CROATIAN NATIONAL REPORT

- Contracts with no governing law in private international law and Non-State law.
  - Le contrat sans loi en droit international privé et droit non étatique.

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In memoriam prof.dr.sc. Petar Šarčević, professor at the Faculty of Law University Rijeka.

1) Is the expression « contract with no governing law » known in your legal system? Is it used by judges or by scholars?

The expression “contract with no governing law” is not known in Croatian legal system, nor is any variant of term equivalent to its meaning used either by academics or judges. This issue has been briefly addressed by Prof. Sikirić¹ who uses the term self-regulatory contracts (samouređujući ugovori) when speaking of contracts governed exclusively by the contractual clauses (for more details see below question 3).

2) Among the definitions given below, which one, in your opinion, could correspond to the expression «contract with no governing law»?

   a. a contract which is not submitted to any rule of law (State law or Non-State law) and which is governed exclusively by the contractual clauses, i.e. by the will of the parties.

   b. a contract which is not submitted to State law, but nevertheless governed by Non-State rules such as usages, general principles of law, lex mercatoria, etc.

   c. both of above

   d. neither of above

   e. other

The definition given in 2a. would be in line with French doctrine of incorporation². However, recent doctrinal writings employ the formulation “contrat sans loi” to correspond

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to the definition given under 2b.; more precisely, referring to the contract that lacks a rules or set of rules emanating from a sovereign authority and enforced by public policy. Term “contrat sans loi” may easily be misapprehended to denote the concept defined under 2a, whereas its adequacy may be questioned. Since extending the contractual autonomy in private international law to Non-State legal sources is likely to become of great importance (especially in the light of art. 3(2) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to the contractual obligations, hereinafter: Proposal for the Rome I Regulation), some remarks should be made concerning the terminology. Simplification and clarification of the terminology when referring to contractual freedom defined in 2b. could be ensured by inserting the terms “a-national law” or “Non-State law” in the text of the provision. Therefore, the contracts described under definition 2b. could be referred to as “contracts with no governing State law” or “contracts governed by a-national law”. Although such proposals already exist in doctrine, objections to this commitment are easily envisaged.

3) Given the different definitions discussed in question number 2, does the distinction between a and b seem relevant to you (i.e.: contract with no governing law and contract with no governing State law? Is this distinction made by scholars in your country?

Among Croatian scholars this issue has been addressed by Prof. Sikirić, who speaks of “unusual” sources of law or “contracts whose content is sufficient for rendering decision on all the issues that could arise from it”, which in the comparative legal scholarship are called

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6 If one is to say that contract is without “law”, it would regularly mean that the contract is without the “State law”, or in other words, it would mean that such contract is governed by legal rules not originating from State authority. From this point of view, employment of terms “a-national” or “Non-State law” would be sufficient.

“rechtordnunglosen Vertrage”, “self-regulatory contracts”, “contrats sans loi”, and “samouredujući ugovori” in the Croatian legal language. This author distinguishes such contracts from contracts governed by “general principles of law, principle of equity and lex mercatoria”, but offers no terminological solution for these Non-State legal sources.

Besides Prof. Sikirić, neither elder nor recent Croatian doctrine points to this distinction. Speaking of party autonomy in private international law, almost all Croatian scholars lay emphasis upon distinction between matteriellrechtliche Verweisung and kollisionsrechtliche Verweisung, unanimously inclining towards the latter. Therefore, when discussing the issues of governing law and party autonomy, doctrinal writings and case law without exception refer only to the “governing law” - the implication being that only the “State law” may be chosen, and not the “Non-State law”.

4) Does your legal system prohibits

   a. Contracts with no governing law in the sense given in definition 2a?
   b. Contracts with no governing State law in the sense given in definition 2b?
   c. Both of above?

If so, does this prohibition result from case law or from statute law?

