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**Materials from the 6<sup>th</sup> Annual International  
Conference on Comparative Law**

## Paolo Ciocia\*, Solidarity as Link Between Public and Private Law Regulations Within the Legal System

Abstract: Whether solidarity, supreme human being's expression in the mutual relation with others, can be recognized as unifying key in the private-law regulations of the single states, in the common attempt to find a shared core and a unanimous path among the state systems.

Keywords : Solidarity, natural rights, duties, responsibility.

True man's freedom in the social context is founded on responsibility towards others, as well as democracy is based on mutual responsibility among its associates. The latin "*esse cum*", to be together, that is the principle of solidarity, expresses the full reciprocity of the consciences which establishes among people a relation of objective solidarity. Solidarity is the manifestation of the full assumption of responsibility, towards every man's dignity. In solidal communion everybody discovers oneself responsible for the others, and meanwhile, he feels supported by others' responsibility.

"The original act of the person is to elicit a society of people, together with others, in which structures, costumes, feelings and institutions are characterized by the human nature".<sup>1</sup>

Thus, the full accomplishment of the relational nature of the human being is *solidarity*, meant as responsibility for / and commitment with / others. The Italian Constitution recognizes the natural inviolable rights of man as closely related to the duty of political, economical, and social solidarity,<sup>2</sup> that is the principle of responsibility towards the other and the 'others', in a wide range of applications; to the point that the principle of solidarity openly recalled in art. n.° 2 as binding duty<sup>3</sup> ("*The Italian Republic recognizes and guarantees the inviolable rights ...and requires the accomplishment of the binding rights of political, economic and social solidarity*")

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<sup>1</sup> The philosophical current named "personalism" (from the french "personnalisme") places the person at the core of the institutional - political experience; from this point of view, it is essential by MOUNIER E, *Il personalismo*, XII ed. a cura di G.Campanini M. Pesenti, Roma,2004. In the same perspective, see H. ARENDT , *Vita activa. La condizione umana* 1958, trad. it., Milano 2012; V. TONDI DELLA MURA , *La solidarietà fra etica ed estetica. Tracce per una ricerca*, in scritti in onore di Angelo Mattioni, Milano 2011, p.657 ss.

<sup>2</sup> On the subject, the literature is very rich; first of all, refer to the following traditional manuals: R. BIN - G. PITRUZZELLA , *Diritto costituzionale*, XIII ed., Torino. 2012; T. MARTINES , *Diritto costituzionale*, by Silvestri G., Milano, 2013.G.AMATO, A. BARBERA, *Manuale di diritto pubblico*, Bologna, 1984.A.LOIODICE A., P. GIOCOLI NACCI, *Diritto Costituzionale*, Bari, 2000.Moreover, for a general understanding: G. ALPA , *I principi generali*, II ed., Milano, 2006; P. BARILE, *Diritti dell'uomo e libertà fondamentali*, Il Mulino, Bologna 1984, and, more recently, by A. MORELLI, L. VENTURA, *Principi costituzionali*, Milano 2015. Specifically, by A. BARBERA, Art. 2, in G. Branca, *Commentario alla Costituzione*, Bologna-Roma, 1975p.80 ss.. G. ALPA, *Solidarietà*, in *Nuova Giur. Civ. Comm.* 1994, II, p. 268 ss.; M.C. BLAIS, *La solidarietà. Storia di un'idea*, trad. it., Milano, 2012. MASSA PINTO, *Costituzione e fraternità, Una teoria della fraternità conflittuale : "come se"* fossimo fratelli, Napoli 2011; F.PIZZOLATO, *Il principio costituzionale di fraternità. Itinerario di ricerca a partire dalla Costituzione italiana*, Roma, 2012.

<sup>3</sup>F. POLACCHINI, *I doveri inderogabili di solidarietà*, L. MEZZETTI (editing) , *Principi costituzionali*, Torino 2013, p. 679 ss. *Idem*, *Il principio di solidarietà*, L.Mezzetti(editing) *Diritti e doveri*, Torino 2013, p. 227 ss..

is widely present in the whole constitutional structure and represents one of the fundamental keys.<sup>4</sup>

First of all, the same principle of democracy, that expresses the sovereign of people (article 1 of Italian Constitution), as well as the pluralism of social aggregations, such as, the family, above all, but also the district county authorities, the minor language communities, the religious confessions, the manifold associations or the political parties.

Besides, responsibility, freedom and solidarity are still the base of the respect of man's thought, art, culture, teaching; but also of the recognition of the right to health.<sup>5</sup>

Furthermore, solidarity is still the foundation of the internationalist principle assessed at article 10 of the Constitution, ("*The Italian set of rules conforms with the International rule system as widely recognized*"), as well as of the limits to the national sovereign aimed at assuring a pacific coexistence among peoples and nations, included in the following article 11.

Consequently, solidarity concerns the interpersonal relationships, organized groups, national communities, the democratic base of the state, the international relationships.<sup>6</sup>

Private law, peculiarly targeted at the regulation of intersubjective relationships, as personal relations law, takes shape historically, within the single regulations, according to the different procedures through which the institutional sectors meet the organizational requirements of the social community or, else, they meet the need for a regular supervision of them.<sup>7</sup>

All this stated, we put ourselves the question whether it may be possible to trace, within the private law of the single states, a shared core among their regulations and an interpretative key tending to prove unanimous.

The search for a common element crossing all regulations can start from the same universal foundation of the human rights, i.e. from the figure of the free and equally worthy man, considered this time, in the specific perspective of the relation with other subjects, that is in his natural disposition for solidarity and for familiar, economical and associative relationships with his fellow creatures.

In this perspective, an indication of the search for the unifying element in the private-law regulations, can be recognized in solidarity, which corresponds to the highest level of the human being's accomplishment in the relationships with his fellow creatures.

Solidarity is the factor capable to unify the spheres of rights and duties, also in the civil-law relationships, thus representing the limit of the exercise of the right and the reason of the duty.<sup>8</sup>

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<sup>4</sup> F. GIUFFRÈ, *la solidarietà nell'Ordinamento Costituzionale*, Milano, 2002; P. CIRIELLO, *considerazioni sulla solidarietà come "valore costituzione"*, S. PRISCO (editing), *Unione Europea e limiti sociali del mercato*, Torino 2002, p. 9 ss.

<sup>5</sup> On the subject, a fundamental work is P. PERLINGERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Napoli, 2006. By the same author, in an equal reconstructive perspective, see *Manuale di Diritto civile*, Napoli, 2014; *Interpretazione e legalità costituzionale*, Napoli, 2013; *Commento alla Costituzione Italiana*, Napoli, 2001.

<sup>6</sup> On the subject, A.LOIODICE, *Identità europea e centralità della persona umana*, in atti del convegno "Persona e identità nel processo di integrazione europea", editing B.Sitka, G.Dammacco, Jakuba Jana Szczerbowski, Anny Kowalskiej, Wydawnictwo Uniwersytetu Warmińskiego – Mazurskiego Olsztyn, Polonia, 2004, p.55 – 60.

<sup>7</sup> P. BARILE, *Il soggetto privato nella Costituzione italiana*, Padova, 1953.

<sup>8</sup> For a full study on the subject, refer again to P. PERLINGERI, *Il diritto civile nella legalità costituzionale*, op. cit; on the subject, see G. ZAGREBELSKY, *Il diritto mite. Legge diritti giustizia*, 1992; M. AINIS, *Cultura e politica. Il modello costituzionale*, Padova, 1997. N. BOBBIO, *L'età dei diritti*, Torino, 2005; P. CARETTI, *I diritti fondamentali. Libertà e diritti sociali*, II ed. Torino, 2011; F. GIUFFRÈ, *I doveri di solidarietà sociale*, in R. Balduzzi, M. Cavino, E. Grosso, J. Luther (editing), *I doveri costituzionali*, Torino., 2007, p 3 ss.; it is still worth

Solidarity, therefore, turns out to clearly prove the element at the basis of the theory and the interpretation of the contract, as an act and a relation, where conflicting interests articulate and consist, in the correspondence of both rights and duties.<sup>9</sup> Such correspondence, even in the most serious forms of economical imbalance, does not represent an element unrelated to the contractual structure, as well as, in the experience of family relations, where rights are closely connected with duties, merging with them in the associative experience. Here, the solidarity relation seems to be the implicit ground of the juristic case.<sup>10</sup>

Following this evidence, it is possible to find the solidarity foundation at the basis of the relations of private law even in specific sectors, such as cases of obligatory relation, the origins of the law (for example, the management of other people's business), the ways of the satisfaction of liabilities (for example, the supervened impossibility of the service), the abuse of right, the excess guarantee and so on.

Such solidarity structure, at the basis of private-law sectors, is widely present both in the common and civil law regulations as well as in jurisprudence and in the applicative interpretation of the rules, thus proving to be a useful factor for the construction of a shared approach to private law.

Here, our concern is to demonstrate that solidarity is not only a feeling of pity, or a moral duty towards consociates, but it is at the base of the society legally founded<sup>11</sup>; in other words, solidarity, from social behavior of mutual respect and tolerance, in the juridical experience has turned into regulatory precept, founding not only the mutual link of a membership, but constituting the general principle of the law.<sup>12</sup>

Thus, it influences positively a plurality of juridical relationships, also within the private law, and directs both the sources of the system of rules and the interpretation of the positive rules. As such, solidarity, foundation of the public law, affects the civil law, on the one hand, as a general principle for the legislator, on the other, as explanatory norm, winds through different cultures and juridical systems.

Hence, it derives that the principle of solidarity as “mandatory duty”, in the context of the political world culture, affects not only all the constitutional relationships, from the moral and social side (family, health, education), to the economical and tributary ones, politics included, but relations of private law, with its peculiar claim for the protection of the interests and positions of the weakest in the juridical relation.<sup>13</sup>

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mentioning the old, synthetic but deep contribution by S. ROMANO, *Doveri. Obblighi*, in *Frammenti di un dizionario giuridico*, Milano, 1947, p. 91 ss.

<sup>9</sup> An elaborate, in-depth study, enriched by a wide bibliography is due to R. CIPPITANI, *Il principio di solidarietà e rapporti di diritto privato* *Diritto privato*, studi in onore di Antonio Palazzo, Volume I, *Fondamenti etici e processo*, Torino, 2009pp. 165-237.

<sup>10</sup> F.D. BUSNELLI, *Solidarietà: aspetti di diritto privato*, in *Justitia*, 1999, vol. 52, fasc. 4, p. 435-452; G. GEMMA, *Doveri costituzionali e giurisprudenza della Corte*, in R. Balduzzi - M. Cavino - E. Grosso - J. Luther (editing), *I doveri costituzionali*, Torino, 2007, p. 365 ss.; R. GUASTINI, *L'interpretazione dei documenti normativi*, in *Trattato di diritto civile e commerciale*, già diretto da A. Cicu F. Messineo L. Mengoni, continued by P. Schlesinger, Milano, 2004.

<sup>11</sup> E. ROSSI, *Il principio di solidarietà*, in Luther I, Malfatti E., Rossi E., (editing), *I principi fondamentali della Costituzione Italiana*, Pisa I, 2002.

<sup>12</sup> B. DE MARIA, *Etica Repubblicana e Costituzione dei doveri*, in collana studi di attualità giuridiche, Napoli, 2013. G. LOMBARDI, *I doveri costituzionali: alcune osservazioni*, in R. Balduzzi, M. Cavino, E. Grosso, J. Luther (editing), *I doveri costituzionali*, Torino, 2007, p. 568 ss.

<sup>13</sup> On the subject, A. SPADARO, *Dai diritti “individuali” ai doveri “globali”. La giustizia distributiva internazionale nell'età della globalizzazione*, Soveria Mannelli, 2005.



The connection between rights and solidarity is present in all European systems of law and finds an extended application outside the union.<sup>14</sup>

The same European Charter of Rights refers to the principles of responsibility and duty towards others, as well as, towards the whole human community, underlying that solidarity is to be meant as “beneficiaries’ right”, before than the duty of the subject who enacts it.<sup>15</sup>

The dimension of solidarity, in its connection with the solemn recognition of man’s rights, has been recognized from the law of numerous sets of rules, as general principle capable to direct the inside of private relations, even though not strictly referred by specific dispositions.

In other words, the same inviolable rights<sup>16</sup>, at the base of the modern system of laws, are ‘functional’ to the full implementation of the duties of solidarity, so that its practice may be allowed on condition of being useful to others and to the community in its whole.<sup>17</sup>

The Italian system, as well as, other system of different historical and cultural origins show lots of examples, such as the consistent safeguard of the worker in the working context, the weak party in a contract, the small and average company in industry and trade, the user of banking or insurance services, the woman, the younger, the migrant, because of one’s heavy personal and material conditions; however, all the cases in which, the juridical relation highlights either an economical disparity or lack of juridical balance towards subjects considered “strong”, or more influential.<sup>18</sup>

In addition, in the contractual regulation, the principle of solidarity is applied to the debtor who benefits protection anytime in which the creditor is requested to collaborate for the fulfillment of the bond, in the supervision of oppression clauses, in the assumption of good faith, in the government of the abuse of right or excess of safeguard of the creditor, as well as in the act of enrichment without cause.

The principle of solidarity, constitutionally founded, is widely present also in the civil legislation of the propriety. In fact, if once, it would have been defined as the judicial case “fully and exclusively” to be safeguarded only in terms of individual interest, nowadays there are lots of limits to the ownership’s rights in the name of the interest of other people and of the superior of the collectivity. All this considered, the practice of the right to ownership results being fully legitimate in a dimension of solidarity rather than in as self centered one.<sup>19</sup>

So, in a new constitutional/private order, in which the constitutional values are introduced in the judicial relations by means of general clauses, it is more and more recurrent the chance to interfere in order to remedy the imbalance among the parties, thus reducing the principle of formal equality of the subjects of the contracts.<sup>20</sup> This thanks to the limits and bounds to self-

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<sup>14</sup> On the subject, see the considerations by A.LOIODICE , Centralità della persona umana nella Carta di Nizza, in *La Costituzione tra interpretazioni e istituzioni*, editing Loiodice A. Giocoli Nacci P., Bari, 2004.

<sup>15</sup> A.LOIODICE, *Il diritto pubblico europeo*, in *La Costituzione tra interpretazioni e istituzioni*, a cura di A.Loiodice, P.Giocoli Nacci, Bari, 2004.

<sup>16</sup> L. MEZZETTI , *Valori, principi, regole*, in L. Mezzetti. (editing), *Principi costituzionali*, Torino, 2011,p. 1 ss.

<sup>17</sup> See A.SPADARO, *op.cit*

<sup>18</sup> About the statement of the constitutional values, as interpretative criteria of the constitutional justice, consult, among others, F.P. CASAVOLA, *I principi supremi nella giurisprudenza della Corte Costituzionale*, in *Foro it.* 1995, 153 ss.;G. ZAGREBELSKY, *La legge e la sua giustizia: tre capitoli di giustizia costituzionale*, Bologna, 2008.

<sup>19</sup> On the topic, M.CALVINO,C. TRIPODINA, *La tutela dei diritti fondamentali tra diritto politico e diritto giurisprudenziale*, Milano 2012.

<sup>20</sup> G. GEMMA , *Doveri costituzionali e giurisprudenza della Corte*, in R. BALDUZZI - M. CAVINO, E. GROSSO, J. LUTHER (editing), *I doveri costituzionali*, Torino., 2007, p.365 ss.

reference by the privates, a sort of ‘positive discriminations’, if you want, towards one of the contractors, because of cultural, social, ethnic or economic conditions.<sup>21</sup>

Finally, the principle of solidarity, today widely welcomed within the European body laws, has become a general interpretative key as well as an inspiring source of the public and private law. As such, it may be assumed as the European identifying common ground of justice in social relationships.<sup>22</sup>

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<sup>21</sup> R. CIPPITANI, *La solidarietà giuridica tra pubblico e privato*. Università degli Studi di Perugia, Perugia, 2010.

<sup>22</sup> A.LOIODICE, *Il diritto pubblico europeo*, in *La Costituzione tra interpretazioni e istituzioni*, op.cit.

## Xianchu Zhang\*, Uncertain Road of Private Law Development in China: Recent Civil Law Codification

Abstract: China as a socialist market economy has initiated again a new round of civil codification since 2014 to deal with its rapid market and social transition and to further modernize its legal system. This article critically examines the academic debates in this course and their implications and demonstrates that unlike other countries China's civil codification as well as private law development is much more complicated with the socialist political ideology, path seeking in between its civil tradition and increasing influence of common law, and different approaches to respond to doctrinal consistency and judicial pragmatism. As a result, the recent civil codification in China is facing a lot of uncertainties and its success will have to depend on some institutional reforms and breakthroughs.

Keywords: China, Civil Code, Private Law, institutional reform, civil law, common law.

China as a socialist market economy has gone through rapid economic and social development since 1970s and at the same time experienced profound and comprehensive legal transformation. In addition to the traditional civil law tradition and the influence of the former Soviet Civil Code, China has been exploring its way to modernize its private law system in the course of intense social change and globalized market competition. In 2014 the Central Committee of the Communist Party (CCP) made its call for compilation of a civil code in its Decisions on Major Issues Concerning Comprehensively Moving Governing the Country According to the Law Forward (2014 Decisions) for the first time in the history of the People's Republic of China (PRC).<sup>1</sup> Although such political promotion has sent China's civil law codification and private law development into a new stage, some ideological and doctrinal controversies and debates have also become intensified over the institutional breakthrough, path development and structural design of the new code to be adopted.

This article critically examines the institutional challenges facing the new round of civil law codification and reviews the major issues and debates in recent years in this regard. In a strict legal sense civil law and private law may be defined differently with the former distinguishing legal rules governing criminal and administrative matters whereas the latter reflecting broader dimensions as opposed to public concerns, the two are closely related. In China's context civil law is considered the foundation of private law<sup>2</sup> and in civil law study the autonomy of private law needs to be particularly emphasized against government intrusion simply because this area was traditionally weak. From this perspective, private rights may include both private commercial and property rights as well as personal rights.<sup>3</sup> Given the focus of the article on the current civil law codification in China which may cover both civil and commercial enactments,

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\* Professor of Law, the University of Hong Kong. This article was first presented at the 6<sup>th</sup> Annual International Conference on Comparative Law: Integration of Society, Economic and Culture at University SWPS in Warsaw in June 2016. Before publication some minor revision and updating were made.

<sup>1</sup> The CCP Decisions was adopted on 30 Oct. 2014 by the Fourth Plenary Session of the 18<sup>th</sup> Communist Party of China Central Committee. An English translation is available at <https://chinacopyright-andmedia.wordpress.com/2014/10/29/explanation-concerning-the-ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>.

<sup>2</sup> Yuanshi Bu (ed.), Preface, *Chinese Civil Law* (Munich: C.H. Beck), 2013, p. v.

<sup>3</sup> Chen, JF, "Market Economy and the Internationalization of Civil and Commercial Law in the People's Republic of China", in Jayasuriya, K (ed), *Law, Capitalism and Power in Asia: the Rule of Law and Legal Institutions*, (London: Routledge), 1999, p 63; and Jiang, P, China's Rule of Law Is in Full Retreat, Chinese L. Prof. Blog, 21 Feb. 2010, at [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html](http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html).

the terms of civil law and private law may be sometimes interchangeably used in the given context

## An introduction

In terms of legal tradition China has long belonged to the civil law family with embodiment of legal principles and rules into codes as the most reliable source of law. However, it should be noted that in the long feudal history almost all the laws were of public nature with criminal penalties where commercial activities were obstructed. As a result, the concept of “civil” or “private” law did not exist. In the reformation period of Qing Dynasty some basic laws were introduced from the West and eventually became the first attempt of modern legislation in China, which included both Draft Civil Law and Commercial Law modeled after the codes of Germany and Japan. After the 1911 Revolution the Nationalist Government promulgated the first Civil Code in China’s history in 1930, which also followed the style of the German Civil Code (Bürgerliches Gesetzbuch, BGB) due to the influence from Japan.<sup>4</sup>

The establishment of a socialist government in 1949 led to not only completely abolition of the legal system of the Nationalist Government, but also domination of the Soviet style planned economy for more than three decades. Since then although it has been a long desire of the top leaders and scholars to eventually develop a comprehensive civil code on a grand scale in China, at least four rounds of civil law codification have failed so far due to the class struggle movements, lack of experience and doctrinal preparation, and political uncertainties in the course of the unprecedented reform since late 1970s.<sup>5</sup>

The historical economic reform with an open-door policy has changed the country significantly. China has become the second largest economy of the world and is expected to surpass the United States within a short period. With per capita GDP of \$8018 reached in 2015, China is entering into a middle class society. Rise of China has become a phenomenon in the new century with profound implications in the entire world.<sup>6</sup>

Although today China is still a socialist country the economic reform and opening in the past 30 years have dramatically weakened and reduced the Party-State control, particularly on economic life of the country. Since the Constitutional Amendments in 1993 where the traditional planned economy was official replaced with the so-called “socialist market economy,”<sup>7</sup> a legal status of private economy as its important part has eventually been recognized.<sup>8</sup> China’s accession to the World Trade Organization (WTO) in 2001 further improved the market access and competition conditions. Today, in terms of business ownership structure, a recent statistical survey showed that by the end of 2013 the number of private enterprises and commercial households reached 12.53 million and 44.36 million respectively making their contribution to more than 60% of the national GDP.<sup>9</sup> On the contrary, the number

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<sup>4</sup> Epstein, J.E, “Codification of Civil Law in the People’s Republic of China: Form and Substance in the Reception of Concepts and Elements of Western Private Law”, 32 *U.B.C. Law Review* 153, 1998, p. 162; and Weber, M, “Economy of Law or Sociology of Law”, in Roth, G and Wittich, C (ed.), *Economy and Sociology: An Outline of Interpretive Sociology*, vol. 2, (Berkeley: University of California Press), 1978.

<sup>5</sup> Wang LM, “The Systematization of the Chinese Civil Code”, in Chen, L and Rhee, C. V. van (ed.), *Towards a Chinese Civil Code: Comparative and Historical Perspectives*, (Leiden: Martinus Nijhoff Publishers), 2012, p. 21-24.

<sup>6</sup> World Bank, *China 2030*, (Washington: World Bank), 2013; and [Andrew Soergel](#), “America’s Days Are Numbered as the World’s Top Economy”, *US News and World Report*, 28 Dec. 2015.

<sup>7</sup> The Constitutional Amendment of 1993, Art. 7.

<sup>8</sup> The Constitutional Amendment of 1999, Art. 16.

<sup>9</sup> Report, “Private Sector’s Contribution to More Than 60% of the National GDP in 2013”, *Xinhua News Agency*, 28 Feb. 2014.

of the state-owned enterprises (SOEs) has dropped to approximately 155000, although they are still very powerful in scale with their monopolistic positions in all the key business sectors of the country.<sup>10</sup>

Meanwhile, more and more private and civil rights have been recognized in the legislations and judicial practice in rapid social and economic transition. At the legislative level, the Chinese Government declared in 2011 that after the reform for more than 30 years a new legal system with Chinese characteristics had been established with civil and commercial law as one of its major components including more than 33 national laws and numerous government regulations.<sup>11</sup>

With respect to the judicial practice, beyond the traditional civil/private law, many new types of litigations have reached to the People's Court even before the relevant laws were enacted or updated, such as disputes related to e-commerce, corporate social responsibility, shareholders' derivative actions, use of computer software, telecommunication services, right to education, damages to mental health and personality rights, employment discrimination, antimonopoly and consumer protection, land requisition, and productive right. In order to streamline handling of civil cases, the Supreme People's Court (SPC) promulgated its first Provisions on Causes of Civil Actions (on trial basis) in 2000 with 300 types of civil cases stipulated in four categories. The Provisions was further revised and dramatically expanded in 2008 and 2011. The current version of 2011 now includes 424 causes of civil actions classified in 10 categories, which are further divided into 43 sub-categories. Contract related disputes alone (include intellectual property contracts) count for 75 different types of claims.<sup>12</sup>

Moreover, the SPC has promulgated a large number of judicial interpretations and policies in order to remedy the situations where the laws are either lacking, or not clear and detailed enough.<sup>13</sup> Since 2011 the SPC has further developed its guiding case system, where cases with guiding value are selected by the SPC and promulgated for the lower courts to follow in their adjudications. By the end of 2015, 56 guiding cases have been promulgated with more than half being civil or commercial decisions.<sup>14</sup>

To a large extent, such developments are much needed in order to respond to the rapid social and economic changes with increasingly intensified conflicts. As the largest developing and socialist country in the world, China's social and economic transition to a rule of law society and a market economy is susceptible to large scale and tempestuous clashes between different interest groups, social classes and old and new institutions. Such conflicts have not only made China become "one of the most litigious" societies in the world,<sup>15</sup> but produced a large number

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<sup>10</sup> Report, "Disclosure of State Owned Enterprises: Less Than 1% in Number with More Than 30% of Total National Assets", *Industrial and Economic Journal*, 31 July 2014 (in Chinese).

