

Jelena Perović

University of Belgrade
Faculty of Economics
Department for International Business
Relations

Ljubica Tomić

Law office TSG, Belgrade

IMPLEMENTATION OF INTERNATIONAL STANDARDS IN SERBIAN CONTRACT LAW: AN OVERVIEW OF SOLUTIONS OFFERED BY THE FUTURE CIVIL CODE OF SERBIA*

Primena međunarodnih standarda u srpskom ugovornom pravu - pogled na rešenja budućeg Građanskog zakonika Srbije

Abstract

The paper presents a brief analysis of the most important issues related to the implementation of international standards in Serbian contract law. In that respect, the paper examines main transnational documents relevant for contract law - international conventions and other sources of uniform contract law, the UN Convention on Contracts for the International Sale of Goods (CISG), the sphere of its application, the main differences between the CISG and the Serbian Law of Obligations, the application of the CISG by Serbian courts and arbitrations and the advantages of its application in business practice. Furthermore, it provides readers with an overview of the future Civil Code of Serbia, its central principles, solutions and reforms in the field of contract law, particularly with regard to the acceptance of international standards and principles. The analysis has led the authors to the conclusion that the future codification in the form of Civil Code is a continuation of the process of full harmonization of Serbian contract law with the internationally accepted standards and achievements of European legal civilization, which can strongly contribute to the overall improvement of business environment in Serbia.

Key words: *international standards, transnational documents, international conventions, contract law, uniform rules, Civil Code, implementation, business practice*

Sažetak

Rad se bavi analizom primene primene međunarodnih standarda u srpskom ugovornom pravu. U radu su analizirani najznačajniji transnacionalni dokumenti relevantni za oblast ugovornog prava – međunarodne konvencije i ostali izvori uniformnog ugovornog prava, Konvencija UN o ugovorima o međunarodnoj prodaji robe (Bečka konvencija o međunarodnoj prodaji), oblast primene Konvencije, osnovne razlike između Konvencije i Srpskog Zakona o obligacionim odnosima, primena Konvencije od strane srpskih sudova i arbitraža, kao i prednosti primene Konvencije u poslovnoj praksi. Pored toga, u radu je učinjen osvrt na osnovna rešenja, principe i reforme budućeg Građanskog zakonika Srbije u oblasti ugovornog prava, posebno sa aspekta prihvaćenosti međunarodnih standarda i načela u Zakoniku. Učinjena analiza vodi zaključku da budući Građanski zakonik predstavlja nastavak procesa potpunog usklađivanja srpskog ugovornog prava sa međunarodno prihvaćenim standardima i tekovinama Evropske pravne civilizacije, čime značajno doprinosi unapređenju uslova poslovnog okruženja u Srbiji.

Ključne reči: *međunarodni standardi, transnacionalni dokumenti, međunarodne konvencije, ugovorno pravo, uniformna pravila, Građanski zakonik, primena, poslovna praksa*

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Introduction

Sources of uniform contract law, such as international conventions, principles of contract law, model laws, standard clauses, model contracts, legal guides and other documents adopted and recommended by the relevant international organizations, in most cases are based on the worldwide acceptance by lawyers raised in different traditions and backgrounds. In that regard, they represent transnational documents which are supposed to minimize the risks arising out of the differences between the national legal systems, being at the same time a “bridge” between the particularity of the local national rules and the international solutions with no national borders. These documents can, as a whole, be viewed as a general framework for the numerous types and specific varieties of transactions in international commerce. Accordingly, in implementing this general framework in practice, the parties should adapt it to the background and nature of each particular contract as well as to the specific conditions of the applicable law where such requirements exist [1, p. 253-278].

In that regard, acceptance, implementation and interpretation of the transnational documents in the field of contract law are the issues of great complexity and practical importance for international commercial contracts in general. This paper is focused on these questions, analysing: international standards contained in transnational documents relevant for contract law – international conventions and other sources of uniform contract law (I), the UN Convention on Contracts for the International Sale of Goods (CISG), the sphere of its application, the main differences between the CISG, its application by Serbian courts and arbitrations and the advantages of its application in business practice (II), the future Civil Code of Serbia, examining the general meaning and importance of the codification of civil law, alignment of the Civil Code with the European legislation and widely accepted international standards, the most significant novelties introduced by the Civil Code related to the implementation of international rules to the field of contract law and the regulation of new contracts by the Civil Code (III). The analysis of the above issues is wrapped up with a summary overview of the legal framework for

arbitration as the most important method of resolving disputes arising from business contracts (IV).