In Croatian legal system substantive rules governing the contractual obligations are, in general, regulated under the recently enacted Code of Obligations (hereinafter: CO). One of the basic principles underlying this Code is dispositive character of its provisions: according to art. 11 of the CO the parties to a contractual legal relation may contract out the provisions

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8 Although some scholars mention the situations in which parties decided to submit their contract to some optional source of the legal rules (as further explained within the responses below), they neither discuss in details the issues related to terminology nor provide further explanation indicating to distinction between the formulations “governing law” and “governing State law”.


of the CO, unless they are mandatory which may derive either from the explicit wording of the individual provision of the CO or may be inferred from its meaning and purpose. When it comes to the application of usages and practice, the CO differentiates between two situations. First concerns contractual relations among merchants (so-called B2B relations), where a commercial custom upon which the parties have agreed and the practice they have developed shall always apply. Additionally, the commercial custom which is regularly applied to specific type of contractual relations shall also apply, unless the parties have either explicitly or implicitly excluded its application. The Code further lays down that the commercial customs and practices the traders have developed, shall apply even if they are contrary to dispositive law. Second situation under the CO relates to the civil obligations among participants other than merchants, where the practices are applied if the parties have agreed upon their application or if their application is prescribed by the law\textsuperscript{11}.

If a contract is not purely a domestic one but contains one or more elements connecting it to a foreign country, depending on its subject-matter, under several Croatian legislation the parties are granted autonomy to choose the law applicable to the contract. Generally, situations with foreign element are regulated under the Resolution of the Conflict of Laws with the Laws of Other Countries in Certain Relationship Act of 1982 (hereinafter: the PIL Act)\textsuperscript{12}, which, as a rule, permits the parties to make a choice of law where contractual obligations are at issue (art. 19). Although Croatian doctrine on the issue of the choice of the “Non-State law” is quite scarce, the possibility that the parties choose a “Non-State law” to govern an international contract has been mentioned in some of the earlier comments on this Act. The 1991 commentary by Dika, Knežević, Stojanović states that if the parties opt for “some model law, international law (in general) or principles of equity”, such choice could be considered merely a materiellrechtliche Verweisung, meaning incorporation of contractual terms. Therefore, chosen legal rules would replace only the dispositive provisions of otherwise applicable law, preserving the application of the mandatory rules of that law\textsuperscript{13}.


\textsuperscript{12} This ex-Yugoslav law (Off.Gazz. of SFRY No. 43/1982.) was overtaken in Croatia in 1991 (Off. Gazz. No. 53/1991.)

\textsuperscript{13} Dika, Knežević, Stojanović, Komentar zakona o međunarodnom privatnom i procesnom pravu, (Commentary of the private international and procedural law), Beograd, 1991, p. 73. Similar was the opinion of prof. Varady, Međunarodno privatno pravo (Private International Law), Novi Sad, 1983.
Special choice of law rules are laid down in *lege specialis* for certain types of contracts (e.g., maritime and air traffic contracts), and these rules have precedence in relation to the general rule of the PIL Act pursuant to art. 3 of the PIL Act.\(^\text{14}\) The Maritime Code (hereinafter: the MC)\(^\text{15}\) and the Obligatory and In Rem Relations in Air Traffic Act (hereinafter: the ORATA)\(^\text{16}\) also contain provisions on party autonomy, and similarly to the PIL Act, refer only to the “law”. According to the opinion of Prof. Sajko, the term “law”, as used in the cited provisions, should be interpreted as allowing only the choice of the governing substantive law of a certain State. This author finds support for this conclusion in the wording of art. 13(1) of the PIL Act: “The court or another competent tribunal shall *ex officio* determine the content of the foreign law to be applied”\(^\text{17}\). The *ex officio* application of substantive State law to disputes before the competent Croatian courts has not been further questioned in leading Croatian doctrinal writings\(^\text{18}\).