<sup>11</sup> The Information Office of the State Council, White Paper on the Socialist Legal System with Chinese Characteristics, 27 Oct. 2011; an English translation is available at [http://www.china.org.cn/government/whitepaper/node\\_7137666.htm](http://www.china.org.cn/government/whitepaper/node_7137666.htm).

<sup>12</sup> Ten major categories of the Provisions on Causes of Civil Actions of 2011 include cases related to personality rights, marriage and family rights, property rights, contract rights, intellectual property rights, labor rights, maritime disputes, enterprises disputes, tort claims, and civil capacity and litigation rights. For an English translation and comments, see Dong YL, Liu HY, and Pißler KB, *The 2011 Regulation on the Causes of Civil Action of the Supreme People's Court of the People's Republic of China : a New Approach to Systemize and Compile the Status Quo of the Chinese Civil Law System* (Berlin : De Gruyter) 2011.

<sup>13</sup> Such practice has been recognized by the Legislative Law of the PRC as amended in 2015, see Art. 104.

<sup>14</sup> For a detailed analysis of the guiding case practice, see Gechlik, M, *Guiding Cases Analytics*, Issue 4, May 2015, at <https://cgc.law.stanford.edu/guiding-cases-analytics/issue-4/>.

<sup>15</sup> Phillips T, "China Will Be 'One of the Most Litigious' Countries in the World", *Intellectual Property Magazine*, 6 Dec. 2013. According to the latest working report of the SPC, the judiciary of China at all the levels received more than 15.51 million lawsuits in 2015, or more than 20% increase from the previous year, with over 75 % being

of “mass incidents” referring to planned or impromptu gathering in forms of public speeches, demonstrations, public airings of grievances, or even violent attacks on government organs, factories or other property as means to protest power abuse, corruption, an underdeveloped social welfare system, lack of applicable legal remedies that are seen as disrupting social stability and direct challenges to the current Party-State regime.<sup>16</sup> According to some academic surveys, the number of reported “mass incidents” rose from 8,700 in 1993 to more than 90,000 in 2006, and further up to 180,000 in 2010.<sup>17</sup>

From this reflection it has become evident that the existing laws and their enforcement cannot really keep up with the country’s social and economic development and effectively settle increasingly complicated civil disputes and social conflicts in the national transition.

## The current private law framework in China

The legislative efforts in 1950s and 1960s, although made limited progress, produced two drafts of Civil Law being completed modeled after the former Soviet Union Civil Code of 1922 based on the political ideology against private rights and autonomy.<sup>18</sup>

After the economic reform and open door policy being implemented, some new drafts with more than 460 articles were worked out. The political uncertainties in the early years of reform and insufficient experience, however, rendered the further progress impossible. As a result, the drafting group was dissolved by the Standing Committee of the National People’s Congress (NPC) as the top national legislature in 1981. Instead, the General Principles of Civil Law (GPCL) was eventually promulgated in 1986 as an interim solution to meet the urgent social and market needs of the time. On the one hand, the GPCL laid down an important foundation for private law development in China with its explicit stipulation for the first time in the PRC history that the law shall govern property relations among the subjects with equal legal status.<sup>19</sup> On the other hand, it was an immature product where the drafting process was guided by the principle of “general rather than detailed” to deal with urgent practical demands while experience and doctrinal preparation were still lacking after the disastrous Culture Revolution for 10 years.

As a result, the current civil and commercial system has been developed on the basis of the GPCL of 1986 with nine chapters and 156 articles covering the general principles, citizens (natural persons), legal persons, civil juristic acts and agency, civil rights, civil liability, statutory limitation, application of law in foreign related civil relations, and miscellaneous provisions. Two main features reflected in the structure and contents of the GPCL are that (1) it follows the German Pandekten and Roman Digest System, where general principles are set out first followed by separate provisions applicable to specific legal areas; and (2) it combines civil and commercial rules in a single legislation. In addition to the general rules to deal with civil law matters, the GPCL stipulates provisions governing individual commercial households, enterprise legal persons, business joint operation, contract, intellectual property rights, civil

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civil and commercial cases. Report, “Takeaways from the Supreme People’s Court 2015 Work Report”, *Supreme People’s Court Monitor*, 15 March 2016.

<sup>16</sup> Ran, T (2011) ‘China’s Land Grab Is Undermining Grassroots Democracy’, *The Guardian*, 16 Dec. 2011; and, Strange, A (2012) ‘Mass Incidents in Central China: Causes, Historical Factors, and Implications to the PAP’ (17.2) *The Monitor* 32.

<sup>17</sup> Demick, B, ‘Protests in China over Local Grievances Surge, and Get a Hearing’, *Los Angeles Times*, 8 Oct. 2011.

<sup>18</sup> Epstein, supra note 4, at 153-198.

<sup>19</sup> Art. 2 of the GPCL.

liabilities including damages arising from tortious conducts, product liability and breach of contract, and foreign related disputes.<sup>20</sup>

Although from today's view the GPCL may not be considered consummate, as the first comprehensive civil/commercial enactment in the PRC history its significance should not be underestimated. It has not only provided the economic reform and market development with urgently needed rules and guidelines, but also laid a foundation to develop a civil and commercial law system in China. As Prof. Wang Liming of the People's University pointed out, promulgation of the GPCL marked a new stage of developing and systematizing civil and commercial legislation in China.<sup>21</sup>

Thus far major civil/private laws adopted on the basis of the GPCL include Marriage Law (as amended in 2001), Tort Liability Law (2009), Contract Law (1999), Law on Right in *rem* (2007), Company Law (as amended in 2013), Partnership Enterprises Law (as amended in 2006), Sole-proprietor Enterprises Law (1999), Commercial Bank Law (as amended in 2003), Security Law (1995), Securities Law (as amended in 2014), Securities Investment Fund Law (as amended in 2012), Trust Law (2001), Maritime Law (1992), Commercial Paper Law (as amended in 2004), Insurance Law (as amended in 2015), Patent Law (as amended in 2008), Trade Mark Law (as amended in 2013), Copyright Law (as amended in 2010), Enterprises Bankruptcy Law (2006), Sino-Foreign Equity Joint Venture Law (as amended in 2000), Sino-Foreign Cooperative Joint Venture Law (as amended in 2001), Wholly Foreign Owned Enterprises Laws (as amended in 2001), and Governing Law Applicable to Foreign Related Civil Relations (2010). Many laws have been amended two or three times since their first adoption in order to deal with the new developments. As such a legislative pattern to include civil and commercial laws on the basis of the GPCL, seems well followed in the past 30 years and has led to the fashion to combine civil and commercial law compilation together.

The fourth round of codification was resumed in late 1998 after the historical Constitutional Amendments where the planned economy was officially replaced with the "socialist market economy" in 1993.<sup>22</sup> China's accession to the WTO in 2001 provided the legislative process with new momentum and pressure as the top leaders of the NPC asked the drafting group to accelerate its work and to complete its first draft of the Civil Code in 2002. Although the first Draft Civil Code was managed to be submitted to the national legislature for review on 17 December 2002 (2002 Draft Code),<sup>23</sup> the acceleration was apparently hindered with difficulties leading to a negative result.

The 2002 Draft Code included more than 1200 articles in nine parts, including the General Principles, Property Law, Contract Law, Rights of Personality, Marriage, Adoption, Succession, Tort Liabilities, and Governing Law Applicable to Foreign Related Civil Relations.<sup>24</sup> As some scholars observed, under the time pressure the 2002 Draft Code was not a fine work at all, but just a rough product to piece together existing legislations without decent digestion. As the legislators could not find a good basis to carry out their deliberation, the civil

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<sup>20</sup> An English translation of the GPCL is available at the NPC's Website, at [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383941.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm).

<sup>21</sup> Wang, LM, "The Systemization of the Chinese Civil Code", in Chen L and Rhee CV van (ed.), *Towards a Chinese Civil Code: Comparative and Historical Perspective*, (Leiden: Martinus Nijhoff Publishers), 2012, p. 21-24.

<sup>22</sup> Art. 7 of the Constitutional Amendments of 1993.

<sup>23</sup> Report, "China's First Draft Civil Code Submitted for Review", *People's Daily*, 23 Dec. 2002, at [http://en.people.cn/200212/23/eng20021223\\_108978.shtml](http://en.people.cn/200212/23/eng20021223_108978.shtml).

<sup>24</sup> An English translation of the draft code is available at Liang HX, *The Draft Civil Code of the People's Republic of China* (Prepared by the Legislative Research Group of the Chinese Academy of Social Science (Leiden: Martinus Nijhoff Publishers), 2010).

code drafting fell into a standstill since 2002 until the new call for civil codification was made by the CCP recently.

Unlike the previous rounds where the enactment efforts were initiated by the legislature subject to the CCP's political approval, the current codification is directly launched by the CCP itself. The new leadership, after being appointed in late 2012, unleashed a campaign to deepen institutional reforms in order to deal with the country's economic rebalance and transitional challenges. On 12 November 2013 the CCP adopted its Decision on Major Issues Concerning Comprehensively Deepening Reform with a pledge to "let the market to play a decisive role".<sup>25</sup> Soon after the CCP promulgated the 2014 Decisions where civil law codification was explicitly called for as part of the efforts to better protect citizens' rights and safeguard market development.<sup>26</sup>

The Standing Committee of the NPC quickly made its response to the CCP assignment by adding the civil law codification to its five year legislative plan for 2013-18.<sup>27</sup> Under the plan, the codification will be divided into two stages with the first one to formulate the general principles of civil law, followed by comprehensive integration of all the civil/private legislations into the code.

On June 2016 the first draft of the General Principles of Civil Code had been completed and submitted to the Standing Committee of the NPC for deliberation as the first step. The Civil Code is expected to be adopted by 2010.<sup>28</sup>

## Major political challenges

The renewed efforts for civil law codification should certainly be welcome as a positive sign of further modernization of the national legal system. However, given China's present political foundation, the legislation may have to first overcome some political obstacles.

In China as a socialist country the Constitution as the supreme law of the country does not stipulate a basis for the equal right entitlement because the public ownership and state economy have been provided with the constitutional guarantee for their sacred and inviolable status and the leading position,<sup>29</sup> whereas the private sector may only be an important components of the socialist market economy subject to the government administration and supervision.<sup>30</sup> Although the Constitution finally recognized private property inviolable in 2004 under strong demands, it has still refused to grant the same status of sacredness to it.<sup>31</sup> As a result, codification of civil law may not advance equal right protection further, unless some breakthroughs can be made at the Constitutional level.

Such political environment has directly affected private law development. In 2005 the national legislature was stunned in its intended final round deliberation of the Law on Rights in *rem* by more than 11000 submissions nationwide and in particular, an open letter from a constitutional law professor of Peking University with supports from 700 officials and scholars to question the constitutionality of the enactment in violation of the fundamental principles of socialism.

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<sup>25</sup> An English translation of the Decision is available at [http://www.china.org.cn/china/third\\_plenary\\_session/2014-01/16/content\\_31212602.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm).

<sup>26</sup> Part 2 (4) of the 2014 Decisions, *supra* note 1.

<sup>27</sup> Report, "China Include Civil Law Codification in Legislative Plan", *Global Times*, 5 Aug. 2015.

<sup>28</sup> Report, "The Draft of General Principles of Civil Law First Submitted to the Standing Committee of the NPC", Xinhua News Agency, 27 June 2016, at [http://news.xinhuanet.com/politics/2016-06/27/c\\_129091462.htm](http://news.xinhuanet.com/politics/2016-06/27/c_129091462.htm) (in Chinese).

<sup>29</sup> Arts. 6, 7 and 12 of the Constitution of PRC.

<sup>30</sup> *Ibid.*, Art. 11.

<sup>31</sup> Art. 22 of the Constitutional Amendment of 2004.



The political debate rendered a long delay of the legislation until it was finally passed in March 2007 with an explicit provision for safeguarding the country's fundamental economic system.<sup>32</sup> In a more recent incident, the State-Owned Assets Supervision and Administration Commission (SASAC) as a state department and mega-shareholder in charge of leading SOEs' operation strongly opposed the SOE reform proposals urged by the World Bank in its Report entitled China 2030 by accusing them in violation of the Constitutional principles on public ownership guarantee with an attempt to overturn the socialist system in China.<sup>33</sup>

Such legal inequality has been widely reflected in practice. For instance, in recent years as many as 570000 violent demolition cases were reported to the state authorities with many casualties in government-led real property development projects nationwide, even after the State Council tried to stop the violations with its regulation on land taking in 2011 mandating fair compensation and judicial intervention.<sup>34</sup>

Against this backdrop, some scholars have raised the question whether the Civil Code should be established on the basis of the current Constitution. In a normal logic such legal hierarchy should not be ever doubted; but in China the linkage and reliance would mean the extension of the political ideology of the Constitution to the equal footing arena of civil law. Prof. Long Weiqiu of Beijing Aviation University recently argued that according to the legal history civil law was developed before the evolution of the constitution. Despite of its higher status, the Constitution, in addition to political right stipulation, should also reflect the civil law demands. This has been evident from the development of Civil Codes in France, Germany and Switzerland as the leading civil law jurisdictions where the Constitution is not necessarily relied on because the political and civil rights should be treated relatively separately.<sup>35</sup> Some scholars disagreed. For instance Prof. Wang Yi of the People's University held that the Constitution should be the legal basis of the civil code, but not the source of civil law and civil adjudication. He further advocated for reflection of the Marxist philosophy in the civil codification.<sup>36</sup>

Another serious debate reflecting the ideological struggle is on personality rights. One school led by Prof. Wang, a key member of the national legislature, has enthusiastically advocated for setting out a special book for protection of such rights, including rights to life, health, name, fame, creditability, portraiture image, privacy, personal information and personal freedoms. The Civil Law Study Association of China as an academic group has even drafted Proposed General Principles of the Civil Code (Draft Principles) for public discussion.<sup>37</sup> According to Wang, the special book is needed for better protection of human rights and other fundamental citizens' rights, particularly in the electronic era as a reflection of the modern trend of civil law development to respond to the defective structure of traditional civil law with much more emphasis on property rights protection over personal rights.<sup>38</sup>

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<sup>32</sup> Art. 1 of the Law on Rights in *rem* of PRC of 2007. For a more detailed discussion, see Chen, JF, *Chinese Law: Context and Transformation*, (Leiden: Martinus Nijhoff Publishers), 2008, p. 375-377.

<sup>33</sup> The World Bank, *supra* note 6. For a comment on the SASAC's behavior and approach, see Barry Naughton, "Leadership Transition and the 'Top-Level Design' of Economic Reform", *China Leadership Monitor*, No. 37 (2012), at <http://www.hoover.org/sites/default/files/uploads/documents/CLM37BN.pdf>.

<sup>34</sup> Chen, F, Wang, L and Ling, J, "High Incidence of Land Disputes: Huge Profits behind Violent Demolition," *Beijing Daily*, 4 Aug. 2014 (in Chinese).

<sup>35</sup> Long, WQ, "Civil Codification Should Be Alert on the Trap to Base on the Constitution", 22 March 2016, *Thinking Website*, at <http://www.aisixiang.com/data/98003.html> (in Chinese).

<sup>36</sup> Report, "Prof. Wang's Talk on Civil Codification", *Jinan University School of Law Website*, 5 June 2015, at <http://law.jnu.edu.cn/Show.asp?C-1-1309.html> (in Chinese).

<sup>37</sup> The Draft Principles of 2015 are available at [http://www.chinalaw.org.cn/Column/-Column\\_View.aspx?ColumnID=81&InfoID=14364](http://www.chinalaw.org.cn/Column/-Column_View.aspx?ColumnID=81&InfoID=14364) (in Chinese).

<sup>38</sup> Wang, *supra* note 21, p. 25-26.

Thus far the most fiercely criticism has come from Prof. Liang Huixing of China Social Science Academy who took the debate to a political level. According to him, the Ukrainian civil codification in 2003 where personality rights was set out in a special book is the only case thus far in the world. Besides the academic controversies, he further linked up the color revolution, national division, and domestic disorder of Ukraine with its civil codification to allow too much civil rights. He even made a call for not following the Ukrainian experience for more social liberalization.<sup>39</sup>

As a result, the institutional evolution to be needed will inevitably make the codification a very difficult process. To some experts, whether the codification condition is ripe remains a question.<sup>40</sup> Long further pointed out, in a sense civil codification is a political process; but thus far unlike the civil codifications in rise of Germany and France with unambiguous political aspiration to build up a civil society, the CCP has not clearly defined the political goal of the legislation, except just one sentence call.<sup>41</sup>

### Technical difficulties concerning the codification

Against the complex backdrop reflected above, the limited space of this article would not be a suitable place to examine all the issues that have been raised and debated in the course of civil codification in China. Instead, some major concerns will be summarized and reflected in a sketch way.

(1) Path of civil law codification. In general, there seem four major schools on the path of civil codification. Liang holds that China should stick to the traditional style of the BGB with necessary adaptation according to the Chinese conditions. He places great emphasis on China's civil law development path to follow the German BGB and its logic system.<sup>42</sup> Prof. Jiang Ping of China University of Political Science and Law, a leading authority of civil and commercial law in China, prefers to a more liberal and pragmatic approach. He argues for a breakthrough of China's traditional path. According to him, legal relations today have been developed to a level so complex that it would be impossible to effectively regulate them by traditional civil law. As a result, civil law codification should not be exclusively based on the German Code and good experiences from common law jurisdictions should also be accommodated as much as possible.<sup>43</sup> Wang seems to try to find a way in between. He has advocated for an approach to codify civil laws principally on the basis on the structure and experience of BGB with structural modifications to reflect Chinese characteristics. To him protection of personality rights in China, for example, needs to be urgently enhanced; so he has proposed a new book on personality rights in the Chinese code in addition to the BGB structure.<sup>44</sup> In addition to the BGB-centered debates Prof. Xu Guodong of Xiamen University advocates for a more French style codification with a primary stress on person and personal relations in the code to be

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<sup>39</sup> Liang, HX, "Certain Legislative and Theoretical Issues Concerning General Principles of Civil Law", Speech made at the Sichuan University School of Law on 15 Oct. 2015; available at <http://m.aisixiang.com/data/93139.html> (in Chinese).

<sup>40</sup> Xiao, W, "Is the Civil Codification Ready This Time?" *Beijing Business Today*, 19 Dec. 2014 (in Chinese).

<sup>41</sup> Long, WQ, "Key Issues in Civil Codification in China", *Legal Education Net*, 26 Oct. 2015; at <http://www.cnchinese.com/html/redian/201510265824.html> (in Chinese).

<sup>42</sup> Liang HX, "Three Thinking Paths on Civil Codification", *Lawyers' World*, No. 4 of 2003, p. 4-5 (in Chinese).

<sup>43</sup> Jiang P, "Adopting An Open Civil Code", *Tribune of Political Science and Law*, No. 2 of 2003, p. 115-116 (in Chinese); and Jiang P, "Civil Law: Retrospective and Prospective", *Journal of Comparative Law*, Issue 2 of 2006, p.1 (in Chinese).

<sup>44</sup> Wang, supra note 21, p. 25-29.

adopted. He even labels his legislative approach “the new humanism” as opposed to the property centered German tradition.<sup>45</sup>

(2) The degree of codification. The global trend of de-codification in recent years has been noticed and discussed among Chinese scholars. In an extreme end, some scholars believed that taking the decodification trend in Europe into consideration China would not need a civil code and the process should be abandoned.<sup>46</sup> With a more modest approach Jiang and some other drafters held that the civil code to be adopted does not have to be “big and complete” and a “loosely structured code” would serve China the best.<sup>47</sup> Some Chinese scholars also argue that it is still premature now to adopt a very comprehensive code with strict logic of the German style and such formulation may even seriously hinder the development of civil law in China. Thus, a moderate degree of civil law codification would be more appropriate.<sup>48</sup> But some scholars apparently want to pursue different approaches. For example, Wang argues that civil legislative system must be code-centered, which will not only ensure the unity of the system, but also exclude other sources. As such, civil law codification must first surmount the development of many self-developed “micro-systems” within the current framework and avoid chaos caused by de-codification.<sup>49</sup>

(3) Based on the positions and approaches taken by different schools different structures and contents of the Civil Code have been put forward becoming a major source of controversies. For instance, Liang has proposed his seven books structure, including General Principles, Rights on *rem*, General Provision on Obligations, Contract, Torts, Family Law, and Succession;<sup>50</sup> whereas Wang has insisted on the addition of a separate book on personality rights.<sup>51</sup> Some other experts have also developed a code draft with only four major component books, including General Provisions, Personal Relationships, Property relations, and Supplementary Provisions.<sup>52</sup>

In terms of structural coverage the first draft of the General Principles of Civil Code, which was first submitted to the top legislature saw very limited breakthroughs. It has still maintained the chapters on contract, properties, torts, family relations and succession.<sup>53</sup>

Rights of Intellectual property (IP) are another battlefield, which was not included in the 2002 Craft Code. Some scholars advocated for IP rights inclusion in order to create a thorough complete legal system of property rights for equal protection, although the legal sources, right contents and liability basis of IP law are quite different from the traditional civil law.<sup>54</sup> However, Prof. Wu Handong of Zhongnan University of Economics and Law disagreed. He questioned whether the paradigm for such inclusion had been established in civil enactments in

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<sup>45</sup> Xu GD, “The Basic Structure of the Draft Civil Code”, CASS Journal of Law, No. 1 of 2000, p. 37–55; and Xu GD, *Humanism of Civil Law*, (Beijing: Law Press), 2009 (in Chinese).

<sup>46</sup> Xu XL and Liang P, “On Decodification”, *Presentday Legal Science*, No. 4 of 2005, p 71 (in Chinese).

<sup>47</sup> Jiang, *supra* note 43 (2003).

<sup>48</sup> Zhang LH, “The Phenomenon of Civil De-codification and Formulation of Chinese Civil Law Code”, *Legal Science*, No. 5 of 2006, p. 48–60 (in Chinese); and Zhang XJ, “Civil De-codification and Sensible Choice of China’s Civil Legislation: Modest Degree Codification”, *Exploration and Free Views*, No. 5 of 2011, p. 85–89 (in Chinese).

<sup>49</sup> Wang LM, “The Code Centered Approach and Systemizing Civil Legislation in China”, *Journal of Yunnan University (Law Edition)*, No. 2 of 2009, p. 2–9.

<sup>50</sup> Liang, *supra* note 39.

<sup>51</sup> Wang, *supra* note 21, p 25-29.

<sup>52</sup> Xu GD, “The Basic Structure of the Future Chinese Civil Code”, *Chinese Journal of Law*, No. 2 of 2000, p 45 (in Chinese).

<sup>53</sup> Report, *supra* note 28.

