

ZLATAN MEŠKIĆ

**APPLICABLE LAW TO THE ARBITRATION AGREEMENT
IN GENERAL CONDITIONS OF SALE AVAILABLE
ON SELLER'S WEBSITE**

A PRO-ARBITRATION APPROACH IN THE JURISPRUDENCE
OF THE SUPREME COURT OF THE FEDERATION
OF BOSNIA AND HERZEGOVINA

The Supreme Court of the Federation of Bosnia and Herzegovina had to determine the applicable law to the arbitration clause contained in general conditions of sale on seller's website. The sales agreement was concluded orally and the reference to the website with general conditions of sale was made on a pro forma invoice paid by the buyer. The arbitration clause provided for ICC Rules and seat of arbitration in Amsterdam, while French law was chosen to apply to the contract. The buyer, a domestic company from Bosnia and Herzegovina, filed for damages before domestic courts, claiming that the arbitration clause was not consented to, nor was it concluded in written. The Supreme Court of the Federation of Bosnia and Herzegovina issued in the "chicken breed" case in 2019 a pro-arbitration judgment with reference to the New York Convention of 1958 and European Convention on International Commercial Arbitration of 1961. It is a landmark decision on one of the most difficult questions of applicable law to formal and substantive validity of the arbitration agreement.

Key words: arbitration agreement, choice of law, New York Convention, European Arbitration Convention, Supreme Court of the Federation of Bosnia and Herzegovina

Prof. Dr. Zlatan Meškić, Professor at the College of Law, Prince Sultan University; Full Professorship from the University of Zenica, e-mail: zmeskic@hotmail.com

INTRODUCTION

The Supreme Court of the Federation of Bosnia and Herzegovina (FB&H) had to decide on the validity of the arbitration clause concluded between a Bosnian-Herzegovinian company which sells chicken and a company with its seat in France. The arbitration clause was contained in general terms and conditions of the French company. This fact does not cause legal problems, because under the Civil Procedure Act of FB&H¹ arbitration agreements concluded in general terms and conditions are valid. However, the facts of the case offer much more than this. The sales agreement between the parties was concluded orally and the reference to the general terms and conditions was on a pro forma invoice issued after the first instalment of delivered chickens. A reference was made to the website of the French company where the general terms and conditions are available with an arbitration clause and a choice of law clause. Once the company from FB&H filed a claim against the French company in front of a municipal court in FB&H, because the chicken delivered allegedly had a disease and died, the courts in FB&H had to decide on the objection raised by the French company, that the dispute needs to be brought to arbitration. The question of validity of the arbitration clause was finally decided by the Supreme Court of FB&H, because it invokes the difficult question of the applicable law to the validity of the arbitration agreement. It is fair to state that it is one of the most difficult questions of private international law related to commercial contracts. The decision of the Supreme Court of FB&H is a pleasure to read to all fans of private international law issues in commercial arbitration. For the ones familiar with the Vis moot competition, it is interesting that in the 26th competition one of the main issues were general conditions on sale concluded in a footer of pro forma invoice by reference to a website, whereas in the 27th Vis moot the problem was about the applicable law to the arbitration agreement. The Supreme Court of FB&H had to decide both issues in one case and provided good solutions to the case.

This paper will firstly present the case in more details as well as the ruling on the issue, and then follow by an analysis of the applicable law to formal and substantive validity of the arbitration agreement which both have been questioned in the proceedings. The judgment will be analysed from the comparative perspective of the most modern legal solutions to the question of validity of arbitration agreements.

¹ Civil Procedure Act of the Federation of BiH, Bosnia and Herzegovina/Federation of BiH, *Official Journal of FBiH*, Nos. 53/03, 73/05, 19/06, and 98/15.

THE “CHICKEN BREED” CASE BEFORE THE COURTS OF FEDERATION
OF BOSNIA AND HERZEGOVINA

A company from FB&H “POSAVINA KOKA” concluded an oral agreement on purchase of chicken breed ISA Brown with an approximate value of 50,000 € from a French company “Institut de Sélection Animale” who delivered the chickens. All chickens delivered died after delivery because of disease. It is disputed between the parties if the disease was present at the time of delivery. The first instalment of payment was conducted based on a pro forma invoice issued by the French Company containing a sentence “on the conditions of sale you may consult our website www.isapoultry.com”. This website still contains similar general terms and conditions, but it is not known if they are identical (especially it is not known if the exclusion of the applicability of CISG was already present at the time of conclusion of the contract). The general terms and conditions of the company could be found on the website and contained an arbitration clause with the following wording: “All disputes arising out of the interpretation or execution of these General Conditions shall be settled under arbitration, in accordance with the rules of the International Chamber of Commerce, by 3 arbitrators, appointed pursuant to the contents of the above mentioned rules. The arbitration shall take place in the city of Amsterdam and will be held in the English language.” In addition, the general conditions also contained a choice of law clause positioned under the same section as the arbitration agreement with the following wording: “All the agreements and any legal interaction between the Seller and the Buyer shall be governed exclusively as follows: For goods invoiced by Institut de Sélection Animale S.A.S. by French law”. The buyer claimed that he did not consent to the arbitration clause and filed a claim for damages before the domestic municipal court in Orašje.