Prof. Šarčević contributed to this subject in the context of the standard forms and general conditions. A significant part of his 1983 article is dedicated to conflict of law problems arising from international commercial contracts in which the general conditions are either referred to or have become an integral part of the contract itself.\(^\text{19}\) This author’s attention is specially directed towards the law to be applied in determining how and when the general conditions became part of an international contract, without questioning whether the

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\(^\text{15}\) Art. 971 on contract of employment for crew members, art. 973. on relations in maritime navigation, art. 978 on property rescue, art. 981 maritime insurance and art. 985 common damage. Maritime Code, Off.Gaz. No. 118/2004.


parties are entitled to such choice, which entails that this is in fact permitted. Prof. Šarčević referred to earlier writings of Prof. Eisner, when stating that question weather the acceptance of a particular contract implies at the same time agreement to the general conditions is governed by the proper law of contract.\textsuperscript{20} Prof. Šarčević emphasized that most of the relevant questions such as a silence (tacit incorporation of general conditions into contract) or gaps are to be governed by the proper law of contract\textsuperscript{21}. Even though individual clauses and their invalidity in foreign general conditions and standard forms are to be controlled by the proper law of contract, exceptions may occur where the mandatory provisions of a national law not being a proper law of contract must be applied, particularly if some acts designated in the contract are prohibited at the place of fulfilment, such acts are to be judged with the \textit{lex loci solutions}.\textsuperscript{22}

As already mentioned (question 1), Prof. Sikirić\textsuperscript{23} speaks of self-regulatory contracts, considering them acceptable, in theory, before the State courts, provided they do not contravene mandatory rules of \textit{lex fori}. Prof. Sikirić additionally discusses the choice of \textit{lex mercatoria}, holding that such choice should be attributed the meaning of \textit{materiellrechtliche Verweisung} by the State courts, consequently, mandatory rules of the law applicable in the absence of choice should be applied as well. This author further states that application of \textit{lex mercatoria} could not be based directly on an objective connecting factor. Still, when speaking of provisions of the Croatian PIL Act, Prof. Sikirić concludes that parties are entitled to choose the “State law” only, and only such choice should be considered valid. Therefore, this author clearly advocates the application of the “State law” before the Croatian State courts\textsuperscript{24}.

In his recent capital writing on Private International Law, Prof. Sajko\textsuperscript{25} mentions that, theoretically, the situation in which the parties opt for a Non-State rules as applicable is possible. He further creates a twofold scenario for the Croatian State courts having

\textsuperscript{20} Eisner, PIL, op.cit. n. 9, p.221.
\textsuperscript{21} This approach is further corroborated with academic writings of Prof. Eisner, Private International Law, op.cit. n. 9, p. 221 and Mitrović, Ugovor o prodaji s inozemnim elementom (The Sales Contract with Foreign Element) in: Enciklopedija imovinskog prava i prava udruženog rada (Encyclopedia of Property Law and Law of Associated Labour), Vol.II Beograd, 1987, p. 73.
\textsuperscript{22} Šarčević, Standard forms and General Conditions, op.cit. n. 19, p. 275.
\textsuperscript{23} Sikirić, Contract on Commercial Agency, op.cit. n.1, p. 293, 294.
\textsuperscript{24} Sikirić, op.cit. p. 295.
\textsuperscript{25} Sajko, Private International Law, op.cit. n. 9, p. 302, ref. 27.
jurisdiction over such case. One of the options is to consider such choice as *materiellrechtliche Verweisung* when the court would apply the chosen legal rules only as contractual provisions, or to fill in gaps, but always subject to the mandatory rules of Croatian laws\(^{26}\). The other possibility for the court is to declare that the parties made no choice of law, and apply provisions of the rules belonging to the law applicable on the basis of the subsidiary connecting factor. Prof. Sajko finds the later situation more likely under the Croatian circumstances\(^{27}\).

Based on all stated above it may be concluded that, according to the Croatian conflict of laws rules applied by the Croatian courts, the contract cannot be governed solely by the will of the parties, as defined in 2a.

