Prof. Vladimir Čolović, PhD[1] **Original scientific paper**

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APPLICATION OF THE THEORY OF *PROPER LAW* TO CONTRACTUAL RELATIONS WITH THE FOREIGN ELEMENT

Abstract

The theory of proper law is a product of the Anglo-Saxon doctrine of the 18th and 19th centuries and is applied, among other things, to determining the applicable law in contractual relations with the foreign element when the party autonomy is absent. This theory is grounded not only in the close connection between contracts and a particular country, but also in the intention of the parties which must be included in the elements of the contractual relations. This theory cannot be defined without the aforesaid elements. The article analyses the relation of the theory of proper law to other theories applied to cases when the parties have not chosen the applicable law, such as the center of gravity theory and the theory of characteristic obligation. In this regard, we shall analyse provisions of the most important sources of EU law in this area, such as the Rome Convention and Regulation 593/2008, and examine legal provisions of individual states outside the EU related to this area. The author concludes that the theory of proper law provides the most leeway for choosing the applicable law compared to the other theories.

Keywords: *contract, applicable law, proper law, center of gravity, characteristic obligation.*

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When discussing contractual relations with the foreign element, we primarily have in mind the party autonomy. The guiding principle in deciding on the applicable law in this area is the party autonomy and to the contracting parties it means the right exercised in a mutual agreement, which regulates the rights and obligations arising from their contractual relations. We can say that the party autonomy is a choice-of-law rule both

[1] Principal Research Fellow, Institute of Comparative Law, Belgrade; mail: vlad966@hotmail.com

for the contracting parties and the competent authorities, i.e. courts of law which decide on any matters of dispute[2].

On the other hand, we pose the question of how to decide on the applicable law if the parties do not make a choice of the applicable law, i.e. if the party autonomy principle is not applied. There are different theories that, more or less adequately, define the rules to be applied to this situation. One such theory is the theory of *proper law* which, put simply, can be defined as the right of the country with which a contractual relations is the most closely connected[3]. However, this theory can be defined in other ways as well, as we will see further below.

Yet, the application of the theory of *proper law* to contractual relations with the foreign element gives rise to many doubts, not only with regard to defining the theory, but also in terms of its relation to the party autonomy, and to other theories defining the rules which apply to cases when the parties have not made their choice of the applicable law. In other words, if the theory of *proper law* is related to other theories in this area, such as the center of gravity theory and the characteristic obligation theory. In that regard, the question is asked if the theory of *proper law* only accounts for the closer connection of a particular contract with a particular legal system, or if it also provides a basis for defining the tacit will of the parties, and if it also enables the decision on the law to be made by a court, with regard to hypothetical party autonomy.

The question of application of the theory of *proper law* to contractual relations with the foreign element is posed for two main reasons. The first is purely theoretical, regarding the impact of a theory deriving from the Anglo-Saxon doctrine on the formulation of rules applied when the party autonomy is absent, while the second reason relates to different solutions which can be found both in international sources and national legislations. As regards national legislations, we take into account the contents of the new Act on the Private International Law of Serbia (hereinafter: APILS)[4] which has not been passed yet, which includes solutions partly different from the Act on the Resolution of the Conflict of Laws with Regulations of Other Countries (hereinafter: ARCL)[5] which is still in force. We will also consider the definitions of the theory of *proper law* in two acts of the EU, as well as in individual laws of states which are not members of EU.

[2] M. Pak, *Međunarodno privatno pravo*, Beograd 1989., 798

[3] F.A.Mann, „The proper law in the conflict of laws", *The International and Comparative Law Quarterly*, vol. 36, No. 3 (July, 1987), 445

[4] Draft of Act on the Private International Law of Serbia (Nacrt Zakona o Međunarodnom privatnom pravu) final version, website of Ministry of Justice of Republic of Serbia, *http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php*, 16.11.2015.