Transnational documents in the field of contract law

International conventions

A particularly important source of contract law are the ratified international conventions governing, in a uniform way, the matters related to the field of contract law [2, p.156-160]. Ratified and promulgated international conventions are part of the internal legal order and are directly applicable when the requirements for application of each particular convention are met. Serbia has ratified numerous international conventions that directly, or indirectly, refer to the sphere of contract law. According to the Constitution of the Republic of Serbia, the ratified international conventions are part of the internal legal order of the Republic of Serbia; they must not be contrary to the Constitution while laws and other legal acts must not be contrary to the ratified international convention.¹ Ratified international conventions in Serbia are published in the official gazette together with the promulgating act.²

One of the most important international documents regarding the unification of contract law is the UN Convention on Contracts for the International Sale of Goods (CISG) of 1980.³ As of December 2015, the CISG has 83 State Parties. These Member States belong to various legal traditions and economic systems. The CISG membership is particularly high in North America and Europe, and among the developed countries. The former Yugoslavia signed and ratified the CISG on 11th April 1980 and 27th March 1985, respectively. On 12th March 2001, the former Federal Republic of Yugoslavia declared the following: “The Government of the Federal Republic of Yugoslavia, having considered the Convention, succeeds to the same undertakes faithfully to perform and carry out the stipulations therein contained as from April 27th, 1992, the date upon which the Federal Republic of

1 Art.16 and Art.194, Constitution of the Republic of Serbia.

2 Official Gazette of RS, International Contracts (*Službeni glasnik RS, Međunarodni ugovori*).

3 For the CISG in general, and for the sphere of its application see [3]; [4] and [5]. In Serbian doctrine, see [6]; [7, pp.272-307] and [2].

Yugoslavia assumed responsibility for its international relations". The Constitutional Charter of Serbia and Montenegro Union (4th February 2003) provided for the transmission of all the rights and obligations of former Federal Republic of Yugoslavia to Serbia and Montenegro Union (Art 63). Furthermore, the Charter stated that, in case of separation of Montenegro from the Union, all international documents shall be automatically taken over by the Republic of Serbia as the successor (Art 60.4). On the basis of these rules, the CISG has been in force in the Republic of Serbia since 27th April 1992.

Other international conventions which seek to achieve unification of substantive law in the field of contractual relations, which have been ratified in Serbia, include: Convention on the Limitation Period in the International Sale of Goods of 1974, Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930, Convention on the Contract for the International Carriage of Passengers and Luggage of 1973, Convention on the Contract for the International Carriage of Goods by Road of 1955, Convention concerning International Carriage by Rail (COTIF) of 1980 including Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) and Uniform Rules on the Contract for International Carriage of Goods by Rail (CIM), Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention) of 1929.⁴

Other sources of uniform contract law

In addition to the ratified international conventions, other sources of uniform contract law are also quite important for the development of contract law on Serbia. These sources include UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), non-ratified international conventions, model laws, standard clauses, model contracts, legal guides, instructions, recommendations and other documents adopted and recommended by the relevant international organizations, especially UNCITRAL, UNIDROIT and ICC.

The influence of UNIDROIT Principles on Serbian contract law is reflected, first of all, in the fact that the contracting parties from Serbia, in concluding international commercial contracts, have begun in recent years to stipulate their application either through a choice of law clause explicitly providing that the contract shall be governed by these principles (e.g. "This Contract shall be governed by the UNIDROIT Principles of International Commercial Contracts"), or by providing that the contract shall be governed by general principles of law, or by *lex mercatoria*. Furthermore, Serbian arbitrators refer to UNIDROIT Principles in the reasoning of awards in some cases.⁵ Finally, certain solutions of UNIDROIT Principles and their comparative analysis with the relevant rules of the Serbian Law of Obligations are intensively discussed in the doctrine of Serbian contract law, which has been paying more and more attention to the sources of uniform law.