In contrast to the above, when the parties opted to resolve their dispute before the arbitral tribunal instead of State court, the possibilities of contractual choice are much wider. According to the Croatian Arbitration Act\(^{28}\) (hereinafter AA), the contract is governed by “legal rules” chosen by the parties. When compared to the above-mentioned provisions of the PIL Act, the MC, the ORATA that allow the choice of “the law”, “Rechtsordnung”, or, in the Croatian language, “pravo”; the AA refers to the “rules of law”, “regles de droit”, “Rechtvorschriften”, or, in the Croatian legal language “pravna pravila”. The distinction is also emphasized in the doctrine: the term used in the AA does not limit the parties’ freedom of choice to some national law, but allows them to opt for a Non-State law, such as the UNIDROIT Principles.\(^{29}\) On the other hand, if the parties made no choice of legal rules, according to the AA arbitrators shall apply “the law” (of a certain State) having the closest connection to the dispute.\(^{30}\) Only if the parties explicitly authorize the arbitrators to proceed

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\(^{26}\) Similar interpretation of the same situation under the art. 3(1) of the Rome Convention is furnished by several scholars: e.g., K. Boele-Woelki, Principles and Private International Law, Uniform Law Review, 1996-4, p. 664; Rigaux, Examen de quelques laissees ouvertes par la Convention de Rome sur la loi applicable aux obligations contractuelles, Cahiers de Droit Europeen, 1988, p. 319; Reithman / Martiny, Internationales Vertragsrecht, 5th ed., 1996, p. 62.

\(^{27}\) This is in line with several interpretations of this situation under the art. 3(1) of the Rome convention, egz. Mayer, Droit international prive, 6th ed., Montchresatien 1998., p.459; Dicey /Morris, THe Conflict of Laws, 13th ed., Sweet & Maxwell, 2000. p.1223.


\(^{30}\) Art. 27(2) of the Arbitration Act, op.cit., n. 26.
ex aequo et bono or en qualite d’amiable compositeur, the arbitrators could decide to apply lex mercatoria to the merits of a dispute.\textsuperscript{31} In any case, their decision is always rendered taking account of the terms of the contract and applicable usages\textsuperscript{32}.

5) \textit{To the extent that your legal system displays a certain hostility to contracts with no governing State law (in the sense given in definition 2 b) what are, by order of significance, the principle obstacles to the recognition of this type of contract?}

In addition to the above stated provisions that allow the conclusion on the level of hostility the Croatian legal system displays towards the contracts absent the governing State law, the obstacles to the recognition of contract governed by Non-State law could be ranked as follows:
1. A Obstacles inherited in the hierarchy of the legal sources and, more generally, those concerned with restricting the application of Non-State law in a sense that it is given subsidiary role when compared to the role of the State law;
2. D The difficulties in identifying exactly the content of certain number of Non-State rules and the unpredictability that could result there from;
3. C The fear of disproportionate role given to the will of the parties and the correlated concern to protect the party which is regarded as the weaker in the contractual relationship;
4. B Obstacles arising from the conflict of law methodology, as Non-State law tends to favour substantive rules over the choice of law rules.

6) \textit{What, in your opinion, would be desirable today?}

\textit{a- that the parties’ choice of law could extend to Non-State law (usages, general principles of law, lex mercatoria, etc)?}

\textit{b-in the affirmative, should this possibility of choice be limited to contracts submitted to arbitration, as it is already the case in many legal systems? Should it also cover international contracts which are brought before a State judge?}


Would you therefore be of the opinion that international conventions which unify the law applicable to international contracts be modified in this sense?

C. Could the possibility for the parties to submit their contract to Non-State rules be allowed regardless of their position to the contract? Or should it be limited to contractual relations between two professionals? More generally, should this possibility be forbidden with regard to certain types of contract? For example, consumer contracts.

It is my view that the parties’ choice of law should extend also to the Non-State law even when the proceedings are brought before the State court, and not merely when they are resolved by means of alternative dispute resolution mechanism such as arbitration. Since many legal systems, including Croatian, provide such possibility when disputes are to be settled before the arbitral tribunal, the actual debate is/should be focused on extending such possibility to international contracts being resolved before the State court. Allowing parties to choose a Non-State set of rules, several objectives are being accomplished, among others, localization of the cross-border transactions governed by optional set of rules in a neutral legal regime whereby the “domestication” is avoided, and, more generally, bringing together the work commenced on harmonizing the substantive contract law and conflict of laws for contracts, which is especially true for work commenced via regional instruments within the EU.