The municipal court in Orašje rejected the objections raised by Respondent, namely that the courts in FB&H lack jurisdiction because of the arbitration clause and claimed that the Convention on International Sale of Goods (CISG) shall apply. Claimant relied on Art. 2 (3) of the New York Convention of 1958² and on the Art. 1 (II) (a) of the European Convention on International Commercial Arbitration of 1961³ of which both France and Bosnia and Herzegovina are Member States, and contended that these articles correspond to Art. 8 of the UNCITRAL Model Law of 1985. Claimant alleged that there is no consent to the general con-

² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (New York Convention).

³ The European Convention on International Commercial Arbitration of 1961, Geneva, 21 April 1961 (European Arbitration Convention), United Nations, Treaty Series, Vol. 484, No. 7041, 364.

ditions of sale of the seller and therefore also no consent to the arbitration agreement, because the pro forma invoice was sent only with the delivery, whereas part of the payment was conducted several weeks before that. On the contrary, Respondent alleged that the consent was given with the payment of the price on the pro forma invoice.

The municipal court in Orašje found that the criteria for a valid arbitration agreement were not met. The court found that Art. 49 Private International Law (PIL) Act of FB&H,⁴ which determined conditions of choice of court agreements, does not relate to arbitration agreements and therefore the gap needed to be filled by reference to Art. 435 of the Civil Procedure Act of FB&H, which requires signature by all parties of the arbitration agreement. Therefore, the municipal court interpreted the signatures to be required also for arbitral agreements contained in general conditions which are specifically regulated in Art. 436 of the Civil Procedure Act of FB&H which states that an arbitration agreement is validly agreed upon also when it is contained in general conditions of sale. Further, the municipal court used the conflict rule on transfer of technology from Art. 20 (18) PIL Act of FB&H to find that the place of the recipient of the technology, meaning law of FB&H shall be applicable. The municipal court awarded approximately 250,000 € in damages to the Claimant.

The Cantonal Court of second instance in most points agreed with the municipal court and upheld the decision. Following an appeal (“revizija”) against the Cantonal Court judgment, the Supreme Court of FB&H disagreed. It announced at the beginning of its reasoning that the validity of the arbitration agreement depends on the applicable law to the arbitration agreement. The Supreme Court of FB&H started its analysis firstly by confirming that a requirement of a written form must be met, but that under the NY Convention and the European Arbitration Convention exchange of faxes and telegraphs, or in the modern age e-mail may suffice this requirement. Further it stated that under the influence of the Model Law, Art. 436 of the Civil Procedure Act of FB&H considers arbitration agreements in General Terms and Conditions to be valid. Therefore, it concluded that the requirement of the written form somehow needs to be met by incorporating general terms into a written agreement, but that it depends on the applicable law if a mere reference to a website or only a full text of the written general terms in the contract will be sufficient.

⁴ Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters of 1982, *Official Journal of the Socialist Federal Republic of Yugoslavia*, Nos. 43/82 and 72/82, *Official Journal of the Republic of Bosnia and Herzegovina*, No. 2/1992, No. 13/1994; *Official Journal of the Republic of Srpska*, No. 21/1992.

The Supreme Court of FB&H further stated that under Art. II NY Convention it is possible for national states to adopt a less strict approach to the written requirement and also consider other forms, even oral arbitration agreements, to be sufficient. It went on to say that the NY Convention does not contain a conflict rule for the form of the arbitration agreement, whereas the European Arbitration Convention under Art. VI (2) refers to the conflict rules of the court. The applicable law therefore shall be found under Art. 19 PIL Act of FB&H, which follows the choice of law by the parties, or in absence of a choice, Art. 20 PIL Act of FB&H refers to the law of the seller. Therefore, the Supreme Court of FB&H considered French law to apply to the question of validity of the arbitration agreement. Finally, the Supreme Court of FB&H reminded the lower courts to apply CISG to the sale contract itself. Thereby, the Supreme Court of FB&H referred the case back to the municipal court for a new decision.

ANALYSIS OF THE “CHICKEN BREED” CASE – A QUESTION OF FORMAL OR SUBSTANTIVE VALIDITY

The dilemma raised by both the municipal and the Supreme Court of FB&H shows a full variety of possible problems related to the question of applicable law to the validity of the arbitration agreement. The technique of determining the applicable law follows the principles and theory of PIL. The understanding of the arbitration agreement is shaped by principles and theory of arbitration. The complex nature of the arbitration agreement between the procedural and contract theories does not only inspire for broad academic discussions. In practice, both substantive and procedural law will regulate certain aspects of the arbitration agreement. This was also demonstrated in the “chicken breed” case in FB&H, where the courts in FB&H naturally assumed that both procedural and substantive laws apply to the question of validity. On the other hand, the Supreme Court of FB&H seems to lean towards the opinion that the question of validity of the arbitration agreement contained in general conditions of sale and referred to in an invoice is a question of form and not a question of substance. Or at least, it is fair to say that in the decision there was not a clear distinction between the formal and substantive validity of the arbitration agreement.

Arbitration agreement between procedural and substantive law

The parties usually choose the seat of arbitration and thereby the *lex arbitri* for the procedural framework of the arbitration proceedings, which is here the

Dutch law, and substantive law which will govern the main contract which would here be the French law. Both laws are only applicable under the assumption that the general conditions of sale have been validly incorporated into the sales agreement. The most obvious solution would be to apply the *lex arbitri* to procedural questions of the arbitration agreement and the law applicable to the main contract to substantive aspects of the arbitration agreement. However, this case shows that such distinction is not always possible.