<sup>54</sup> Wang Q, “Thoughts on Inclusion of Intellectual Property Rights into the Civil Code”, *Intellectual Property*, No. 10 of 2015, p. 16-20 (in Chinese).

major European countries. According to him, the Civil Code may just set out some general provisions, leaving IP law relatively independent from civil law legislations for the sake of its own jurisprudence.<sup>55</sup>

A newly emerged controversy is on objects of civil rights. Thus far, a consensus seems reached to include some provisions in the civil codification as a necessary measure to correct the ignorance of the Soviet ideology to the civil rights and the overconcentration of the BGB on properties. However, with respect to how to define and stipulate such provisions, Prof. Sun Xianzhong of the Social Academy of China insists to set them in the General Principles as a special chapter, which deviates from the focus of the BGB General Principles merely on *rem*, to cover, *inter alia*, environment, animal, innovation protections,<sup>56</sup> but Prof. Yin Tian of Peking University is of the opinion that these rights should not be provided in the General Principles, but just subordinate chapters concerned to avoid confusion simply because the nature of these rights and their protection means are very different. He took enterprise rights as an example to question whether they should be provided as object of rights or subject of rights.<sup>57</sup>

(4) Civil codification and commercial legislation. As reflected above, by following the European tradition since 1920s commercial law has been treated as a special part of civil law in China. After the formation of the PRC in 1949 practice of the planned economy and rigid political ideology for three decades did not allow any market development as well as commercial law making. Once the GPCL was adopted as the first batch of comprehensive enactments in 1986, the model of combining civil and commercial rule enactment has been followed.

However, rapid development of a market economy in China has never stopped its demands for a separate set of commercial law rules.<sup>58</sup> Some scholars argue for the merits of such separation on the ground of the special characteristics of commercial law, such as status of merchants, their business operation for profit and special concerns for safety of transactions. Moreover, unlike civil law, commercial law is an area subject to more public law intervention and regulation. Thus, as far as the civil and commercial law relations are concerned, commercial law should be applied first in practice due to its specialty.<sup>59</sup> On this basis some academics took Uniform Commercial Code of the United States (UCC) as an example to support their position.<sup>60</sup>

In recent years an alternative way has been advocated by some scholars led by Jiang and the late Prof. Wang Baohu of Tsinghua University.<sup>61</sup> As a practical approach to deal with the

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<sup>55</sup> Wu HD, "Inclusion of IP Law into the Civil Code and General Provisions on Property Rights", *Law and Social Development*, No. 4 of 2015, p 58-67 (in Chinese).

<sup>56</sup> Report, "The General Principles Shall Not Be Missed 'the Objects of Rights'", *Legal Daily*, 22 March 2016 (in Chinese).

<sup>57</sup> Yin T, "On the Structure of the General Principles of Chinese Civil Code", *Journal of Comparative Law*, No. 3 of 2007, p 44-54 (in Chinese).

<sup>58</sup> Liu KX, "On Nature, Basis and Characters of Commercial Law", *China Review*, March 2009, at <http://www.china-review.com/sao.asp?id=21255> (in Chinese); Xu XL, "On Integration of Commercial Law", *Journal of the National Procuratorate College*, No.4 of 2004, p. 77-82 (in Chinese); and Shi SX, *Footprints of Commercial Law Considerations*, (Beijing: Procuratorate Press), 2008 (in Chinese).

<sup>59</sup> Wang BS, *General Principles of Commercial Law*, (Beijing: Tsinghua University Press), 2007, p. 27-28 (in Chinese).

<sup>60</sup> Guan XR, "Exploring the New Open Path towards Enactment of General Principles of Commercial Law", *Legal Science*, No. 8 of 2010, p. 27-28 (in Chinese).

<sup>61</sup> Jiang P, "Some Macro-considerations on Civil Codification" *Journal of East China University of Political Science and Law*, No. 2 of 2002, p. 41-44 (in Chinese); and Wang BS, "Commercial Law Principles: Beyond Civil-Commercial Combination and Civil-Commercial Separation", *CASS Journal of Law*, No. 1 of 2005, p. 32-41 (in Chinese).

dominant civil law tradition, the new strategy no longer insists on a separate commercial code, but a separate set of general principles within the current legal framework to govern commercial acts and transactions, commercial subjects and their rights in order to coordinate the existing commercial legislations. In this way, the controversy of civil-commercial law combination or separation could be avoided to a large extent.

On this basis, some versions of general principles of commercial law have been worked out.<sup>62</sup> The most influential one among them is the Draft General Principles of Commercial Law developed by the Commercial Law Society of China in 2004–2009 with ten chapters on general principles, merchants, commercial conducts, commercial registration, commercial establishment, business transfer, commercial accounts, management and employee, agency and miscellaneous provisions.<sup>63</sup> However, some civil law experts openly disagree with this approach. Prof. Yang Lixin of the People’s University, for example, stated that under a civil code it would be unnecessary to adopt either a commercial code or general principles of commercial law.<sup>64</sup>

(5) Private law protection environment. Unlike capitalist countries, China today is still a socialist country practicing a “socialist market economy” with public ownership and state economy being guaranteed as the foundation of the economic system and the leading force of the country.<sup>65</sup> As such despite the dynamic marketization for three decades the political ideology of the former Soviet Union still sees its influence in China’s private law enactments today, particularly on equal entitlement and a level playing field.<sup>66</sup> For instance, although equal protection has been stipulated as a basic principle of the Law on Rights in *rem*,<sup>67</sup> other enactments apparently provide the government with strong power to demolish houses and relocate the inhabitants with compulsory measures since unclearly defined “public interest” and government power have enjoyed superiority over private rights almost all the time. The right of private parties to challenge the government demolition decision in the People’s Court was not allowed until 2011 under the pressure of a large number of fatal incidents in brutal demolition nationwide.<sup>68</sup>

Even under the new Regulation of the State Council 2011 the judicial remedy may be allowed only against the government decision concerning demolition and monetary compensation for the premises concerned, but not available for any equity claims for the land use right. Further, the rights and interest of lessee/tenants of the land to be taken is virtually ignored in the Regulation. According to a recent survey based on the government statistics, in 2010-2014 approximately 800000 cases were filed against the government with more 46% being land property related, but the winning rate was barely 10%.<sup>69</sup> Other examples in this regard include

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<sup>62</sup> Miao YB, *Legislative Study on General Commercial Principles* (Beijing: Intellectual Property Publishing House), 2008, p. 249–260 (in Chinese); and Fan T and Wang YC, *Study on Commercial Liabilities and Remedies* (Beijing: Law Press), 2008, p. 177–188 (in Chinese).

<sup>63</sup> A report of the drafting process is available at <http://www.bhtlaw.cn/Introduction/Discussion/2009-12-16/287.html> (in Chinese); and Guan XR (2010), “New Path to Decoding the Puzzle of General Commercial Principles”, *Journal of East China University of Political Science and Law*, No. 8 of 2010, p. 23–30 (in Chinese).

<sup>64</sup> Report, “The Debates between Civil and Commercial Law Circles on Adoption of General Principles of Commercial Law Comes Back”, *21<sup>st</sup> Century Business Herald*, 13 Jan. 2009, at <http://finance.sina.com.cn/roll/20090113/02585751273.shtml> (in Chinese).

<sup>65</sup> See Art. 7 of the Constitutional Amendment of 1993 and Articles 6 and 7 of the Constitutional amended in 2004.

<sup>66</sup> Chen, TF, “Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution”, 6 *National Taiwan University Law Review* 2011, p. 419-423.

<sup>67</sup> Arts. 3 and 4 of Law on Rights in *rem* of 2007.

<sup>68</sup> The State Council promulgated the Regulation on the Expropriation of Buildings on State-owned Land and Compensation on January 21, 2011 to replace the previous regulation adopted in 2001.

<sup>69</sup> Report, “800000 Lawsuits against the Government in Five Years with only 10% Winning Rate”, *Net Ease*, 21 Jan. 2016, at <http://data.163.com/16/0121/20/BDSMKKKS00014MTN.html> (in Chinese).



the rule of the Company Law mandating not only establishment of grass-root organizations of the Communist Party in companies, but also provision of “necessary conditions” for their activities;<sup>70</sup> the different legal effects to vitiate private and public contracts,<sup>71</sup> and prohibition of SOEs from becoming a general partner.<sup>72</sup>

In more recent years a new debate has emerged on the legislative goal of civil and commercial laws. Some scholars by following the political policy of the CCP argue that “efficiency first with attention to social justice” should still be the guiding principle in China’s civil legislation;<sup>73</sup> whereas some others believe that in legal field, the correct goal should be social justice first with adequate attention to efficiency of the economic development.<sup>74</sup>

### Some further concerns

The new round of codification, although is an encouraging move on the right direction, will be a serious test to the Party-State’s commitment to private right protection towards a civil society. Since formation of the PRC in 1949 the ideology of the Leninism that “all laws are public law”<sup>75</sup> has dominated and troubled the civil legislation in China for a long time. Even after the reform for almost 40 years, “private” in many occasions is still a dirty word. For instance, in all the official documents “non-public economy” has been used in order to avoid the term of private economy. The top leaders have routinely made their declarations firmly against privatization.<sup>76</sup> Thus, to what extent the spirits of civil society embodied in civil law empowering citizens to fight against the government intrusion will pose a daunting political challenge first to the Party-State, which echoes the thesis of Prof. Lawrence Friedman that codification may have great political meaning in a society.<sup>77</sup>

Despite the heated debates on the direction, structure and content of civil law codification, it has been generally agreed that research and study on the fundamental theories and rules of civil/commercial laws and local conditions of transplantation in China are still far from being sufficient and thorough.<sup>78</sup> Particularly, some scholars argue that civil codification in China needs to make breakthrough of the yoke of the political ideology and technical thinking patterns, otherwise the rules borrowed from the western world may not be effectively used to deal with the problems facing China as a transitional economy, such as equal competition, business autonomy and private property right protection. They have further criticized the codification movement to pursue more in form than the real spirit of civil law.<sup>79</sup>

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<sup>70</sup> Art. 19 of Company Law as amended in 2013.

<sup>71</sup> Comparing Art. 52 and Art. 54 of Contract Law of 1999.

<sup>72</sup> Art. 3 of Partnership Enterprise Law as amended in 2006.

<sup>73</sup> The view was endorsed by the Central Committee of the Communist Party of China in 1994 in its Decision on Certain Issues to Establish a Socialist Market Economy in China. For a recent article that continues to support the goal, see Professor Li L of Jinan University, “Conflicts and Choices of Value Goals in China’s Civil Legislation”, *Legal Forum*, No. 3 of 2010, p. 82–88 (in Chinese).

<sup>74</sup> Qiu B of China Academy of Social Science, “Scientific Development and Legal System Construction”, *Institute of Law Website*, 2005, at <http://www.iolaw.org.cn/showArticle.asp?id=1395>.

<sup>75</sup> Quoted from Wu YM, “Exploring the Different Legislative Paths of Civil Codification in China and Russia”, *Seeking Truth*, No. 2 of 2010, p. 66 (in Chinese); also see Epstein, *supra* note 4, p. 162.

<sup>76</sup> Report, “China says western-style democracy impossible for CCP Dynasty”, *China Daily Mail*, 13 March 2013, at <https://chinadailymail.com/2013/03/13/china-says-western-style-democracy-impossible-for-ccp-dynasty/>.

<sup>77</sup> Friedman, Lawrence MF, *The Legal System*, (New York: Russell Sage Foundation), 1975, p. 271.

<sup>78</sup> Shen WW and Zhao XG, “Ten Academic Years of Civil Codification: 1997–2007”, *Journal of Judicial College of Henan Province*, No 1 of 2011, p. 25–26 (in Chinese); and Yu J, “Centenary Notes on Civil Codification in China since 1911”, *Tribunal of Political Science and Law*, No. 4 of 2011, p. 116–132 (in Chinese).

<sup>79</sup> Su YG, “Form at the Experiences of True Significance: From the “Tang Lu Complex” to “Civil Code Complex”, *China Social Science*, No. 1 of 2005, P. 123–134 (in Chinese).

On the technical level, although currently all the major components of civil law codification, including the Contract Law, the Law of Rights on *rem*, the Tort Liability Law and the Governing Law Applicable to Foreign Related Civil Relations, have been promulgated, given the intense academic controversies reflected above the enactment progress is still facing a great deal of uncertainties. Moreover, the approach taken thus far to give a way to comprehensive codification with a piecemeal enactment in order to deal with dynamic and rapid market developments in China has in turn significantly increased the difficulty to sort out the conflicts and inconsistencies in the existing laws and digest them in a rational structure.

Despite the serious debates on civil law codification and diversified transplantation of legal rules, fundamentally speaking China has still maintained its civil law tradition, particularly the German style legislative approach. As Prof. Christiane C. Wendehorst of Vienna University observed, “I have never seen any scholars who support the Pandekten system as strong as I saw in China. Many of them favor the German law even more than myself.”<sup>80</sup> Codification in China today has still been viewed as a crucial benchmark of maturity of a legal system, the highest stage of legal systematization and full display of institutional civilization.<sup>81</sup> As such, despite uncertainties and difficulties civil law codification will continue to be the goal of the national legislature.

In the course of civil law codification the relationship between civil and commercial legislations must be further sorted out. In fact the approach to combine civil and commercial legislations has led to irrationality, inconsistency or even conflict of legal rules. For instance, Article 121 of Contract Law of 1999 has introduced strict liability to deal with any breach regardless of civil or commercial contracts. This is considered an example of “over-commercialized legislation”.<sup>82</sup> By the same token, Article 410 of the Contract Law provides that both the mandator and the mandatary may terminate a mandate contract any time without differentiating the nature of contracts concerned, which is identified an example of “under-commercialized legislation.”<sup>83</sup> Rationalization and harmonization of the entire system are further affected with the transplantation of commercial rules from common law jurisdictions in recent years, such as floating charge, business organization with debtor-in-possession, derivative action, independent directors, punitive damages, limited liability partnership and a trust system. It seems the trend now that although the civil law tradition may still dominate legislations on civil matters, commercial enactments are increasingly subject to heavy influence of common law rules and doctrines.

Although heated academic debates will no doubt deepen understanding of key issues concerned and facilitate progress of the civil law codification, the irrational division of teaching and research work leading to a variety of schools and study associations with sectarian bias has complicated the situation. Thus far the national Civil Law Association and Commercial Law Association as well as Economic Law Association have been established separately with their annual conferences and research agendas. In the debate over how to define the borderline of different subjects, some scholars have even denied the necessity to have a separate department of commercial law. According to them, combination of civil and commercial laws and

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<sup>80</sup> Wendehorst, CC., “Exploring Uniformed Civil Code: A Comparative Study of EU and China”, *Tsinghua Law Journal*, No. 4 of 2010, p. 13.

<sup>81</sup> Wang, LM, “Formulation of Civil Code in China: Review and Prospective”, *Legal Forum*, No. 5 of 2008, p. 2–3 (in Chinese); and Yin T, “On Civil Law Codification in China”, *Political Science and Law*, No. 2 of 2006, p. 60–66 (in Chinese).

<sup>82</sup> Zhang G, “Commercial Law as a Hermit Crab—on Independence and Special Characteristics of Commercial Law”, *Tsinghua Journal of Rule of Law*, vol. 6 of 2005, p. 25–27 (in Chinese).

<sup>83</sup> Wang YC, “Types of Commercial Conducts and Diversified Legislation”, *Contemporary Law Review*, No. 4 of 2011, p. 74 (in Chinese).

expansion of public law into private areas have left no basis for independence of commercial law.<sup>84</sup> Such quarrel seems to aim more at increasing influence power of certain schools than promoting academic comprehension.

Civil and commercial law enactments in China offer some interesting experiences not only to diversification of law, but also comparative law theories on legal transplantation and transformation. According to Prof. Pitman Potter of University of British Columbia, China has taken a dynamic strategy of selective adaptation to balance local needs with external conditions.<sup>85</sup> On the one hand, the important role of civil and commercial legislations in promoting China's opening and modernization should be fully recognized; on the other hand, as a transitional socialist market economy China's civil/commercial law codification is facing the challenges of both institutional competition in the globalized market and the domestic institutional reorientation.

The legislative and academic debates have also been reflected in the judicial practice. The entire judiciary was restructured as part of preparation work for China's accession to the WTO in 2000. With the approval of the CCP, a larger civil trial division was established with commercial trial as one of the subdivision. The inclusion of the commercial trials into the larger civil law system has been pretty controversial since the philosophy and value goals to settle commercial cases, such as market efficiency, safety of transaction, and business autonomy, may be different from those of civil cases handling. As a result, such blending may hinder development of commercial trials according to its own norms and logics.

Further, as indicated above thus far a very large number of judicial circulars and interpretations have been promulgated to guide the judicial practice with the legal weight as the law.<sup>86</sup> Most of these rules have been adopted according to the practical needs with a pragmatic approach and judicial activism. As a result, sometimes these judicial rules may not be read together with the enactments concerned. For example, Art. 51 of the Contract Law provides that a contract concluded by a party without disposition right shall be invalid (e.g the contract not formed), unless the transaction is ratified by the right owner, or the contracting party obtained the right after the conclusion of the contract concerned; but Art. 3 of the SPC Interpretation on Dealing with Sales Contract Disputes dated 10 May 2012 stipulates that the People's Court shall not support the claim to invalidate a contract made by a buyer on the ground that the seller does not have the ownership or disposition right over the subject matter at the time of contracting, although he may be entitled to damages and rescission (e.g the contract formed already).<sup>87</sup>

However, so far not much attention has been paid to sorting out and incorporating the judicial rules in the civil law codification as a crucial part of the legal sources and important judicial contribution. As a result, its legal status, relationship with the civil code and necessary consolidation to a large extent are still left untouched. Thus, Prof. Xue Jun of Peking University has warned that the civil law codification has strayed from the right path to rationalize the legal rules, sources and structures. Without necessary correction, the codification may have no substantial sense, but add to the disarray in the legal practice.<sup>88</sup>

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<sup>84</sup> Shi JC and Chen YQ, "On Commercial Law", *Chinese Legal Science*, No. 4 of 2001, p 91–104 (in Chinese); and Shi JC and Yao HF, "On Commercial Law Again", *Journal of Beijing Normal University* (Social Science Edition), No.1 of 2003, p. 45–48 (in Chinese).

<sup>85</sup> Potter, P. B. P, "Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices", 2 *Washington University Global Studies Law Review*, 2003, p. 119.

<sup>86</sup> Art. 5 of the Certain Provisions on Judicial Interpretations of the SPC dated 23 March 2007.

<sup>87</sup> An English translation of this Interpretation is available at <http://lawinfochina.com/display.aspx?lib=law&-id=10976&EncodingName=gb2312>.

<sup>88</sup> Xue J, "How Judicial Interpretation Be Treated in Civil Law Codification?," *China Law Review*, No. 4 of 2015, p 48-52 (in Chinese).



## Conclusion

Since late 1970s a large number of private laws, including civil and commercial laws, have been promulgated on the basis of the GPCL and a new legal framework of the socialist market economy has been established in China. Thus, civil law codification will further modernize and systemize the country's legal system. However, given the political and market conditions in China such codification is still facing serious challenges and uncertainties and bound to be a long learning process. In addition to acute conflicts in radical social transition, institutional breakthroughs will be needed to further liberalize the private law regime from the control of the Party-State ideology and mechanically reliance on the German model. The academic debates are expected to not only bring in more new comparative experience and inventions in the course of globalization, but also shape a better doctrinal foundation for the codification.

Wojciech Łukasik\*, Ośrodek podstawowej działalności dłużnika (COMI-Center of Main Interests) jako łącznik jurysdykcyjny w transgranicznych postępowaniach upadłościowych. Stan obecny i jego krytyka a nowa regulacja (Center of Main Interests «COMI» as a jurisdictional link of cross-border insolvency proceedings. The present state and its criticism vs. new regulations)

Abstract: Center of main interests is the determining factor in the initiation and conduct of cross-border insolvency proceedings. This procedure is governed by EC Regulation 1346/2000 on cross-border insolvency proceedings. The main objective of the regulation was to counteract the phenomenon of forum shopping. Cross-border insolvency proceedings are divided into primary and secondary. Current regulations do not contain a definition of COMI. This state of affairs gives rise to many problems of interpretation. Over the past years we have had to deal with a wave of criticism of the current regulation and the need to make changes in the regulation. The result of this criticism is the adoption of the Regulation on 20 May 2015. The new regulation contains a definition of COMI. It satisfies demands reported during the discussion, as well as being consistent with the interpretation adopted earlier by the European Court of Justice.

Keywords: center of main interests, jurisdictional link, cross-border insolvency proceedings, european law

## Stan obecny

Jednym z podstawowych celów rozporządzenia WE nr 1346/2000 w sprawie postępowania upadłościowego jest koordynacja i prowadzenie transgranicznych postępowania upadłościowych na terytorium Unii Europejskiej. Artykuł 3 tego rozporządzenia normuje kwestię krajowej jurysdykcji w transgranicznych postępowaniach upadłościowych prowadzonych na terytorium Unii Europejskiej<sup>1</sup>. Normy jurysdykcji krajowej w zakresie postępowania upadłościowego określają za każdym razem państwa członkowskie, gdyż tylko ich sądy mają kompetencję do wszczynania i prowadzenia takiego postępowania<sup>2</sup>. Art. 3 ust. 1 rozporządzenia określa procedurę wszczęcia głównego postępowania upadłościowego. Wszczęcie ma skutek uniwersalny i rozciąga się na cały majątek dłużnika położony na terenie państw członkowskich Unii Europejskiej<sup>3</sup>. Główne postępowanie upadłościowe wszczynane jest w państwie, na którego terytorium znajduje się ośrodek podstawowej działalności. Natomiast art. 3 ust. 2 rozporządzenia zawiera regulacje dotyczące wszczęcia ubocznego postępowania upadłościowego. Upadłość ta ma jednak bardzo ograniczony zakres terytorialny i obejmuje jedynie majątek upadłego dłużnika znajdujący się na terytorium państwa, w którym jest zlokalizowany jego oddział. Wyróżniamy dwa typy postępowania ubocznych: postępowanie wtórne toczące się równolegle do już prowadzonego postępowania głównego i samoistne postępowanie uboczne. Do ogłoszenia zarówno upadłości głównej, jak i wtórnej nie wystarczy samo położenie majątku dłużnika w danym państwie<sup>4</sup>. Czynnikiem najważniejszym i determinującym postępowania transgraniczne jest łącznik jurysdykcyjny. Tym łącznikiem jest główny ośrodek podstawowej działalności, określany często skrótem COMI. Rozporządzenie

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<sup>1</sup> Zedler F. (red.), Filipiak P., Hrycaj A., Europejskie prawo upadłościowe. Komentarz., LEX, 2011.

<sup>2</sup> Virgós M., Schmit E., Report on the Convention on Insolvency Proceedings, 1996 (dokument Rady UE nr 6500/1/96).

<sup>3</sup> Zedler F. (red.), Filipiak P., Hrycaj A., Europejskie prawo...