As regards rationae personae limitations, the restriction of the choice of Non-State Law to contracts between professionals only seems justified in the light of the endeavours to prevent misuses in situations of unequal bargaining powers of the parties. Still, one of the main arguments pro choice of the Non-State legal rules is that they are created and specially adapted to the cross-border transactions, providing, when compared to national contract laws,

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more appropriate source.\textsuperscript{36} Having that in mind, the question may be posed as to whether excluding natural persons from this legal milieu is actually the most advantageous approach.

There are persuasive arguments for restricting this choice \textit{rationae materiae}. For instance, under the regime adopted in the Rome Convention on the Law Applicable to Contractual Obligations (hereinafter: the Rome Convention)\textsuperscript{37} the consumer contracts are not subject to general choice of law rules at all, which is motivated by the principle of the protection of weaker party.\textsuperscript{38} Application of the same principle to individual employment contracts results in different situation: the parties to such contracts should not be restrained from opting for Non-State rules.\textsuperscript{39} The ratio lies in the fact that global Non-State law emerges also in the field of labour law: \textit{lex laboris internationalis} is created by enterprises and labour unions as private lawmakers\textsuperscript{40} In my view such choice should not deprive the employee of the protection afforded to him by the otherwise applicable law\textsuperscript{41}.

As to the issue whether the international conventions which unify the law applicable to international contracts should be modified in this sense to allow the choice of the Non-State law, my view is that this would be advantageous for the same reasons which speak in favour of adopting this solution in the national laws.

7) Assuming the parties were allowed to submit their contract to Non-State law, to what extent could they do so?

\textit{a- Should their choice be expressed in an explicit manner or could one allow the judge to give effect to an implied choice? and under what conditions?}

\textit{b- Could the parties choose any sort of Non-State rules or should this possibility be restricted to Non-State rules which have been codified? (for example, the Unidroit principles or the Principles on European contracts, ICC usages, etc.)}

\textsuperscript{36} Lando/Beale, Principles of European Contract Law, op.cit. n.34, p. xxiv, p.97.


\textsuperscript{38} See Article 5 of the Rome Convention.

\textsuperscript{39} See Article 6 of the Rome Convention.


\textsuperscript{41} Compare to Art. 6(1) Rome Convention, op.cit.n.33.
c – Could the parties choose different bodies of Non-state rules for different parts of the contract (dépeçage)? or should they respect the mandatory provisions that are contained in some bodies of Non-State rules (for example: Article 1.5 Unidroit principles), or still other conditions?

If the choice of Non-State law is placed on equal footing with the choice of State law, their restrictions should be minimal and should be limited to the situations where some other objective takes precedence over the principle of party autonomy. In that sense, expansion of party autonomy should not be allowed to the detriment of legal certainty, predictability, efficiency and promptness of rulings. The wording of provision allowing Non-State choice should enable that this new “burden” placed upon judges does not hinder their task of efficient dispute resolution.

In my view, both explicit and implied choice should be given effect; however, the latter should be subject to certain conditions. If parties implied choice of Non-State law would be allowed, their ignorance, lack of legal proficiency, or negligence could cause the courts task to be more difficult. Therefore: A) The conditions for implied choice should be enumerated. Examples can be found within art. 3 of the Proposal for the Rome I Regulation prescribing that implied choice should be demonstrated with reasonable certainty by the term of the contract, behaviour of the parties, or the circumstances of the case. Furthermore, conferring jurisdiction to courts or the tribunals of a Member State is presumed to amount to an implied choice of substantive law of the forum as well. B) Implied choice should be construed in restrictive manner meaning that in cases of doubt it should be considered that there was no choice of legal rules. After all, since parties to the B2B cross-border transactions are professional dealers in foreign trade transactions, they should be aware of the advantages of express their will explicitly.