[5] Act on the Resolution of the Conflict of Laws with Regulations of Other Countries (Zakon o rešavanju sukoba zakona sa propisima drugih zemalja) - *Sl.list SFRJ* br. 43/82, 72/82, *Sl.list SRJ* br. 46/96

1. The theory of *proper law* in general

As far back as the 19th century, English courts used to apply applicable law according to the theory of *proper law*. This theory was associated with contracts for the first time in 1925 by Westlake, who stated that the law that the contractual relations is the most "truly" connected with should be applied[6]. The theory of *proper law* includes three elements in determining the applicable law: - the explicit intention of the parties; - the assumed intention of the parties; and – the closest connection principle[7]. However, in defining the *proper law of the contract* theory, Westlake included only the third element. What was problematic was the fact based on which the applicable law was to be established, when there was no explicit choice of law by the parties. The decision lied between the assumed intention of the parties and the closest connection principle. However, there is no clear boundary between the hypothetical party autonomy and the closest connection principle, as demonstrated by earlier English court practice[8]. English professor Cheshire advocated the adoption of the objective concept in deciding on the applicable law. Cheshire drew on the center of gravity theory, by means of which he explained that connections of a contractual relations with a potentially applicable law can be multiple and varied, and that the center of gravity defines the concentration of those connections in a contract. However, the assumed intention of the parties which is a significant indicator in deciding on the applicable law must also be taken into account, but it must also be linked to the relation localization factor in the particular contract[9].

Nowadays, a great majority of countries apply the principle of the closest association of a contract with a particular law, in case the parties do not decide on the applicable law. The theory of *proper law* comprises this principle, along with other elements, as we have indicated above. An exact definition of this theory could be that it refers to the law according to which the contract was drawn up, i.e. that it is most closely connected with. Graveson thinks that this theory represents the application of the right of free choice of the law applicable to regulating the rights and obligations under a contract. Each contract must have its *proper law*, even in the absence of an explicit clause of choice[10].

In other words, the theory of *proper law* implies that, in cases when a governing law is applied to a contract, the court applies the law

[6] J.Belović, *Korektivna funkcija principa najbliže veze*, doctoral thesis, Faculty of Law of University of Belgrade, 2012., 18
[7] J.Belović, 121
[8] *Ibid.*
[9] J.Belović, 122
[10] M. Ročkomanović, *Međunarodno privatno pravo*, Niš 1995., 265

which is at the moment the most closely connected with it. In doing so, it must also take into account the rules characteristic of the contract in question, such as *lex loci contractus*, *lex loci solutionis*, and other rules that apply to this subject, in view of the fact that the application of the applicable law also depends on the intentions of the parties, along with other facts, when the party autonomy is absent[11]. The criteria for defining this relationship are numerous. According to this theory, priority is given to the law of the contracting party which is more obliged to abide by certain norms while performing its obligations, the party which performs an active role, essential for the contract, whose contractual obligations are more complex[12]. However, we should allow for the possibility that this method is not easily applied to some contracts, when deciding on the applicable law[13]. It follows from the aforesaid that this theory is related to the characteristic obligation theory.

On the other hand, the theory of *proper law* can be considered from two perspectives, related to the parties and their will. It can be observed both subjectively and objectively[14]. From the subjective standpoint, the parties had the intention of deciding on the applicable law, which is closely connected with the contract, and it is exactly the law that they have agreed on. Conversely, looked upon from the objective perspective, the contract is more closely connected with some other law, depending on any number of circumstances[15]. This theory points out that many facts within the contract suggest the application of a particular law, which is most closely connected with the contract[16]. The governing law of a country can determine both the form and language of the contract, which can in turn serve as indicators for a particular law to be applied[17].