<sup>4</sup> Ibid.

w swojej części normatywnej nie zawiera definicji pojęcia COMI, szczególnie próżno szukać tej definicji w art. 2, który jest słowniczkiem pojęć. Z pomocą przy interpretacji pojęcia COMI przychodzi nam punkt 13 preambuły, który to stanowi: "Główny ośrodek podstawowej działalności powinien oznaczać miejsce, w którym dłużnik zazwyczaj zarządza swoją działalnością i jako takie jest rozpoznawalne przez osoby trzecie". Pojęcie COMI powinno interpretować się zgodnie z punktem 13 preambuły i w sposób jednolity dla wszystkich państw Unii Europejskiej<sup>5</sup>. Niektórzy autorzy, jak G. Moss wskazują, że punkt 13 preambuły jest jedynie wyjaśnieniem pojęcia COMI a nie jego definicją w ścisłym tego słowa znaczeniu<sup>6</sup>. Sądem właściwym do dokonywania interpretacji pojęcia COMI będzie sąd państwa, który jako pierwszy wszczął postępowanie główne<sup>7</sup>. Odmiennego zdania jest z kolei Grzejszczak i Hilarski, którzy twierdzą iż właściwym momentem jest moment złożenia wniosku<sup>8</sup>. Wedle dotychczasowego orzecznictwa sądów europejskich, każdy dłużnik może posiadać z normatywnego punktu widzenia tylko jeden ośrodek podstawowej działalności<sup>9</sup>. Pojęcie COMI odnosi się do wszystkich podmiotów prawnych, bez względu na ich charakter prawny oraz na to, czy prowadzą działalność gospodarczą czy też nie<sup>10</sup>. Nie wolno nadto zapominać, iż art. 3 ust. 1 zdanie drugie Rozporządzenia wprowadza dodatkowe wzruszalne domniemanie prawne, zgodnie z którym COMI spółek i innych osób prawnych będzie znajdować się tam, gdzie ich siedziba statutowa. Domniemanie to jest o tyle uzasadnione, że organy wyżej wymienionych podmiotów zazwyczaj znajdują się w siedzibie statutowej i tam prowadzą swoją regularną działalność. Dodatkowym czynnikiem są dane ujawniane w rejestrach handlowych, które są bez trudu dostępne dla osób trzecich. Ciężar dowodu obalenia tego domniemania będzie spoczywał na podmiocie, który będzie miał w tym interes prawny. Podmiot taki powinien wykazać, iż miejsce w którym dłużnik zazwyczaj prowadzi swoją działalność i jako takie jest bez trudu rozpoznawalne przez osoby trzecie znajduje się w innym miejscu, aniżeli siedziba statutowa spółki lub innej osoby prawnej. Doktryna wskazuje, co w takiej sytuacji powinien zrobić podmiot wzruszający domniemanie. Powinien on przeprowadzić tzw. *head office functions test*, czyli test na sprawdzenie, gdzie znajduje się centrala funkcji operacyjnych<sup>11</sup>. Jednak brak legalnej definicji COMI nastęrcza wiele problemów interpretacyjnych. Odzwierciedleniem tego jest kilka istotnych orzeczeń Trybunału Sprawiedliwości UE z ostatnich lat. Wyroki te znacząco przybliżają nas do zrozumienia pojęcia COMI oraz ułatwiają jego stosowanie w praktyce. W wyroku z 2 maja 2006r. w sprawie Eurofood, stwierdzono co następuję: „[...] główny ośrodek podstawowej działalności należy identyfikować w oparciu o kryteria, które są jednocześnie obiektywne i możliwe do zweryfikowania przez osoby trzecie. Ta obiektywność i możliwość weryfikacji przez osoby trzecie są niezbędne dla zagwarantowania pewności prawa i przewidywalności w kwestii określenia sądu właściwego dla wszczęcia głównego postępowania upadłościowego. W związku z tym w celu określenia głównego ośrodka podstawowej działalności spółki będącej dłużnikiem domniemanie zwykle ustanowione przez prawodawcę wspólnotowego na rzecz siedziby określonej w statucie tej spółki może zostać obalone jedynie wtedy, gdy obiektywne i możliwe do zweryfikowania przez osoby trzecie kryteria umożliwiają

<sup>5</sup> Por. Rzecznik Generalny D.R.J. Colomer w punkcie 60 opinii z dnia 6 września 2005 r. w sprawie C 1/04 Susanne Staubitz Schreiber.

<sup>6</sup> Moss G., Fletcher I.F., Isaacs S., The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide. 2nd Edition, Oxford 2009.

<sup>7</sup> Hrycaj A., Filipiak P., Transgraniczne postępowania upadłościowe przed sądami polskimi, PiP 2010, z. 8.

<sup>8</sup> Grzejszczak P., Chilarski T., Jurysdykcja krajowa w międzynarodowym postępowaniu upadłościowym, PPH 2004, nr 2.

<sup>9</sup> Por. pkt 100 opinii Rzecznika Generalnego F.G. Jacobsa w sprawie C-341/04 Eurofood IFSC Ltd.

<sup>10</sup> Virgós M., Garcimartín F., The EC Regulation on Insolvency Proceedings: A Practical Commentary, Hague 2004.

<sup>11</sup> Moss G., Fletcher I.F., Isaacs S., The EC Regulation on Insolvency Proceedings...

stwierdzenie, że rzeczywista sytuacja jest odmienna niż ta, która wynikałaby z położenia przedsiębiorstwa w miejscu statutowej siedziby spółki. Jednak jeżeli spółka prowadzi działalność na terytorium państwa członkowskiego, w którym znajduje się jej statutowa siedziba, sama okoliczność, że jej decyzje ekonomiczne są lub mogą być kontrolowane przez spółkę nadrzędną, mającą siedzibę w innym państwie członkowskim, nie jest wystarczająca do obalenia domniemania ustanowionego w rozporządzeniu<sup>12</sup>. Z kolei w wyroku z 2 października 2011 Trybunał Sprawiedliwości UE stwierdził: „Z powyższego wynika, że w sytuacji gdy organy kierownicze i kontrolne spółki znajdują się w miejscu jej siedziby statutowej i w tym też miejscu są podejmowane – w sposób weryfikowalny dla osób trzecich – decyzje dotyczące zarządzania tą spółką, wówczas domniemanie przewidziane w art. 3 ust. 1 zdanie drugie rozporządzenia, wedle którego główny ośrodek podstawowej działalności spółki znajduje się w owym miejscu, ma pełne zastosowanie. Jak wskazał rzecznik generalny w pkt 69 opinii, w tego rodzaju sytuacji odmienna lokalizacja podstawowej działalności dłużnika jest wykluczona. [...] Obalenie domniemania przewidzianego w art. 3 ust. 1 zdanie drugie rozporządzenia jest jednak możliwe, jeżeli z punktu widzenia osób trzecich miejsce głównego zarządzania spółką nie znajduje się w miejscu siedziby statutowej. [...] Pośród okoliczności podlegających uwzględnieniu wskazać należy w szczególności wszystkie miejsca, w których spółka będąca dłużnikiem wykonuje działalność gospodarczą oraz w których posiada składniki majątku, o ile miejsca te są rozpoznawalne dla osób trzecich<sup>13</sup>”. Tezy zawarte w obu wyżej wymienionych wyrokach zostały potwierdzone przez Trybunał Sprawiedliwości UE w najnowszym wyroku z 15 grudnia 2011 roku<sup>14</sup>.

## COMI a zjawisko forum shopping.

Twórcom rozporządzenia przyświecał jasny cel, który został określony jako przeciwdziałanie zjawisku forum shopping. Warto byłoby chwilę pochylić się nad tym pojęciem. Forum shopping rozumiane jest jako poszukiwanie przez stronę postępowanie najkorzystniejszego dla niej systemu prawnego i w naszym przypadku przemieszczanie COMI do tegoż państwa<sup>15</sup>. Istnieje poważny spór w doktrynie co do tego, czy zjawisko forum shopping jest zjawiskiem negatywnym. Zdecydowana większość opowiada się za negatywną oceną tego zjawiska, przedstawiając jednocześnie liczne sprawy, w których to dłużnicy skutecznie chronili swoje interesy oraz majątek przed wierzycielami<sup>16</sup>. Inni z kolei podkreślają, że w dobie otwartości granic oraz możliwości swobodnego przemieszczania kapitału w ramach Unii Europejskiej nie da się do końca zapobiec takiemu zjawisku. Niektórzy nawet podkreślają dobre strony takowej sytuacji<sup>17</sup>. Powołują się oni na pozytywną konkurencję prawną pomiędzy poszczególnymi państwami, które dążąc do przyciągnięcia jak największej liczby przedsiębiorców, jednocześnie reformują swoje wewnętrzne regulacje prawa upadłościowego i naprawczego, co może być w tym wypadku korzystne dla wszystkich stron postępowania. Takim pozytywnym przykładem są Niemcy, które w ostatnim czasie dokonały poważnej nowelizacji swojego prawa upadłościowego, pod wpływem przenoszenia siedziby wielu spółek niemieckich do Wielkiej Brytanii<sup>18</sup>. Niestety, jak pokazuje wieloletnia praktyka stosowania rozporządzenia, zjawisko forum shopping jest najczęściej zjawiskiem niepożądanym. Ma ono na celu doprowadzenie do

<sup>12</sup> Wyrok ETS z 2.05.2006, w sprawie C-341/04, Eurofood.

<sup>13</sup> Wyrok TSUE z 2.10.2011, w sprawie C-396/09, Interedil.

<sup>14</sup> Wyrok TSUE z 15.12.2011, w sprawie C-191/10, Rastelli Davide v. Hidoux.

<sup>15</sup> Juenger F.K., Forum shopping, domestic and international., Tulane Law Review 1989/63.

<sup>16</sup> Szydło M., Prevention of Forum Shopping In European Insolvency Law, European Business Organization Law Review, 2010/2.

<sup>17</sup> Eidenmuller H., The Transnational Law Market, Regulatory Competition, and Transnational Corporations, Indiana Journal of Global Legal Studies, 2011/2.

<sup>18</sup> Kolmann S., Thoughts on the governing insolvency law, International Insolvency Law Review, 2011/3.

sytuacji, w której niewypłacany dłużnik będzie starał się zaspokoić wierzycieli w jak najmniejszym stopniu. Innymi słowy, wierzyciele najczęściej staną się relatywnie pokrzywdzeni.

## Krytyka COMI

W tym miejscu należy zadać sobie pytanie, czy dotychczasowe uregulowanie pojęcia COMI w rozporządzeniu rzeczywiście przeciwdziała zjawisku forum shopping, lub chociażby w jak największym stopniu je minimalizuje. Otóż z wielu stron można usłyszeć głosy krytyki, które pojawiają się już od kilku lat. Zdecydowana część doktryny stoi na stanowisko, że dotychczasowa regulacja nie tylko nie spowodowała eliminacji zjawiska forum shopping, ale wręcz nasiliła to zjawisko, poprzez brak legalnej definicji COMI w rozporządzeniu<sup>19</sup>. Można by zatem rzec, że rozporządzenie osiągnęło odwrotny skutek do zamierzonego. Potwierdzeniem takiego oto twierdzenia będą wydawane w ostatnich latach dokumenty na temat praktyki stosowania rozporządzenia przez Europejskie Stowarzyszenie Prawników Prawa Upadłościowego INSOLE Europe. To właśnie INSOLE jako pierwsze zainicjowało poważną dyskusję na temat potrzeby nowelizacji rozporządzenia. Obszerny raport wydany w 2011 roku został przedstawiony Parlamentowi Europejskiemu oraz Komisji Europejskiej<sup>20</sup>. Efektem tych działań był raport Parlamentu Europejskiego z października 2011 roku<sup>21</sup>. Raport Parlamentu Europejskiego w dużej mierze skupiał się na problemie zjawiska forum shopping, które w ostatnich latach zaczęło przybierać na sile. Żadnych wątpliwości nie budził też fakt, że dotychczasowa regulacja rozporządzenia w niewielkim stopniu wpływa na przeciwdziałanie temu zjawisku. Raport wskazywał także na potrzebę szybkiego rozpoczęcia prac nad zmianami w rozporządzeniu, szczególnie w zakresie miejsca położenia głównego ośrodka podstawowej działalności. Tym samym eurodeputowani przychyliłi się do stanowiska INSOLE, którego członkowie tacy jak Bob Wessels, Gabriel Moss, Lars Westphal, Jean Luc Vallens wskazywali na to, że dotychczasowe uregulowanie pojęcia COMI jest niewystarczające i że rozporządzenie nie spełnia przez to swojego podstawowego celu, jakim jest przeciwdziałanie zjawisku forum shopping. Jednak pojawiały się także inne głosy w dyskusji, jak na przykład Stephen'a Taylor'a, który to stwierdził, iż obecna definicja COMI jest jak najbardziej wykonalna, realistyczna i może być dalej odpowiednio stosowana w praktyce<sup>22</sup>. Pogląd ten jest jednak odosobniony w literaturze przedmiotu.

## Nowe regulacje

Rozporządzenie (UE) 2015/848 z dnia 20 maja 2015 roku w sprawie postępowania upadłościowego przekształca i uaktualnia rozporządzenia 1346/2000 z dnia 29 maja 2000. Większość jego przepisów wejdzie w życie w dniu 26 czerwca 2017. Niewątpliwie nie jest to rewolucja i moim zdaniem zmiany dotyczące pojęcia COMI są raczej kosmetyczne i subtelne.

Zasady jurysdykcji międzynarodowej, wyrażone w artykule 3 rozporządzenia, nie dają wyboru wnioskodawcy wszczęcia postępowania upadłościowego. Artykuł 3 potwierdza zasadę, że główne postępowanie upadłościowe wszczynane jest w państwie, gdzie dłużnik posiada ośrodek podstawowej działalności. Rozporządzenie definiuje COMI jako "miejsce, w którym dłużnik regularnie zarządza swoją działalnością o charakterze ekonomicznym i które jako takie jest rozpoznawalne dla osób trzecich". Przewiduje się zatem dwa kryteria, a mianowicie miejsce prowadzenia działalności dłużnika i czy lokalizacja może być ustalona przez strony

<sup>19</sup> Por. Szydło M., Prevention of Forum Shopping In European...

<sup>20</sup> Por. Revision of the European Insolvency Regulation. Proposals by INSOL Europe, May 2012.

<sup>21</sup> Por. European Parliament Report – The revision of EU Insolvency Regulation, 17.10.2011.

<sup>22</sup> Konferencja „The future of the European Insolvency Regulation, 28.04.2011, Amsterdam.

trzecie. Przepisy także wyjaśniają koncepcję COMI dla osób prawnych i fizycznych, poprzez ustanowienie szeregu domniemań prawnych. Dla grup kapitałowych, centrum głównych interesów to siedziba korporacji. To założenie można odrzucić na rzecz rzeczywistej siedziby. W tym względzie rozporządzenie ustanawia rozwiązania przyjętego przez orzeczenie ETS w sprawie Interedil (3). W przypadku osób fizycznych, należy wprowadzić rozróżnienie między osobami fizycznymi prowadzącymi działalność gospodarczą i osobami prywatnymi. O ile w przypadku pierwszego centrum głównych interesów jest główne miejsce prowadzenia działalności, dla tego ostatniego, rozporządzenie przewiduje, miejsce zwykłego pobytu. Te domniemania mogą zostać obalone, szczególnie jeśli większość majątku dłużnika znajduje się w państwie członkowskim, które nie jest miejscem jego stałego pobytu. Co więcej, rozporządzenie przewiduje, że w przypadku kiedy dłużnik przeniesie główne miejsce prowadzenia działalności lub miejsce stałego pobytu w okresie 6 miesięcy przed wszczęciem postępowania upadłościowego, to czynność taka nie jest skuteczna wobec osób trzecich, w szczególności wierzycieli.

# Ivan Seheda\*, General Peculiarities of Joint Venture Agreements in the States of Maghreb (Algeria, Morocco, Tunisia)

Abstract: The article deals with the legislation of Algeria, Morocco and Tunisia governing the creation and activities of temporary groups of companies (joint ventures) as well as the terms of their participation in government tenders and carrying out joint projects. Conclusions have been made about the application of such form of cooperation by foreign legal entities whose aim is to implement projects or to do other joint businesses in the states of Maghreb.

Keywords: joint venture, partnership, Algeria, Morocco, Tunisia

## Introduction

The agreement on cooperation (joint venture agreement) has a long history and application in different judicial systems around the World. It is the easiest way of cooperation and integration between legal entities or individuals. At the same time laws of many countries don't provide sufficient legal regulation in the field of contracting, litigation, sharing financial responsibilities etc. In Algeria, Morocco and Tunisia, the concept of joint venture agreements (henceforth JV) has own peculiarities comparing to the European approaches. However, this type of contracts can be successfully used by European enterprises in the Maghreb region.

Due to the recent tendency of rapid changing of foreign economic relations in Europe it is particularly relevant to explore new business possibilities and new markets. Despite the fact that the French-speaking states of the North Africa were considered as a traditional market for the Central Europe, the Eastern European countries including Ukraine have also much economic interests in this region. At the same time, modern conditions require new approaches and strategies in the competitive environment and technological progress.

The analysis of JV agreements and its functioning in Algeria, Morocco and Tunisia will be useful for foreign companies that are interested in providing services and implementation of infrastructure projects in the Maghreb states.

In general, the subject of legal regulations concerning legal entities in the Maghreb countries was studied by such foreign jurists as Tani Trari<sup>1</sup>, A. Bakirat<sup>2</sup>, L. Derder<sup>3</sup> and others. However, the subject of joint ventures is not covered in scientific researches in the countries of the Eastern Europe.

The article aims to explore the peculiarities of joint venture agreements in Algeria, Morocco and Tunisia and to describe its practical application for foreign legal entities.

In Ukraine the subject of JV agreements is regulated by the Civil Code. According to the article 1130 of the Civil Code of Ukraine “1. Under a joint venture agreement, the parties (participants) shall be obliged to act mutually without creating a legal entity to reach a certain goal that does not contradicts the law. 2. Joint venture may be performed on the basis of uniting the

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<sup>1</sup> Trari Tani, *Droit commercial international* [International commercial law], Alger: Berti Editions, 2007, p. 287.

<sup>2</sup> الباقيرات ع. مبادئ القانون التجاري / عبدالقادر الباقيرات. - الجزائر: ديوان المطبوعات الجامعية, 2011. - 151 ص

<sup>3</sup> Derder L., *Mini-encyclopédie de droit algérien* [Mini-encyclopaedia of Algerian law], Alger: Berti Editions, 2009. p. 544.

participants' contributions (simple partnership) or without uniting the participants' contributions"<sup>4</sup>.

The purpose of a joint venture agreement must be legitimate and can be carrying out various business operations (single or multiple). In Ukraine this agreement is mostly used for the creation of scientific and industrial complexes, scientific and educational institutions on the basis of property of industrial enterprises or for the implementation of supply, marketing or construction activities.

## Algerian legislation on joint ventures

There are certain features of application of the joint venture agreement in Algeria due to local market conditions. The major part of the Algerian market is ruled by public procurements and the Presidential program of infrastructural development of the country.

The Commercial and Civil Codes of Algeria do not regulate JV agreements but does not prohibit such form of cooperation. The article 54 of the Civil Code (henceforth CC) states: "A contract is a deal according to which one or more persons undertake in respect of one or more other persons to provide something, to carry out something or to abstain from an action"; according the article 106 of the CC of Algeria: "The contract is binding for the parties. It can neither be withdrawn nor modified, except by mutual agreement of the parties or for other reasons provided by law"<sup>5</sup>.

In practice, the conclusion of a joint venture agreement in Algeria is used mainly by Algerian and foreign legal entities in the framework of realization of tenders for public projects. As far as public contracts dominate in the Algerian market, foreign companies often need to join capacities with other foreign or national partners in order to implement turnkey infrastructure projects.

Because of the fact that the major customers in Algeria are legal entities of public law (public companies, ministries, government agencies etc.) the JV agreements are governed by the Code of Public Procurement 2013 <sup>6</sup>, Decrees of the President of Algeria №10-236 from 07.10.2010 <sup>7</sup>, №12-23 from 18.01.2012 <sup>8</sup> and №15-247 from 16.09.2015 <sup>9</sup> which are published in the Official Journal of Algeria.

According to the Algerian law it is not prohibited to conclude joint venture agreements for legal entities of private law so the provisions of the mentioned legislation may be used in the private sector as well.

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<sup>4</sup> Civil code of Ukraine of 16.01.2003, law № 435-15 (amended 01.01.2016), available at <http://zakon4.rada.gov.ua/laws/show/435-15>.

<sup>5</sup> Code civil d'Algérie 2007 [Civil code of Algeria of 2007], available at <http://www.joradp.dz/TRV/FCivil.pdf>.

<sup>6</sup> Code des Marchés Publics [Code of public procurements], Journal Officiel de la République Algérienne Démocratique et Populaire [Official journal of the People's Democratic Republic of Algeria] 2013, available at <http://www.joradp.dz/TRV/FMPublics.pdf>.

<sup>7</sup> Décret présidentiel n° 10-236 du 7 octobre 2010 portant réglementation des marchés publics [Presidential decree], Journal Officiel N°58 du 07.10.2010, available at <http://www.mincommerce.gov.dz/fichiers10/dec10236fr.pdf>.

<sup>8</sup> Décret présidentiel n° 12-23 du 18 Janvier 2012 modifiant et complétant le décret présidentiel n°10-236 du 07 Octobre 2010 portant réglementation des marchés publics [Presidential decree], Journal Officiel N°04 du 26.01.2012, available at <http://www.mincommerce.gov.dz/fichiers12/dec1223fr.pdf>.

<sup>9</sup> Décret présidentiel n° 15-247 du 16 septembre 2015 portant règlementation des marchés publics et des délégations de service public [Presidential decree], JO n° 50 du 20 Septembre 2015, available at <http://www.mincommerce.gov.dz/fichiers15/textereglem/dec15247fr.pdf>.



The term "joint venture" corresponds to "temporary group of companies" in the Algerian legislation (in French: groupement momentané d'entreprises - GME).

In the Algerian law all of the following terms "temporary group of companies» (groupement momentané d'entreprises, the article 59 of the Decree of the President of Algeria №10-236 from 07.10.2010)<sup>10</sup>, "group of companies" (groupement, the article 796-799 of the Commercial Code of Algeria)<sup>11</sup> and "group of customers" (groupement de commande, the article 19 of the Decree of the President of Algeria №10-236 from 07.10.2010)<sup>9</sup> have different meanings.

A legal act for creation of the temporary group of companies (JV) is called convention. Conclusion of such convention does not result in the creation of a new legal entity so it's not necessarily to register the JV in the Commercial Register of Algeria. The JV can be created by two or more companies or individuals that agreed to jointly participate in a tender or to perform a contract. The JV participants must choose a "main enterprise" authorized to act on behalf of the JV before the customer.

In the Algerian law the term "convention" is used to distinguish it from the statute, which is a constituent act of a legal entity. The Convention must clearly state no intention of establishing a legal entity by the participants of the JV. The Algerian law stipulates that the JV shall refrain from creating of a secret society, otherwise this fact will result in appropriate legal, fiscal and other consequences.

According to the Algerian law, the JV cannot possess a capital, own funds, a statute or a legal address. On creation of the JV there is no contributions of the participants, no division of profits or losses. Temporary group of companies (JV) may be registered in the Commercial register of Algeria but each party of the JV retains autonomy.

Temporary group of companies has no right to act as a legal entity. The main enterprise (a legal entity or a natural person) can act on behalf of the JV in accordance with the powers stipulated in the Convention (for example, to represent JV participants before the customer, banks, etc.). However, such actions as hiring staff, purchasing equipment, signing subcontracts etc. shall be executed strictly by the JV participants separately.

The JV convention shall allocate risks and duties of each participant before the customer and must determine the part of each participant in the project according to their financial and technical capabilities. The responsibilities of JV participants are limited by contractual and legal obligations that are acquired after signing a contract with a customer.

The Article 59 of the Decree of the President of Algeria № 12-23 from 18.01.2012 distinguishes two types of joint ventures (temporary groups of companies): solidary and conjoint<sup>12</sup>.

All members of the solidary JV are jointly and severally responsible for the contract. If one of the JV participants does not fulfill its obligations, other partners shall provide complete performance of the contract to the customer. The main enterprise represents interests of the JV before the customer and coordinate activities of the JV participants.

Conjoint JV is created according to the convention on joint activities, where each JV participant is responsible separately for his part of the contract. All conjoint JV participants coordinate their activities according to the contract but have separate financial relations with the customer.

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<sup>10</sup> Décret présidentiel n° 10-236 du 7 octobre 2010 portant réglementation des marchés publics [Presidential decree], JO N°58 du 07.10.2010, available at <http://www.mincommerce.gov.dz/fichiers10/dec10236fr.pdf>.

