic performance, while the PIL Code diverts to the law of the party that placed the offer. There is no rational explanation for this diversion, made by the former Yugoslav legislator. The rule for unlisted contracts should be guided by the same general principle as the rules for the listed contracts.

A further advantage of the Rome I Regulation is that it recognizes the existence of mixed contracts (e.g. distributorship and sale) and offers an apparently simple solution for them in Article 4, paragraph 2. This is the application of the law of the party required to effect the characteristic performance. According to the recitals, the characteristic performance in mixed contracts needs to be determined ‘having regard to the centre of gravity’. This is further interpreted in the following manner:

‘The idea behind this formulation and most likely also behind Art. 4(2) seems to be that the dominant contract part should characterize the entire contract and result in the application of the conflicts rule that applies to the dominant contract type.

It is definitely better to search for a single law applicable to mixed contracts than to try to split them apart and apply different laws to their different elements. This rule undoubtedly deserves to be transposed into the new PIL Code. However, the formulation should be carefully chosen in order to avoid the pitfalls that the simple rule on the characteristic performance may hide.

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87 See G. Jakšić, op. cit. n. 40, p. 442.
88 In that case, the law of the party that is receiving the technology would apply. The PIL Code, Art. 19, para. 1(18).
89 The principle of protection of the weaker party, applied in these two provisions (See Proposal (Com(2005) 650 fin.) p. 6), corresponds well with the reasoning behind the rule for transfer of technology contracts, included in the PIL Code, Art. 19, para. 1(18). The application of the law of the domicile of the franchisee and distributor, respectively, will generally lead to application of the Serbian law in disputes arising before Serbian courts.
90 The reason for the last condition is that the place of the auction may not be determinable if it is an internet auction.
91 U. Magnus, loc. cit. n. 72, p. 43.
92 M. Bogdan, loc. cit. n. 75, p. 222.
3. The Escape Clause and the Residual Rule: The Law that is the Most Closely Connected

The principle of the closest connection is relegated to the status of an escape clause and a residual rule in the Rome I Regulation:

3. Where it is clear from all circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is the most closely connected.

When two escape clauses are compared – the discretion of the judge to deviate from the applicable law is greater under the Serbian rule than under the EU rule. While the former allows for 'special circumstances of the case' the latter requires for 'all circumstances of the case' to refer to a different law, and the contract must be 'manifestly more closely connected' with another country. As a result, the deviation from Article 4 paragraph 3 of the Rome I Regulation should be made only if strong reasons point to a more closely connected law. The general objective of the Regulation is legal certainty, and for that reason, the conflict-of-law rules need to be strongly connected with a country other than that indicated in paragraphs 1 or 2, or the country shall apply.

Likewise, placing the principle of the closest connection at the very end of the relevant provision, as in Article 4 of the Rome I Regulation is a good idea, since such structure will dispel doubts and different interpretations of the order of the rules, and make it clearer that the principle is just an escape clause and not the starting point in search for the applicable law.

The residual rule covers contracts that are neither covered by the list in paragraph 1, nor can a characteristic performance be defined for them under paragraph 2 of the Rome I Regulation. One may think of the consortium agreement as an example of a contract for which a party responsible for the characteristic performance may be hard to identify. In such cases, the law of the closest connection becomes directly applicable.

4. Scope of the applicable law

The provision on scope of the applicable law (Article 12 of the Rome I Regulation) accepts basically unchanged wording from Article 10 of the Rome Convention. Obviously, its existence and content is uncontroversial. As such a provision is lacking in the current PIL Code, it would be beneficial to consider its inclusion into the reformed law. Attention should be drawn to paragraph 2 of this provision which would introduce a slight and desirable change into the current system of Serbian PIL rules. The rule concerns the applicable law to the manner of performance and steps to be taken in the event of defective performance. This is the law of the country in which performance takes place. A similar rule is contained in Article 23 of the PIL Code, but it applies only to the manner the thing is handed over and the measures to be taken if the receipt of the thing is refused. Thus, it primarily concerns the sale of goods or other contracts that require the transfer of possession of a thing as part of performance. The acceptance of the European wording would broaden this rule to all kinds of performance. Furthermore, the special rule would become relevant also in cases when the applicable law is determined by parties' choice (while presently it applies only in the absence of the parties' choice).

III. CONCLUSION

The analysis of the fundamental rules of the Rome I Regulation and their comparison to the existing Serbian conflict rules has shown that their basic structure and connecting factors are similar. As far as the core provisions are concerned the Serbian conflicts law for contracts can be easily adapted to their Rome I counterpart. Adding a few new contracts to the list, replacing the law of the offeror with the law of the party performing the characteristic obligation, clarifying that the closest connection is an escape clause and a residual rule, and expounding the rule on party autonomy will do. However, special contracts regulated in Articles 5–8, and other provisions of the Regulation which have not been the subject of this comparative law exercise should not be forgotten. The cut into the flesh of domestic Private International Law would have to go much deeper if they are to be incorporated therein. But that is a topic for some other discussion.

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98 Ibid., p. 29.
99 The Rome I Regulation, Art. 4. para. 3.
100 U. Magnus, loc. cit. n. 72, p. 20.
101 Regulation Rome I, Recital 16.
102 The practice has shown that the Serbian courts tend not to use escape clause contained in Art. 20 of the PIL Code. The author has not found a single example of reliance on the escape clause in judicial practice.
103 Ibid., p. 34.
104 It received no comments or changes in the Max Planck Report. The Max Planck Institute for Comparative and International Private Law (MPI), op. cit., p. 85.