The nature of the arbitration agreement is somewhere between procedural and substantive law. This conclusion is a result of a rather long and still developing theoretical discussion,⁵ but also has its important practical reflections. Namely, some aspects of the arbitration agreement are regulated by procedural law and some are regulated by substantive law. In UNCITRAL Model law countries the form of the arbitration agreement is regulated by the (procedural) arbitration law, the same applies to all countries that ratified the New York Convention. The same is true for Bosnia and Herzegovina, where Arts. 435 and 436 Civil Procedure Act regulate the question of form of the arbitration agreement. On the other hand, question of the consent to arbitrate, error, fraud etc. will mostly be regulated by (substantive) contract law. The question of validity of arbitration agreement may therefore raise difficult questions even in purely domestic cases.⁶ In international arbitration cases this means that both substantive and procedural law of the applicable law determined by the conflict rules will be applicable to the arbitration agreement. Therefore, not only the *lex arbitri* will be the applicable law (to arbitration proceedings), but possibly also foreign procedural law may become applicable (to the arbitration agreement).

This fact that both substantive and procedural law might become applicable to the arbitration agreement causes several problems for PIL. This is an important exception from the PIL rule applied before courts, that always the domestic procedural law applies (*lex fori*).⁷ This is probably also why the municipal court, but also to some extent the Supreme Court of FB&H naturally assumed that the requirements from the Civil Procedure Act of FB&H have to be fulfilled, regardless of the applicable law. However, the PIL does have an answer to this problem with the instruments of characterization (classification) *lex causae*. In the first step the applicable conflict rule “in toto” (so called “open referral”) refers to the

⁵ Gašo Knežević, Vladimir Pavić, *Arbitraža i ADR*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2010, 45.

⁶ Almir Gagula, “Arbitrability of Shareholder Disputes in Bosnian Law”, *Balkan Yearbook of European and International Law* (eds. Zlatan Meškić et al.), Springer, 2019, 53–69.

⁷ Jan Kropholler, *Internationales Privatrecht*, Mohr Siebeck, Tübingen, 2001, 4 edn, 553.

applicable foreign law and in the second step the facts of the case are qualified once again, this time in accordance with the foreign substantive law which is applicable (*lex causae* characterization or classification).⁸ Theory of characterization in two steps (“Stufenqualifikation”) is today the prevailing theory of characterization in Austria,⁹ Switzerland,¹⁰ and it is also the prevailing theory of ex-Yugoslav republics.¹¹ Even if another version of the *lex causae* qualification and not the qualification in two steps (“Stufenqualifikation”) would be accepted, with regards to the applicable law to the arbitration agreement the outcome would be the same: both procedural and substantive law of the foreign law would become applicable.¹² In the literature the qualification *lex causae* is considered to be methodologically justified, because after the foreign law is determined to be applicable in accordance with the chosen conflict rule, it is logical that the provisions of that foreign law will be applied and interpreted in accordance with the legal order they belong to (meaning *lex causae*).¹³

Therefore, the applicable law to the arbitration agreement is the exception from the rule that procedural law is always applied *lex fori*. This means that in this case the written form requirements from Art. 435 and 436 Civil Procedure Act only have to be fulfilled, if the conflict rules of FB&H do not refer to a law of a state which does not require a written requirement. In fact, this was confirmed by the ruling of the Supreme Court of FB&H, only with a different reasoning.¹⁴ Once the applicable law is determined, its rules on the formal and/or substantive validity of arbitration agreements become applicable, regardless if they are contained in their procedural or substantive law.

⁸ Leo Scheucher, “Einige Bemerkungen zum Qualifikationsproblem”, *ZfRV*, 1961, 232; Tibor Varadi, *Međunarodno privatno pravo*, Forum, Novi Sad, 1990, 67-68; Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo – opšti deo*, Službeni glasnik, Beograd, 2008, 260; Dirk Loo-schelders, *Die Anpassung im internationalen Privatrecht: Zur Methodik der Rechtsanwendung in Fällen mit wesentlicher Verbindung zu mehreren nicht miteinander harmonisierenden Rechtsordnungen*, Müller, Heidelberg, 1995, 147.

⁹ Fritz Schwind, *Internationales Privatrecht*, Manz, Wien, 1990, 28–29; L. Scheucher, op. cit., 232; against this theory Michael Schwimann, *Internationales Privatrecht*, Manz, Wien, 2001, 25–26.

¹⁰ Adolf Schnitzer, *Handbuch des IPR*, Basel, 1957, 102.

¹¹ Zlatan Meškić, Slavko Đorđević, “Bosnia and Herzegovina”, *International Encyclopaedia of Laws: Private International Law* (ed. Bea Verschaegen), Kluwer, Alphenaan den Rijn, 2018, 48.

¹² Stefan Kröll, *Ergänzung und Anpassung von Verträgen durch Schiedsgerichte*, Carl Heymanns, Köln, 1998, 18.

¹³ Z. Meškić, S. Đorđević, op. cit., 48.

¹⁴ The view followed by the Supreme Court of FB&H was also expressed in Maja Stanivuković, “Merodavno pravo za arbitražni sporazum”, *Pravni život*, br. 12, 1998, 313.