<sup>11</sup> Code de commerce [Commercial Code], Journal Officiel de la République Algérienne Démocratique et Populaire, 2007, available at <http://www.joradp.dz/TRV/FCom.pdf>.

<sup>12</sup> Décret présidentiel n° 12-23 du 18 Janvier 2012 modifiant et complétant le décret présidentiel n°10-236 du 07 Octobre 2010 portant réglementation des marchés publics [Presidential decree], Jo N° 04 du 26.01.2012, available at <http://www.mincommerce.gov.dz/fichiers12/dec1223fr.pdf>.

In the conjoint JV the main enterprise is jointly and severally liable to the customer for execution of the whole contract even in the case of failure of one of the JV participants to fulfill its obligations.

Usually, the main enterprise of the JV is a legal entity (or a natural person) who performs the major part of the contract. In the case of reasonable arguments this role can be performed by another JV participant.

The main enterprise of a solidary JV shall submit a bank guarantee in full for the contract. In Algeria, this guarantee of performance of a contract must be opened at a bank of first category and is usually evaluated around 5-10% of the total cost of the contract. If the JV participants are legal entities of Algerian and foreign law, as an exception, a bank guarantee for the contract may be submitted by each JV participant separately according to the JV convention.

In the conjoint JV the bank guarantees shall be submitted separately by each participant if the JV convention does not stipulate otherwise<sup>13</sup>. According to the article 59 of the Presidential Decree №12-23 from 18.01.2012, payments to a solidary JV shall be carried out by a customer through a common transit bank account that is opened in the name of the temporary group of companies (JV)<sup>14</sup>. The transit account can be used only for receiving payments and its redistribution among the JV participants. After receipt of funds to the transit account a bank within 3 days shall execute money transfers to current accounts of each JV participant according to the JV convention and the JV invoice.

Financial payments to the conjoint JV shall be carried out directly between the customer and each partner of the JV if the JV convention doesn't stipulate otherwise. A foreign company performing a contract in Algeria through the establishment of a JV may not claim to exist in Algeria only through the mentioned JV convention. If the foreign legal entity intends to claim its existence in Algeria and run businesses, the company must establish itself as an independent structure by either using a company incorporated under Algerian law, a branch or a permanent establishment, in order to claim existence in Algeria recognized by Algerian authorities, whether this existence is legal or merely fiscal<sup>15</sup>.

This issue is quite well regulated for legal entities of Ukrainian law because there is the convention between Ukraine and Algeria on double taxation which entered into force on July 1, 2004. According to the Article 7 part 1 of the mentioned Convention "profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State situated therein through a permanent representation office. If the enterprise carries out business as aforesaid, the profits may be taxed in the other State but only in the amount attributable to that permanent representation office"<sup>16</sup>.

If one or more foreign legal entities established the solidary JV for fulfilling contracts in Algeria they shall act as one party to the customer but as independent legal entities to third parties. Taxation will be based on similar international agreements between Algeria and foreign countries.

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<sup>13</sup> Décret présidentiel n° 15-247 du 16 septembre 2015 portant réglementation des marchés publics et des délégations de service public [Presidential decree], JO n° 50 du 20.09.2015, available at <http://www.mincommerce.gov.dz/fichiers15/textereglem/dec15247fr.pdf>.

<sup>14</sup> Décret présidentiel n° 12-23 du 18 Janvier 2012 modifiant et complétant le décret présidentiel n°10-236 du 07 Octobre 2010 portant réglementation des marchés publics [Presidential decree], Journal officiel N° 04 du 26.01.2012, available at <http://www.mincommerce.gov.dz/fichiers12/dec1223fr.pdf>.

<sup>15</sup> Guide to investing in Algeria, Algiers: Ellipse, 2015, p. 85.

<sup>16</sup> Convention between the Cabinet of Ministers of Ukraine and the Government of People's Democratic Republic of Algeria concerning avoidance of double taxation on profit and property and forestalling of tax evasion, law № 012-004 (entered into force 01.07.2004), available at [http://zakon4.rada.gov.ua/laws/show/012\\_004](http://zakon4.rada.gov.ua/laws/show/012_004).

For legal entities of those states that don't have double taxation treaties with Algeria, the concept of permanent establishment of a legal entity will be applied. The existence of foreign legal entities in Algeria will be recognized for the period of the contract. In this case the foreign company shall be only a taxpayer without a legal address in Algeria. This legal entity will be recognized by the Algerian competent authorities as present in Algeria, and therefore has certain rights (for example: to a bank account, to hiring personnel, etc.) and obligations (paying taxes).

If the company operates on the territory of Algeria the contract must be domiciled by tax authorities of Algeria. Consequently, a foreign legal entity may not claim its presence in Algeria without having a contract to carry out in this country.

The existence (establishment) makes it possible to carry out temporary operations in Algeria without heavy infrastructure and to freely repatriate a portion of the revenues (transferable under contract) stemming from activities conducted in Algeria.

Although a foreign company can conduct its activities in Algeria, in practice, it can still encounter difficulties stemming from the fact that it is not registered in the Trade Register of Algeria.

It's very important to sign a JV convention according to the Algerian laws in order to have the right to participate in international tenders in Algeria. All parties of the JV during the implementation of projects in Algeria shall be responsible by all their property acting as independent legal entities.

The parties who intend to establish a JV can sign a framework (preliminary) convention with the possibility to specify terms of participation of each party in the project afterwards. This is useful at the initial phase during the period of searching for contracts and tenders. After winning a tender the JV must determine all responsibilities of each JV participant before the customer.

Cooperation within the JV is very close to doing business in general but there might be some difficulties connected with a large number of participants, the lack of a vertically integrated management structure, different approaches of participants to doing business etc.

It is necessary to determine in advance powers of managers as well as to agree on conditions of supply of products and equipments, its installation or production, financial management etc. A very important step is the election of a chief of project who will be able to successfully coordinate all activities taking into account interests of all JV participants.

Such form of cooperation as a JV (temporary group of companies) is relatively new to Algeria so it faces certain organizational barriers, particularly when dealing with banks, notaries, fiscal authorities and others.

According to the author's research, only two French banks and less than ten notaries in Algeria have experience of working with joint ventures. The majority of banks in Algeria refer to the lack of information from the Central Bank concerning such operations with JV. That's why foreign companies may face a lack of experience in this sphere in Algeria.

There are many advantages of cooperation in the frame of the JV because foreign companies can test the Algerian market without allocation much resources. At the same time it doesn't exclude the need to formalize certain procedures in order to implement projects in Algeria. Often establishment of a JV is more advantageous for foreign companies who wish to join forces and resources to achieve a common goal.

A temporary group of companies (JV) has the right to participate only in those tenders in Algeria where this opportunity is stipulated by the tender documents. When foreign companies

and their Algerian partners agree on more permanent cooperation it will be more convenient to create a joint company (group of companies) according to the article 796-799 of the Commercial Code Algeria<sup>17</sup>.

The Commercial Code of Algeria stipulates that a group of companies (in French: groupement) can be established with a condition that the Algerian resident shareholder represents 51% of the share capital at least. In this case there will be a new legal entity which can use references of the companies of the group. For such groups of companies all administrative procedures, relations with banks and fiscal authorities work well at all levels. This group shall be a legal entity of Algerian law therefore it will be able to participate in national tenders and will use about 15-25% of advantages over foreign entities in international tenders in Algeria<sup>18</sup>.

## Moroccan legislation on joint ventures

The legal system of Morocco is close to the Algerian legislation because of similar historical processes in the Maghreb region. Moroccan company laws are also based on French civil law, with some borrowings from German, Ottoman and Islamic legal systems<sup>19</sup>. However, the legislation of Morocco and Tunisia, unlike the Algerian laws, permit the creation of undeclared partnerships (joint ventures) and the presence of their common property.

The joint venture agreement in Morocco is governed by the Law №5-96 on Partnerships, Limited Partnerships, Limited Partnership by Shares, Limited Liability Companies and Joint Ventures from 1 May 1997<sup>20</sup>. In addition, the establishment of partnership must not be contrary to the articles 982, 985, 986, 988, 1003 of the Code of obligations and contracts of Morocco from 1913 (amended)<sup>21</sup>.

In the Moroccan law the term «Société en participation» (SEP) refers to the joint venture. The article 88 (chapter 5) of the Law № 5-96 states: "The joint venture exists only through relations between its members and does not aim to disclose its existence to third parties. It is not a legal entity. It is not subject to any registration or any other formality of disclosure, its presence can be proven by all means. It can be created de facto".

The article 89 of the aforementioned law states that unless otherwise agreed, relations within the JV are governed by rules that apply to the general partnership. Regarding third parties, each participant of the JV shall conclude agreements only on behalf of itself and shall be fully responsible for its fulfillment even if the third party is informed about other participants of the joint venture. If the members act obviously as participants of the JV, they shall be considered versus third parties as members of the general partnership («Société en nom collectif», SEC).<sup>19</sup>

According to the article 3 of the above mentioned law, the general partnership is a partnership in which all participants perform commercial activities and are fully and jointly liable for the obligations of the partnership.<sup>19</sup>

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<sup>17</sup> Code de commerce [Commercial code], Journal Officiel de la République Algérienne Démocratique et Populaire, 2007, available at <http://www.joradp.dz/TRV/FCom.pdf>.

<sup>18</sup> Guide to investing in Algeria, Algiers: Ellipse, 2015, p. 285.

<sup>19</sup> Commercial laws of Morocco, The European Bank for Reconstruction and Development, 2015, available at <http://www.ebrd.com/documents/strategy-and-policy-coordination/read-ebdrds-morocco-country-law-assessment.pdf>.

<sup>20</sup> Dahir [Decree] n° 1-97-49 (5 chaoual 1417) portant promulgation de la loi n° 5-96 sur la société en nom collectif, la société en commandite simple, la société en commandite par actions, la société à responsabilité limitée et la société en participation, Bulletin Officiel, 1997, available at <http://adala.justice.gov.ma/production/-legislation/fr/affaire/loi%205-96.pdf>.

<sup>21</sup> Dahir [Decree] du 9 ramadan 1331 (12 août 1913) portant promulgation du Code des obligations et des contrats, Bulletin Officiel, 1913, available at [http://www.wipo.int/wipolex/fr/text.jsp?file\\_id=191424#LinkTarget\\_644](http://www.wipo.int/wipolex/fr/text.jsp?file_id=191424#LinkTarget_644).

Moroccan law allows the existence of a joint property that is stipulated in the article 90 of the law № 5-96. In this case, the common property, unless otherwise agreed, is indivisible until the dissolution of the JV. The joint venture may be dissolved at the end of the period for which it was created or when one of the participants informs all other JV participants in appropriate way about willing to dissolve the JV.

The JV is used in Morocco mainly by financial institutions or other legal entities for implementation of large construction projects<sup>22</sup>. Foreign companies can use this form of cooperation on the first stage of entering the Moroccan market or for cooperation in the frame of realization of certain projects.

Treaties on double taxation with Morocco regulate the existence and taxation of foreign and Moroccan enterprises. Otherwise, the concept of permanent establishment of a legal entity will be applied. The existence of foreign legal entities in Morocco will be recognized for the period of the contract.

### Tunisian legislation on joint ventures

Legal regulations of the JV in the Tunisian Republic has much in common with Moroccan laws and the term «société en participation» is also used for JV. This sphere is governed by the articles 77-89, chapter 3 of the Commercial Companies Code (November 3, 2000)<sup>23</sup>.

The Tunisian legislation has many points in common with Moroccan laws concerning JV: relations between partners, relations of the JV with third parties, competitive activities between partners, management, distribution of the common property, transfer of shares, etc.

According to the Commercial companies code, the JV is a contract where participants freely determine their mutual rights and obligations, as well as distribution of losses, income and expenses, that may arise as a result of joint activities. The JV is a subject to general rules for companies and can have commercial purposes. The JV has no legal personality, it is not subject to registration and it cannot be known to third parties.

The article 79 of the Code stipulates: "If the JV disclose itself to third parties in any way, the JV participants shall be in the same conditions as members the general partnership. Disclosure of the existence of the joint venture to third parties does not result in invalidity of the contract, which will continue regulating relations between the parties. Any agreement in the contract contrary to this provision shall be void in respect of third parties".<sup>22</sup>

Third parties shall have legal relations only with the JV participant with whom the contract was signed. The latter assumes full personal responsibility for other participants of the JV.

The legislation also stipulates that participants of the JV must inform each other about their contracts concluded within 3 months from its signing. The JV participants must refrain from competitive activity between themselves, if they did not do it before conclusion of the JV. In case of violation of this paragraph, other members have the right to require another participant to stop doing a competitive activity, not limiting themselves to individual rights to damages. In this case, the prosecution must be initiated within 3 months since starting the competitive activity, or since disclosure of such activity.<sup>22</sup>

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<sup>22</sup> Morocco. Investment, trade laws and regulations handbook. Volume 1 Strategic information and basic laws, Washington DC: International Business Publications, USA, 2013, p. 40.

<sup>23</sup> Code des sociétés commerciales [Commercial companies code], Journal Officiel de la République Tunisienne, 2000, available at [http://www.cmf.org.tn/pdf/textes\\_ref/reglementations/Version\\_FR-/code\\_ste\\_commer/code\\_societes\\_fr.pdf](http://www.cmf.org.tn/pdf/textes_ref/reglementations/Version_FR-/code_ste_commer/code_societes_fr.pdf).

One or more managers shall be elected among the JV participants. The manager can only carry out the activities on its own behalf and for the benefit of the whole JV. The elected manager shall represent all participants of the JV under Article 1104 of the Code of obligations and contracts of 2005.<sup>24</sup>

Under the Tunisian law, conditions of appointment and dismissal of the manager can be stipulated in the JV convention. If this issue is not provided by the convention, the rules to general partnership will be applied. The JV convention can also regulate distribution of income between the JV participants. If it's not stipulated by the convention the income distribution shall be based on the principle of equality among all participants.

The Commercial company code provides also the possibility of share transfer to another JV participant or to a third party, conditions of dissolution of the JV, distribution of the joint property between JV participants, etc. In some cases there is a reference to the rules governing a general partnership.

Ukraine and the Republic of Tunisia do not have the agreement on double taxation so fiscal matters are regulated on the base of the concept of permanent establishment of a legal entity.

## Conclusions

If foreign companies are not yet ready for a close integration with their partners in the Maghreb countries it can be useful to start the cooperation through signing a joint venture agreement. In future, it may be more convenient to find more stable form of cooperation, such as by registration of companies in these countries.

Because of the different business conditions in Algeria the temporary group of companies (JV) are used mainly to relations with government customers, while in Morocco and Tunisia the use of joint ventures extends to all areas of the market.

At the conclusion of JV agreements with partners in the Maghreb states the following factors should be taken into consideration:

- unlike to the Tunisian and Moroccan laws concerning JV, Algerian legislation does not provide the possibility of consolidation of deposits of the JV participants, nor any common property or means of production;
- JV members in Algeria elect a main enterprise (it is very useful to have a reliable Algerian partner), which represents their interests before the customer. The main enterprise shall have additional responsibility, including financial risks, but all the JV participants shall act as independent legal entities and coordinate their activities among themselves within a certain project. In Morocco and Tunisia, the JV management is elected among its members, but everyone acts as an individual enterprise and is fully responsible only for their contracts concluded with third parties;
- it is important to take into consideration existence of treaties on double taxation between foreign countries and Algeria, Morocco and Tunisia, which regulates taxation regimes in the frame of implementing projects by joint ventures where foreign enterprises are involved;
- along with foreign enterprises and their Maghreb partners, the JV can also include other foreign or offshore companies if it is necessary to attract additional financial or other

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<sup>24</sup> Code des obligations et des contrats [Code of obligations and contracts], Journal Officiel de la République Tunisienne, 2005, available at [http://www.e-justice.tn/fileadmin/fichiers\\_site\\_francais/codes\\_juridiques/Code\\_des\\_obligations\\_et\\_des\\_contrats.pdf](http://www.e-justice.tn/fileadmin/fichiers_site_francais/codes_juridiques/Code_des_obligations_et_des_contrats.pdf).

resources. In creation of temporary joint ventures can be interested European designing institutes, industrial enterprises, construction and installation companies, etc. who wish to join intellectual and material resources in order to participate in tenders in Algeria or for fulfillment of subcontracts in the Maghreb states;

- thanks to the creation of a JV, participants can use the references (documented experience, qualified personnel, financial reports during the last period, etc.) of all members of the JV. Availability of solid joint references will increase chances of foreign companies for winning tenders and to implement important projects in the Maghreb region.

## Maciej Rzewuski, Das europäische Privattestament (European private testament)

Abstract: The article is a discussion on the institution of the “European private testament”, which remains unknown to currently applicable EU law. The proposal to create an inheritance law mechanism, uniform for all Member States of the European Union, seems to be especially desirable in terms of public perception. Due to the ever-growing migration of the population (not only European), it is worth considering the introduction of such a type of testament, the formal requirements of which will be simple and inexpensive, yet common to all citizens of EU Member States. The core of such European testament could well be the current handwritten testament, although in its liberalized form. The discussion in this article certainly cannot be deemed an exhaustive study of the problem. On the other hand, the proposed solutions for the law as it should be (*de lege ferenda*) can be a contribution to an in-depth debate on the "European testation" issue.

Schlüsselwörter: das Privattestament, das europäische Testament, handgeschriebenes Testament, das Erben, der Erblasser, der Erbe.

Keywords: private testament, European testament, handwritten testament, inheritance, testator, heir

### 1. Einleitung

Das Testament-Erben ist eine sowohl aus theoretischer, praktischer als auch aus sozialer Sicht eine besonders wichtige Problematik. Trotz zahlreicher wissenschaftlicher Aufarbeitungen zu diesem Bereich hat man oft den Eindruck, dass manche Probleme hier ausgelassen oder sehr oberflächlich behandelt werden. Diese Tatsache scheint die Neuausgabe des polnischen Zivilgesetzbuches zu bestätigen. Auch in dem europäischen Bereich arbeitet man an der Vereinheitlichung des europäischen Privatrechts. Ziel ist die Ausarbeitung von *Common Frame of Reference*, dessen Umfang auch das Vererben umfassen soll. Zusätzlich begegnet man in der Literatur immer öfter den Forderungen nach der Einführung von neuen Rechtsinstituten, wie etwa das Aufteilungstestament, die mystische Verfügung, die Ergänzungen der Erb-Berufungs-Titel um weitere Erben, darunter über die Schenkung von Todes wegen.<sup>1</sup>

Ohne die Notwendigkeit einer Reform des polnischen sowie europäischen Zivilrechts im Bereich Erben abzustreiten, werde ich meine Überlegungen auf den Versuch fokussieren, die Begründetheit der Bildung eines innerhalb der EU einheitlichen Rechtsmechanismus bezüglich der Vermögensverfügungen von Todes wegen zu beweisen. Diesem Mechanismus gab ich den Arbeitstitel „das europäische Privattestament“. Dieses Problem wurde bisher weder in der Literatur noch in der Rechtssprechung umfassend behandelt. Als einen möglichen Grund hierfür kann man die Zweifel und Diskrepanzen bezüglich der Auslegung der geltenden Testamentvorschriften bezeichnen.

Unbestritten ist die Tatsache, dass die Berechtigung zur Vermögensrechtsverfügung *post mortem* ein Sonderrecht des Menschen darstellt, das mit dem absoluten Eigentumsrecht verbunden ist und die Anregung der Lebensaktivität des Erblassers durch die Vermögensvermehrung zum Ziel hat. Die natürliche Person hat nämlich eine ihr in der Regel

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<sup>1</sup> T. Mróz, *O potrzebie i kierunkach zmian przepisów prawa spadkowego [Über die Notwendigkeit und Änderungen im Erbrecht]*, Przegląd Sądowy 2008, Nr 1, s. 81f.; M. Załucki, *Krąg spadkobierców ustawowych de lege lata i de lege ferenda [Gesetzliche Erbberechtigte de lege lata und de lege ferenda]*, Przegląd Sądowy 2008, Nr 1, s. 95f.; H. Witczak, A. Kawałko, *Prawo spadkowe [Erbrecht]*, Warszawa 2008, s. 71.



aus dem Grundgesetz zustehende Freiheit, Vermögensrechte zu erwerben, sie zu erfüllen und über sie in dem *inter vivos* und *mortis causa*<sup>2</sup> - Verkehr zu verfügen.

Das wirtschaftliche Wachstum ist eine von vielen Ursachen, weshalb die Menschen einen immer größeren Wert auf die Möglichkeit wirksamer Vermögensverfügung von Todes wegen legen. Dies macht die Diskussion über die Notwendigkeit der Verbesserung der Rechtsmechanismen bezüglich der generationenübergreifenden Übertragung vom Eigentum unvermeidbar.<sup>3</sup> Der Rang dieses Problems wird insofern größer, da die Migration der europäischen Bevölkerung weiterhin deutlich präsent ist und das nicht nur in wirtschaftlicher Hinsicht.

Das Testament ist eine formalisierte Rechtshandlung. Die Verfügung von Todes wegen ist gültig, wenn sie die für diese Form vorgesehenen Rechtsanforderungen erfüllt. Die jeweiligen europäischen Gesetzgeber stimmen grundsätzlich damit überein, dass für eine natürliche Person, die über die Testierfähigkeit verfügt, das handgeschriebene Testament die einfachste, billigste und allgemein zugänglichste Möglichkeit darstellt. Für dessen Anfertigung genügt grundsätzlich die Einhaltung der folgenden drei Voraussetzungen: Handschrift, Datum und Unterschrift des Erblassers. Leider zeigt die Praxis, dass je komplizierter die Rechtshandlung in Bezug auf die Formalitäten erscheint, desto weniger Zweifel an deren Wirksamkeit entstehen. Die Erfüllung der formellen Voraussetzungen ist jedoch aus vielerlei Gründen relevant. Diese Vorgehensweise soll den Erblasser zu einer vollkommen bewussten und endgültigen Entscheidung zwingen, was nach seinem Tod mit seinem Vermögen passieren sollte. Außerdem soll sie helfen, den Testierwillen des Autors zu prüfen und eine Möglichkeit zu verschaffen, das echte Testament und deren Entwürfe sowie ggf. ein gefälschtes Testament voneinander unterscheiden zu können.<sup>4</sup>

Ich bin der Meinung, bei dem europäischen Privattestament sollte es sich um eine für jeden potenziellen Erblasser allgemein zugängliche Verfügung handeln, die zudem preisgünstig sein und über keine übermäßig strengen formellen Anforderungen verfügen sollte. Als Grundkern dieses europäischen Testwesens sollte das handgeschriebene Testament fungieren. In den jeweiligen europäischen Ländern gibt es allerdings unterschiedliche Rechtsvorschriften in Bezug auf die Erstellung eines gültigen und wirksamen handgeschriebenen Testaments. Ich möchte mich zuerst mit der Beschreibung von grundsätzlichen rechtlichen Anforderungen der ausgewählten Rechtssysteme befassen, um anschließend einen Vorschlag für ein allgemeines Schema des europäischen Testaments unterbreiten zu können. Der Rechtsvergleich wird zwei Rechtsordnungen umfassen, d.h. das scheinbar strenge deutsche System und das vermeintlich liberale italienische System, die – wie es scheint – immer noch als eine Art „Trendsetter“ für das europäische Zivilrecht fungieren.

An dieser Stelle möchte ich ausdrücklich darauf hinweisen, das ich mich aus Rücksicht auf den begrenzten Rahmen der vorliegenden Bearbeitung auf die Titelfragestellung konzentrieren werde und zwar ausschließlich in Hinblick auf das materielle Zivilrecht, ohne dabei auf die Verfahrensnormen und das internationale Privatrecht einzugehen.

