International Academy of Comparative Law

Académie Internationale de Droit Comparé

Silvia Ferreri
Editor

COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITÉ DES SOURCES TRANSNATIONALES

Reports to the XVIIIth International Congress of Comparative Law

Rapports au XVIII^{e} Congrès international de droit comparé

Washington, D.C. 2010

JELENA PEROVIC

COMPLEXITY OF TRANSNATIONAL SOURCES
SERBIA

Electronic edition of the national reports presented to the XVIII[th] International Congress of Comparative Law on the theme «Complexity of Transnational Sources» prepared by the Isaidat Law Review for the *Società Italiana di Ricerca nel Diritto Comparato* (SIRD).

With the editorial assistance of Laura Lasagna

Version électronique des rapports nationaux présentés au XVIII[e] Congrès international de droit comparé sur le thème «La complexité des sources transnationales», préparée par la Revue Juridique de l'Isaidat pour la *Società Italiana di Ricerca nel Diritto Comparato* (SIRD).

Merci à Laura Lasagna pour la révision des textes

ISSN: 2039-1323

(2011) Volume 1 –Special Issue 3, Article 10

COMPLEXITY OF TRANSNATIONAL SOURCES

SERBIA

JELENA PEROVIC*

I. International conventions in the field of contract law. - II. Other sources of uniform contract law. - III. European union directives. - General conclusion

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 with different traditions and backgrounds. In that regard, they represent transnational documents which suppose to minimize the risks arising out from the differences between the national legal systems, being at the same time a "bridge" from the particularity of the local national rules the to 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 requirements of the applicable law where such requirements exist.

In that regard, acceptance, implementation and interpretation of the transnational documents in the field of contract law are questions of great complexity and practical importance for international commercial contracts in general. This article is focused on these questions, analysing: International conventions in the field of contract law, especially examining the UN Convention on Contracts for the International Sale of Goods (CISG), the sphere of its application, the application by Serbian courts and arbitrations, main differences between the CISG and the Serbian Code of Obligations (I); Other sources of uniform contract law –

* Prof. Dr. Jelena Perovic, Faculty of Economics, University of Belgrade.

especially UNIDROIT Principles and PECL and their influence on Serbian contract law (II); EU Directives relating contract law matters – how to transpose them into the Serbian law (III).

2.International conventions in the field of contract law

Ratified international conventions

The ratified international conventions regulating on uniform way matters in the field of contract law are a specially important source of contract law. Ratified and promulgated international conventions constitute part of internal legal order and are directly applicable when conditions 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.[1] According to the Constitution of the Republic of Serbia, the ratified international conventions constitute part of 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.[2] Ratified international conventions in Serbia are published in the official gazette together with the promulgating act.[3]

The UN Convention on Contracts for the International Sale of Goods

The UN Convention on Contracts for the International Sale of Goods (CISG), which applies to contracts for international sale of goods, is one of the most important international documents regarding the unification of contract law.[4] The former Yugoslavia

[1] For the list of international conventions relating to contract law and private international law ratified by Serbia, see M. Stanivuković, M. Živković, Serbia, Supplement 21 (January 2009), International Encyclopaedia of Laws, Private International Law.

[2] Constitution of the Republic of Serbia, art.16 and art.194.

[3] Official Gazette of RS, International Contracts (*Službeni glasnik RS, Međunarodni ugovori*) .

[4] For the CISG in general, and for the sphere of its application see, P. Schlechtriem, I. Schwenzer*, Commentary on the UN Convention on the International Sale of Goods,* Second (English) ed. Oxford University Press, 2005; C. M. Bianca, M. J. Bonell, *Commentary on the International Sales Law, The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987; K. H. Neumayer, C. Ming, *Convention de Vienne*

had signed and ratified the CISG on 11th April 1980 and 27th March 1985, respectively. By action effected 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 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 Republic of Serbia as the successor (art.60.4). On the basis of these rules, in Republic of Serbia the CISG is in force as of 27th April 1992.

Sphere of application of the CISG

The sphere of the CISG application is defined in Chapter I, Part I of the CISG. For the application of the CISG, first of all, the requirements concerning contract of sale (application *ratione materiae*) that has the international characteristics (application *ratione personae*) defined in article 1. CISG must be satisfied. On the other hand, article 2 excludes certain types of sales transactions from the

sur les contrats de vente internationale de marchandises, Commentaire, Lausanne, 1993; J. O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* Kluwer Law International, 1999. See also, V. Heuzé, *La vente internationale de marchandises. Droit uniforme.* Traité des contrats sous la direction de Jacques Ghestin, Paris, 2000, pp. 74-117; B. Audit, *La vente internationale de marchandises, Convention des Nations-Unies du 11 avril 1980,* L.G.D.J., Paris, 1990, pp. 17-30;C.Witz, *Les premières applications jurisprudentielles du droit uniforme de la vente internationale Convention des Nations Unies du 11 avril 1980,* L.G.D.J; Paris, 1995; F. Ferrari, *La compraventa internationale, Aplicabilidad y aplicaciones de la Convención de Viena de 1980*, pp. 81-176. In Serbian doctrine, J.Perović, *Bitna povreda ugovora. Međunarodna prodaja robe* (*Fundamental Breach of Contract. International Sale of Goods*), Belgrade, 2004 ; J.Perović, *La contravention essentielle au contrat comme fondement à la résolution des contrats dans les codifications de droit uniforme*, Revue de droit international et de droit comparé, Bruylant, Bruxelles, 2008/2-3, pp.272-307.