*Arbitration agreements in general terms and conditions
– a question of formal or substantive validity*

The question of validity of arbitration agreements is generally divided into formal and substantive validity. While the question of classifying certain provisions within one legal system into rule of substantive or formal validity may not be of practical importance, in cases with a foreign element, this choice influences which conflicts rules will be applicable. Consequently, there is possibly a different applicable law to the formal and substantive validity of the arbitration agreement.

Formal validity of the arbitration agreement. – The Supreme Court of FB&H was correct by stating that there is no specific conflict rule for the formal validity of the arbitration agreement. Namely, the conflict rules of Art. V NY Convention and Art. VI (2) European Arbitration Convention are conflict rules on substantive validity. For the form of the arbitration agreements, Art. II (2) of the New York Convention contains a substantive maximum form requirement.¹⁵ This means that there is no conflict rule, but a directly applicable substantive solution for the question of form. It is uniformly held that such maximum form under Art. II (2) of the NY Convention does not require a signature by the parties.¹⁶ A conflict law analysis based on national conflict rules makes only sense if the conditions under Art. II (2) of the New York Convention are not fulfilled and the conflict rules refer to applicable law that preserves the formal validity of the agreement, following the most favorable treatment-principle under Art. VII of the New York Convention, which on this matter leads to the principle *in favorem validitatis*.¹⁷ This confirms that the written form requirement from the Civil Procedure Act of FB&H will be applied, only if the law of FB&H is the applicable law to the form of the arbitration agreement.

The correct conflict rules to be applicable to the formal validity is Art. 7 PIL Act of FB&H, which keeps the contract formally valid if it either satisfies the law of the state where it was concluded or the law applicable to the substance of the agreement. Consequently, in addition to the law applicable to the substance of the agreement which will be elaborated further below, the Supreme Court of FB&H

¹⁵ Gary Born, *International Commercial Arbitration*, Vol. I, Kluwer, The Hague, 2014, 617.

¹⁶ Toni Deskoski, “Форма на спогодбата за меѓународна трговска арбитража во правниот систем на Република Македонија“, *Evropsko pravo*, No. 1–2, 2012, 23; Alan Uzelas, “Forma arbitražnog ugovora: kako otjerati avet papirnate pismenosti?“, *Pravo u gospodarstvu*, No. 2, 2001, 113.

¹⁷ Rolf Trittman, Inka Hanefeld, “Form of Arbitration Agreement“, *Arbitration in Germany* (eds. Karl Heinz Böckstiegel, Stefan Michael Kröll, Patricia Nacimiento), Kluwer, Austin/Boston/Alphen a.d. Rijn, 2007, 126, 129.

missed the opportunity to check the requirements of the law of the state where the contract is concluded. Of course, this is again in this complex case not an easy task and it reveals the flaws of the outdated connecting factor of the *lex loci contractus*. Namely, if the contract is not concluded in one place in physical presence of both parties, the question where the contract is concluded again raises the preliminary question under which law shall we assess where the contract was concluded. Especially because some states follow the principle that the contract is concluded in the place of receipt of the acceptance of the offer, whereas other follow the principle of the state from which the acceptance was sent. It seems that the Supreme Court of FB&H considers it possible that with the payment of the pro forma invoice the contract was concluded in FB&H. Under Art. 7 PIL Act of FB&H, this means that on the one hand law of FB&H would be applicable as *lex loci contractus* and on the other hand the law applicable to the substance of the contract, whichever law keeps the contract formally valid. Considering that the pro forma invoice was in written as well as the reference to the website on the invoice, the written requirement would be satisfied. An inclusion of general terms and conditions by a mere reference within the contract is valid as a matter of form under the Law of Obligations of FB&H and would therefore cause no problems.¹⁸

Substantive validity of the arbitration agreement. – The question that remains open is, however, if both parties consented to the inclusion of general terms and conditions. This is a question of substantive validity. The Supreme Court of FB&H was not fully correct in its assessment that the NY Convention does not contain a conflict rule for the validity of the arbitration agreement. Namely, Art. V (1) of the New York Convention subjects the validity of the arbitration agreement under the law chosen by the parties, or failing any indication thereon, under the law of the country where the award was made. The two-step test of Art. V (1) of the New York Convention, comprises of the parties' choice of law in the first step and the law of the seat in the second step. The same solution is taken over by the Art. 34 (2) (a) (i) and Art. 36 (1) (a) (i) UNCITRAL Model Law¹⁹ and is consequently widespread in national arbitration laws. Art. VI (2) of the European Arbitration Convention referred to the Supreme Court in fact repeats the two steps from the NY Convention and adds a third step for the case that courts deciding on the validity of the arbitration agreement cannot determine the seat in the second step.

¹⁸ Zlatan Meškić, Alaudin Brkić, "Zaštita potrošača od nepravednih ugovornih odredbi - usklađivanje obligacionog prava BiH sa Direktivom 93/13/EEZ", *Analni Pravnog fakulteta Univerziteta u Zenici*, 2010, 58.

¹⁹ Model Law on International Commercial Arbitration 1985, UNCITRAL Model Law, UN Doc A/40/17, Annex I.

In the third step, they shall apply the conflict rules applicable in the state of that court. Therefore, the most important international legal sources have a harmonized view on the matter.