In England the theory of *proper law* has almost entirely been replaced by regulations of EU law, i.e. the Rome Convention, but it is still influential in many countries, especially those which abide by *common law* systems[18]. The question is whether the application of foreign rules

[11] J.G. Castel, *Conflict of laws – contract – proper law - foreign exchange control regulations*, The Canadian Bar Review, 1962., 108, fn.10

[12] V.Čolović, „Specifičnosti određivanja merodavnog prava u ugovornim odnosima sa elementom inostranosti", *Yearbook of Faculty of Law Sciences* no.1 *(Godišnjak Fakulteta pravnih nauka)*, University „Apeiron", Banja Luka 2011., 74

[13] A.J.E. Jaffey, »Engleska "proper law" doktrina i konvencija EEZ" (The English Proper Law Doctrine and the EEC Convention), *International and Comparative Law Quarterly*, 1984; 33:531-537, taken from: *Strani pravni život* no. 128-129/85

[14] V.Čolović (2011.), 74

[15] J.G. Castel, 113

[16] G.C. Cheshire, *Private International Law*, Oxford 1961., 213

[17] G.C. Cheshire, 215

[18] M.Bagheri, „Conflict of Laws, Economic Regulations and Corrective/Distributive Justice", *Journal of International Law*, Vol. 28, Iss. 1 [2014], Art. 5, University of Pennsylvania Journal of International Economic Law (14th Judicial Conference of the United States Court of International), 2014., 125

could be allowed, when the parties are free to choose their law, if the law of the foreign country in question is more closely related to the content of the contract[19]. The law application principle according to the theory of *proper law* is not absolute. We could say that the theory of *proper law* is unitary in nature, as regards the relation of this theory to legal rules and corrections to the application of laws, in case the public order is disrupted[20]. When speaking of the conflict of laws in civil law relations with the foreign element, we also speak of the institute of corrective justice. Corrective justice refers to the physical connection between the place where the contract is signed and the place of its performance and the applicable law. But this institute cannot always support the assumption that the law of those places can govern the contract in question. The will of the parties is also important, as well as the application of the closest connection principle which, in fact, expresses the corrective justice that must be carried out between the contracting parties. This could call for the application of *lex mercatoria*[21].

As we have stated above, there are different criteria governing the establishment of applicable law according to the theory of *proper law*. Even in cases when a number of elements within the contract point in the direction of the legal system of a particular country, this does not mean that the law of that country shall be applicable. Namely, in one specific case of a claim for industrial injury compensation, the applicable law was determined based on the contract, while the law governing the employer's tortious liability was not applied. In other words, the facts that the claimant is resident in England, that the contract was executed in England, in the English language, and that the employer's parent company was in the USA, do not provide sufficient grounds for the conclusion that the law governing the contract is either the English law or the law of the State of Texas in the US[22].

2. The relationship between the theory of *proper law* and other principles governing the choice of law applicable to contractual relations

We will now try to define the relationship between the theory of *proper law* and other principles (theories) in this area. This also includes the party autonomy. Namely, we have seen that this theory comprises the

[19] M. Bagheri, 128-129
[20] M. Bagheri, 129-130
[21] M. Bagheri, 130
[22] „Pravo koje se primenjuje na ugovor", *Journal du droit international* 1973., 2:441-445, taken from: *Strani pravni život* no. 86/74

element relating to the assumed intentions of the parties. On the other hand, the party autonomy proponents hold that the contracting parties can adopt the law to be applied with absolute freedom of choice, and that law does not, in their view, have to be in any way related to the elements of the legal transaction in a particular contractual relations. This means that the parties do not have to abide by any particular law. This opinion, termed the "contract without the law" theory, is not accepted, especially in the legislations of France and Germany, which stipulate that every contract must be governed by the law of a particular country. In other words, in order to establish whether an international or domestic contract is in question, the court is always obligated to examine the so-called "objective localization of the contract". To determine the "objective localization of the contract" means to establish objective connections of the contract with particular countries. In line with the aforesaid opinion, allowing the parties to choose a law totally unrelated to the contract would amount to acknowledging that the parties can rule out the laws of all the countries that their contract is connected with. For this to be avoided, it must be accepted that the parties are not free to adopt just any law. They are free only in making choice from among those laws that are connected with their contract[23]. The theory of *proper law* includes the assumed intention of the parties which is determined based on the content of the contract. Further below we will see that similar rules also exist in regulations from the legal sources of the EU and individual states.