CISG sphere of application (sales of goods for personal, family or household use, sales by auction, sales on execution or otherwise by authority of law, sales of stocks, shares, investment securities, negotiable instruments or money, sales of ships, vessels, hovercrafts or aircrafts and sales of electricity). Finally, the CISG governs only the formation of the contract of sale and the rights and obligations of the parties from such a contract. The CISG is not concerned with: the validity of contract, or of any of its provisions or of any usages, the effect that the contract may have on the property in the goods sold (article 4 CISG).

The application ratione materiae. Regarding the application *ratione materiae*, the CISG does not expressly define the contract of sale. Definition can be established indirectly from the provisions regulating the obligations of the seller (art. 30) and of the buyer (art. 53). According to those provisions, the meaning of the contract of sale in CISG does not differ from the relevant definition of the Serbian Code of Obligations (art. 454).[5]

However, the application of the CISG may cause difficulties in cases of certain contracts of mixed nature, or of contracts similar to the contract of sale. In that regard, article 3 CISG provides that contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods

[5] Law on Obligations (*Zakon o obligacionim odnosima*), "Official Gazette SFRY" No. 29/78, 26.05.1978. Modifications: "Official Gazette SRY" No.31/93. The formal title of this act is the Law of Obligations; however, since both in terms of substance and form, it represents a codification in the deepest meaning of the word, it is usually referred to in domestic legal terminology as the Code of Obligations. The Law on Obligations was enacted in the former Yugoslavia in 1978 and with modifications of 1993 is in force in Serbia as the Serbian Law on Obligations. While drafting the Law on Obligations, not only domestic legal tradition, but comparative law as well, especially the Swiss Code of Obligations, were taken into account, which resulted in a Law conforming with that of the Civil Law countries. In addition, the Law takes into account the rules of Common Law to the extent those rules have had an impact on solutions adopted by the relevant international conventions, especially the 1964 Hague Uniform Laws – ULIS and ULFIS. As a result, the Serbian Law on Obligations represents a modern codification, completely in line with the main contemporary sources of uniform contract law. Serbian Code of obligations was a predecessor of many solutions adopted in UNIDROIT Principles and Principles of European Contract Law.

undertakes to supply a substantial part of the material necessary for such manufacture or production. The CISG does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. In determining whether that conditions is satisfied one should take the economic criteria,[6] *i.e.* the relative value of each element of a contract in question.[7]

Regarding distribution contracts, one has to make distinction between the framework distribution agreement on the one side, and the individual contracts of sale concluded between the supplier and the distributor on the basis of the framework agreement on the other side. The framework distribution contract which regulates the long term relationship between the parties, which is mainly related to the rights and obligations of the parties arising from the *distribution* relation, by prevailing opinion is not governed by the CISG. Contrary to that, the *individual sales contracts* which parties conclude each time when the goods suppose to be supplied to the distributor, may fall under the CISG, if the other requirements of Article 1 are met.[8] Consequently, the international distribution contract is submitted to the different legal regimes: the rights and obligations of the parties arising from the individual sales contracts (supply orders) could be governed by CISG, and the rights and obligations of the parties strictly related to the distributionship are regulated by the national law applicable by virtue of the rules of private international law. This *dépeçage* is the logic consequence of the mixed nature of the distribution contract. Such approach is supported by case law.[9]

In the case of the District Court's Gravenhage Netherlands, a Dutch and Swiss company concluded a framework agreement for the non-exclusive distribution of certain products. The agreement

---

[6] See B.Audit, *La vente internationale de marchandise opus citatum* p.25-26; R.Herber, Art.3, In: P.Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG),* Clarendon Press Oxford, 1998, p.39.

[7] See for example Arbitration award of the ICC7153,1992 in Collection of ICC Arbitral Awards 1991-1995, Kluwer, 197, p.443-447, comm. D.Hascher.

[8] In that regard, V.Heuzé, *opus citatum*, p.75; C.Witz, *opus citatum* , p.32; F.Ferrari, *opus citatum*, p.129.

[9] Detailed analysis, J.Perovic, *Applicability of the CISG to International Distribution Agreement*, Pravni zivot no 12, vol.IV, Belgrade, 2007, pp.359-369.

contained no choice of law clause. On the same day, the parties concluded a sales contract of the same products. That contract was to be governed by the Swiss law. The sales contract contained elements of distribution as for instance the clause on non-exclusivity. The Dutch buyer claimed that the Swiss seller did not fulfil his obligations deriving from the distribution agreement and therefore refused to make payment for the sale. The seller sued for payment. In counterclaim, the buyer asked for the setting aside of the distribution agreement. The court stated that the CISG does not apply to distributionship agreements. The framework contract could not be regarded as a sale because the most important elements of the sale contract were in fact laid down in the sale contract itself. The seller's claim was rejected under the applicable domestic law. [10]

Similar was the ICC case where a German seller and a Spanish buyer concluded an agreement pursuant to which the buyer was to be the exclusive distributor in Spain of industrial equipment produced in Germany.[11] Several individual sales contracts were then concluded between the parties. Four years later the German company informed the Spanish buyer that, due to the insufficiency of the buyer's sales, it would sell its products in Spain through another company. Thereafter, upon the buyer's refusal to pay for some of deliveries, the seller started arbitral proceedings. The buyer counterclaimed damages arising from breach of the exclusive distributionship agreement as well as from lack of conformity of certain products. The sole arbitrator held that the CISG was not applicable to the distribution agreement as such, but to the individual sales contracts concluded pursuant to the distribution agreement.[12]

---

[10] Decision of 2nd July 1997. See, J.Perovic, *Applicability opus citatum*, p. 363.