In FB&H there is no specific conflict rule for the substantive validity of the arbitration agreement in the national law, so the international legal sources apply. Notwithstanding the fact that their provisions on the applicable law to the arbitration agreement of the international instruments are designed to be applied in specific proceedings before courts, it has already been widely accepted that there is no plausible reason to hold that a different law shall apply to the arbitration agreement at different stages of the proceedings. In case there is a specific conflict rule in the national law, national courts will be bound by it. One of the prominent examples is Art. 178 (2) of the Swiss PIL Act, under which “as to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law”. This provision is interesting, because it does not only follow the principle *in favorem validitatis*, but also adds the law applicable to the main contract to the usual connecting factors of the chosen law and the law of the seat.²⁰ It is quite different from the solution in the New York Convention, the European Arbitration Convention and the UNCITRAL Model Law, because it provides for the three connecting factors alternatively and not subsidiary. This is typical for conflict rule on the validity of legal acts, because their main aim is to preserve the validity of such acts in cross-border transactions. The Swiss provision was used as an inspiration for the newer Dutch solution in Art. 10:166 of the Dutch Civil Code, which also considers the arbitration agreement to be valid if it is valid either under the chosen law, the law applicable to the main contract or the law of the seat.²¹ In absence of a specific conflict rule on substantive validity of the arbitration agreement, conflict rules of the PIL Act of FB&H on contracts contain three subsidiary connecting factors: 1. the choice of law; 2. domicile of the person performing the characteristic performance and 3. the closest connection in Art. 19 and 20 PIL Act of FB&H. Again, the choice of law is the main connection factor for the substantive validity.

Have the parties chosen the law to the arbitration agreement in the “chicken breed” case? It is not easy to answer this question, at least not as easy as it may seem. A choice of law to the arbitration agreement is allowed under any known

²⁰ Kurt Siehr, *Das Internationale Privatrecht der Schweiz*, Schulthess, Zürich, 2002, 715.

²¹ Vesna Lazić, “Interpretation and Application of the New York Convention in The Netherlands”, *Recognition and Enforcement of Foreign Arbitral Awards* (ed. George A. Bermann), Springer, 2017, 689, 700.

legal act: the New York Convention, the European Arbitration Convention, the UNCITRAL Model Law and national PIL codification which contain explicit conflict rules on the applicable law to arbitration agreements, the conflict rules on contracts of PIL codification without explicit rules on arbitration agreements, but also relevant arbitration case law such as the famous *Sulamerica case*²² of the English courts followed, or at least taken reference to, by various courts and arbitral tribunals.²³ It goes without saying that whenever a conflict rule does not require an explicit choice of law, that the choice of law may be conducted explicitly and implicitly.²⁴ Usually the parties will simply make a reference in their contract which includes an arbitration clause, that the law applicable to this contract shall be the law of certain state. This is exactly what the parties have done in this case. Namely, in the general conditions of sale under the same subchapter in which the arbitration clause is contained, it is stated as follows: “All the agreements and any legal interaction between the Seller and the Buyer shall be governed exclusively as follows: For goods invoiced by Institut de Sélection Animale S.A.S. by French law”.

Surprisingly, it is almost universally accepted that a choice of law for the sales agreement, which contains the arbitration clause, is not considered to be an explicit choice of law for the arbitration agreement. The separability doctrine apparently has something to do with this conclusion. From a PIL perspective this is not visible at first sight, because it is understandable even without the separability doctrine that the parties are allowed to choose a separate law for each contract clause. Therefore, the separability doctrine does not really add any value to the discussion if a choice of the applicable law to the contract is also a chosen law for the arbitration clause contained in the contract. The only valid argument is that, if the chosen law is intended to also apply to the arbitration agreement, an choice of law should explicitly mention the arbitration agreement and not just the contract. The formulation of the choice of law clause will be a decisive factor to establish if a choice of law is done also for the arbitration agreement and not just the contract. The HKIAC has therefore in the reform of its model clause included a clause for the choice of law “of the arbitration clause”.²⁵ In the “chicken breed” case, however, the clause does not only refer to the sales agreement. It refers to

²² *Sulamerica Cia Nacional De Seguros S.A. V. Enesa Engenharia S.A.* [2012] EWCA Civ 638, www.trans-lex.org/311350/_/sulamerica-cia-nacional-de-seguros-sa-v-enesa-engenharia-sa-%5B2012%5D-ewca-civ-638/, 26.04.2020.

²³ Alan Redfern, Martin Hunter, *International Arbitration*, Oxford, 2015, 159.

²⁴ Marike Paulsson, *The 1958 New York Konvention in Action*, Kluwer, 2016, 177.

²⁵ See www.hkiac.org/arbitration/model-clauses, 26.04.2020.

“All the agreements and any legal interaction between the Seller and the Buyer” which shall be governed by French law. Such a broad clause referring to all agreement should be interpreted in a way to encompass also the arbitration agreement. This is rather an example of a clause which is formulated in a way that it refers not just to the sales agreement, but to all agreements, and leaves little doubt that also the arbitration agreement is encompassed.