As regards the relationship of the theory of *proper law* with the center of gravity theory, they display certain similarities. Namely, the center of gravity theory promotes the choice-of-law rule according to which, with regard to contracts with the foreign element, the applicable law is determined taking into account legal connections of that contract which "gravitate" towards a particular country. Those specific connections or a combination of circumstances are also termed "close connection", "specific circumstances", etc[24]. Every contract contains one specific fact which is essential for its functioning. What fact it is depends on the type and subject of the contract. Such a fact can be found in every contract and it should be given the status of the relevant fact in the choice-of-law rule[25]. This fact shall be established according to the law of the country where the question is raised, which means according to *lex fori*[26]. There are, most often, two correlative obligations in a contract. In terms of space, those obligations do

[23] H. Batiffol, „Uloga volje u MPP", *Archives de philosophie du droi*t 1957., 71-85, taken from: *Strani pravni život* br. 33/61
[24] M. Pak, *Međunarodno privatno pravo*, Beograd 2000., 444
[25] *Ibid.*
[26] L. Raape, *Internationales Privatrecht*, Berlin und Frankfurt a. M. 1955., 449

not have to be performed in the same territory and in that case one point of connection could point towards the application of two laws[27].

If there is no so-called "close connection" between the elements of a contract and the law of a particular country, the problem of determining the applicable law becomes even greater. Then, practically speaking, we have to resort to some other rules that should be defined in advance for any kind of contractual relations. This is possible by using the theory of characteristic obligation, which defines the basic rule for establishing the applicable law based on the place of residence (seat or abode) of the main obligation debtor. Characteristic obligation as the point of connection, in advance, determines whose obligation in a contract is more important, so as to serve as basis in deciding on the applicable law. This characteristic obligation or action objectivizes a contract, in which the party autonomy is not applied, or it is impossible to determine the "closest connection". Characteristic obligation can be expressed in the transfer of property of objects, in the obligation of services etc. Those prestations or obligations must have priority over payment of the other party[28]. If that characteristic obligation is the basis of the contractual relation, decision-making on the relative importance of one or another obligation must follow. In other words, it must be established whose prestation, or obligation is more important[29]. The characteristic obligation theory has become predominant in recent legislation. A great majority of countries have adopted this principle. Those countries include countries originating from the former SFR Yugoslavia, then Austria, the Czech Republic, Poland, Hungary, Switzerland, etc. On the other hand, some countries recognize the principle according to which the applicable law is determined based on the place of signing the contract. Similarly, many Latin American countries have adopted the place of contract execution as the governing principle in this area[30]. It should be noted that no rule for deciding on the applicable law following the characteristic obligation theory is absolute. All the rules are refutable assumptions. Even the *lex rei sitae* as the place where a property is situated constitutes a refutable assumption.

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The original meaning of the term *proper law* is the correct law, the law that can be applied. This meaning should be the starting point in analysing this theory. It indicates that the law applied is the one most closely

[27] E. Muminović, *Osnovi Međunarodnog privatnog prava*, Sarajevo 1997., 175
[28] M. Pak (2000.), 445
[29] M. Pak (1989.), 806
[30] M. Ročkomanović, 266

connected with the contract, while the content of the contract represents the will of the parties, even in the case of adhesion contracts, given that the execution of those contracts also requires the will of the parties. We could say that the theory of *proper law* expresses both the will of the parties, and the close connection of the contract with the law of a country. On the other hand, the center of gravity theory only takes account of the content of the contract, i.e. its elements that "point towards" the law of a particular country. Finally, the characteristic obligation theory defines, in advance, the elements of a contract that will be relevant in deciding on the applicable law, although those elements are not necessarily in any way related either to the content of the contract, or the will of the contracting parties. The fact remains that incorporating this theory within the law has facilitated the work of courts, but it has also marked a departure from the essential rule – the party autonomy and the principle of applying the law best suited to the contractual relation in question.