[11] 23.01.1997. 8611/HV/JK.

[12] The same views regarding this question were expressed in the decision of District Appeal Court of Amsterdam (16th July 1992) regarding exclusive distribution contract for the resale of shower cabinets, decision of the United States District Court in the case Viva Vino Import Corporation v. Farnese Vini (29th August 2000), decision of the Metropolitan Court of Budapest regarding the exclusive distribution of Swiss instruments in Hungary (19th March 1996), decision of the Appellate Court of Düsseldorf related to an exclusive

However, the problem could arise from the fact that the borderline between framework distribution and sales contracts may be very thin and uncertain if the framework contract already contains most of the typical obligations of a seller (the supplier) and a buyer (the distributor), precisely formulated, so it is only up to the distributor to require delivery at a certain date, in a specified quantity, etc. so, just to confirm the seller's obligations which are already provided by the framework contract.[13] It is for these reasons that some authors does not exclude possibility of application of the CISG rules to the entire framework agreement, if such rules arise from the general rules of the law of obligations (i.e. if they are not specially adapted to the contract of sale).[14]

Application of the CISG to the framework distribution contract can also be found in the case law. For instance, in the case of the Italian *Corte di Cassazione*,[15] an Italian company and a British company entered into an agreement providing for the sale and distribution of goods. The Italian company sued the British one claiming termination of the agreement due to non-performance of obligations of the British distributor (*i.e.*, to buy and distribute the goods on the British market and to pay the price). The decision of the Italian court relied on the assumption that the CISG is applicable not only to sales, but also to distribution agreements, provided that these can be construed as accessory clauses to a sale contract. It means that the court applied the principle according to which, when there is a prevalent nature of one type of contract, together with accessory elements of other contracts, the provisions of law regulating this main type of contract should be applied (the main elements of one contract absorb the accessory elements of other).[16]

---

distribution of German engines for lawn mowers in Italy (11th July 1996), etc., source: CISG-online.

[13] P.Schlechtriem, I.Schwenzer, *opus citatum*, p.27.

[14] See P.Schlechtriem, in: P.Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht*, 3rd ed., Munich, 2000, n.7 of intr. To art.14-24 CISG; F.Visher, L.Huber, D.Oser, *Internationales Vertragsrecht*, 2nd ed., Berne 2000, § 356.

[15] 14.12.1999, Imperial Bathroom Company v. Sanitari Possi S.p.A., source: CISG-online 895.

[16] The same view as about the applicability of the CISG to distribution agreement was expressed in the decision of the US District Court (17th May

The mentioned facts lead to the conclusion that problems of applicability of the CISG to international distribution contracts are to be solved on the basis of the facts of each particular transaction and not under a general rule specifying *a priori* whether it is possible to apply the CISG or not. In that regard, the basic criterion should be the *cause* of the dispute – whether it arises from the sale relation between the parties or its source is the pure distribution relation. In case the dispute arises from the rights and obligations of *sale*, the judge/arbitrator may apply CISG (if conditions for its application are met), taking into consideration all relevant circumstances of the case. Contrary to that, if the dispute is related strictly to the *distributionship*, the application of the CISG would be inadequate. In that case, dispute is to be settled in conformity with the national law applicable by virtue of the rules of private international law as well as in conformity with the general principles of the law of obligations.[17]

Finally, the CISG covers only the contract of sale of "goods". Under the CISG "goods" are basically moveable, tangible things. However, the notion of "goods" should be perceived as widely as possible as to cover all objects which form the subject-matter of commercial sales contracts.[18]

The application ratione personae. The application *ratione personae* of the CISG requires the international character of the contract of sale. According to art.1.1 CISG, that character exists when the parties have the place of business in different states: a) when the states are the Contracting States (direct application); or b) when the rules of private international law lead to the application of the law of a Contracting State (indirect application).

1999) in case *Medical Marketing International* v. *Internazionale Medico Scientifica*, *cit*. P.Schlechtriem, I.Schwenzer, *op.cit*. p. 28, as well as in the decision of the OLG Koblenz (17thSeptember 1993), source: CISG-online 2 U 1230/91.

[17] J.Perovic, *Applicability opus citatum*, p. 368.

[18] See, R.Herber, Art.1. In: P.Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG),* Clarendon Press Oxford, 1998, p. 23; R.Herber, B.Czerwenka, *Internationales Kaufrecht. Kommentar zu Übereinkommen der Vereinten Nationen vom 11 April 1980 über Verträge über den internationalen Warenkauf. Kommentar,* München, C.H.beck, 1991, p. 16; Ph.Kahn, *La convention de Vienna du 11 avril 1980 sur les contrats de vente international de marchandises,* Revue international de droit comparé, 1981, p. 956.