Therefore, under Art. V (1) of the New York Convention, Art. VI (2) of the European Arbitration Convention or Art. 19 PIL Act of FB&H the applicable law to the question if there is consent of the parties would be French law. However, it is not this easy. We have to remember that we are examining if the general conditions of sales are consented to, so the choice of law contained therein is only valid if there is consent. So, may we decide on the chosen law if the law was chosen in the first place? In the PIL theory this is called the purported choice of law. It means that the question if the choice of law clause is valid will be determined by the (purportedly) chosen law. This is explicitly stated in Art. 6 Hague Principles, which state that the existence of an choice of law agreement will be determined by the law that was purportedly agreed to. This is also the prevailing view in the PIL theory of the ex-Yugoslav Republics, even though it is not explicitly regulated.²⁶ The reasoning behind it is that otherwise any party could by a mere objection to the validity of a choice of law endanger its validity, because another law would apply to it, possible the law which would be applicable without a choice of law. Therefore, validity of the choice of law clause will be determined by French law and if it is validly consented to under French law, then French law would apply to the substantive validity of the arbitration agreement. At the same time, under Art. 7 PIL Act of FB&H, it would also be applicable to the question of form, in addition to the *lex loci contractus*. And French law is particularly friendly towards questions of formal validity of arbitration agreements.²⁷

If the choice of law clause is not valid under the purportedly chosen French law, this does not automatically mean that the arbitration agreement is invalid as well. Then, the applicable law to the substantive validity of the arbitration agreement will not be the explicitly chosen law, but either an implied choice of law, or the next subsidiary connecting factor after the choice of law which is either the

²⁶ Maja Stanivuković, Petar Đundić, *Međunarodno privatno pravo – posebni deo*, Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2008, 112.

²⁷ See Jelena Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži*, Udruženje pravnika Jugoslavije i Spoljnotrgovinska arbitraža pri Privrednoj komori Jugoslavije, Beograd, 1998, 120 i dalje; Milena Petrović, “Punovažnost arbitražnog sporazuma”, *Zbornik radova “Harmonizacija građanskog prava u regionu”*, Pravni fakultet Istočno Sarajevo, Istočno Sarajevo, 2013, 485.

seat of arbitration, domicile of the person performing characteristic performance or the closest connection.

A possible criterion to establish an implicit choice of law, might be the choice of the seat of arbitration, because it shows which procedural law the parties have chosen for the arbitration procedure.²⁸ Nevertheless, the threshold to meet for an implicit choice of law should be rather high.²⁹ The EU Rome I Regulation requires under Art. 3 (1) that “the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case”. The requirement of the “clear demonstration” aims to raise the level of probability needed for the conclusion that parties did want to choose an applicable law. Namely, one of the main challenges for the arbitral tribunal or courts is to establish if the parties have ever intended for a certain legal order to be applicable.

This analysis should be strongly differentiated from the determination of the closest connection to the case. The law that the parties want to choose does not have to be in any connection to the case. The parties may want it to be applicable because of the quality of its solutions, neutrality, or because one of the parties or both (and their attorneys) are particularly familiar with the legal system. Some of these criteria are also decisive for the choice of the seat of arbitration, therefore the choice of the seat is by many authors and tribunals considered to be a strong indication for the choice of the applicable law to the arbitration agreement.

There is a great dispute among PIL scholars, as to whether the choice of jurisdiction of the courts or seat of arbitration shall be a decisive factor or no factor at all when establishing the implicit choice of law (for the arbitration agreement or even for the contract). Art. 4 of the Hague Principles on Choice of Law in International Commercial Contracts³⁰ explicitly states that “An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law”. The official commentary of the provision clarifies that the choice of jurisdiction/seat may be used as one of the criteria for the determination of the choice of law to the contract, but it does not in itself amount to a choice of law.³¹ The reason is

²⁸ See Mario Guliano, Paul Lagarde, Report on the Convention on the law applicable to contractual obligations, *Official Journal of the EU*, 1980, 1–50.

²⁹ Zlatan Meškić, “Parties’ Choice of Law Governing the Arbitration Agreement: A Curse or a Blessing?”, *1st Annual Research Symposium on International Commercial Arbitration* (ed. Maria Casoria), Bahrain, 2020, 43.

³⁰ Opened for signature 30 June 2005 (entered into force 1 October 2015).

³¹ See www.hcch.net/en/instruments/conventions/full-text/?cid=135, 26.4.2020.

very simple: if a choice of jurisdiction/seat would in itself amount to a choice of law, this would mean that a chosen court or arbitral tribunal would never apply foreign law. This does not (always) correspond to the will of the parties. The same provision can also be found in the Art. 7 (2) of the Mexico Convention,³² stating that a “selection of a certain forum by the parties does not necessarily entail selection of the applicable law”.

In any case, the arbitral tribunal or court should restrain from a presumed (objective) imputed choice of law and restrict itself to a real (subjective) intention of both parties.³³ It is not about the question which law the parties should have chosen to their contract, it is about the question if they actually have implicitly chosen that law. This is also the main criticism to the current arbitral practice, the discretion in determination of the applicable law seems to be confused with an analysis of the hypothetical instead of the actual will of the parties. Words are put in parties' mouth that they have expressed or even intended to express, neither expressly not impliedly.

In the “chicken breed” case, the choice of the seat of arbitration to be in Amsterdam, Netherlands, was done in the general conditions of sale. If the court would consider this as an implicit choice of law, it would have to use this as purportedly chosen law of Netherlands and apply it to establish if the choice of law clause (implicit choice of law clause) is valid. If the choice of law in the arbitration clause is valid, then the substantive validity of the same arbitration clause shall be considered under the chosen law of Netherlands. This means that in the first step the substantive validity of the same arbitration clause is considered from the perspective of the criteria to be met for a choice of law clause and in the second step for an arbitration clause. Obviously, this makes sense only if under the Dutch law there are separate criteria for the substantive validity of the choice of law and arbitration clauses.