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<sup>2</sup> Begründung des Verfassungsgerichts zum Urteil vom 31. Januar 2001, P 4/99, GBL. Nr. 11, Pos. 91.

<sup>3</sup> J. Turlukowski, *Testamenterstellung in der Praxis*, Warszawa 2009, s. 11.

<sup>4</sup> J. Gwiazdomorski, *Sporządzenie testamentu w praktyce [Formen des Testaments]*, Nowe Prawo 1966, Nr 6, s. 713.

## 2. State-law - Rechtssysteme

### 2.1 Das deutsche Recht

Gem. § 2247 Abs.1 und 2 BGB gehören zu den formellen Voraussetzungen für das handgeschriebene Testament in Deutschland die eigene Handschrift und die Unterschrift des Erblassers, außerdem das Datum (bestehend aus dem Tag, dem Monat und dem Jahr) sowie der Testierort. Ein handgeschriebenes und unterzeichnetes Testament ist jedoch sogar bei fehlender Zeit- und Ortsangabe der Testamenterstellung gültig, falls die Feststellung dieser Angaben auf Grund von Umständen möglich ist, die nicht zum Dokumenteninhalte gehören (Abs. 5 der Vorschrift).<sup>5</sup> Das handgeschriebene Testament kann in jeder vom Erblasser beherrschten Sprache niedergeschrieben werden, einschließlich Latein und Altgriechisch.<sup>6</sup>

Eine Grund- und zugleich absolute Voraussetzung für die Gültigkeit des Testaments ist gem. § 2247 BGB die handschriftliche Dokumentenerstellung. Eine Person, die die Handschrift nicht beherrscht, kann diese Verfügungsform nicht anwenden. Der Begriff der Handschrift wird in Deutschland breit aufgefasst und zwar in der Hinsicht, dass behinderte Personen nicht nur die Hände, sondern auch den Mund, die Füße und sogar eine Prothese hierfür benutzen können.<sup>7</sup>

Bemerkenswert ist auch der Umstand, dass in der Doktrin die Möglichkeit eingeräumt wird, Kopien des handgeschriebenen Testaments so zu behandeln, als ob sie ein durch den Erblasser handgeschriebenes Testament wären. Beherrscht der Erblasser das Lesen nicht, so reicht ein reiner Durchschlag oder eine Kopie des Verfügungsentwurfes, der durch einen Dritten erstellt wurde, nicht aus.<sup>8</sup> Die Hand des Erblassers darf nicht vollständig einem Dritten unterstellt sein. Andererseits ist es zulässig, dem Erblasser körperliche Hilfestellung zu leisten, soweit die Schreibtätigkeit ausschließlich von dem Willen des Erblassers abhängt. Relativ breit aufgefasst wird auch die intellektuelle Hilfe - z.B. bei der Formulierung von Sätzen oder Begriffen. Als ein wirksames Testament gilt außerdem ein durch eine Drittperson vorbereiteter Entwurf, der durch den Erblasser niedergeschrieben wurde.

Die Willenserklärung des Erblassers muss immer in dem Masse lesbar sein, dass sie auf den individuellen Schriftcharakter des Autors hindeutet und somit eine spätere Identifikation ermöglicht.<sup>9</sup>

Die zweite Voraussetzung für die Erstellung eines deutschen Testaments ist die Unterschrift des Erblassers. Gem. § 2247 Abs. 3 BGB sollte sich dieses graphische Zeichen aus dem Namen und Vornamen des Erblassers zusammensetzen. Sollte jedoch der Erblasser die Unterschrift auf eine andere Weise betätigen, aus der die Feststellung des Autors und die Ernsthaftigkeit der Erklärung hervorgehen, so wird damit diese Unterschriftsweise die rechtliche Wirksamkeit des Testaments nicht anfechten. Zulässig sind somit die Abkürzung von Nachnamen,

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<sup>5</sup> Vgl. H. Prütting, G. Wegen, G. Weinreich, *BGB Kommentar*, Luchterhand 2007, s. 2777-2778; M. Schmidt, In: *Erman Bürgerliches Gesetzbuch*, red. H.P. Westermann, Münster 2000, s. 4601.

<sup>6</sup> J. von Staudingers, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 5, Erbrecht*, Berlin 2003, s. 443.

<sup>7</sup> Op. cit., s. 445-448.

<sup>8</sup> G. Schlichting, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 9, *Erbrecht. § 1922-2385, § 27-35 BeurkG*, München 2004, s. 1427-1428.

<sup>9</sup> Op. cit., s. 1428. Bemerkenswerterweise findet die Verordnung über die Ersetzung eines zerstörten oder verlorenen gerichtlichen oder notariellen Dokumentes vom 18. Juni 1942 (RGBl. I s. 395) keine Anwendung in Bezug auf handschriftliche Testamente, auch nicht auf solche, die sich im amtlichen Depot befinden.

Pseudonymen, Kosenamen oder sogar nur die Nennung des Vornamens oder der Position des Erblassers in der Familie.<sup>10</sup>

Der Erblasser sollte das Testament mit dem tatsächlichen Enddatum der Testamentserstellung versehen. Das fehlende Datum bedeutet nicht zwangsläufig die Unwirksamkeit des Testaments, sofern sich das Datum auf eine andere Weise feststellen lässt.<sup>11</sup> Sollte es Zweifel an der Testierfähigkeit des Erblassers geben, kann sich die Angabe von Erstellungsdatum des Testaments als signifikant erweisen. Bezeichnenderweise muss das Datum im deutschen Testament nicht handgeschrieben werden. Es kann sich dabei um einen maschinellen Eintrag, um einen Datumstempel oder um ein entsprechendes Formular handeln. Es ist allerdings notwendig, dass das Datum auf diesem Dokument auf eine Art und Weise platziert wird, dass ein Zusammenhang mit der niedergeschriebenen letzten Willenserklärung ersichtlich ist. Ist das Datum unlesbar, so ist das Testament erst dann unwirksam, wenn es keine Beweismittel gibt, die Feststellungen in diesem Umfang ermöglichen würden.<sup>12</sup>

Mehrere Testamente, die mit demselben Datum versehen werden, gelten als Testamente, die zum selben Zeitpunkt erstellt wurden. Widersprüche im Inhalt, die unerklärbar sind, werden vollkommen ausgelassen. Wird eines der Testamente mit Datum versehen und das andere nicht, so wird die Rechtskraft nur dem ersten zuerkannt, es sei denn, der Erstellungszeitpunkt des zweiten Testaments kann aufgrund anderer Umstände festgestellt werden. In der Praxis kann es vorkommen, dass das Testament mit Doppeldatum versehen wird. Dies wird keine negativen Konsequenzen mit sich bringen, insofern aufgrund des Inhaltes der Verfügung das Enddatum der Testamentserstellung festgestellt werden kann.<sup>13</sup>

## 2.2. Das italienische Recht

Gem. Art. 602 des italienischen Zivilrechts muss in Italien das handgeschriebene Testament vollständig eigenhändig erstellt und mit Datum und Unterschrift des Erblassers versehen werden. Die genannten formellen Voraussetzungen entsprechen großteils den Anforderungen der Rechtsvorschriften vieler anderer EU-Länder, allerdings gibt es im römischen Rechtssystem gewisse ausführliche Regelungen, die im Folgenden erklärt werden sollen.

Als Erstens ist es darauf hinzuweisen, dass die Gültigkeit des italienischen handgeschriebenen Testaments von der Authentizität aller formellen Elemente abhängt, d.h. von der Unterschrift, dem Datum und dem Inhalt des Dokuments. Fast jeder Eingriff einer Drittperson in das Testierverfahren soll die Ungültigkeit des Testaments zu Folge haben.<sup>14</sup> Diese Auffassung wurde vom italienischen Obersten Gericht bestätigt, unter der Annahme, dass sowohl das Stützen, als auch das Führen der Hand des Erblassers bei der Aufzeichnung des letzten Willens die Unwirksamkeit des Testaments zu Folge hat, selbst dann, wenn die Zusammenarbeit mit einer Drittperson nicht dazu beigetragen hat, dass der Erblasser zu reinem „Schreibwerkzeug“ wurde.<sup>15</sup> In der italienischen Rechtsprechung lassen sich allerdings gewisse begründete

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<sup>10</sup> G. Schlichting, *Münchener Kommentar...*, s. 1432-1433.

<sup>11</sup> Vgl. H. Prütting, G. Wegen, G. Weinreich, *BGB Kommentar...*, s. 2777 i n.; M. Schmidt, In: *Erman Bürgerliches...*, red. H.P. Westermann, s. 4601.

<sup>12</sup> G. Schlichting, *Münchener Kommentar...*, s. 1437-1438.

<sup>13</sup> Op. cit., s. 1438.

<sup>14</sup> G.P. Cirillo, V. Cufaro, F. Roselli, *Codice civile a cura di Pietro Rescigno. Le fonti del diritto italiano. I testi fondamentali commentati con la dottrina e annotati con la giurisprudenza*, Band 1, *Libri I-IV*, Milano 2006, s. 781 ff.; L. Ferroni, *Codice civile. Annotato con la giurisprudenza*, Band 1, *Libri I-IV, Art. 1-2059*, Roma 2006, s. 739 ff.

<sup>15</sup> 04/12458. Das untersuchte Problem sieht in der amerikanischen Rechtsprechung vollkommen anders aus, denn dort wird die Meinung vertreten, dass eine Person, die bei der Unterschrift die Hand der schreibenden Person steuert oder stützt, das Dokument nicht unterzeichnet, denn diese Handlung wird von der unterschreibenden Person

Beispiele der Liberalisierung des strengen Verbots der „Teilnahme“ von Drittpersonen im Testierverfahren feststellen. Als Beispiel hierfür kann man die Aussage des italienischen Kassationsgerichtes heranziehen, laut der ein Testament, das vollständig durch einen Erblasser niedergeschrieben wurde, dessen Hand ausschließlich beim Eintragen des Datums geführt wurde, nicht als ungültig gilt.<sup>16</sup>

Gem. Art. 602 des italienischen Zivilgesetzes sollte das Datum im handgeschriebenen Testament den Tag, den Monat und das Jahr der Erstellung eines Testaments bezeichnen. Ein Gegenbeweis bezüglich der Echtheit des Datums ist nur dann zulässig, wenn es notwendig ist, die Testierfähigkeit des Erblassers, die Reihenfolge von mehreren Testamenten usw. zu prüfen. Das Datum kann im jeden Bereich des Dokuments eingetragen werden, sogar vor den Verfügungen von Todes wegen.<sup>17</sup> Fehlt das Datum, so hat es die Ungültigkeit des Testaments zu Folge, ebenso wie im Fall der Angabe eines unvollständigen Datums der Erstellung des Testaments.

Interessanterweise darf das Datum - anders als es in dem scheinbar strengen deutschen Recht der Fall ist - hier nicht auf Grundlage von Umständen ermittelt werden, die nicht zum Dokumenteninhalt gehören.<sup>18</sup>

Eine weitere obligatorische formelle Voraussetzung für das handgeschriebene Testament ist die Unterschrift des Erblassers (Art. 602 i.v. mit Art. 606 des italienischen Zivilgesetzbuches). Die Unterschrift des italienischen Erblassers soll aus dem Vornamen und dem Nachnamen bestehen, obwohl es allerdings zulässig ist, ein anderes graphisches Zeichen anzuwenden, das die unbestrittene Identifikation des Autors des Dokumentes ermöglicht. Zulässig ist z.B. das Unterschreiben des handgeschriebenen Testaments mit Paraphe des Erblassers und im Falle eines Brieftestaments – die Angabe des Verwandtschaftsgrades zwischen dem Erblasser und dem Erben.<sup>19</sup> Diese Lösung verdient Zustimmung, denn sie liberalisiert tatsächlich die strengen formellen Voraussetzungen im Bereich der Unterschrift des Testaments bei gleichzeitiger Gewährleistung, dass der letzte Wille des Verstorbenen geachtet wird. Zulässig ist also die Unterzeichnung des Testaments mit einem graphischen Zeichen (unter anderem mit Paraphe), das die Identifizierung des Autors der Willenserklärung ermöglicht.

Die Unterschrift des Erblassers sollte sich am Ende der Verfügung von Todes wegen befinden, was allerdings gewisse Zweifel hervorrufen kann. Die Platzierung der Unterschrift an einer anderer Stelle, z.B. am Rande des Schreibens oder auf dem Umschlag, der ein nicht unterzeichnetes Testament enthält, hat in der Regel die Unwirksamkeit der Verfügung zu Folge. Diese Sanktion bestreitet nicht die Eintragung des Titels „Testament“ im Dokumentkopf durch den Erblasser bzw. das Zusammennähen oder das Zusammenheften der Blätter mit der endgültigen Willenserklärung mit dem Umschlag. Es wird angenommen, dass diese Vorgehensweise den logischen Zusammenhang zwischen dem durch den Erblasser nicht unterschriebenen Dokument und dem unterschriebenen Briefumschlag nicht bestätigt.<sup>20</sup>

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vorgenommen. Mehr dazu M. Maciejewska-Szałas, *Wybrane aspekty instytucji podpisu w prawie Stanów Zjednoczonych Ameryki [Ausgewählte Fragen zu der Unterschrift im Recht der Vereinigten Staaten]*, Gdańskie Studia Prawnicze 2009, Band 21, s. 41-42.

<sup>16</sup> 93/3163.

<sup>17</sup> So das italienische Oberste Gericht im Fall 01/11703.

<sup>18</sup> G. Cian, A. Trabucchi, *Commentario breve al codice civile. Complemento giurisprudenziale*, Padova 2005, s. 569–570. Mehr dazu G.P. Cirillo, V. Cufaro, F. Roselli, *Codice civile a cura di Pietro Rescigno...*, s. 781 und ff. Vergleiche das italienische Urteil im Fall 88/6682.

<sup>19</sup> Vergleiche das Urteil des italienischen Obersten Gerichtes, erlassen im Fall 51/851 und 92/11504.

<sup>20</sup> G. Cian, A. Trabucchi, *Commentario...*, s. 570. Ähnlich das italienische Oberste Gericht im Fall 00/15379.

### 3. Das common law- System

In den angelsächsischen Rechtsordnungen muss das handgeschriebene Testament vollständig durch den Erblasser handgeschrieben und von ihm unterzeichnet werden. Zum Zweck der Beglaubigung der Unterschrift des Erblassers und seines Testierwillens muss das Dokument in der Regel zusätzlich durch einen dem Testierverfahren beiwohnenden Zeugen unterschrieben werden.<sup>21</sup>

In den *common law* - Vorschriften werden die handgeschriebenen Testamente meistens in dringenden bzw. in Ausnahmefällen erstellt. In Großbritannien ist die hier erwähnte Form des Testaments nur in Schottland vorhanden.<sup>22</sup> Die Grundvoraussetzungen, die praktisch jedes angelsächsische Testament erfüllen muss, sind:

- 1) die Veröffentlichung des Testaments - diese beruht auf einem klaren Hinweis, der Autor des Dokuments sei der Erblasser und bei seinem Verhalten handle es sich um eine Testierrechtshandlung,
- 2) die Abberufung aller vorherigen Testamente und Nachträge,
- 3) die „Vorführung“ der Fähigkeit des Erblassers über das eigene Eigentum zu verfügen,
- 4) die Unterzeichnung des Testaments mit einer Unterschrift,
- 5) die eigenhändige Datierung des Testaments<sup>23</sup>.

In den Vereinigten Staaten von Nordamerika werden in jedem Staat separate Formvoraussetzungen bezüglich der Erstellung von handgeschriebenen Testamenten vorgesehen. Grundsätzlich wird jedoch Folgendes verlangt: eine Erklärung darüber, dass das aufgezeichnete Dokument ein rechtlich wirksames Testament sein sollte sowie die Beglaubigung der Unterschrift des Erblassers durch mindestens zwei, manchmal drei Zeugen. Der Inhalt der Erbverfügung ist grundsätzlich beliebig. Es wird lediglich verlangt, dass der Inhalt nachvollziehen lässt, ob der Erblasser in vollem Bewusstsein gehandelt hat und dessen Willen über die Erstellung des Testaments bestätigt. Der Verfügungsinhalt sollte den Vor- und Nachnamen, sowie das Datum und den Geburtsort der nächsten Verwandten des Erblassers (insbesondere Ehefrau/Ehemann und Abkömmlinge) beinhalten. Außerdem soll der Autor eine leserliche Liste von Personen erstellen, die die jeweiligen Vermögensgegenstände erben.<sup>24</sup>

In Kalifornien muss das Testament vollständig handgeschrieben, datiert und vom Erblasser unterzeichnet werden. Das Datum soll obligatorisch den Tag, den Monat und das Erstellungsjahr der Verfügung beinhalten. Es wird angenommen, dass es handschriftlich vom Erblasser niedergeschrieben werden muss. Die fehlende Erfüllung dieser Anforderung hat grundsätzlich die Unwirksamkeit der Verfügung zur Folge, es werden in der Judikatur allerdings Ausnahmen in dieser Hinsicht zugelassen, beispielsweise wenn der Erblasser zu

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<sup>21</sup> T.H. Malone, *Incorporation, by reference, of an extrinsic document into a holographic will*, *Holographic wills-extrinsic documents*, Nashville, 16 Va. L. Rev. 1929-1930, s. 571-572; I. Woerner, *American Law of Administration*, 1923, § 43.

<sup>22</sup> Siehe *Rights of Succession. A brief guide to the Succession (Scotland) Act 1964*, Scottish Executive, Revised 2005, Nr 11.

<sup>23</sup> G. Boreman Bird, *Sleight of Handwriting. The Holographic Will in California*, *The Hastings Law Journal* 1980-1981, Band 32, s. 605, 608-612.

<sup>24</sup> Vgl. K. Osajda, *Ustanowienie spadkobiercy w testamentie w systemach prawnych common law i civil law [Das Bestimmen des Erbberechtigten in Testament der Privatsysteme common law und civil law]*, Warszawa 2009, s. 205-207, 220-224.

einem mechanisch gedruckten Datum, das nur aus der Jahreszahl besteht, handschriftlich den Tag und Monat der Beendigung der Erstellung des Testaments hinzufügt.

Im Unterschied zu den meisten *stat law* – Rechtsordnungen hat man in den *common law* - Vorschriften unter Vorbehalt der Testamentsungültigkeit die Pflicht der handschriftlichen Titeleintragung im Dokument eingeführt - z.B. „*Last Will and Testament*“. Der Inhalt der Verfügung soll durch den Erblasser vollständig handschriftlich verfasst werden. Wird diese Voraussetzung nicht erfüllt, so hat es meistens die Ungültigkeit der Verfügung zu Folge. Bekannt sind jedoch Entscheidungen, in denen diese Voraussetzungen liberalisiert werden. Als Beispiel lässt sich hier der Fall *Estate of Atkinson* heranziehen,<sup>25</sup> bei dem der Erblasser auf einem Dokument, das zwei Jahre vorher maschinell erstellt und für ungültig erklärt worden war, zwei horizontale Linien durchstrich und gleichzeitig vermerkte, er schließe die durchgestrichenen Bestimmungen aus dem Testament aus, anschließend verfasste er handschriftlich, dass das Erbe an seine Kinder vermachtet wird, daraufhin wurde die Willenserklärung mit handschriftlicher Unterschrift und mit Datum versehen. Das für diesen Fall zuständige Gericht hat dieses Dokument für ein gültiges Testament erklärt.<sup>26</sup>

Die Frage nach dem mechanischen Eingriff in den Inhalt des handgeschriebenen Testaments wird durch die amerikanischen Gesetzgeber unterschiedlich beurteilt. Grundsätzlich kann man hier zwischen zwei Ansichten unterscheiden. Gemäß der „*intent theory*“ haben die mechanisch erstellten Verfügungen keinen Einfluss auf die Gültigkeit der handschriftlich verfassten Bestimmungen des Erblassers. Dagegen sollte gemäß der „*surplusage theory*“ die Gültigkeit des handgeschriebenen Testaments von der Prüfung abhängen, ob der Erblasser die Absicht hatte, die mechanisch erstellte Verfügung als einen Teil des Testaments zu betrachten (das in diesem Fall ungültig sein wird) oder dies von ihm nicht erwünscht war (das Testament bleibt in Hinblick auf den handgeschriebenen Teil gültig)<sup>27</sup>.

#### 4. De lege ferenda- Bemerkungen

In Bezug auf die dargestellten Rechtsvorschriften der ausgewählten Länder halte ich die Diskussion über die Schaffung eines europäischen Privattestaments für durchaus begründet. Dieser Mechanismus sollte einfach, preiswert und für jeden Bürger der EU-Mitgliedsländer allgemein zugänglich sein. Als Grundkern eines solchen Dokuments würde sich sehr gut ein handgeschriebenes Testament in einer liberalisierten einheitlichen Form eignen.

Das Hauptanliegen der Rechtsvorschriften bezüglich des Testaments ist die Beseitigung von jeglichen Zweifeln am tatsächlichen Willen des Erblassers. Schon aus diesem Grund gilt die Vereinfachung der Anforderungen bezüglich der Form des Testaments als überzeugend. Man muss schließlich auch an die ständige technische Entwicklung, den mittlerweile fast allgemeinen Zugang zu Computern sowie an die immer besseren Methoden und Techniken der Kriminalistik denken, die eine präzise Verifizierung des Autors des Dokuments bereits anhand der Unterschrift ermöglichen. Der Ansicht des Obersten Gerichtes, Urteil vom 5. April 1946 zufolge ist es somit anzunehmen, dass die Handschrift des Erblassers nicht nur mit Zeichen gleichzusetzen ist, die mit dem Füller oder Kugelschreiber verfasst werden, sondern auch mit Willenserklärungen, die durch den Erblasser mittels Schreibmaschine wie auch Computer, Tablet-PC oder Smartphone usw., erstellt wurden und deren Inhalt anschließend ausgedruckt und eigenhändig vom Erblasser unterschrieben wird.

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<sup>25</sup> 110 Cal. App. 499, 294 P. 425 (1980).

<sup>26</sup> Ausführlicher s. G. Boreman Bird, *Sleight of Handwriting...*, s. 610-620.

<sup>27</sup> Op. cit., s. 621-631. siehe auch B. Kucia, *Forma testamentu w prawie amerykańskim [Das Testament im amerikanischen Recht]*, *Kwartalnik Prawa Prywatnego* 2012, z. 2, s. 490-495.