In defining the international character of contract, the CISG adopts the *subjective* criteria that, for one contract to be international, requires the place of business of the parties in different states. In that regard, the international character of the contract would not exist if the places of business are situated in the territory of the same state while the goods is in another state and has to be transferred in the state where the parties have their places of business (objective criteria). Nor the international character exists if the contract was concluded in one state by parties in this state and it is then to be performed from that state to another (mixed criteria).[19]

Under article 1.1.a the place of business of each party must have been in a different Contracting State.[20] The CISG applies *directly* when the parties have the place of business in different Contracting States. The CISG is also to be applied where the parties (neither or only one) do not have their places of business in different *Contracting States*, but rules of private international law of the forum lead to the application of the law of a Contracting State. In such a case, the CISG applies *indirectly* by virtue of rules of conflict of laws of the forum state. Article 1.2 CISG provides for a limitation of the sphere of application of the CISG, restricting both alternatives of par.1.a and b: the fact, that the parties have their place of business in a different states, is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. Finally, article 1.3 CISG states that neither the nationality of the parties nor the civil or commercial character of the parties or of the

[19] In that regard, see for example B.Nicholas, *The Vienna Convention on International Sales Law,* Law Quarterly Review, 1989, p. 205; P.Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling, International Sale of Goods,* Dubrovnik lectures, Oceana, New York/London/Rome/, 1986, p. 24; C.Witz, *opus citatum*, p. 25.

[20] A Contracting State is any state which has implemented the CISG by ratification or accession under articles 91.2.2. and its entering into force under articles 99.2, 91,4. The concept of a Contracting State is limited in the special cases provided in articles 92.2 and 93.3 CISG. The similar limitation is provided in article 94 stating that states with the same or similar sale of goods limitation may exclude the application of the CISG as between themselves.

contract is to be taken into consideration in determining the application of the CISG.

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 of the application, the CISG adopts the system "opting out", 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 the 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).[21]

Application of the CISG by Serbian courts and arbitrations

Although the application of the CISG, as a ratified international convention, has the 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, the first instance courts in most cases do not apply the CISG at all; instead, the judges determine the applicable law by virtue of the rules of private international law which usually means the application of Serbian substantive law under which they consider the Serbian *Code on Obligations* and *not the CISG,* although all the conditions for the application of the CISG are met. On the other hand, in the appeal proceedings the High Commercial Court expressed different views regarding the application of the CISG.

[21] See, M.J.Bonell in C.M.Bianca, M.J.Bonell, *Commentary on the International Sales Law. The 1980 Vienna Sales Convention,* Milano, Giuffrè, 1987, p.56; J.P.Béraudo, *la Convention des Nations Unies sur les contrats de vente internationale de marchandises et l'arbitrage,* Bull. de la Cour internationale de la CCI, mai 1994, pp.64 and f.

For instance, in a decision of the High Commercial Court of 7th February 2006,[22] 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 has to be applied to their contract of sale and not the Serbian Code of Obligations. Therefore, the application of the Serbian Code of Obligations to the contract by the court of 1st instance was wrong. Similar view is expressed in a decision of the High Commercial Court of 23rd August 2004,[23] where the Court stated that, concerning international sale of goods, the relevant source of law is the UN Convention on the International Sale of Goods of 11th April 1980 (CISG). In this case, the CISG is to be applied to the contract of international sale concluded between the party from Serbia and the party from Germany. The parties did not make a choice of law applicable to their contract and both parties were from the CISG Contracting States: Yugoslavia (presently Serbia) which ratified the CISG on 1985, and Germany which ratified the CISG on 1989. The Court held that the relevant facts of the case lead to the application of the CISG by virtue of art.1.1.a, or by virtue of art.1.1.b CISG, stating that a decision of the court of 1st instance regarding the application of national Code of Obligations as substantive law to the contract was wrong. However, the opposite view can be found in a decision of the High Commercial Court of 9 June 2004,[24] where the Court decided to apply the national Code to the contract of international sale of goods concluded between the party with the place of business in Slovenia and the party with the place of business 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 choice of the court in Serbia by the parties the Court appreciated as one of the main indicators of the parties' intention that the substantive law to their contract is to be the law of Serbia. Having that in mind, the Court concluded that the decision of the 1st instance court to apply the Code of Obligations of Serbia as a substantial law to the contract was correct.

[22] XVIII PŽ. 9326/2005.
[23] PŽ. 1937/2004/2.
[24] PŽ. 1006/2004/1.

Court practice regarding application of the CISG to contracts of mixed nature. The High Commercial Court of Serbia had opportunity to express its view relating the mentioned question of applicability of the CISG to contracts of mixed nature. In a decision of 13th September 2004,[25] the Court stated that the contract providing the exclusive right of one party to import and to sell the products of the other party for the agreed period of time, for the agreed percentage, and with a right to return to the other party the unsold products, is to be qualified as an agency contract where the agent acts in his own name but on behalf of the principal and not as a contract of international sale of goods. The court of the 1st instance qualified that contract as a contract on international sale of goods and, according to that, applied the CISG as substantive law. In the appeal, the respondent alleged the wrong qualification of the legal nature of the contract by the court of the 1st instance, stating that the contract in question is not the contract of sale. The High Commercial Court adopted the appeal, appreciating that the content of the contract as well as the agreed rights and obligations of the parties indicate that the subject-matter of the dispute is a contract where a contract of mixed nature with prevailing elements of agency and distribution.

Arbitration practice. Contrary to the regular court practice, the CISG is well known and widely implemented in the Serbian arbitration practice. The research of the practice of the International Trade Arbitration attached to the Chamber of Commerce of Serbia (ITAS) shows that in most of the arbitration awards concerning contracts of international sale of goods from the 1998-2008 period, the CISG was applied in cases where the conditions of its application were met.[26] In that regard, one could make a distinction between: 1. the awards where the CISG was applied; 2. the awards where the CISG was not applied because the conditions of its application were not met (exclusion on the basis of articles 1.1, 3.1 and 3.2 CISG) and 3. the awards where the

[25] Pž. 6584/2004.