Even if the implicit choice of law of Dutch law would be invalid or if the court follows the view expressed in this paper that the seat should not be considered as an implicit choice of law, the Dutch law would be applicable under the subsidiary connecting factor of Art. V (1) of the New York Convention, Art. VI (2) of the European Arbitration Convention. Therefore, the Dutch law would be applicable to the arbitration agreement if there is no choice of law, explicit or implicit. This paper follows the hierarchy given by Art. VI (2) of the European Arbitration Convention, meaning the conflict rules for contracts should only be ap-

³² The Inter-American Convention on the Law Applicable to International Contracts signed in Mexico on March 17, 1994.

³³ Alex Mills, *Party Autonomy in Private International Law*, Cambridge, New York, 2018, 358.

plied if for some reason the seat of arbitration cannot be determined. The reason for such opinion is that in case there is no choice of law, the conflict rules for contracts provide for characteristic performance, usually the law of the domicile of the seller or service provider (not the buyer) to determine the applicable law.³⁴

The same is true for Art. 20 PIL Act of FB&H. However, when it comes to arbitration agreements, this is not the correct approach. The specific performance when it comes to the arbitration agreement is rather connected to the arbitral proceedings than to the domicile of the seller/service provider or buyer. Consequently, the specific performance as a connecting factor is not suitable to refer to the applicable law for the arbitration agreement. Considering that this is the main connecting factor in comparative law when it comes to the law applicable to contracts in absence of a choice of law, it seems that the conflict rules for contracts in general are not suitable to be applicable to arbitration agreements. The remaining connecting factors, the choice of law and the closest connection, do not need to be taken out of specific conflict rules on contracts, because they are considered to be general principles of both international arbitration and PIL.

THE SUPREME COURT OF FB&H PROVIDES A STRONG PRO
– ARBITRATION SIGNAL IN A DIFFICULT CASE

The question of the applicable law to the arbitration agreement concluded by a reference to a website in a pro forma invoice is one of the hardest questions of PIL. The analysis in this paper was not intentionally complicated to prove this point, on the contrary. The Supreme Court of FB&H certainly solved this matter in the “chicken breed” case in a manner which can be easily followed and managed to simplify it for the lower courts that have to decide on the issue again. The application of French law as proposed by the Supreme Court of FB&H is the most likely solution for the question of consent of the parties, firstly as purportedly chosen law to the arbitration agreement and then, in case such choice of law is valid under French law, as the chosen law for the arbitration agreement. Both Art. V (1) of the New York Convention and Art. VI (2) of the European Arbitration Convention support this solution. Of course, the Supreme Court of FB&H did not elaborate further what will happen in case the choice of law is not valid or the courts interpret that the choice of law does not refer to the arbitration agreement, but only to the sales agreement. But simply by following the subsidiary connecting factor of the law of the seat, the Dutch law applies in that case. In

³⁴ See e.g. Brooke Adele Marshall, “Reconsidering the Proper Law of Contract”, *Melbourne Journal of International Law*, Vol. 13, 2012, 1, 23.

the view of the author, there is no place for the application of the conflict rules for contracts, because the specific performance of the seller is not the specific performance in the arbitration agreement, but only in the sales agreement.

The question of form of the arbitration agreement is a completely separate question and requires satisfying substantive the criteria of an agreement in writing under Art. II NY Convention. The same provision allows national states to adopt a less strict approach to the written requirement and also consider other forms, even oral arbitration agreements, to be sufficient, as rightly recognized by the Supreme Court of FB&H. Therefore, conflicts rules may be consulted to establish if the applicable law allows for a less strict requirement. In any case, a written reference to general terms and conditions on a written pro forma invoice should not cause problems to fulfill the requirements of the agreement in writing, neither under Art. II NY Convention, nor under less strict national legal standards.

The Supreme Court of FB&H set a more than solid basis for future developments on this difficult issue. In addition, it clearly sets a pro-arbitration signal to lower courts, in a case where it would have been easy to slide into the emotions of protecting the domestic company. This is even more of importance considering that arguments in favor of validity of the arbitration agreement required quite sophisticated arguments.

Prof. dr ZLATAN MEŠKIĆ
Profesor na *College of Law, Prince Sultan University*
Redovni profesor Univerziteta u Zenici

MJERODAVNO PRAVO ZA ARBITRAŽNI SPORAZUM SADRŽAN U OPŠTIM USLOVIMA POSLOVANJA NA INTERNET STRANICI PRODAVCA

PRAKSA VRHOVNOG SUDA FEDERACIJE BOSNE I HERCEGOVINE U KORIST ARBITRAŽE

Rezime

Vrhovni sud Federacije Bosne i Hercegovine imao je zadatak da utvrdi mjerodavno pravo za punovažnost arbitražne klauzule sadržane u opštim uslovima poslovanja dostupnim na internet stranici prodavca. Ugovor o prodaji zaključen je u usmenoj formi, a upućivanje na internet stranicu s opštim uslovima poslovanja učinjeno je na profakturi po kojoj je kupac izvršio plaćanje. Arbitražna klauzula nalagala je primjenu Pravila Međunarodne trgovinske komore (ICC) sa sjedištem arbitraže u Amsterdamu, a u opštim uslovima poslovanja izabrano je francusko pravo kao mjerodavno za ugovor. Kupac je domaće preduzeće iz Bosne i Hercegovine, koje je podnijelo

zahtjev za naknadu štete pred domaćim sudovima, smatrajući da nije dalo saglasnost na arbitražnu klauzulu te da ista nije zaključena u pismenoj formi. Vrhovni sud Federacije Bosne i Hercegovine u predmetu “jato matičnih pilića” u 2019. godini odlučio je u korist arbitraže pozivajući se na Njujoršku konvenciju iz 1958. godine i Evropsku konvenciju o međunarodnoj trgovinskoj arbitraži iz 1961. godine. Radi se o temeljnoj odluci o jednom od najtežih pitanja mjerodavnog prava za formalnu i materijalnu punovažnost arbitražnog sporazuma.