3. The theory of *proper law* in EU law sources

3.1. The Rome Convention and the theory of *proper law*

We shall analyse the application of the theory of *proper law* in the sources of EU law through the clauses of the two most important acts passed in EU law with regard to this area. First of all, it is the Rome Convention on the Law Applicable to Contractual Obligations, passed within the EEC (hereinafter: the Rome Convention)[31], which has greatly influenced many national legislations. Pursuant to the Rome Convention clauses, the parties are granted full autonomy of the will in deciding on the applicable law, which means that they can choose the law governing the entire contract, or any of its parts[32]. In the absence of choice of law by the parties, a contractual relation will be most closely connected with the country in which the contracting party which is to execute a characteristic obligation has, at the time of signing the contract, its regular residence or seat. If the party performs a business activity, the contractual relation will be most closely connected with the country of the principal place of business. Finally, if the characteristic obligation is to be carried out in some other location, and not the place of business, the closest connection will be with the country where the obligation is to be carried out, i.e. the law following the *lex loci actus* will be applied. If the main obligation of

[31] Adopted 19.06.1980., entry into force of the seventh ratification 01.04.1991., Rome Convention on the law applicable to contractual obligations, *OJ* C027/26.01.1998.
[32] Art. 3.1 Rome Convention

a contract cannot be determined, this rule will not be applied[33].

If the contract relates to real estate, according to the Rome Convention the contract will be most closely connected with the country where the real estate is located[34]. This means that the law pursuant to *lex rei sitae* will not be exclusively applied[35]. The Rome Convention has left some leeway for regulating these contracts in a different way, i.e. if one such contract is "closer" to a country other than the country where the real estate is located, the "closer" country principle shall be applied.

The Rome Convention was founded on the characteristic obligation principle, disregarding other elements of a contract which could possibly point to "closeness" of the contract with any other law. On the other hand, in determining the governing law of contracts related to real estate, the Rome Convention allowed for the possibility of choice of some other law, should the particular contractual relation not be closely connected with the *lex rei sitae*. In this way, individual elements of the theory of *proper law* came to be accepted.

The Rome Convention stipulates that it is possible to regulate a contractual relation by means of more than one governing law. Namely, if any part of a contract can be set apart and if it is "most closely connected" with any other legal system, it is possible to decide on another law applicable to this part of the contract. If the contract can still exist in this way, there will be no obstacles to the aforesaid[36].

3.2. Regulation 593/2008 and the theory of *proper law*

The Rome Convention was replaced by the Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) No. 593/2008 of 17 June 2008 (hereinafter: Regulation 593/2008)[37]. Regulation 593/2008 also gives priority to the party autonomy, but lays down rules to be applied in its absence[38]. If the rule for a contract is not laid down, or if the contract can be governed by various elements indicated in this provision, the applicable law shall be determined according to the habitual residence of the debtor owing the characteristic obligation. However, Regulation 593/2008 also takes into account situations when a

[33] Art. 4.2, Rome Convention
[34] Art. 4.3, Rome Convention
[35] K. Sajko, *Međunarodno privatno pravo*, Zagreb 2005., 387-388
[36] Some authors are of the opinion that this will disturb the balance of the contract. See M. Dika, G.Knežević, S. Stojanović, *Komentar Zakona o Međunarodnom privatnom i procesnom pravu*, Beograd 1991., 75
[37] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) - *Official Journal of the European Communities* L 177, 04.07.2008., 6-16
[38] V.Čolović, *Međunarodno privatno pravo*, Banja Luka 2012., 208

contract is more closely associated with a country other than the one where the fact relating to characteristic obligation is situated[39]. In those cases the law shall be the law of the country that the contract is most closely associated with. Moreover, if the law cannot be chosen according to the aforesaid rules, the law of the country that the contract is most closely connected with shall be applied[40]. We can see that Regulation 593/2008 gives priority to the "closer connection" of a contract over characteristic obligation. As a result, the theory of *proper law* is being increasingly applied. In particular, Regulation 593/2008 lays down the rules governing the law applicable to contracts on the carriage of goods[41], consumer contracts[42], insurance contracts[43] and individual employment contracts[44]. We shall see that some legislations are particularly concerned with these contracts. We will not go into analysing these rules, but will only point out that some of them are determined by the application of the characteristic obligation theory, while some rules limit the party autonomy, allowing the parties to choose from among the applicable laws related to rules predefined by Regulation 593/2008.