The relevant international conventions not ratified by Serbia such as "UNIDROIT Convention on International Financial Leasing", "UNIDROIT Convention on International Factoring", and "Convention on Agency in the International Sale of Goods (Geneva)" have a significant role in the development of Serbian contract law, first of all as models for the national legislators in drafting new rules in certain fields of contract law, or in amending the existing ones. In that regard, it should be noted that the UNIDROIT Convention on International Financial Leasing of 20th May 1988 (Ottawa) was the main source of the Serbian Law on Financial Leasing which came into force on 27th May 2003.⁶ The Serbian Law incorporates many provisions from that Convention, especially with respect to the principal issues. Consequently, the internationally accepted standards have been integrated into the national legal system, compatibly with the entire national legal system, the legal tradition and fundamental legal principles[10, pp.503-516].

5 See for example the award of International Trade Arbitration attached to the Chamber of Commerce of Serbia T-9/07, 23.01.2008 where the tribunal expressed the following view: "The arbitration tribunal considers that no important difference exists regarding damages due to non-performance of obligation from the part of the seller which he could foresee at the time of conclusion of contract as a reasonable person, independently on the legal basis to which the tribunal refers. All three documents – CISG, PECL and UNIDROIT Principles regulate this question on a similar manner".

6 *Law on Financial Leasing*[28]. About the Serbian Law on Financial Leasing, see, [9].

4 For the list of international conventions relating to contract law and private international law ratified by Serbia, see [8].

European Union directives

The directives of the European Union are binding as to the results to be achieved upon each Member State of the European Union to which they are addressed. The Member States are obliged to take the national measures necessary to achieve the results set out in the directive but they are free to decide how to transpose the directive into the national law.

At the time of writing this paper, Serbia is still on its road to join the Union, so for the time being, one may only speak of the indirect influence of the EU directives on Serbian contract law. In any case, due to the EU membership of Serbia in prospect, the directives are supposed to be gradually transposed into the national law. This should be ensured on a case by case basis, taking into account the nature, background and wording of each particular directive as well as the results to be achieved. It means that the existing national legislation should be modified, or national provisions enacted for the sake of harmonization. In the field of contract law, in that regard, directives related to consumer protection, electronic signature and electronic commerce in general are of special importance. The European Union directives related to contract law should be transposed into Serbian national law by enacting new laws or by-laws, together with adequate changes of the existing relevant laws.⁷

Application of the UN Convention on International Sale of Goods in Serbian law

Sphere of application of the CISG

The UN Convention on Contracts for the International Sale of Goods (CISG) is one of the most important international uniform law instruments, as evidenced both by the number of Contracting States and the number of cases governed worldwide by its uniform rules. The CISG has been the centre of a tremendous interest in legal writing and has drawn the attention of domestic and international legislators. Thus, the understanding of the main rules regarding the sphere of application of the

CISG in Serbian contract law is of great importance for the Serbian parties in international commercial contracts and for the Serbian courts in resolution of international business disputes.

The sphere of application of the CISG is defined by Articles 1 – 6. The CISG governs the contract of sale of goods (application *ratione materiae*) between the parties whose places of business are in different States (application *ratione personae*) when the states are Contracting States (direct application) or when the rules of private international law lead to the application of the law of a Contracting state (indirect application). These basic requirements for application of the CISG are defined by Article 1. On the other hand, Article 2 excludes certain types of sales from the scope of the CISG and Article 3 establishes additional requirements for the application of the CISG to the contracts for the goods to be manufactured and mixed contracts. Furthermore, the extent to which sales transactions are governed by the CISG is determined by Articles 4 and 5. Regarding the application of the CISG, the principle of parties' autonomy is expressly provided by Article 6 CISG, stating that the parties may exclude application of the CISG or derogate from or vary the effect of any of its provisions, with the exemption of the rules concerning the writing provided for in article 12 CISG. It means, in other words, that the CISG is not the mandatory law of a Contracting State. In regard to the application, the CISG adopts the "opting out" system, according to which the CISG is to be applied automatically if the conditions of its application *ratione materiae* and *ratione personae* are met and if the parties did not exclude its application. The parties may exclude the application of the CISG in whole or only in part by an express provision (a choice of law clause, either nominating the law of a non-contracting state or simply by excluding the CISG that would otherwise have applied) or by implicit derogation (by choice of a concrete national statute/code to be applied).