Ključne riječi: arbitražni sporazum, izbor mjerodavnog prava, Njujorška konvencija, Evropska konvencija o međunarodnoj trgovinskoj arbitraži, Vrhovni sud Federacije Bosne i Hercegovine

Bibliography

- Born G., *International Commercial Arbitration*, Vol. I, Kluwer, The Hague, 2014.
- Deskoski T., “Форма на спогодбата за меѓународна трговска арбитража во правниот систем на Република Македонија”, *Evropsko pravo*, No. 1-2, 2012.
- Gagula A., “Arbitrability of Shareholder Disputes in Bosnian Law”, *Balkan Yearbook of European and International Law* (eds. Zlatan Meškić et al.), Springer, 2019.
- Guliano M., Lagarde P., Report on the Convention on the law applicable to contractual obligations, *Official Journal of the EU*, 1980.
- Knežević G., Pavić V., *Arbitraža i ADR*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2010.
- Kröll S., *Ergänzung und Anpassung von Verträgen durch Schiedsgerichte*, Carl Heymanns, Köln, 1998.
- Kropholler J., *Internationales Privatrecht*, Mohr Siebeck, Tübingen, 2001.
- Lazić V., “Interpretation and Application of the New York Convention in The Netherlands”, *Recognition and Enforcement of Foreign Arbitral Awards* (ed. George A. Bermann), Springer, 2017.
- Looschelders D., *Die Anpassung im internationalen Privatrecht: Zur Methodik der Rechtsanwendung in Fällen mit wesentlicher Verbindung zu mehreren nicht miteinander harmonisierenden Rechtsordnungen*, Müller, Heidelberg, 1995.
- Marshall B.A., “Reconsidering the Proper Law of Contract”, *Melbourne Journal of International Law*, Vol. 13, 2012.
- Meškić Z., “Parties’ Choice of Law Governing the Arbitration Agreement: A Curse or a Blessing?”, *1st Annual Research Symposium on International Commercial Arbitration* (ed. Maria Casoria), Bahrain, 2020.
- Meškić Z., Đorđević S., “Bosnia and Herzegovina”, *International Encyclopedia of Laws: Private International Law* (ed. Bea Verschraegen), Kluwer, Alphenaan den Rijn, 2018.
- Mills A., *Party Autonomy in Private International Law*, Cambridge, New York, 2018.
- Paulsson M., *The 1958 New York Konvention in Action*, Kluwer, 2016.
- Perović J., *Ugovor o međunarodnoj trgovinskoj arbitraži*, Udruženje pravnika Jugoslavije i Spoljnotrgovinska arbitraža pri Privrednoj komori Jugoslavije, Beograd, 1998.

- Petrović M., "Punovažnost arbitražnog sporazuma", *Zbornik radova "Harmonizacija građanskog prava u regionu"*, Pravni fakultet Istočno Sarajevo, Istočno Sarajevo, 2013.
- Redfern A., Hunter M., *International Arbitration*, Oxford, 2015.
- Scheucher L., "Einige Bemerkungen zum Qualifikationsproblem", *ZfRV*, 1961.
- Schnitzer A., *Handbuch des IPR*, Basel, 1957.
- Schwind F., *Internationales Privatrecht*, Manz, Wien, 1990.
- Siehr K., *Das Internationale Privatrecht der Schweiz*, Schulthess, Zürich, 2002.
- Stanivuković M., "Merodavno pravo za arbitražni sporazum", *Pravni život*, br. 12, 1998.
- Stanivuković M., Živković M., *Međunarodno privatno pravo – opšti deo*, Službeni glasnik, Beograd, 2008.
- Stanivuković M., Đundić P., *Međunarodno privatno pravo – posebni deo*, Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2008.
- Trittmann R., Hanefeld I., "Form of arbitration Agreement", *Arbitration in Germany* (eds. Karl Heinz Böckstiegel, Stefan Michael Kröll, Patricia Nacimiento), Kluwer, Austin/Boston/Alphen a.d.Rijn, 2007.
- Uzelac A., "Forma arbitražnog ugovora: kako otjerati avet papirnate pismenosti?", *Pravo u gospodarstvu*, No. 2, 2001, 113.
- Varadi T., *Međunarodno privatno pravo*, Forum, Novi Sad, 1990.
- Uzelac A., "Forma arbitražnog ugovora: kako otjerati avet papirnate pismenosti?", *Pravo u gospodarstvu*, No. 2, 2001, 113.
- Varadi T., *Međunarodno privatno pravo*, Forum, Novi Sad, 1990.

Article history

Received: 26.04.2020.

Accepted: 08.05.2020.

ORIGINAL SCIENTIFIC
PAPER