[26] Detailed analysis, J.Perovic, *The CISG in Serbia,* GTZ - UNCITRAL PROJECT: Regional implementation of the Convention on International Sales of Goods (CISG) and international arbitration rules (published by GTZ).

CISG was not applied although the conditions of its application existed (in a very limited number of cases).

Awards where the CISG was applied. The CISG was correctly applied in most of the awards of ITAS regarding international sale of goods. The awards, which represent the typical examples the CISG application, will be presented.[27]

The award concerned the claim for contract performance in a dispute between the claimant from Yugoslavia (presently Serbia) and the respondent from Greece. The tribunal held that in contracts of international sale of goods the CISG is to be applied prior to the relevant national laws. Since the CISG is ratified both in Yugoslavia (23rd March 1985) and in Greece (12th January 1998), the tribunal found out that the CISG is to be applied to the contract in question. In that regard, the tribunal referred to article 54 CISG proving that the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made. The tribunal emphasizes that the obligation of the buyer to pay the price is similarly regulated in the Yugoslav (presently Serbian) Code of Obligations (art.516).[28]

---

[27] V. also the awards: T-15/01 (claimant from Yugoslavia, respondent from Holland, application of articles 1.1.a, 8.2, 35 and 79 CISG); T-17/01 (claimant from Yugoslavia, respondent from Czech, application of articles 59 and 78 CISG); T-18/01 (claimant from Yugoslavia, respondent from Germany (application of article 39 CISG); T-17/02 (claimant from Serbia and Montenegro, respondent from Canada, application of articles: 53, 60, 61, 64 and 74-77 CISG); T-22/03 (claimant from Serbia and Montenegro, respondent from Hungary, application of articles: 1, 59 and 78 CISG); T-5/05 (claimant from Serbia and Montenegro, respondent from Ukraine, application of articles 1.1.a, 30, 45, 46, 74, 78 CISG); T-15/05 (claimant from USA, respondent from Serbia and Montenegro, application of articles: 35, 38, 39, 46, 50 and 78 CISG); T-6/06 (claimant from Serbia, respondent from Bosnia, application of articles: 33, 56, 61, 62 CISG); T-8/06 (claimant from Serbia, respondent from Rumania, application of articles: 7, 8, 26, 74, 78, 79 and 81 CISG); T-15/06 (claimant from Hungary, respondent from Serbia, subject-matter of dispute: sale of telephone booths); T-24/06 (claimant from Serbia, respondent from Macedonia, application of articles 59 and 78 CISG) etc.

[28] Award T-19/99 of 1999. The same view was expressed in the award T-09/01 of 2001. relating a dispute between the claimant from Serbia and the respondent from Italy regarding the sale of radiators. The contract did not contain a choice of law clause. The tribunal applied the CISG as substantive

In the award rendered in a dispute between the claimant from Italy and the respondent from Serbia for damages from the contract of sale, the tribunal applied the CISG as a substantive law, referring also to the relevant provisions of PECL and UNIDROIT principles. The tribunal stated that the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained, or packaged, in the manner required by the contract (article 35.1. CISG), that the seller is liable in accordance with the contract and the CISG for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time (article 36.1. CISG) and if the seller fails to perform any of his obligations under the Contract or the CISG, the buyer may claim damages as provided in CISG articles 74 to 77 (CISG article 45.1.b.). The tribunal found out that the seller failed to provide the buyer with the certificate confirming that the goods in question were of the Serbian origin. On the basis of these facts and provisions, the tribunal applied CISG article 74 to the issue of damages. In that regard, the tribunal expressed the following view: "The arbitral tribunal considers that no important difference exists regarding the damages due to non-performance of obligation from the part of the seller which it 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".[29]

law in this matter. In that regard, the tribunal referred to article 39 CISG regulating the notice of the lack of conformity. The tribunal found out that for the questions not covered by the CISG, according to article 20. point 1. of the Serbian Law on International Private Law, the applicable law is the law of the place where the seller had his place of business at the time of reception of offer. In this case, it is the Serbian law, that is to say the Serbian Code of Obligations.

29 Award T-9/07 of 23rd June 2008. In the award T-4/01 of 10.05.2002. rendered in a dispute between the claimant from Serbia and the respondent from Bulgaria, the CISG was applied as the law of the place where the seller had its place of business at the time of conclusion of contract (article 20 of the Serbian Law of International Private Law). Since the contract in question did not contain a choice of law clause, the arbitrators were leaded by the rules of private international law to the substantive law of Bulgaria. The tribunal held

Awards where the CISG was not applied because the conditions of its application were not met. In certain disputes, the application of the CISG was excluded on the basis of the requirement regarding the qualification of the contract as a *contract of sale* according to CISG article 1.1 . In most of the analysed cases, the exclusion was made under CISG articles 3.1 and 3.2 . Where the arbitrators found out that the contract in question (contract with a mixed legal nature) did not represent the contract of sale but some other contract, as for example the contract for the supply of goods and services under article 3.2 CISG, they excluded the application of the CISG and implemented the rules of the relevant national law.

For instance, the award T-19/03 concerned a dispute for contract performance between the claimant from France and the respondent from Serbia. The contract provided for the obligation of the claimant to deliver the material to the respondent and the obligation of the respondent to shape it into the goods and deliver it to the claimant in the form of the final product. The tribunal referred to article 3.2 CISG, stating that the CISG does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consist in the supply of labour or other services. The tribunal held that the CISG is not applicable since the contract in question is qualified as a contract for the supply of goods and services; otherwise it is the CISG that would be applied as substantive law in this matter.