Main differences between the Serbian Law of Obligations and the CISG

The main differences between the Serbian Law of Obligations and the CISG lie in the concepts of the *fundamental breach*

⁷ Analysis of this and other questions regarding contract law in Serbia, see [11, pp. 93-109].

of contract and *non-conformity of goods*, as defined in the CISG.⁸

The CISG provides for the fundamental breach of contract as a basis for avoidance of contract (Article 25). The Serbian Law of Obligations, like many other codes in civil law countries, is unfamiliar with the concept of the fundamental breach of contract. Instead, it adopts the non-performance of contractual obligation as a general ground for the avoidance of bilateral contracts (Arts. 124-132) on one side, and material and legal defects as special grounds for avoidance of a sale contract, on the other (Arts. 478-515). Nevertheless, the same criteria relating to the importance of non-performance, *i.e.* consequences of non-performance, are the starting point for both legal sources, regardless of the different concepts they use. In that regard, the basis for contract avoidance is not the non-performance of an obligation in general, but only a non-performance that substantially deprives the aggrieved party of the expected benefit under the contract and substantially impairs the entire purpose of the contract for that party. The main problem both systems face is how to evaluate the importance of a specific non-performance for the purposes of determining whether sufficient ground for contract avoidance exists [6, pp. 111-184].

The uniform concept of the lack of conformity as defined under the CISG is wider than the concept of material defects and includes not only differences in quality, but also differences in quantity, delivery of goods of different kind (*aliud*) and defects in packing (Article 35). On the other hand, the Serbian Law of Obligations specifies the rules for sales contracts regarding material defects of the goods (Arts. 478-500), while other cases of non-performance are subject to general rules on avoidance of contract due to non-performance. Nevertheless, the specific cases of non-conformity defined under the CISG, such as unfitness for ordinary purpose of the goods, lack of fitness of the goods for a particular purpose and non-conformity of goods to a sample or model, largely correspond to the definition

of material defects under the Law of Obligations. In addition, the liability of the seller for non-conformity is dealt with almost identically under the CISG and the Law of Obligations' provisions dealing with the seller's liability for material defects, and those dealing with the defects for which the seller bears no liability. Provisions of the CISG dealing with buyer's right to rely on a lack of conformity are also similar to the relevant rules of the Law of Obligations. Based on the comparative analysis of these solutions, the conclusion seems to be that under both systems, it is not just any defect that gives the buyer the right to avoid the contract, but only such defect that diminishes the expected benefit to the buyer and substantially impairs the entire purpose of the contract. Under the CISG, this principle is integrated under the definition of fundamental breach, whereas under the Law of Obligations, it is articulated through the rules on avoidance of contract for partial defects as well as through the general rule stating that a contract cannot be avoided for non-performance of an immaterial part of an obligation.

Application of the CISG by Serbian courts and arbitrations

Although the application of the CISG as a ratified international convention has priority over national laws, the courts of Serbia are not very familiar with its application even in simple cases of direct application specified in article 1.1.a. CISG. Generally speaking, in most cases, the courts of first instance do not apply the CISG at all; instead, judges determine the applicable law by virtue of the rules of private international law which usually means the application of Serbian substantive law, which they perceive as the Serbian *Law of Obligations* and *not the CISG*, although all the conditions for the application of the CISG are met.

In appeal proceedings, the High Commercial Court has expressed different views regarding the application of the CISG. For example, in a decision of the High Commercial Court of 7 February 2006, the Court held that, when the seller is a foreign company and the buyer a domestic legal person, and both parties are from CISG Contracting States, the CISG and not the Law of Obligations must be applied to the contract of sale. Therefore, the application of the Law

⁸ One of the differences between the CISG and the Law of Obligations is related to the revocation of an offer. The CISG adopts the principle of revocability of an offer (with significant exceptions specified in Art 16) whereas under the Law of Obligations an offer is irrevocable; it may be revoked if the revocation reaches the offeree before an offer or in the same time as an offer (Art 36).