4. The theory of *proper law* in some national legislations

We shall analyse the application of the theory of *proper law* within provisions of several laws in this area. As the governing principle, these laws primarily recognise the party autonomy, and if the law is not decided on following that principle, they lay down rules to connect a particular contractual relationship with the country most closely associated with it. Some national legislations define the rules of the characteristic obligation theory more broadly or narrowly, as the case may be. Similarly, some national legislations define specific rules for particular contract types, as do the Rome Convention and Regulation 593/2008. Nevertheless, the common feature of all those laws is regulating the close connection of the contractual relation with the law of a particular country. In view of the above analysis of provisions from EU law sources governing this area, we shall focus on the laws of some countries outside the EU.

4.1. Serbia

According to the ARCL, in the absence of the party autonomy, the applicable law is determined, according to the characteristic obligation

[39] *Ibid.*
[40] Art. 4 Regulation 593/2008
[41] Art. 5 Regulation 593/2008
[42] Art. 6 Regulation 593/2008
[43] Art. 7 Regulation 593/2008
[44] Art. 8 Regulation 593/2008

theory, based on the habitual residence of the debtor owing the characteristic obligation at the time of receipt of the offer (the signing of the contract). In article 20, the ARCL specifies solutions for a large majority of contracts, i.e. lays down the facts according to which the applicable law is to be chosen. Nevertheless, it must be noted, first of all, that the ARCL has adopted the party autonomy principle and that in article 19 it stipulates that contractual relation shall be primarily governed by the will of the contracting parties. The ARCL has defined the aforesaid rules as absolute, which means that the law of any other country shall not be applied if the contractual relation is more "strongly", or closely associated with that country. However, provision of article 20 stipulates that the law shall be applied pursuant to the rules of the characteristic obligation theory, if the law has not been chosen following the party autonomy principle, i.e. if the circumstances of the case do not point towards the application of any other law. It is possible that the quoted part of the provision refers to the application of the theory of *proper law*, but the legislator does not explicitly state what constitutes specific circumstances relating to a case.

The APILS bill stipulates slightly different rules for deciding on the applicable law compared to the ARCL. Namely, the APILS does not depart from the basic principles governing this matter, that the ARCL is also based on, but it should be noted that the latter law provides more leeway for the "closer connection" theory, and in turn the theory of *proper law* compared to the characteristic obligation theory. The APILS bill primarily stipulates that the choice of applicable law must be explicit or must indisputably result from contract provisions or the circumstances of the case[45]. If, at the moment when the choice of applicable law is made, all the other element of the contract are associated with a country whose law has not been chosen, the choice of the applicable law shall not affect the implementation of the provisions that, pursuant to the law of that other country, cannot be departed from in line with the contract[46]. The APILS also stipulates rules defined by the characteristic obligation theory, while also raising the number of contract types to be governed by those principles, in the absence of the party autonomy. If all the circumstances of the case indicate that the contract is obviously much more closely connected a the country not mentioned in the rules defined by the characteristic obligation theory, the law of that other country shall be applied, except in the case of compulsory insurance contracts[47]. If the applicable law cannot be determined according to the aforesaid, the law applicable to the contract shall be that of the country that the contract is considerable

[45] Art.145, par. 2 APILS
[46] Art. 145, par. 6 APILS
[47] Art. 146, par. 3 APILS

more closely associated with[48]. The APILS stipulates, specifically, the rules for determining the applicable law for contracts on the carriage of goods, contracts on the carriage of passengers, consumer contracts and individual employment contracts, as do the aforesaid sources within the EU.