In a dispute between the claimant from Serbia and the respondent from France, the sole arbitrator found out, by virtue of the rules of private international law, that the applicable law to the contract in question is the substantive law of Serbia, *i.e.* the CISG. However, the application of the CISG in this matter was excluded because the contract in question represents the contract for the supply of goods and services under article 3.2. CISG. Accordingly,

---

that the states of both parties have ratified the CISG – Bulgaria on 1st August 1991 and Yugoslavia on 23rd March 1985, so that the CISG shall be applied as the substantive law of the seller's place of business, *i.e.* Bulgarian law. Articles 30 and 49 CISG were applied in this matter. The same view was expressed in the award T-1/06 of 20th December 2006, where the contract of sale concluded between the claimant from Germany and the respondent from Serbia provided for "the Austrian law to apply"; on the basis of this clause the arbitrators have applied the CISG as Austrian substantive law.

the sole arbitrator applied the relevant rules of the Serbian Code of Obligations.[30]

In the award rendered in a dispute between the claimant from Serbia and the respondent from Macedonia, the tribunal qualified the contract in question as a distribution contract. The tribunal stated that the CISG is not applicable to the framework distribution contract, while the supply orders (individual sales contracts) concluded on the basis of the framework contract are governed by the CISG. [31]

Awards where the CISG was not applied although the conditions of its application existed. The number of ITAS cases where the CISG was not applied despite the fact that all conditions of its application were met is very limited. In most of the cases of this category, the arbitrators have applied the national Code of Obligations instead of the CISG. Such a case was, for example, in the award T-2/2003 made in a dispute between the claimant from Serbia and the respondent from Macedonia. In the contract of sale, the parties agreed on Serbian to be applied to the contract. On the basis of this clause the tribunal applied the Serbian Code of Obligations. The same view was expressed in the award T-27/02, where the contract concluded between the claimant from Serbia and the respondent from Switzerland provided for the application of the Serbian law; the sole arbitrator applied the Serbian Code of Obligations as a substantive law.[32]

[30] Award T-13/2002.

[31] Award T-23/06 of 2006. The similar reasons for exclusion of the CISG could be find in ITAS awards: T-18/02 of 2002 (claimant from Hungary, respondent from Serbia and Montenegro); T-8/02 of 2002 (claimant from Serbia and Montenegro, respondent from Republika Srpska); T-10/02 (claimant from Germany, respondent from Serbia and Montenegro); T-26/03 of 2003 (claimant from Serbia and Montenegro, respondent from Bosnia); T-22/06 of 2006 (claimant from Serbia, respondent from Italy) etc.

[32] In the affairs of 2001: T-5/01 (claimant from Serbia, respondent from Macedonia) and T-7/01 (claimant from Germany, respondent from serbia), in the absence of an choice of law clause, the tribunal applied the Serbian Code of Obligations although the conditions for the application of the CISG existed.

Fundamental breach of contract as one of the basic differences between the CISG and the Serbian Code of Obligations

A brief historical survey on avoidance of contract due to non-performance. From its earliest roots in the fragmented Roman law approaches, to the detailed system established by Pothier's and Capitant's theories, the legal institute of contract avoidance due to non-performance has come a long way. This early development has been followed by different theoretical discussions, each attempting to answer the questions whether the contract avoidance due to non-performance should be permitted or not, what should be the legal basis for it, and in which manner it should be exercised.[33] The proposed answers largely vary: some find this sort of contract avoidance completely inappropriate and view it as being prohibited, some find it totally acceptable and justified by the general notions of fairness and morality, whereas some others justify it under certain circumstances that fall within the precise legal categories such as the implicit resolutory condition and *causa* of the contract.[34] In order to understand modern rules on contract avoidance due to non-performance one must take into account all of the above. Stated comparative approaches, in the light of the court practice and scholarly writings lead to the general conclusion that avoidance of contract due to non-performance is the legal tool for the creditor by which he, while withdrawing from the contract,

[33] See for example, E. Lepeltier, La résolution judiciaire des contrats pour inexécution des obligations, Paris, 1935, pp.11-37; G. Boyer, Recherches historiques sur la résolution des contrats, Paris, 1924, pp.53-104; R. Ihering, *L'esprit de droit romain*, vol. III, Paris, 1887, pp.225 et suiv.; E. Cuq, Les institutions juridiques des romains, vol. I, Paris, 1891, p. 790; R. Cassin, « Réflexions sur la résolution judiciaire des contrats pour inexécution », *Revue trimestrielle de droit civil*, 1945; R .Zimmermann, Roman Law and European Legal Unity, Towards a European Civil Code, Kluwer Law International, The Hague/London/Boston, 1998, pp. 30 and f.