of Obligations to the contract by the court of 1st instance was wrong. A similar view is expressed in a decision of the High Commercial Court of 23 August 2004, where the Court stated that, concerning international sale of goods, the relevant source of law was the UN Convention on the International Sale of Goods of 11 April 1980 (CISG). The opposite view can be found in a decision of the High Commercial Court of 9 June 2004, where the Court decided to apply the law of Serbia to a contract for the international sale of goods concluded between a party with the place of business in Slovenia and a party whose place of business was in Serbia. Since the contract did not contain a choice of law clause, the Court held that the parties implicitly expressed that choice by choosing the court in Serbia. The Court perceived the parties' choice of the court in Serbia as one of the main indicators of their intention to apply the law of Serbia as the substantive law for their contract. On this assumption, the Court concluded that the decision of the first instance court to apply the Law of Obligations of Serbia as substantive law to the contract was correct.⁹

In contrast to regular court practice, the CISG is well known and widely implemented in Serbian arbitration practice. Most arbitration awards concerning contracts of international sale of goods, rendered between 1998 and 2015, involved the application of the CISG where the conditions for such application were met.¹⁰

Practical advantages of the CISG application

From the economic perspective, the CISG brings immediate benefits to traders in terms of reduction in transaction costs and lower prices for imported and exported goods [13]. Therefore, Serbian final users and consumers could receive more value for their money, and Serbian exports' lower prices could be more competitive in global markets. In light of these benefits, the vast majority of European Union Member States, as well as most other European States and almost all major trading States, have adopted the CISG. It is estimated that the CISG may apply to 80% of global cross-border sales. Most key commercial partners of Serbia are a party to the CISG, including 24 of the 28 members of the European Union, the United States

of America, Canada, Brazil and most Latin American countries, China, Japan and South Korea.¹¹

One of the most important advantages that the CISG provides concerns the efficiency of the legislative framework and predictability of applicable law. There is a widespread assumption among traders that the choice of the applicable law is merely a theoretical problem of little practical relevance and that the most important thing is to draft a "good" contract. They often look at the contract as if it were a self-sufficient set of clauses, without realizing that it must be put into the context of legal rules [15, pp.21]. Such approach causes significant problems in practice since the choice of applicable law may have a decisive impact on the success of a dispute arising from a contract of international trade. Differences in solutions offered by national legal systems in the field of contract law, solutions of relevant international conventions and sources of uniform contract law in general, and in particular the fundamental differences that exist between civil law and common law legal systems [16] can lead to substantially different outcomes of one and the same dispute, depending on the law applicable in the specific case [2, pp.135-187].

By the application of the CISG, the contractual parties may easily resolve the problem of the applicable law, since the CISG provides uniform, neutral, ascertainable legal rules. Small and medium-sized enterprises, as well as traders located in developing countries, typically have a reduced access to legal advice when negotiating a contract. Thus, they are more vulnerable to the problems caused by inadequate treatment in the contract of issues relating to applicable law. The same enterprises and traders may also be the weaker contractual parties and could have difficulties in ensuring that the contractual balance is kept. Those merchants would therefore derive particular benefit from the default application of the fair and uniform regime of the CISG to contracts falling under its scope [17].

The Civil Code of Serbia

Work on drafting Serbian Civil Code

Serbia is at present one of the few countries with no Civil Code at the beginning of the 21st century. This is a

¹¹ [14] www.cije.up.pt/download-file/1202.

⁹ Detailed analysis, see [1, pp. 253-278].

¹⁰ Detailed analysis, see [12].

strange phenomenon, as it was one of the first European countries to have adopted its Civil Code, as early as 19th century (1844). Parts of civil law are presently regulated by specific laws: the Law of Obligations [18], Property Law [19], Family Law [20] and the Law on Inheritance[21]. It is well known that codification of civil law *per se* increases the richness of legal culture and contributes to the stability of legal relations. In addition, it regulates the entire corpus of subjective civil rights in one place, which is especially significant for natural and legal persons as the holders of these rights.