4.2. USA

The Second Restatement of the Conflict of Laws of the USA (hereinafter: Restatement)[49] also regulates the choice of applicable law for the validity of contracts and the rights arising from contracts[50]. The party autonomy comes first. In other words, the law of the country that the parties have chosen to regulate their contractual rights and obligations is applied if the particular issue is such that it can be resolved by an explicit provision of the contract relating to that issue. The law chosen according to the principle of party autonomy will also applied to cases when the issue in question is such that the parties cannot resolve it by means of an explicit provision of the contract relating to that issue, unless: the chosen country is in no significant connection with the parties or the contract, and there are no other reasonable grounds for applying the law that the parties have chosen, and if the application of the chosen law would be in conflict with the public order of the country having considerably more interest than the chosen country in resolving the matter in question, which would in turn be the country whose law would be governing had the parties actually not decided on the law to be applied[51]. With regard to the rights and obligations of the parties concerning any issue from the contract, the applicable law shall be that of the country which is most closely associated with the contract and the parties with reference to that issue. If the parties have not made their choice of law, in deciding on the applicable law for regulating an issue the following linking points should be considered: the place of signing; the place of negotiations before signing the contract; the place of execution; the place where the subject of the contract is situated; residence, place of abode, citizenship, place of registration, place of the parties' business[52]. We can say that elements of the theory of *proper law* are also present in regulating the application of law by means of the party autonomy, i.e. by restricting the application of this principle. The law of the country with more interest is associated with both the content of the contract and the parties. In this way the closer connection of a contract is defined, which is contrary to the intention of the parties.

[48] Art. 146, par. 4 APILS
[49] Restatement II of Conflict of Laws, 1969., M.Živković, *Međunarodno privatno pravo*, nacionalne kodifikacije, knjiga prva, (national codifications, first book) Beograd 1996
[50] Art. 186 of Restatement
[51] Art. 187 of Restatement
[52] Art. 188 of Restatement

4.3. Switzerland

The Swiss Federal Act on International Private Law of 1987 (hereinafter: SIPL)[53] stipulates as the principal rule the free choice of law following the party autonomy principle, so that the choice of law must be explicit, or must credibly result from provisions of the contract or circumstances related to it[54]. Had the parties not applied the party autonomy principle in deciding on the applicable law, the law of the country that the contract is most closely associated with shall be applied. It is assumed that the closest connection is with the country in which the party to carry out the characteristic obligation has its habitual residence or, if a party to the contract is a person professionally dealing with trade or any other activity, the law shall be determined according to their principal place of business. The SIPL specifically defines characteristic performance with regard to particular contracts[55]. The SIPL specifically lays down the rules for contracts on the sale of movable property, contracts regarding the sale of real estate, consumer contracts and employment contracts. With reference to contracts on real estate, the principal rule is the *lex rei sitae*, while the parties are free to choose the law[56]. As regards consumer contracts, the party autonomy is limited[57], while the choice of law is limited in employment contracts[58]. When speaking of the application of the theory of *proper law* in the aforesaid provision, we imply that the choice of law must clearly result from provisions of the contract, i.e. the content of the contract. As regards the circumstances, the court has to assess them in each particular case which in turn demonstrates the application of this theory since it is the assumed intention of the parties that the court will take into account as the basic element in deciding on the applicable law.

4.4. The Russian Federation

The Civil Code of the Russian Federation (hereinafter: CCRF)[59] regulates the choice of applicable law in contractual relations by stipulating

[53] Swiss Federal Act on Private International Law of 18 December 1987 as amended until 1st July 2014, *http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf,* 20.11.2015.
[54] Art. 116, par. 1 and 2 SIPL
[55] Art. 117 SIPL
[56] Art. 119, par. 1 and 2 SIPL
[57] Art. 120 SIPL
[58] Art. 121 SIPL
[59] The Civil Code of the Russian Federation, with the Additions and Amendments of February 20, August 12, 1996, October 24, 1997, July 8, December 17, 1999, April 16, May 15, November 26, 2001, March 21, November 14, 26, 2002, January 10, March 26, November 11, December 23, 2003, *http://www.russian-civil-code.com/PartIII/SectionVI/,* 20.11.2015