Als Voraussetzung für diese Handlung gilt natürlich immer die Feststellung, dass der Erblasser das Testament selbständig und beim vollen Bewusstsein verfasst hat, was indirekt die Unterschrift bestätigen soll.<sup>28</sup>

Mein Konzept stützt auch die Tatsache, dass der Computerzugang nahezu allgemein vorhanden ist. Prozentuell gesehen, benutzen heutzutage immer mehr Menschen in Europa zum Schreiben einen Computer, anstatt handschriftliche Texte zu verfassen. Bezeichnenderweise wird dieser Prozentsatz ständig höher. Dementsprechend erscheinen die Vorschriften bezüglich der vollständigen Niederschrift des Testaments mit der Hand anachronistisch.<sup>29</sup>

Man kann sich natürlich auch überlegen, ob es nicht sinnvoll wäre, neue formelle Richtlinien für das europäische Testaments einzuführen, z.B. in elektronischer Form. Diese Lösung wäre jedoch wesentlich teurer und auch gefährlicher. Aus diesem Grund befürworte ich die Schaffung eines europäischen Privattestaments, das auf Grundlage von liberalisierten formellen Anforderungen der heutigen handgeschriebenen Testamente beruhen würde. Dieses Konzept wäre mit Sicherheit eine wesentlich einfachere, preiswertere und zugleich – aus der Sicht der Gesetzgebung - schnellere Lösung als die Einführung eines völlig neuen Rechtssystems, das doch ein spezielles Prüfungsverfahren der letzten Willenserklärung in elektronischer Form verlangen würde. Zwar würde es im Falle einer mechanischen Erstellung des Testaments ausreichen, dass der grafologische Gutachter anstatt des gesamten Dokumentes nur die Unterschrift des Erblassers prüft, doch man muss daran denken, dass derzeit auch kurze Testamente erlaubt sind - sogar Einsatztestamente- die grundsätzlich einen ausreichenden Gegenstand für ein grafologisches Gutachten darstellen.<sup>30</sup>

In der Literatur wird oft auf die Tatsache hingewiesen, dass die Voraussetzung der Handschrift im Testament viele wichtige Funktionen erfüllt. Zu den wichtigsten zählen dabei: die erschwerte Fälschung des Testaments, die Verleihung der Ernsthaftigkeit der Rechtshandlung *mortis causa*, die Gewährleistung des Bewusstseins bei der Aufzeichnung des letzten Willens durch den Erblasser, die Unterscheidung zwischen dem letzten Willen und anderen Willenserklärungen des Erblassers oder die Vermeidung der Kosten, die mit der Erstellung des Testaments einhergehen.<sup>31</sup>

Ich bin der Auffassung, dass alle erwähnten, die Notwendigkeit der handschriftlichen Aufzeichnung der Verfügung beim Privattestament begründenden Funktionen auch im Falle der Zulassung der mechanischen Erstellung des Testaments erfüllt wären. Dies ist beispielsweise im französischen Recht der Fall, in dem trotz der Anordnung bezüglich der handschriftlichen Erstellung der Testamente durch den Erblasser persönlich (Art. 970 des französischen Zivilgesetzes) allgemein erlaubt ist, die Verfügung von Todes wegen per Schreibmaschine oder Computer zu erstellen. Die einzige Bedingung hierfür ist die selbstständige Erstellung des Dokuments durch den Erblasser, die mit seiner Unterschrift bestätigt wird.<sup>32</sup>

Bemerkenswert ist außerdem die Stellungnahme des polnischen Obersten Gerichts im Urteil vom 5. April 1946 A.Z.: C II 94/46, in der es dargelegt wurde, „die durch den Erblasser

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<sup>28</sup> C II 94/46, nicht veröffentlicht.

<sup>29</sup> K. Osajda, *Wpływ rozwoju techniki na uregulowanie formy testamentu. Rozważania de lege ferenda [Einfluss der Entwicklung der Technik auf die geregelte Testamentsformen. Überlegungen zu de lege ferenda]*, Rejent 2010, Nr 5, s. 61.

<sup>30</sup> M. Rzewuski, *Podpis spadkodawcy na testamentie własnoręcznym [Unterschrift des Erblassers auf dem handgeschriebenen Testament]*, Warszawa 2014, s. 121-123.

<sup>31</sup> K. Osajda, In: W. Borysiak [und andere.], *Kodeks cywilny. Komentarz, t. 3, Spadki [Zivilgesetz. Kommentar, Band 3, Das Erben] (Art. 922–1088 KC)*, red. K. Osajda, Warszawa 2013, s. 331.

<sup>32</sup> Mehr dazu G. Wiedegkehr, X. Henry, A. Tisserand, G. Venandet, F. Jacob, *Code Civil*, Dalloz 2004, s. 827-830. Vgl. K. Osajda, *Testamenty wspólne [Gemeinsame Testamente]*, Warszawa 2005, s. 100.

handschriftlich erstellte Verfügung des letzten Willens auf einer Schreibmaschine entsprechen den Anforderungen des § 578 ABGB". In der Urteilsbegründung wurde wie folgt angenommen „(...) da die Schreibmaschine in der heutigen Zeit zum allgemein gebräuchlichen Schreibmittel geworden ist, z.B. bei Erstellung von notariellen Urkunden, darf man angesichts der gegebenen wirtschaftlichen Verhältnisse die Anwendung dieses Schreibmittels bei der handschriftlichen Erstellung der Verfügungen des letzten Willens nicht ausschließen. Schwieriger geworden ist nur die Beweisführung, dass der Erblasser diese Verfügung eigenhändig auf der Schreibmaschine verfasste (...)”<sup>33</sup>.

Man kann zwar nicht ausschließen, dass es schwieriger wird, das ganze Dokument zu fälschen als nur die Unterschrift des Erblassers, dennoch muss berücksichtigt werden, dass die Kriminaltechnik heutzutage in der Lage ist, die Authentizität der einzelnen Worte und Fragmente äußerst präzise zu bewerten. Andererseits, wenn der Erblasser die endgültige Willenserklärung mit der eigenen Unterschrift signiert, bleibt die Echtheit und die Bedeutung der durchgeführten Rechtshandlung *mortis causa* erhalten, unabhängig davon, ob der Inhalt der Willenserklärung handschriftlich oder per Computer erstellt wurde. Die eigenhändige Unterschrift wird gleichzeitig zur Garantie für die durchdachte Willenserklärung des Erblassers und soll gleichzeitig ermöglichen, das Testament von anderen Willenserklärungen des Autors der Verfügung zu unterscheiden. In Zeiten, in denen der Zugang zum Computer nahezu für jeden möglich ist, kann man kaum annehmen, dass das Ausdrucken des Inhaltes der Willenserklärung mit besonderen Schwierigkeiten oder Kosten verbunden wäre. So bin auch der Meinung, die Pflicht der Erfüllung sämtlicher Funktionen, die für den handschriftlichen Inhalt des Testaments vorgesehen sind, könnte mit Erfolg und ohne Eingriff in die Rechtssicherheit in diesem Umfang von der eigenen Handunterschrift des Erblassers übernommen werden.<sup>34</sup>

Unter Berücksichtigung all dieser Gründe bin ich der Auffassung, dass die einzige formelle obligatorische Voraussetzung für das europäische Privattestament die eigene Handunterschrift des Erblassers sein sollte. Der Inhalt des Testaments dürfte dabei nicht nur handschriftlich, sondern auch mechanisch oder per Computer verfasst werden. Dasselbe sollte auch das Datum betreffen, das zusätzlich mit einem Datumstempel eingetragen oder mittels eines entsprechenden Formulars angegeben werden könnte. Wie es scheint, in Hinblick auf den unumstrittenen technischen Fortschritt und die damit einhergehende immer seltenere Anwendung der Handschrift in der Praxis, würde mein Vorschlag den gesellschaftlichen Anforderungen in Bezug auf die schnellere und einfachere Testamenterstellung entgegenkommen. Darüber hinaus würde die Zulassung der mechanischen Testamenterstellung wesentlich realitätsbezogener, da wir mit einem riesigen Fortschritt im Bereich der Elektronik und Digitalisierung konfrontiert werden. Gleichzeitig würde man in Hinblick auf die jetzige Anforderung bezüglich der Signierung des Dokumentes mit Handunterschrift das Gleichgewicht zwischen der Anordnung der Umsetzung des tatsächlichen Willens des Erblassers und dem Verbot der Widerspiegelung dieser Absichten auf Grundlage von mangelhaften oder gefälschten Akten einhalten.

Aus gleichem Grund bin ich auch gegen die Anordnung zur Beteiligung von Drittpersonen an der Erstellung des Testaments, die in den *common law* -Vorschriften enthalten ist. Bezeichnenderweise verzichtete man auf diese Anforderung bereits während der Herrschaft des Kaisers Valentinians III., der im Gesetz *Novella Valentiniani 21,2* vom 26. Dezember 446 u.Z. konstatierte, jeder habe das Recht, ein Testament handschriftlich nach eigenem Willen und

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<sup>33</sup> W. Świącicki, *Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych. 30.VI.1945 r.–30.VI.1947 r., [Rechtsprechung des Obersten Gerichtes nach der Kriegszeit 30.VI.1945–30.VI.1947]*, Łódź 1948, s. 721-723.

<sup>34</sup> M. Rzewuski, *Unterschrift des Erblassers...*, s. 123-124.



ohne Beisein von Zeugen zu erstellen, die Testamentsrechtskraft bleibt in diesem Fall im vollen Umfang erhalten.<sup>35</sup>

Ich glaube, dass die vorgeschlagenen Lösungen das Verfahren „des europäischen Testierwesens“ wesentlich erleichtern und den wachsenden Anforderungen der Gesellschaft in diesem Umfang entgegenkommen könnten. Die Einführung einer einheitlichen Rechtsstruktur des Privattestaments für alle Mitgliedsländer der Europäischen Union begründet auch die ununterbrochene Migration der Bevölkerung, was übrigens nicht nur die Einwohner Europas betrifft. Natürlich sollte man die hier dargelegten Forderungen ausschließlich unter der Berücksichtigung der Bemerkungen *de lege ferenda* betrachten, die möglicherweise als Anregung zu einer vertieften Diskussion im Rahmen des analysierten Bereichs dienen werden.

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<sup>35</sup> M. Kuryłowicz, *Testamentum holographum*, Rejent 2003, Nr 10, s. 121-122.

# Damla Gürpınar\*, The Civil Liability for Damages from the Genetically Modified Organisms (GMO) in Turkish, German and Austrian Law

Abstract: Genetically modified organisms can be used with different aims. But it is not possible to say before using a GMO, if it would be harmful in the future for health of the other organisms and ecosystem or not. And if a GMO could be harmful, we cannot say at the beginning for sure how much harm it would cause. That's the reason why states are very careful. They cannot easily give up taking advantages of this technology, but they also cannot allow the activities in this field without any control. Consequently, the acts about biosafety or gen technology in different countries came into force. These acts depend on international agreements. One of them is the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. This Protocol was accepted on the base of Rio Declaration on Environment and Development, which accepted at the UN-Conference on Environment and Development in 1992. And there are also some directives and regulations of European Union about this problem. The system of these acts in different countries brings a freedom but under a control mechanism. There are also some prohibitions about using GMOs in some areas. Any infringement of these prohibitions can cause some punishments but if the infringement causes some damages, there is also a civil liability. With this presentation, the provisions about the civil liability of the acts in Turkey, Switzerland, Germany and Austria will be compared.

Keywords: Civil liability of GMOs, Legal precautions against damages from GMOs, Prescription for civil liability of GMOs, Biosafety Acts, Cartagena Protocol.

## General information about the problem

### Definition of GMOs and the Using Purviews of Them

Genetically modified organisms are living organisms, which are produced through transfer of gen with modern biotechnological methods. We can use them with medical aims (red gen technology); to diagnose genetically caused illnesses, to search the causes of some illnesses, to produce some medicine and vaccine. We can also use them with agricultural aims (green gen technology); to increase the durability of foods, to increase the resistant of the growing plants against illnesses and pests, to avoid using more chemical in the agriculture, to produce the foods in a cheaper and faster way, to get rid of some allergens on some foods. And we can use them with environmental aims (grey gen technology); since some specially produced microbes can be used to clean the surfaces, genetically changed bacteria can be used on purification the waste water.

### Different Opinions about Using GMOs in Different Purviews

Although most of the people like the idea of using GMOs in the purview of the red gen technology, there are two different opinions about using GMOs in the purview of the green gen technology. Some people who are supporting to use GMOs in green gen technology think that by using GMOs the problem of hunger in the whole world can be overcome; in addition producing more foods in shorter time than ever by GMOs, is good for everyone. Even some allergies against some food can be prevented by using of GMOs. Besides GMOs can help by the producing more nutritious, durable and attractive foods.

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However many people are very skeptic about using GMOs with agricultural aims, because all GMOs are living beings, which can improve themselves by the time, can pullulate, can infect the other living beings, can stay many years long unnoticed and this progress cannot be returned. Therefore, if GMOs are produced without any control, they could harm ecosystem; and there is always a hole in every control procedure. Every single activity with GMOs, which could run away from the control, may cause very serious troubles on the health of human beings, animals and plants and also risks the biological diversity.

## Approach of the States to the Problem

### General Approach of the States

It is not possible to say before using a GMO, if it would be harmful in the future for health of the other organisms and ecosystem or not. And if a GMO could be harmful, we cannot say at the beginning for sure how much harm it would cause. That is the danger. The questions are, can we live with that danger and do we have to live with that danger, especially when we consider that too, how much useful the same GMO would be.

That's the reason why states are very careful. They cannot easily give up taking advantages of the developments in green gen technology, but they also cannot allow the activities in this field without any control. Consequently, the acts about biosafety or gen technology in different countries came into force.

These acts depend on international agreements. One of them is the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. This Protocol was accepted on the base of Rio Declaration on Environment and Development, which accepted at the UN-Conference on Environment and Development in 1992. And there are also some directives and regulations of European Union about this problem.

Article 1 of the Cartagena Protocol contents the objective of the Protocol, which exactly says:

“In accordance with the precautionary approach contained in the Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring of an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on trans boundary movements.”

Regarding this article, the system of the acts in different countries brings a freedom but under a control mechanism. There are also some prohibitions about using GMOs in some areas. Any infringement of these prohibitions can cause some punishments but if the infringement causes some damages, there is also a civil liability. With this presentation, the provisions about the civil liability of the acts in Turkey, Switzerland, Germany and Austria will be compared.

## The Provisions about the Civil Liability for Damages from GMOs in the Acts of Turkey, Switzerland, Germany and Austria

### Civil Liability for Damages from GMOs in Turkey

This liability has been regulated in Turkey with Biosafety Act, which came into force in 2010. This Act has only one article about civil liability, Art. 14. According to this article, the civil liability for damages from GMOs is a liability even without any fault. This liability depends on the idea of the danger, because activities with GMOs risk the health of human beings, plants, animals and biological diversity. Damages can arise because of not to be obeyed the law but also can arise although law terms were obeyed, which means obeying the law terms doesn't exclude the liability.

If the damage was caused by a natural disaster such as landslide, flood, earthquake or by the gross fault of the person who is injured or by the gross fault of a third person, the person who handles with GMOs can get rid of the liability. There is a joint liability among the people who GMOs produces, changes, handles, sells etc. (incl. packaging, putting label, storing...). There is no limitation about the kind of damages. All damages can be compensated and the liability of the person who caused the damage is not limited with a certain amount.

Unfortunately, there is not any insurance obligation for this liability. The people who do activities with GMO's have to pay only for some precautions, before any damage happened. So, if the liable person has no power to compensate the damage, the person who is injured, would have difficulties. The people, who do any activity with GMOs have to inform each other about potential damages and liability. But they are not under any other obligation to inform the person who is injured or can get injured. Prescription for the civil liability from GMOs is two years after learning of the damage and the responsible person and in any case twenty years after the event, which caused the damage.

### Civil Liability for Damages from GMOs in Switzerland

Federal Act about Gen Technic came into force on 21.03.2003 in Switzerland. The fifth part of this Act has the title of «Liability», which includes five articles (Art. 30-34). The principles of the liability are written down on the Art. 30. According to this article, who does activities with GMOs in a closed system, or sets them free or launches them in the market without any permission, is liable for the damages, which arise through these activities because of modifying genetic material (Art. 30/I).

If GMOs which are launched in the market with permission, cause damage, the person who had to get permission, is again liable, only if the GMOs are defaulted. There is still a liability when the organisms are defaulted, even if that cannot be known according to the science and technic at the time of launching them in the market (Art. 30/IV). If GMOs cannot provide under all circumstances the whole security, which can be normally expected from them, they are considered as defaulted. These circumstances are especially the presentation of them to the public, expected using form of them, and the time when they launched in the market (Art. 30/V). Besides, just because a better product with GMO launched in the market in the future, that is not a reason for saying the old GMO was defaulted (Art. 30/VI).

Damage should have arisen because of the new characteristics of the organisms, or because of pullulating or changing of the organisms, or because of the inheritance of the changed genetic materials of the organisms (Art. 30/VII). If the damage arose because of force major, or gross fault of person who is injured, or gross fault of a third person, then there is no liability of person

who does activities with GMOs (Art. 30/VIII). Who demands some compensation for his damage, should have proven the causality. If the causality cannot be proved exactly or the proof cannot be expected from the person who is under the burden of proof, the court can be satisfied with the high probability. The circumstances can be searched by the court as well (Art. 32).

For protection of people who get injured, the Federal Parliament has some authentications. The parliament can make some provisions, which force potential responsible people to secure their potential liability through insurance or in any other way. It also can determine the extent and continuous of this security or can delegate the authorities in certain cases to determine this. It can oblige the person, who the liability secures, to inform the executive offices about existing, breaking up and ending of the security and can order that the security can be broken up or ended first 60 days after information reached to the authority (Art. 34). The prescription for liability is three years after the learning of the damage and the responsible person and in the latest thirty years after the event which caused the damage, happened or found an end or thirty years after GMO was launched in the market (Art. 32).

### Civil Liability for Damages from GMOs in Germany

Gen Technic Act of Germany is from 16.12.1993 and has been changed 31.08.2015. The Act has provisions about liability in the fifth part, which has seven paragraphs. According to § 32 of this Act, the liability exists without any fault, and if there are many people who are responsible for damages, they are jointly liable. Even if the third person has also fault for the damage, the person who caused damage through his activities with GMOs cannot get free of his liability. They can be jointly liable. The fault of the person, who is injured, can annihilate or decrease the responsibility of person who does activities with GMOs. There is a presumption, which means if a damage caused by a GMO, it has been caused through these characteristics of the organism, which have been derived from gen technical works. If only it is very likely that the damage caused by other characteristic of this organism, then that presumption is not effective any more (§ 34).

If there are some reasons to accept that damages arose because of GMOs, the person who does activities with the GMOs, has to inform the person who is injured, about his working progress (§ 35). The act has brought a limit for the total compensation from 85 million Euros. If many people get damages from the same event, every person can get only a proportional compensation (§ 33). Federal Government can make some regulations with the approval of Federal Parliament, which force the people who do activities with GMOs, to take some measures to compensate the potential damages. These measures are formed especially in insurance for the liability or in a warranty from a credit institute (§ 36). Prescription for this liability is same as the prescription for tort in German Civil Code (§ 32/8), which is for the damages on person thirty years from the event on; for damages on materials ten years from the moment on when the damage arose, and thirty years from the event on (§ 199 BGB).

### Civil Liability for Damages from GMOs in Austria

Gen Technic Act of Austria came into force in 1994. There are thirteen paragraphs about civil liability in this Act. According to this Act, if the works with GMOs or their releasing cause death of a person or losing his health or damage of a thing, the person who does this activity is liable from these damages. Even if this person got permission, he could be still liable, when his products are launched in the market not according to this permission (§ 79a). The person, who does activities with GMO can get free of the liability, if the damage caused by a war activity or something similar, civil war, rebellion or a natural disaster or by the gross fault of the third person; if the damage caused through obeying a regulation or an order of an authority (§ 79c).

If the person who got damage has also fault, § 1304 of Austrian Civil Code should be applied. According to this rule, if the person, who is injured, has also fault, then he is also responsible from damage proportionally, if the proportion of his fault cannot be determined, then the parties are equally responsible (§ 79h).

Regarding every conditions if it can be said that a GMO caused damage, it can be accepted the damage arose because of the characteristics of organism which derived from gen technical works. This presumption lose its effect, if the responsible person can show it very likely, that damage didn't caused by this characteristic of the organism (§ 79 d). If there are many people who do activities with GMO, which cause damage, they are also jointly liable (§ 79 e). If there are some reasons to accept the damage caused by a GMO, the person who is injured, can demand for information from the person who did the activities with that GMO. Information is about produced, used, multiplied, stocked, destroyed, lost, set free GMOs and their effects. The person who does activities with the GMO doesn't have to inform, if he can prove this information is not necessary to determine the reason and the content of the damage (§ 79 f).

Austrian Civil Code can be applied in these cases too, if there are not any other provisions (§ 79 h). That means, the prescription is three and thirty years. Because according to § 1489 ABGB prescription about every compensation suit is three years after learning of the damage and the responsible person or thirty years if the person who got damage cannot learn the damage or the responsible person. The people who do activities with GMOs should take some precautions especially having insurance for their liability. In Austria there is no limit for the compensation the damage but insurance has to be at least 712.200 Euro for every event of damage, if the activity is on security level 3, and 4.069.700 Euro for every event of damage, if the activity is on the security level 4 (§ 79j).

## Conclusion

As an answer for question of the conference topic, in front of my view a common approach to private law in this area would be very useful and necessary. Because genetically modified organisms can be effective and dangerous not only in the country, where they have been produced or used, they also can affect other countries.

# Fatma İtir Bingöl, The Lex Mercatoria and its Role in Turkish Arbitration Law

Abstract: The term ‘Lex mercatoria’ came from Latin and it means the law of merchants. This law was applied between the merchants in the Middle Ages. After the 18. century due to nationalization it was forgotten for sometime but after the 1960s the merchants need such a law again. In 1980s a French court gave an enforcement decision to an arbitral award which applied the lex mercatoria. This was the victory of the lex mercatoria. After this decision the states and the individuals left most of their prejudices against lex mercatoria. Turkey seems to left its prejudices as well because in its arbitration act it is possible to choose lex mercatoria as the applicable law. In 2015 an International Arbitration and Mediation Center is established in İstanbul and this center’s rules also allow the parties to choose lex mercatoria as the applicable law.

Keywords: Lex Mercatoria, İstanbul Arbitration and Mediation Rules

## I) Introduction

There is a logical trend of Thought that any legal techniques of doing business should be the same all over the world. If this is so, we may put away the political, ideological and economic differences of the parties of the international commercial relations which may occur as an obstacle to the relation and help to develop transnational commercial legal rules which we can call as the ‘new *lex mercatoria*<sup>1</sup>. These legal rules can be called as ‘transnational commercial law’<sup>2</sup>, ‘transnational law’<sup>3</sup>, ‘the transnational law of international trade’, ‘the law of international trade’, ‘international commercial law’<sup>4</sup>, ‘international business law’, etc.. These terms are used interchangeably by different authors who place varying emphasis on different aspects of essentially the same topic: *lex mercatoria*<sup>5</sup>.

*Lex mercatoria* is a system of law which was developed by the merchants to be applied to the disputes arising between the merchants in Europe<sup>6</sup>, Africa and in the Asia Minor<sup>7</sup> in the Middle Ages.

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<sup>1</sup> STOECKER, Christoph W. O., The Lex Mercatoria: To What Extent Does It Exist?, 7 J. Int. Arb., 101 (1990).

<sup>2</sup> GOODE, Roy, Usage and Its Reception in Transnational Commercial Law, 46 Int’l & Comp. L. Q., 1 (1997)  
BAMODU, Gbenga, Exploring The Interrelationships of Transnational Commercial Law, The New Lex Mercatoria and International Commercial Arbitration, 10 African J. Int. Arb. & Comp. Law, 32 (1998),  
MANIRUZZAMAN, Abul, F. M., The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?, 14 Am. Un. Int. L.Rev. V. 14, 660 (1999).

<sup>3</sup> JESSUP, Philip C., The Concept of Transnational Law, 3 Colum. J. Transnat’l L. 1 (1964), HORN, Norbert, Uniformity and Diversity in the Law of International Commercial Contracts, in HORN, Norbert/ SCHMITTHOFF, Clive, The Transnational Law of International Commercial Transactions: Studies in Transnational Economic Law, 14 (1982).

<sup>4</sup> GOLDSTAJN, Alexandar, Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention, ed SARCEVIC, Peter/ VOLKEN, Paul, International Sale of Goods: Dubrovnik Lectures, (Ocena), 70 (1986) <http://www.cisg.law.pace.edu/cisg/biblio/goldstajn.html> (last visited. June, 1, 2016).

<sup>5</sup> FREEMAN, Paul, Lex Mercatoria: Its Emergence and Acceptances a Legal Basis for the Resolution of International Disputes, 6 Arb. & Disp. Res. L. J.290 (1997).

<sup>6</sup> BERMAN, Harold J./KAUFMAN, Colin, The Law of International Commercial Transactions (Lex Mercatoria), 19 Harv. Int’l L. J. 224 (1978).

<sup>7</sup> TRAKMAN, Leon, E., From the Medieval Law Merchant to e-Merchant Law, 53 Un. Toronto L. J., 265 (2003), DONAHUE, Charles, Jr., Medieval and Early Modern Lex Mercatoria: An attempt at the probatio diabolica’, 5 Chi. J.Int’l L., 22 (2004).