[34] See, R. Cassin, *De l'exception tirée de l'inexécution dans les rapports synallagmatiques*, Paris, 1914, pp. 42, 96 and f.; J. Levy, *La résolution de plein droit des contrats*, Paris, 1931, pp. 9 and f. . Acollas, *Manuel de droit civil à l'usage des étudiants contenant l'exégèse du Code Napoléon et un exposé complets des systèmes juridiques*, vol. II, Paris, 1869, pp. 825 and f.; Dimitresco, *La condition résolutoire dans les contrats*, Paris, 1906, pp.103-107; Planiol et Ripert, *Traité pratique de droit civil français*, vol. II, Paris, 1926, no. 1309 and f.; Marty et Raynaud, *Droit civil, Les obligations,* vol. II, Paris, 1962, p. 272.

attempts to preserve his economic interests. At the same time, it represents a moral act by which, the fairness prerogative is accomplished, in accordance with the provisions of the law.[35]

Different grounds for contract avoidance – 1. fundamental breach of contract under the CISG; 2. non-performance of contractual obligation under the national Code. There are different legal basis for contract avoidance in national laws and sources of uniform contract law. The CISG provides for the *fundamental breach of contract* as a basis for contract avoidance.[36] The Serbian Code of Obligations, like many other codes in civil law system countries, is unfamiliar with the concept of fundamental breach of contract. Instead, it adopts the non-performance of contractual obligation as a general ground for avoidance of bilateral contracts[37] on one side, and material and legal defects as special grounds for avoidance of a sale contract, on the other.[38] Nevertheless, both legal sources, regardless of the different concepts they use, start with the same criteria relating to the importance of non-performance, *i.e.* consequences of non-performance. In that regard, the basis for contract avoidance is not any non-performance of obligation, but only such 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, that both systems face, is how to evaluate the importance of the particular non-performance for the purposes of determining whether sufficient ground for contract avoidance exists. Under the Convention, the aggrieved party must determine that non-performance has caused a detriment which substantially deprives him of what he is entitled to expect under the contract, whereas, under the Code of Obligations the creditor must determine that the non-performance in question has not occurred in regard to an immaterial part of the obligation. In both instances,

---

[35] Detailed analysis, J.Perovic, *La contravention essentielle au contrat comme fondement à la résolution des contrats dans les codifications de droit uniforme*, Revue de droit international et de droit comparé, *opus citatum*, pp.272-307

[36] See art.25 of CISG as general rule on fundamental breach.

[37] See arts. 124-132 of Serbian Code of Obligations as general rules on termination of contract due to non-performance.

[38] See arts. 478-515 of Serbian Code of Obligations on material and legal defects of goods in sale contract.

the border line between "more" and "less serious" breaches of contract is flexible and subject to the subjective determination of the aggrieved party. For this reasons, the creditor in most cases cannot be *a priori* certain that the legal grounds justifying avoidance exist. In any case, the key factor to consider in determining whether avoidance of contract is justified, under both systems, is the significance of the non-performance of an obligation for the creditor, *i.e.* the consequences which such non-performance causes for accomplishment of the purpose of the entire contract.

Right to avoid a contract in case of late delivery, non-conformity, legal defects. Application of this criteria to specific cases of non-performance of an obligation arising out of a sales contract provides answer to the question whether the parties to the contract have the right to avoid a contract in case of non-delivery or late delivery, non-conformity of the goods, legal defects, late payment, non-taking of delivery etc.[39]

Regarding *late delivery*, one should emphasize that the importance of the agreed date of delivery for the buyer, and the seller's knowledge of this fact should be the main criteria in determining whether late delivery constitutes grounds for avoidance of contract. In other words, it is important to determine whether the delivery at the exact date was the crucial motive for the buyer to enter into the contract, and whether the seller was aware of that motive. The importance of the delivery date may be apparent from the contract, or from the circumstances of each particular case. In case of late delivery, both systems give the buyer the right to avoid a contract without setting an additional period of time for the seller to perform his obligations, if performance of the obligation at the agreed time was of the essential importance to the buyer. The Convention defines this principle through the concept of fundamental breach being a precondition for avoidance (art.49.1.a), while the Code of Obligations provides for avoidance without fixing an additional period of time only if performance at the agreed time was the essential term of the contract (art.125). However, contract avoidance due to late delivery without fixing an additional period of time, under both systems, constitutes rather an

[39] Detailed analysis, J. Perović, *Bitna povreda ugovora (Fundamental Breach of Contract),* opus citatum, pp.111-184.

exception than the rule, meaning that the buyer who wishes to avoid the contract is generally required to fix an additional time for performance.

One of the main differences between the CISG and the Code of Obligations lies in the concept of *lack of conformity* (*défaut de conformité*), as defined under the CISG. The uniform concept of 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.[40] On the other hand, the Serbian Code, relying on the Roman-pandect categories, specifies the rules for sale contract regarding material defects of the goods,[41] while other mentioned cases of non-performance are subject to general rules on avoidance of contract due to non-performance. Nevertheless, specific cases of non-conformity defined under the CISG, such as lack of fitness of the goods for the ordinary purpose, lack of fitness of the goods for the particular purpose and non-conformity of goods to a sample or model, largely correspond to the definition of material defects under the Law on Obligations. In addition, liability of the seller for non-conformity is almost identically dealt with under the CISG and the Law on Obligations, provisions dealing with liability of the seller for material defects, and those dealing with defects for which the seller bears no liability. Provisions of the CISG dealing with buyer's right to rely on lack of conformity are also similar to the relevant rules of the Serbian Code. Based on the comparative analysis of these solutions, the conclusion can be that, under both systems, not any defect gives the right to the buyer to avoid the contract, but only such defects that diminish the expected benefit to the buyer and *substantially* impairs the entire purpose of the contract for him. Under the CISG, this principle is integrated under the definition of fundamental breach, whereas under the Code of Obligations, it is articulated through the rules on avoidance of contract for partial defects as well as through the general rule

[40] See art. 35 of the CISG as a basic rule regulating non-conformity of goods.
[41] See arts. 478-500 on material defects.

stating that a contract cannot be avoided for non-performance of immaterial part of an obligation.[42]

In respect to the buyer's right to avoid a contract due to legal defects, the main difference between the Convention and the Code of Obligations lies in the fact that under the Code, the contract is avoided *ipso jure* in case of total eviction,[43] whereas the Convention does not distinguish between total and partial eviction.[44] Under the Convention, a legal defect shall be regarded as a ground for avoidance only if it causes fundamental breach of contract; the right of avoidance can only be exercised by notice to the other party, and not automatically, *ipso jure*. On the other hand, according to both legal sources, the main criterion for determination of the magnitude of the legal defect lies in the significance that the buyer attaches to this defect. The buyer shall have the right to avoid a contract if the defect is such that prevents the accomplishment of the purpose of the contract. Therefore, it can be con cluded that the legal consequences caused by the legal defects are *de facto* similar under both legal systems.