In addition, my position is that the choice of Non-State law is restricted to legal rules codified with internationally recognized institutions (in line with the wording of art. 3(1) of the Proposal for the Rome I Regulation). Parties wishing extra flexibility have the possibility

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42 We witnessed huge difference in interpretations of “reasonable certainty test” under art. 3(1) of the Rome Convention, as provision were applied in manifestly opposite manner under similar circumstances: e.g. Egon Oldendorff v. Liberia Corporation, 1996, 1 Lloyd's Report p. 380, before an English court, and Winters Arnhem BV v. SA Ceodeux, RDIPP, 1991, p.1092, before a Luxembourg court.

43 Šarčević, Standard Forms and General Conditions, op.cit. n.19, p.271.
to refer their dispute to arbitral tribunal and thus avail themselves of the possibility to use non-codified legal rules.

8) To what extent would the judge be bound by a choice of Non-State law?

a-Should he scrupulously respect the will of the parties?

b-By contrast, should he always seek the law applicable to the contract regardless of the parties’ choice in order to supplement the Non-State rules chosen by them?

c-Should he put aside these rules when they are contrary to the provisions of the law which would have been applicable to the contract had there been no choice by the parties?

d-Is your legal system adopting a clear position on this issue?

Having in mind the previous answers, it is clear that Croatian legal system does not adopt a position on the set of questions relating to the extent the judge is bound by a choice of Non-State law, as it actually does not allow law other than that of a certain State to govern the international contract. Hypothetically speaking, if the choice of Non-State law would be permitted under the Croatian law, once a judge would ascertain such choice, it would be in line with reasonable expectations of the parties to respect parties’ stipulations. A judge could often find himself or herself in a situation of lacunas when applying Non-State legal rules, but he or she still should make the best endeavour to discover the parties intention: deciding on the issues not being dealt within the Non-State legal source, applying the principles underlying the relevant Non-State legal source would correspond the best to the reasonable expectations of the parties. An additional legal source enabling a judge to render a decision in such situation should be the law applicable in the absence of choice44.

Regarding question 8c, if a judge is allowed to put aside the provisions of the chosen Non-State law when they are contrary to the provisions of otherwise applicable law, where would we stand with party autonomy in private international law at all? Since the question seems to refer to all provisions, both dispositive and mandatory provision of otherwise applicable law, allowing a judge to proceed in such manner would erase the borders between materiellrechtliche and kollisionrechtliche Verweisung leading to derogation of party

44 Art. 3(2) p.2. “However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.” Proposal for a Regulation, op.cit. n.4.
autonomy in private international law, or in word of Prof. Eisner, turning it into an illusory concept. If choice of Non-State Law is in private international law placed on equal footing with the choice of State law, their position should be more-less the same in all aspects, without diminishing importance to either of them. On the contrary, placing additional restrictions over the choice of Non-State law would discourage the parties to take advantage of such option since their reasonable expectations would be frustrated; moreover, the judges would be faced with highly-complicated situation – generally speaking, it would hamper new developments and render a disservice to the business community.

In today’s ever more global society one has to make room for the cross-border contractual obligations to be adequately resolved before a State judge as well, without additionally burdening the judiciary. Therefore, the parties should be allowed to opt for Non-State legal rules, although not any they can find, but only those codified under the auspices of the recognized international bodies designed for harmonization of laws. The benefit of this approach rests in the fact that legal relationships is subjected to the rules designed especially for cross-border transactions, thus providing much better legal milieu than any national substantive rules (designed in the first place for internal situations) could do. In the last decade “private” global norm production is significant. Legal rules published by non-official bodies such as the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law are well designed, they do not contain many lacunas and are easily accessible by the court – although objections to this point have been made.

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45 Katičić, Ogledi o međunarodnom privatnom pravu, op.cit. n. 9, p. 274, 275; subsequently restated in doctrine, see Bosnić, Granice autonomije stranaka u međunarodnom privatnom pravu Jugoslavije (Borderlines of party autonomy in private international law), Zbornik PF u Splitu, vol. 15/1978. p.89; Klasiček, Basic principles, op.cit. n. 9, p.206.