Starting from the fact that drafting of the Civil Code is an important step to legal certainty and rule of law, and considering the present status of Serbian private law, its history and culture, the Government of the Republic of Serbia established a Commission for Drafting the Civil Code of Serbia in 2006 [29]. The Commission published a report under the title “*Work on the Drafting of Civil Code of the Republic of Serbia*” in 2007, where it presented its work, together with open issues relating to the Code [22]. The work on drafting the Code is made considerably easier by the fact that some laws in the field of civil law, like for example the Law of Obligations, are already at the high end of legal culture. However, the Commission emphasised that the drafting of the Civil Code must not boil down to a simple reception of the existing particular laws in the field of civil law and their technical formulations in the form of codification. This work includes firstly an analysis of the existing legislative solutions, their modernization and development, and particularly their harmonization, both between themselves and with the most common solutions and trends in comparative law. This means that it is necessary to harmonize the corresponding legislative solutions with those adopted in ratified international conventions as well as with other international and particularly European standards. The Commission underlined that the future Civil Code of Serbia should meet two basic requirements: to further develop the rules in the sphere of private law promoting the principle of legal certainty and the rule of law, while at the same time not closing the road to the further evolution of civil law and its continuous improvement. In May 2015, the Commission published a Preliminary Draft of the Civil Code of the

Republic of Serbia, consisting of 2.800 articles and of 480 alternative solutions. The Preliminary Draft was sent to one-year public debate which is ongoing [23, pp.696-710].

Compliance of the Civil Code with the European legislation and widely accepted international standards

One of the primary goals of adopting the Civil Code has been harmonization with the solutions of European law and international law. The Statement of Reasons for the Preliminary Draft of the Civil Code states that the comparative method with regard to the European legislation in the field of civil law was largely employed in drafting the Code. First of all, there was an analysis of the solutions from the Swiss, French and German legislations, as well as from the recently adopted civil codes (*e.g.* in Quebec, Russia, Brazil, Hungary, etc.). The Commission for Drafting the Civil Code anticipated a professional engagement of an *International Council*, composed of the most distinguished European jurists in the field of civil law, to whom the text of the Code translated into English would be delivered. Any suggestions and remarks of foreign experts would be used in drafting the final text and its harmonization with the modern achievements and tendencies of European legal culture [24].

The most important novelties offered by the Civil Code regarding application of international rules in the field of contract law

The Preliminary Draft introduces several major novelties relating to the application of international rules and standards to the field of contract law and its full harmonization with modern trends in comparative law.

In the first place, the Preliminary Draft provides that the Code seeks to achieve the virtues of justice. It proclaims equal legal protection of human rights in all areas it governs. A court of law or another competent authority shall apply this provision to all persons regardless of race, colour, sex, language, religion, political or other affiliation, national or social origin, property, birth or other similar circumstances (Arts 1-3).

Special attention is given to the fundamental values and principles on which the Code is based. These

principles are of tremendous importance, not only for the creation, exercise and protection of civil rights, but also for the proper interpretation of legislation, as well as for resolving disputes. The principle of good faith and fairness is proclaimed as the governing principle, which can be neither excluded nor restricted. In addition to the principle of good faith and fairness, the essential principles of the Code include: autonomy of will, equality of persons in civil law, direct implementation of the principles of fairness, protection of environment, prohibition of causing damage, prohibition of creation and exploitation of monopoly position, prohibition of abuse of rights, as well as other principles important to the civil law relations. The principle of uniform provisions for classic civil and commercial contracts dominates the modern legislation. This principle is observed in the Civil Code, however, special regulations have been proposed for certain commercial contracts, due to their specific nature.

The Preliminary Draft expressly provides that the UN Convention on Contracts for the International Sale of Goods shall apply to the “international commercial sale, provided that the requirements for such application as envisaged by that Convention have been met” (Article 663). The enjoyment to implement international rules contained in the express provisions of the Preliminary Draft of the Civil Code achieves several important goals – it emphasizes the *obligation* to apply the CISG, which, being a ratified Convention, constitutes an integral part of the legal order of Serbia; it *reminds* the parties of the existence of uniform rules in the field of international sale of goods; it eliminates *different interpretations* that may appear in the context of clauses of the contracts on the international sale of goods where the “Serbian law” is provided as the law applicable to the contract; and it underscores the legislator’s general commitment to the application of widely accepted international standards in the field of contract law.