the party autonomy as the governing principle. The applicable law chosen by the parties must not infringe the rights of third parties. The parties can agree on one law applicable to the whole contract, or on several laws applicable to specific parts of the contract. If it follows from circumstances of the case or the content of the contract that the contractual relation is associated with the legal system of another country, the choice made by the parties shall not affect the implementation of the country's imperative rules to the contractual relationship[60]. If the parties have not decided on the applicable law, the right to be applied shall be that of the country with which the contract is most closely connected. The CCRF defines the theory of characteristic obligation, specifying that the law of the habitual residence of the debtor owing the principal obligation shall be applied, unless the circumstances of the case, the content of the contract or the law dictate otherwise. If the contract comprises features of different contract types, the law to be applied shall be the one that the contract as a whole is most closely associated with[61]. If the parties fail to reach an agreement, and the contract is connected with real estate, the law following the closest connection shall be applied. This is the law of the place where the real estate is situated, unless the circumstances of the case, the content of the contract or the law indicate otherwise. On the other hand, if the contract is concerned with real estate located in the Russian Federation, and the legislator specifies all the categories included in the concept of real estate, the law of the Russian Federation shall be applied. The CCRF stipulates that a connection must exist between a contract and the law of a particular country. This part of the provision illustrates the application of elements of the theory of *proper law*. The situation is similar with regard to real estate, except that in this case the application of this theory is rather limited, if the real estate is located in the Russian Federation.

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The provisions mentioned above demonstrate that legislators have principally opted for the application of "firmer" rules in deciding on the applicable law when the party autonomy is absent. The fact of restricting the party autonomy is associated with determining the real content of a contract and all the negative aspects of regulating a contractual relation by the law of a country not related to it. The theory of *proper law* enables that, but it also defines connexity, or the "close connection" discussed above.

[60] Art. 1210 CCRF
[61] Art. 1211, par. 1, 2 and 5 CCRF

5. Conclusion

The objective of the theory of *proper law* is to enable the choice of the applicable law best suited to the content of the contractual relation and the party autonomy. Besides, it is understood that the party autonomy must derive from the content of the contract. The essential definition of the theory of *proper law* refers both to the will of the parties and the "close connection" of the contract with a particular country. On the other hand, the center of gravity theory and the theory of characteristic obligation do not leave much leeway for deciding on the law most suited to the nature of the contractual relations and the party autonomy. The center of gravity theory specifies which country a contractual relation is the closest to, according to the facts stated in the contract. The theory of characteristic obligation defines in advance the rules that the choice of applicable law shall be governed by. Both the center of gravity and characteristic obligation theories include some elements of the theory of *proper law*, regarding the "close connection" of a contract with a particular country.

In view of the aforesaid, the theory of *proper law* provides a basis for determining the applicable law in the absence of the party autonomy. However, even if the party autonomy is applied to choosing the law, the theory of *proper law* limits its application, if the contract is "closer" to a country other than the one whose law has been chosen. This results in the application of the only law truly applicable to a contractual relation, which is in fact the main objective of the theory of *proper law*.

Prof. dr Vladimir Čolović
naučni savetnik, Institut za uporedno pravo Beograd

PRIMENA TEORIJA *PROPER LAW* KOD UGOVORNIH ODNOSA SA ELEMENTOM INOSTRANOSTI

Rezime

Teorija *proper law* je proizvod anglosaksonske doktrine XVIII i XIX veka i primenjuje se, između ostalog, kod određivanja merodavnog prava u ugovornim odnosima sa elementom inostranosti u odsustvu autonomije volje. Osnov ove teorije nije samo u bliskoj vezi ugovora sa nekom

zemljom, već i u nameri stranaka koja mora biti sadržana u elementima ugovornog odnosa. Ne može se definisati ova teorija bez navedenih elemenata. U radu se analizira kakav je odnos teorije *proper law* i drugih teorija koje se primenjuju u slučaju kada stranke nisu izabrale merodavno pravo, kao što su teorija centra gravitacije i teorija karakteristične prestacije. U vezi sa tim, analiziraju se odredbe najvažnijih izvora prava EU u ovoj oblasti, kao što su Rimska konvencija i Uredba 593/2008, a posvećuje se pažnja odredbama zakona pojedinih zemalja van EU u ovoj oblasti. Autor zaključuje da teorija *proper law* ostavlja najviše prostora za određivanje merodavnog prava u odnosu na ostale teorije.

Ključne reči: ugovor, merodavno pravo, *proper law*, centar gravitacije, karakteristična prestacija.