46 For further argumentation see : Libonati B., Kronke H., Bonell, M.J., Reply by the International Institute for the Unification of Private Law (UNIDROIT) to question 8. p.3.


49 Lando/Beale, Principles of European Contract Law, op.cit. n.34.

9) More generally, what should be the limits set up by State law to the application of Non-State rules chosen by the parties?

a- The mandatory rules of the law applicable to the contract in the absence of choice (i.e. the rules which cannot be derogated from by contract)?

b- The mandatory rules of the forum (lois de police du for), and in some cases, foreign mandatory rules (lois de police étrangères)?

c- Public policy of the forum?

d- No limit, State law not being in a position to supersede Non State law.

e- Does your legal system adopt any position on this subject?

The Non-State law chosen by the parties cannot supersede State law completely; this was reaffirmed in the Resolution of the Institut de droit international of 1991, according to which, in principle, the State courts cannot avoid the application of the State law. More generally, regarding question no. 9, the limitations placed upon use of Non-State rules should not differ from already existing limitations placed upon application of foreign State law. According to the Croatian PIL Act, the foreign law shall not be applied if it is contrary to the public policy of the forum (art. 4 of the PIL Act.). As far as the evasion of law embodied in art. 5 of the PIL Act is concerned, even though the earlier scholars advocated its application to contracts governed by lex autonomiae, today the opinion prevails that the chosen law would be applied even if the purpose of its application is the evasion of lex fori.

One of the most controversial restrictions of lex autonomiae is due to effect given to the internationally mandatory rules. There are several specific provisions in Croatian legal system that compel the application of Croatian internationally mandatory rules, but there exist no general clause proving for the effectuation of the internationally mandatory rules of the third countries which would be equivalent to art. 7(1) of the Rome Convention or art. 19 of the Swiss Statute on PIL or art. 3079 of the Quebec Civil Code. The Croatian private international law contains neither the general provision which would prescribe the application

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51 The autonomy of the parties in international contracts between private persons or Entities, Session de Bale 1991, Annuaire Vol. 64-II (1992), p. 383.

52 Katičić, Međunarodno privatno pravo (Private International Law), Zagreb, 1975, p. 155.

53 Matić, Obveznopravni odnosi s međunarodnim, međurepubličkim i međupokrajinskim obilježjem (Obligations with International and/or Interlocal Element) in; Goldštajn, Barbić, Vedriš, Matić, Obvezno pravo, I, (The Law of Obligations I.) 1979, p. 374.; Sajko, PIL, op.cit. n 9, p.207.
of the internationally mandatory rules of *lex fori* (which would be parallel to art. 7(2) of the Rome Convention)\(^{54}\).

Several questions have been discussed in this context in the Croatian doctrine: can the court give effect to mandatory rules of *lex fori* in a situation when the entire contract is governed by foreign law; can the court apply the mandatory provisions of a third state having close connection to the situation at issue; should the Croatian PIL Act be amended as to insert the provision that would give effect to mandatory rules of *lex fori* or of the third state law?

In elder Croatian doctrine Prof. Eisner wrote on the issue of mandatory rules, expressing opinion in favour of application of mandatory rules belonging to the legal system governing the contract by virtue of the parties’ choice\(^{55}\).

The opinion that mandatory provisions of the country providing the applicable law and the mandatory rules of *lex fori* should be taken account of is shared by Prof. Sajko and Prof. Sikirić\(^{56}\). On the other hand, in the unofficial Thesis for the Croatian Statute on Private International Law, Prof. Bouček, along with Prof. Sajko and Prof. Sikirić, clearly opposes to the application of mandatory provisions of a third state\(^{57}\).

In contrast, some scholarly opinions advocate application of mandatory rules of *lex causae*, *lex fori* and a third state having close connection to the case. Such opinion can be found with Prof. Klasiček, and shared by doc. Puljko as well\(^{58}\). Prof. Šarčević supported the view that some rules of *lex fori* should always be given effect; and in exceptional cases, where the close connection between the contract as a whole and the law of other country is determined, the mandatory rules of a country other than that to which the contract has been


\(^{55}\) Eisner, Private International Law, op.cit. n. 9, p. 209.