The impact of international uniform rules on the solutions contained in the Civil Code is particularly evident in the general rules of the Code relating to contract avoidance due to non-performance of an obligation. In this regard, the principle of fundamental breach of contract based on the solutions of the CISG and

the UNIDROIT Principles of international commercial contracts has been introduced into Serbian contract law. Further harmonization with international standards has also been achieved in the context of the rules governing termination or modification of the contract due to changed circumstances – hardship (Arts 273-277), usurious contracts (Article 282), general conditions of adhesion contracts (Arts 283-285) as well as other general rules of the Code relevant to contract law.¹²

The rules of the Code relating to individual contracts have also been further aligned with international standards. Thus, certain rules governing sales contracts have been changed in order to be brought into compliance with the appropriate solutions of the CISG. In addition to contract avoidance due to the fundamental breach of contract, a particularly important issue is that of liability for material defects (Arts 691-698) and, within this context, the broadening of the concept of material defects for which the seller bears liability (Article 691), the extension of the period in which the seller bears liability for hidden defects (Article 694), as well as the notification of defects rule (alternative to Article 695). New solutions have also been introduced to the provisions of the Civil Code governing the sale with the pre-emption right, trial sales, sale by sample or model, sale with a specification, sale by retention of right of ownership, instalment sale and the order for sale.

In addition to the sales contract, the Code has introduced changes to a number of other special contracts, such as exchange contract, loan contract, lease contract, piecework contract, construction contract, licensing contract, contract of carriage, deposit, warehousing, order, commission business, agency contract, brokerage contract, forwarding contract, control of goods contract, travel package contract, agency travel contract, contract of allotment, insurance contract for property and persons, security contract, warranty contract, contract of assignment and settlement, as well as the rules relevant to the banking operations.¹³

¹² For more details see *Obrazloženje Građanskog Zakonika*, (2015), in *Građanski zakonik Republike Srbije*, Vlada Republike Srbije, Komisija za izradu Građanskog zakonika, Belgrade.

¹³ For more details see [24].

Regulation of new contracts in the Civil Code

The contracts which are not regulated by law (un-nominated contracts, *contrats innommés*) [26, pp. 149-166] present a special issue in the contract law of Serbia. These contracts may be validly concluded by parties in accordance with the principle of party autonomy. Their content is determined by parties either through a combination of some elements of the contracts regulated by law or by stipulating an entirely new content, independent of any other contract provided for by law [27, pp. 69-109].

Where a contract is regulated by law, the parties do not have to regulate their relationship in detail. It suffices to reach an agreement on the essential elements of the specific contract so that the relevant statutory provisions may apply. For the innominate contracts, however, as there are no statutory provisions which may replace or supplement the parties' intention, the contract must be formulated with special care in order to ensure the parties' intention is expressed precisely, correctly and with no ambiguity. Where a dispute arises, the court/arbitration shall apply the general rules and principles of contract law as well as the rules relevant for similar contracts (analogy) regulated by the Law of Obligations. Generally, the most important national sources for contracts not regulated by law are: the contract itself as the first source, practices established by the parties between themselves, trade usages to which the parties have agreed, general principles in the field of commercial relations, general principles and rules of the national Law of Obligations and its specific rules relevant for similar contracts.

Quite a number of new commercial contracts arising out of the *lex mercatoria* in Serbia are not regulated by law. Thus, for instance, contracts on distribution, franchising, time sharing, factoring, forfeiting, and technology transfer, as well as agreements for long-term supply of goods, manufacture of goods, supply of services and other new commercial contracts are not regulated by the Serbian Law of Obligations.

Taking into account the economic and legal significance of certain contracts which have so far not been regulated by law, the Civil Code has opted to provide legal provisions to govern such contracts. The contracts in question include: contracts of sale with the right of

repurchase, contracts of partnership, leasing, franchising, distribution contracts, deeds of gift, contracts of loan for use, publishing contracts, contracts of cooperation in agriculture, reinsurance contracts, liability insurance contracts, contracts of storage of items in dispute, contracts of lifelong annuity or games of chance contracts. Furthermore, the existing provisions on banking operations have been innovated and supplemented. In addition to the banking operations governed by law, such as bank cash deposit, savings deposits, lodging of securities, current account with a bank, contracts of safe-deposit box, loan contracts – especially those against pledged securities, letters of credit and bank guarantees, the Civil Code provides for the contracts of opening and maintaining accounts, payment services contracts, safe deposit box contracts and contracts of payment card transactions.¹⁴

Resolution of commercial disputes through arbitration

An analysis of the rules of Serbian contract law applicable to business transactions, particularly from the perspective of investors and business community in general, requires an overview of the key issues relevant to arbitration as the dominant method of resolving disputes arising from business relations.