The aforementioned rules can be applied by analogy to the seller's right to avoid a contract due to non-payment, or late payment of the price by the buyer, and due to the buyer's failure to take delivery.

Other sources of uniform contract law

In addition to ratified international conventions, other sources of uniform contract law are rather important in the development of contract law on Serbia as well. These sources include UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and Principles of European Contract Law (PECL),[45] non-ratified international conventions,

[42] See, J.Perović, *Bitna povreda ugovora (Fundamental Breach of Contract)*, *opus citatum*, pp.134-147, 195-200, 219-230.

[43] Art.510.

[44] See arts.42-44 CISG.

[45] Comparative analysis between the main solutions of the UNIDROIT Principles and PECL on the one side and those of the Serbian Law on Obligations on the other, J.Perović, *Bitna povreda ugovora (Fundamental Breach of Contract)*, *opus citatum*; J. Perović, *La contravention essentielle au contrat comme fondement à la résolution des contrats dans les codifications de droit uniforme*, *opus citatum*;

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 and PECL on Serbian contract law relates, first of all, to the fact that contracting parties from Serbia, in concluding international commercial contracts began in recent years to stipulate their application either through a choice of law clause explicitly providing that a contract shall be governed by them (*e.g.* "This Contract shall be governed by the UNIDROIT Principles of International Commercial Contracts"), or by providing that a contract shall be governed by general principles of law, or by *lex mercatoria*. On the other hand, in some cases, in the reasoning of awards, Serbian arbitrators refer to UNIDROIT Principles, or PECL.[46] Finally, certain solutions of UNIDROIT Principles and PECL and their comparative analysis with the relevant rules of the national Law on Obligations are intensively discussed in the doctrine of Serbain contract law, which pays more and more attention to the sources of uniform law.[47]

The relevant international conventions not ratified by Serbia like "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

---

J.Perovic, *Medjunarodno privredno pravo,* Belgrade, 2009, pp.258-280 ; 295-309 ; 312-322.

[46] 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". More on that issue, J. Perovic, *The CISG in Serbia*, GTZ – UNCITRAL Project, *opus citatum*.

[47] The list of publications on the CISG in Serbian, J.Perovic, *The CISG in Serbia, opus citatum.*

modification of the existing ones. In that regard, it should be noticed 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.[48] The Serbian Law incorporates many provisions from that Convention, especially with respect to the principal issues. Consequently, internationally accepted standards were integrated into the national legal system, compatibly with the entire national legal system, the legal tradition and fundamental legal principles.[49]

European union directives

The directives of the European Union are binding upon the Member States of European Union to which they are addressed, as to the results to be achieved. 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 national law.

At the time of writing this paper, Serbia is still on its road to join the Union so that as for now 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 perspective, the directives are supposed to be gradually transposed into national law. This should be ascertained 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 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.

---

[48] Law on Financial Leasing (*Zakon o finansijskom lizingu*), "Official Gazette of Republic of Serbia", No55/2003, 27.05.2003. About the Serbian Law on Financial Leasing, see, J.Perovic, *Komentar Zakona o finansijskom lizingu* (Commentary of the Law on Financial Leasing), Belgrade, 2003.

[49] See, J.Perovic, *Financial Leasing in Serbia: an Overview of Recent Legislation*, Uniform Law Review, UNIDROIT, NS-Vol.X, 2005-3, pp.503-516.

Directives of European Union related to contract law should be transposed into Serbian national law by enacting new particular laws or by-laws, together with adequate changes of the existing relevant laws. According to the author, the text of directives *should not* be introduced in the Code of Obligations, especially not integral texts. The influence of directives may be seen only in possible amending the Code of Obligations where necessary in order to adapt certain provisions of the Code to the adequate requirement of a relevant directive. The Code of Obligations, which represents a *permanent source* of the law of obligations and a specific monument of legal culture, should not be exposed to frequent changes, what is exactly the domain of directives that are prompt to adapt to the dynamics of commercial relations. The objective of directives is not their transcription into the national laws, but the adaptation of the national legislations of the Member States to the solutions specified in the directives.[50]

General conclusion

An analysis of the relevant sources of uniform contract law, their application and applicability, and of the differences between certain solutions of uniform rules and the relevant national rules, allow us to conclude that 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 whole since these factors

[50] Analysis of this and other questions regarding contract law in Serbia, J.Perovic, *Contract Law in Serbia*, national report, Conference "Private Law in Eastern Europe - Autonomous Developments or Legal Transplants?" Max Planck for Comparative and International Private law Hamburg and Faculty of Law University of Kiel, Hamburg, 27, 28 March 2009 (publishing in progress).

determine in general way the legal destiny of a transnational document in each particular country.