\(^{56}\) Sajko declared the application of the mandatory rules of *lex fori* “commonly accepted principle of private international law”. Sajko, Private International Law, op.cit.p. 148; Sikirić, Prisilna pravila, pravila neposredne primjene i mjerdavno materijalno pravo u međunarodnoj arbitraži (Mandatory rules, rules of immediate application and applicable substantive law in international arbitration), Pravo u gospodarstvu, 38 (1999) 1, (pp. 83-110), p.89.


submitted, should also be applied. Most recent contribution to this topic in Croatian doctrine is given by Kunda, who, similarly to Prof. Šarčević and Prof. Tomljenović strongly, favours insertion of the provision allowing the judge to give effect to mandatory rules of the third state having close connection to the case into new Croatian PIL Act.

In the contemporary Croatian legal system, only an arbitral tribunal would be in a position to apply Non-State Law. The Arbitration Act prescribes the limitation in application of governing legal rules by means of the public policy exception (art. 40). As far as mandatory rules are concerned, according to Prof. Sikirić, arbitrators should take account of those internationally mandatory rules whose non-application would jeopardize the legitimate expectations of the parties (above all recognition and enforcement of the arbitral award). Such mandatory rules are to be identified within *lex causae*, or the law of the third country where the enforcement of the award would probably be sought.

10) In the hypothesis, where the parties would not have chosen any applicable law for their contract, could the judge decide to submit the contract to Non-State rules? If so, under what conditions and for what type of contract?

Could you furthermore give some indications on the judge’s prerogatives towards Non-State-law in your legal system. Is it required for him to prove the content of Non-State law?

As already pointed out, in the Croatian legal system the judge shall not apply the Non-State law if chosen by the parties, let alone in the absence of such choice. I’m of opinion that in the absence of the parties’ choice of law, the judges should not be allowed to apply Non-State legal sources, even if it would be allowed for them to make choice to that effect. Although the author of this national report acknowledge arguments in favour of the possibility that a judge could submit the contract to Non-State law, since it is our strong belief that each cross-border transaction is at an advantage when governed by the Non-State law designed especially for such transactions, the argumentation to the contrary seem to have the prevailing

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61 Sikirić, Mandatory Rules, op.cit.n. 56, p. 108.
weight in this particular situation. Those arguments include the fact that parties engaged in foreign business transitions are expected to be legally literate and well-acquainted with the possibility of designating substantive law applicable to their cross-border contract. Having this in mind, absence of explicit or implicit reference to legal system/law should be clear indication that the parties wanted and expected their contract to be governed by subsidiary statute, i.e. law designated in the absence of choice. Allowing judges to submit such contract to Non-State legal source would frustrate legitimate expectations of the parties that the substantive law designated by means of the subsidiary connecting factor would be applied.

In regard to the issue of ascertaining the content of the applicable law, as already stated, the Croatian judges are obliged to determine it *ex officio*. Under hypothesis, that a Non-State law would be is placed on equal footing with State law, the judges would be obliged to *ex officio* determine the content of such legal source as well\(^\text{62}\).

However, in a view of the case law of the Croatian Commercial Courts concerned with international commercial disputes\(^\text{63}\), certain steps need to be taken to ensure the correct application of the law designated by the conflict of law rules. This problem might be solved by appointing, within the territorial jurisdiction of each commercial court in Croatia, several judges that would be specially educated and skilled to resolve disputes with foreign element. Unless additional importance is given on the actual application of national/conventional choice of law rules, their role in eliminating legal obstacles in cross-border commercial transactions would be severely reduced.

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\(^\text{62}\) Art. 13 of the Croatian PIL Act.

\(^\text{63}\) Župan, M., Pravo najbliže veze u europskom međunarodnom privatnom ugovornom pravu (Closest Connection Principle in European Private International Contract Law), Rijeka, 2006. (in print)