Arbitration has received increased popularity and global recognition as the 'ordinary and normal method' of resolving commercial and investment disputes, in particular those of international character. This is due to its adaptability to the needs of business community and its multi-faceted advantages over litigation before national courts. Consequently, by agreeing on arbitral dispute resolution, Serbian businesses would not only gain recourse to a faster and often less costly and more efficient dispute resolution mechanism, but would also significantly contribute to enhancement of overall business climate in Serbia.

The legal framework for arbitration is comprised of both international and domestic sources. The most important international sources of arbitration law are the ratified international conventions related to arbitration,

¹⁴ For more details see [24].

such as: Protocol on Arbitration Clauses of 1923 (Geneva Protocol), Convention on Execution of Foreign Arbitral Awards of 1927 (Geneva Convention), Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), European Convention on International Commercial Arbitration of 1961 (European Convention), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 (Washington Convention), all of which the Republic of Serbia is a party to. The relevant provisions of arbitration-related regulations in Serbia are contained in the Law on Arbitration based on 1985 UNCITRAL Model Law on International Commercial Arbitration regulating both domestic and international arbitration, whether commercial or not.

It is important to underline that all of these sources recognize party autonomy as the primary source of arbitration law and, at the same time, give high regard to usages and business practices as elements of business oriented regulatory framework for arbitration [25, pp.238-255].

Conclusion

An analysis of the relevant sources of Serbian contract law and particularly the Law of Obligations and the central principles and solutions of the future Civil Code of Serbia, the significant influence of international standards contained in international conventions and other transnational documents on the development of Serbian contract law, reveals that it is a liberal, well developed, modern and progressive part of Serbian private law. Future codification in the form of the Civil Code is a continuation of the process of full harmonization with the worldwide accepted standards and European legal civilization, which can significantly contribute to the overall improvement of business environment in Serbia. However, the acceptance of uniform rules (by national legislator or by party autonomy) could not be taken *per se* as a guarantee for their successful implementation in practice. In order to accomplish the real uniformity, it is necessary to provide the uniform interpretation of international documents as well as to continuously develop and strengthen the knowledge of the sources of uniform

contract law, especially among judges, lawyers and business communities and to share practical experiences from all around the world. Finally, the effects of transnational documents in one country should be regarded in the light of legal, economic and social factors of that country as a whole, since these factors determine in general way the legal destiny of a transnational document in each particular country.

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Jelena Perovic

Full Professor at Faculty of Economics, University of Belgrade. Lecturing: International Commercial Law, International Business Contracts, International Sale of Goods, EU Private Law. Vice-President of the Jurists' Association of Serbia. President of the Commission for the International Sale of Goods of International Association of Lawyers - UIA, Paris (2009-2014). Member of International Academy of Comparative Law, Paris. Expert of the drafting team of the ITC Committee on International Commercial Model Contracts, Geneva (2009-2010). Member of the ICC Commission on Commercial Law and Practice. National correspondent for distribution and commercial agency contracts for the International Distribution and Commercial Agency Institute, Torino. Scientific collaborator for the *Revue de droit international et de droit comparé*, Bruylant, Brussels. Editor of the section "International Commercial Contracts, Arbitration" for the law review *Pravni zivot*, Kopaonik School of Natural Law, Belgrade. Professor Perovic is specialized in international business law, particularly international sales and related transactions. She has acted for many years as chairman of the arbitral tribunal and arbitrator in international institutional and ad hoc arbitrations under a variety of arbitration rules, including ICC and UNCITRAL.



Ljubica Tomic

(1970) is the founding and managing partner with TSG Tomic Sindjelic Groza Law Office in Belgrade, Serbia. She is head of the firm's corporate law team and corporate governance practice. She has completed the Corporate Governance Specialization at the Law Faculty in Belgrade (specialization established in Belgrade within the IFC –World Bank program). Her 15 years practice is devoted largely to commercial law, complex transactions, regulatory and corporate governance matters in Serbia. Ms. Tomic is active within the UIA Commission for International Sale of Goods. Ljubica Tomic and her team were awarded the Corporate INTL annual legal award as the Corporate Governance Law Firm of the year in Serbia for 2015. Ms. Tomic is the German and English speaking member of the firm.