The merchants elaborated the rules of *lex mercatoria* according to their customs<sup>8</sup> and practices<sup>9</sup> without an effect of the sovereign authority<sup>10</sup>. A number of usages, each of which exist among merchants and persons engaged in mercantile transactions, not only in one particular country, but throughout the civilized world, and each which has acquired notoriety, not only amongst those persons, but also in the mercantile world at large, that courts of this country will take judicial notice of it (Lethulier's Case (1692))<sup>11</sup>. In order to encourage the foreign merchants to come to their countries sovereigns established special courts for merchants to settle their disputes throughout the European continent<sup>12</sup>. The judges of these special merchant courts were merchants as well<sup>13</sup>.

## A) Stages

The *lex mercatoria* has had three stages until today. The first stage was the birth of the *lex mercatoria* among the merchants in the Middle Ages<sup>14</sup>. In the second stage (18th-19th centuries) this law was absorbed into national laws<sup>15</sup>. Due to the increase in the capacity and variation of the international commercial relations after the II. World War, business community have begun to be interested in the law, legal systems and any legal rules which could be applied to their disputes and fostered the development of the new *lex mercatoria*. In this third stage the international character of the *lex mercatoria* has been emphasized<sup>16</sup>.

In history there had been a need to a special law merchant: A law which the merchants were efficient in creating the rules of it. As documentary credits, demand guaranties<sup>17</sup>, bill of exchange<sup>18</sup> which the merchants created. Today the need for a special law merchant is still continuing. Therefore some institutions such as UNCITRAL and UNIDROIT work to formulate this law. Of course in the 21<sup>st</sup> century the way of formulating the rules of law merchant is more professional. The jurists and the practitioners from many of the countries

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<sup>8</sup> THAYER, Philip, W., Comparative Law and the Law Merchant, Brook. L. Rev. 141 (1936) TRAKMAN, Leon E., 'The Evolution of the Law Merchant: Our Commercial Heritage', 12 J. Mar. L. & Com., 4 (1980), MEDWIG, Michael T., The New Law Merchant: Legal Rhetoric and Commercial Reality, 24 Law & Policy in International Business, 590 (1993), BARON, Gesa, 'Do The UNIDROIT Principles of International Commercial Contracts form a New Lex mercatoria?', Pace Essay Submission, 1998, <http://www.cisg.law.pace.edu/cisg/biblio/baron.html>, (last visited June,1, 2016).

<sup>9</sup> see BAMODU supranote 2 at. 33, 42.

<sup>10</sup> JIN, Ning, 'The Status of Lex Mercatoria in International Commercial Arbitration', 5 Am. Rev. Int'l Arb., 164 (1996).

<sup>11</sup> WINDBICHLER, C., Lex Mercatoria, <http://windbichler.rewi.hu-berlin.de/Aufsatz%20lex%20mercatoria%20IESBS.pdf> (last visited June, 1, 2016).

<sup>12</sup> CREMADES, Bernardo, M./ PLEHN, Steven, L., 'The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions', 2 B.U. Int'l L. J, 318 (1984).

<sup>13</sup> See supranote 5 at 225; see TRAKMAN, supranote 8 at. 15; see CREMADES/PLEHN, supranote 12 at 319; see MEDWIG, supranote 8 at 590-591; see BARON supranote 8 at 2.

<sup>14</sup> SCHMITTHOFF, Clive M., 'The Unification of the Law of International Trade', J.Bus.L., 105 (1968); see also CREMADES/PLEHN, supranote 12 at. 318; see also STOECKER, supranote 1 at 102-103; see also WILKINSON, Vanessa L. D., The New Lex Mercatoria Reality or Academic Fantasy?, 12 J.Int'l Arb. 105 (1995), see also FREEMAN, supranote 5 at. 289; see also BAMODU, supranote 2 at 33; see also BARON supranote 8 at 1.

<sup>15</sup> See SCHMITTHOFF supranote 14 at 107; see also BERMAN/KAUFMAN, supranote 6 at 223, 274; see also CREMADES/ PLEHN, supranote 12 at. 320; see also STOECKER supranote 1 at 103; see also BAMODU, supranote 2 at 33; see also BARON, supranote 8 at 2; JUENGER, Friedrich K., 'The Lex Mercatoria and Private International Law, 5 Unif. L.Rev., 173 (2000).

<sup>16</sup> See SCHMITTHOFF, supranote 14 at 108; see also CREMADES/PLEHN, supranote 12 at 320; see also BAMODU, supranote 2 at 33.

<sup>17</sup> GOODE, Roy, Rule, Practice, and Pragmatism in Transnational Commercial Law, 54 Int'l & Comp. L. Q., 548 (2005).

<sup>18</sup> BAXTER, Ian, F. G., International Conflict of Laws and International Business, 34 Int'l & Comp. L. Q., 547 (1985).



come together and formulate the rules which are best suiting for international commerce<sup>19</sup>. Two of these instruments are the CISG (United Nations Convention on Contracts for the International Sale of Goods) by UNCITRAL and the Principles of International Commercial Contracts by UNIDROIT.<sup>20</sup>

## B) Content

There isn't a consensus between the writers about the exact content of the new *lex mercatoria*<sup>21</sup>. Some writers include many elements into the new *lex mercatoria*. For example customs and usages of international trade<sup>22</sup>, multilateral conventions (uniform laws on sale of goods), the general principles of law<sup>23</sup>, standard form contracts<sup>24</sup>, public international law<sup>25</sup> on treaties, the rules of international organizations such as UN, UNCTAD, OECD, UNIDROIT and Commission on European Contract Law<sup>26</sup> and reporting of arbitral awards<sup>27</sup>. Goldstajn classified the standard contracts and the general conditions produced by various associations as the universal practice of international trade<sup>28</sup>. Goldstajn also states that multilateral conventions such as sale of goods explicitly emphasize usages<sup>29</sup>.

On the other hand some of the writers include restricted elements to the content of the *lex mercatoria*. For example Schmitthoff, includes only two elements; international legislation and international commercial customs<sup>30</sup>. The CISG is an example of the international legislation and the INCOTERMS and the Uniform Customs and Practice for Documentary Credits are the examples of the international commercial customs<sup>31</sup>. Berman and Kaufman share this view as well asserting that the uniform laws of UNCITRAL are builded on international commercial customs<sup>32</sup>.

Some writers explained the reasons why some of the elements which Lando accepts as a source of *lex mercatoria* can't be a source of it in reality. For example it is hard to accept standard form contracts as a source of *lex mercatoria*. Because standard form contracts can only be considered to constitute the *lex mercatoria* if they have been commonly accepted by the trading community<sup>33</sup>. There is no obligation that parties to a transaction bind themselves to a set

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<sup>19</sup> See GOODE, supranote 17 at 554.

<sup>20</sup> See JUENGER, supranote 15 at. 178; practitioners frequently tend to avoid the term '*lex mercatoria*' or, since their publication in May 1994, prefer to make reference to the UNIDROIT Principles of International Commercial Contracts, BERGER, Klaus Peter/ DUBBERSTEIN, Holger/ LEHMANN, Sascha/ PETZOLD, Viktoria, 'The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration' in Practice of Transnational Law, The Hague 106, (2001).

<sup>21</sup> See WILKINSON supranote 14 at 107; see also MANIRUZZAMAN supranote 2 at 673; OĞUZ, Arzu, Lex Mercatoria, Ankara, 191 (2004).

<sup>22</sup> LANDO, Ole, The *lex mercatoria* in International Commercial Arbitration, 34 Int'l. Comp. L. Q. 750(1985) GOLDSTAJN, p. 72.

<sup>23</sup> See LANDO, supranote 22 at 750; see also GOLDSTAJN supranote 4 at 72.

<sup>24</sup> Ibid. at 751.

<sup>25</sup> Ibid. at 749.

<sup>26</sup> Ibid. at 750.

<sup>27</sup> Ibid. at 751.

<sup>28</sup> See GOLDSTAJN, supranote 4 at 87.

<sup>29</sup> Ibid. at 72.

<sup>30</sup> SCHMITTHOFF, Clive, M., Nature and Evolution of the Transnational Law of Commercial Transactions, in Clive Schmitthoff's Select Essay's on International Trade Law ed., CHENG, Chia-Jui, London, 234 (1988).

<sup>31</sup> Ibid. at 236.

<sup>32</sup> See BERMAN/ KAUFMAN, supranote 6 at 275

<sup>33</sup> See STOECKER, supranote 1 at 120; WILKINSON, supranote 14 at 111; according to AKINCI, although in the disputes regarding construction, FIDIC (Fédération Internationale des Ingénieurs-Conseils- Condition of Contract for Works of Civil Engineering Constructions) rules are applied of a rate %30, it isn't possible to accept FIDIC rules as *lex mercatoria*, Milletlerarası Hukukta İnşaat Sözleşmeleri, İzmir, 31 (1996), on the contrary

standard contract. In fact, such a universal contract does not exist<sup>34</sup>. It is very doubtful if the arbitral awards can be a source of *lex mercatoria* as well. Only if a consensus could be reached in the business and the arbitration community that awards based on the *lex mercatoria* would have a binding force, could those awards then be a source of the *lex mercatoria*<sup>35</sup>. Enlarging the content of the *lex mercatoria* as large as Lando does, may cause unwanted results if the arbitrators or the judges who are applying *lex mercatoria* are not experienced enough in their branches.

## II) The Criticisms against *Lex Mercatoria*

The main criticism against the *lex mercatoria* is that; the *lex mercatoria* can't be referred to as a legal system without being a part of a national law<sup>36</sup>. A writer gives an answer to this critic: It can not be disputed that an independent legal order governing the behavior of the Merchant community exists<sup>37</sup>, at least in those situations where the parties of an agreement are of the same opinion as to their rights and duties under the contract. They will perform their obligation in accordance with the written or unwritten rules of the international trading community and no government or legislator would be able to interfere where there is a consensus between the parties. However, as soon as a dispute arises, some sort of legal order must be applied and a panel of judges consulted to resolve that dispute<sup>38</sup>. Unlike in the medieval merchant community, today's business community is hardly able to apply pressure within the group to ensure that rules and judgments are complied with. Therefore the existence, consequently the definition of the new *lex mercatoria* will largely depend on its acceptance and application in national courts and whether arbitration awards based on the *lex mercatoria* will be enforced<sup>39</sup>.

Recent arbitration awards indicate that arbitrators are aware of general commercial principles and practices and utilize them in rendering their decisions. Like its medieval predecessor, the new *lex mercatoria* finds its substance in these principles and practices. Arbitration awards may therefore be regarded as empirical evidence of the development of a new *lex mercatoria*<sup>40</sup>.

The writers who are against *lex mercatoria* defend the fact that; international trade doesn't need a special law which is non-national. According to these writers, if the parties of the dispute are from different nations or if the dispute has another foreign element, the national law which is found by the conflict of law rules should be applied. But the conflict of laws techniques may lead to completely unpredictable decisions<sup>41</sup>.

But classical choice-of-law mechanism-which is premised on notions of sovereignty and legislative jurisdiction-could not possibly work well as applied to international contracts. Neither the *lex loci contractus* nor the *lex loci solutionis* rule offered satisfactory solutions, because both put international contracts in jeopardy by invoking substandard rules of decision<sup>42</sup>.

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Douglas thinks that FIDIC rules generates an important part in the *lex constructionis*, DOUGLAS, Michael, *The Lex Mercatoria and the Culture of Transnational Industry*, 4 U. Miami Int'l & Comp. L. Rev., 399 (2006).

<sup>34</sup> See WILKINSON, *supra*note 14 at 111; RAMBERG, Jan; *The Law and Practice of International Commercial Contracts in the 2000s*, Stockholm Institute for Scandinavian Law, 434 (2009).

<sup>35</sup> See STOECKER, *supra*note 1 at 121.

<sup>36</sup> See WILKINSON, *supra*note 14 at 115.

<sup>37</sup> See STOECKER, *supra*note 1 at 105; FREEMAN, *supra*note 5 at 299.

<sup>38</sup> See STOECKER, *supra*note 1 at 105.

<sup>39</sup> *Ibid.* at . 105.

<sup>40</sup> See CREMADES/PLEHN, *supra*nete 12 at. 335.

<sup>41</sup> SWEET, Alec Stone, 'The New Lex Mercatoria and Transnational Governance', 13 JEPP 632 (2006).

<sup>42</sup> JUENGER, Friedrich K.; 'The Lex Mercatoria And The Conflict of Laws' in *Lex Mercatoria And Arbitration A Discussion of the New Law Merchant*, ed. CARBONNEAU, Thomas, E., New York, 220 (1990).

And also usually the national laws are inadequate to reply to the new commercial relations<sup>43</sup>. In a dispute if a national law-which couldn't catch the novelty of the commercial life- is applied; the benefits of the parties of the relationship could be threatened and the solution of the dispute may not be fair<sup>44</sup>.

Such kind of a risk exists when the arbitrators choose 'the law with the most significant relationship' as the applicable law as well. In this situation the result of the arbitration award may not be foreseen<sup>45</sup>. For example it is declared in article 13 (3) of the Arbitration Rules of the Chamber of Commerce that; 'in the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate'. A Similar duty is given to the arbitrators by the International Arbitration Act of Turkey as well. According to article 12 of this Act; if the parties haven't determined the applicable law, the award shall be given according to the national law which the arbitrators designate that has the most significant relationship with the dispute.

To avoid unpalatable results, the courts created a *lex mercatoria* of sorts by permitting private parties to extricate themselves from the grasp of undesirable national laws. Judicial recognition of the principle of party autonomy allows enterprises and individuals to select a forum of their choice and to stipulate whatever law they wish to govern their agreements<sup>46</sup>. By this way parties can let *lex mercatoria* to be applied to their disputes.

The criticism against *lex mercatoria* that 'it's content is indefinite therefore it's a risk to choose *lex mercatoria* as the law governing the contract'<sup>47</sup> is less defensible any more. Because in 1994 the UNIDROIT published the 'Principles of The International Commercial Contracts'<sup>48</sup>. The jurists who prepared the Principles called the Principles a kind of *lex mercatoria* and declared that the application of these Principles by the arbitrators and the courts meant that they became a part of *lex mercatoria*. By the general acceptance of the international trading community and the inclination of contracting parties and their advisers to give the Principles priority before the national law which otherwise would have become applicable the Principles may give rise to a modern *lex mercatoria* constituting a more or less complete regulation of the law of international commercial contracts<sup>49</sup>.

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<sup>43</sup> Ibid at 213; see also BERNARD, Audit, 'The Vienna Sales Convention and The Lex Mercatoria' ed. CARBONNEAU, 140 (1990); see also STOECKER, supranote 1 at 106; see also WILKINSON, supranote 14 at 106-107; see also BAMODU, supranote 2 at. 45; see also BARON, supranote 8 at 3; see also BONELL, Michael Joachim; 'The UNIDROIT Principles of International Commercial Contracts, Nature, Purposes and First Experiences in Practice', [www.unidroit.org/english/principles/prexper-htm](http://www.unidroit.org/english/principles/prexper-htm), (last visited June,1 2016).

<sup>44</sup> LOWENFELD, Andreas F., *Lex Mercatoria: An Arbitrator's View*, in *Lex Mercatoria And Arbitration A Discussion of the New Law Merchant*, ed. CARBONNEAU, Thomas, E., 51 (1990); see also JUENGER, supranote 42 at 220, 224.

<sup>45</sup> See AUDIT, supranote 43 at 140.

<sup>46</sup> See JUENGER, supranote 42 at 220.

<sup>47</sup> BONELL, Joachim, *The Unidroit Principles of International Commercial Contracts Nature, Purposes and First Experience in Practice*, [www.unidroit.org/english/principles/pr-exper-htm](http://www.unidroit.org/english/principles/pr-exper-htm), (last visited June, 1 2016), *General International Contractual Law: The Unidroit Principles of International Commercial Contracts*, <http://www.ljextra.com/practice/internat/GENAP.html>, (last visited June,1, 2016), see also BARON, supranote 8 at 8-10.

<sup>48</sup> See BONELL, supranote 47 at.3; SELDEN, Barton, S., 'Lex Mercatoria in European and US Trade Practice: Time To Take A Closer Look', In *II Golden Gate University School of Law, Annual Survey of International and Comparative Law*, 112 (1995); BONELL, 'The UNIDROIT Principles And Transnational Law' in *The Practice of Transnational Law* ed. BERGER, Klaus Peter, 41 (The Hague 2001); GAILLARD, Emmanuel, 'Transnational Law: A Legal System or A Method of Decision- Making? In The Practice of Transnational Law', ed. BERGER, 56 (The Hague 2001); on the contrary DROBNIG, Ulrich, 'The UNIDROIT Principles In The Conflict of Laws', 2 *Unif. L. Rev.* 387-388 (1998).

<sup>49</sup> See RAMBERG, supranote 34 at 437.

In order to see the situation in practice if the UNIDROIT Principles are accepted by the international trading community, CENTRAL (The Centre for Transnational Law) in Muenster University in Germany had a research project which took 3 years of time. The name of the project was ‘The Role of Merchants, their Lawyers and their Arbitral Tribunals in the Evolution and Development of Transnational Commercial Law’.

One of the hypothesis of this project was that; the repeated use of certain contract clauses and the adherence of the parties mutually to these clauses brings up a new legal system called *lex mercatoria*<sup>50</sup>. CENTRAL prepared an enquiry and the solutions of the answers showed that ‘the new *lex mercatoria* is born out of practical needs of the business community’<sup>51</sup>.

One of the questions in the enquiry was this: ‘Are you aware of any cases occurring in your practice in which the parties have referred to transnational law during the negotiation of an international contract/in the text of the contract or in the choice-of-law-clause/in international arbitration proceedings? According to the positive answers: ‘General Principles of Law’ was in the first step, ‘*lex mercatoria*’ was in the second step, ‘UNIDROIT Principles of International Commercial Contracts’ was in the third step. ‘Transnational Principles of Law’ was in the 4. step, ‘Others’ was on the 5. step and ‘Lando Principles of Law was in the 6. step’<sup>52</sup>.

On the other hand an other academician made a field study of arbitral awards searching for the rate of the arbitral awards which are given in the last fifty years and got an answer that almost 40 awards are given according to *lex mercatoria* in its broadest meaning including the natural law, general principles of law, etc... The academician who made this field study came to the conclusion that in arbitral practice, a *lex mercatoria* as something akin to an independent legal order does exist, but plays a marginal role<sup>53</sup>.

There is a thought that this worldwide movement towards a growing acceptance of the (Unidroit) Principles, ranging from the stage of contract negotiations to dispute settlement through international arbitral tribunals and even domestic courts will, in turn, give impetus to the doctrine and practice of a law merchant, a new *lex mercatoria*<sup>54</sup>.

### III) The First Arbitral Award Applying the Lex Mercatoria Which is Enforced

A Turkish company Pabalk and a French company Norsolor had an agency contract in 1971 which was including an arbitration clause. According to this contract a good called acrymythile will be sold to a Turkish company Akxa and Pabalk will get commission from this sale. Due to some disputes with Akxa, Norsolor annul the contract. Afterwards Pabalk initiated arbitration against Norsolor under the ICC arbitration rules in order to compensate its damage and to let the unpaid commissions to be paid. The parties didn’t choose the arbitration place or the applicable law. The ICC International Court of Arbitration chosed Vienna as the arbitration place and Austrian Procedure Law as the procedural law<sup>55</sup>. The parties didn’t give the arbitrators to act as amiable compositeur.

The arbitrators gave a decision in October 1979. In this decision the arbitrators considered the dispute thoroughly international therefore they said that it is hard to apply either the Turkish law or the French law, but the *lex mercatoria* will suit the dispute best. The arbitrators came to

<sup>50</sup> See BERGER/ DUBBERSTEIN/ LEHMANN/PETZOLD, supranote 20 at 94-95.

<sup>51</sup> Ibid at 109.

<sup>52</sup> See BERGER/ DUBBERSTEIN/ LEHMANN/PETZOLD, supranote 20 at 159.

<sup>53</sup> DASSER, Felix, *Lex Mercatoria-Critical Comments on a Tricky Topic*, Jusletter 6. January 2003, <http://www.homburger.ch/fileadmin/publications/LMCRIT.pdf> (last visited June,1, 2016).

<sup>54</sup> BERGER, Klaus Peter, ‘International Arbitral Practice and the Unidroit Principles of International Commercial Contracts’, 46. Am. J. Comp. L. 150 (1998).

<sup>55</sup> CREMADES, Bernardo, M., ‘Good Faith in International Arbitration’ 27 AM. U. Int’l L. Rev., 762 (2012).

a conclusion that the Norsolor have acted in the way which is not acceptable in a fair business life and they gave a decision in favor of Pabalk.

Norsolor applied to the first instance court in Vienna for the annulment of the arbitration award with the reason that the arbitrators violated article 13/3 of ICC Rules by applying *lex mercatoria* the arbitrators pretended to act as amiable compositeurs which is a violation of public policy<sup>56</sup>. The court rejected the Norsolor's claim. Then Norsolor applied to the Vienna Court of Appeal and the Appeal Court gave a decision on 29 January 1982. Vienna Court of Appeal partly set aside the award on the ground that arbitral tribunal had breached art. 13 of ICC rules. Then Pabalk applied to the Vienna Supreme Court and this court recognized the validity of the arbitral award on 18. November 1982 . The Supreme Court based its decision on the ground that the arbitrators relied on the rule; good faith which is a common rule for both of the national laws, so arbitrator's behavior don't infringe any mandatory rules of the both of these national rules within the meaning of article 595 /6 ZPO<sup>57</sup>. Article 595/6 says that '...an award rendered in Austria could be set aside, *inter alia*, if the award violated mandatory provisions of law'.

Meanwhile Pabalk applied the first instance court in Paris to get a decision for enforcement. Norsolor defended that an enforcement decision musn't be given to this award because the arbitrators acted wrong by applying the *lex mercatoria* instead of a national law. In addition they acted as *amiable compesiteur* although they are not given authority to act like this in the arbitration agreement, which is violating article 13 of the ICC Arbitration Rules.

The first instance court of Paris rejected the Norsolor's claim and allowed enforcement of the award on 5 February 1980. . Norsolor then appealed this before the Paris Court of Appeal. The Paris Court of Appeal retracted the enforcement order mentioning that the Vienna Court of Appeal's decision preclude enforcement in Paris. Both of the decisions were based on the article V/1 (e) of New York Convention. In this article '*recognition and enforcement of the award may be refused...if the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, under the law of which, that award was made*'.

In the end the French supreme Court (Court of Cassation) annul the decision of court of appeal of Paris on 19 November 1984. The Court of Cassation declared its decision in the way that; according to article VII of New York Convention, French judges have the duty, and not just the right, to apply the 'more-favourable-right provision' of Article VII(1) in enforcing a foreign arbitral award, even where enforcement would otherwise be refused under Article V(1)(e) of the Convention<sup>58</sup>. In other words, Court of Cassation gave its decision on the ground that if a French court refuse the enforcement of an award under article V/1 (e) of the New York Convention without examining weather according to article VII of the New York Convention that award could be enforced in France in accordance with the French arbitration law then the court would violate the article VII of the convention and by doing this Paris Court of Appeal had already violated this article<sup>59</sup>.

Article VII of New York Convention states that; 'the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and

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<sup>56</sup> Ibid. at 763.

<sup>57</sup> Introductory Note Court of Cassation Decision in *Pabalk Ticaret v. Norsolor*, 9 October 1984, translated by GAILLARD, Emanuel, 24 International Legal Materials, 363 (1985).

<sup>58</sup> FREYER, Dana, 'The Enforcement of Awards Affected by Judicial Orders of Annulment an the Place of Arbitration', in Chapter 26 of Enforcement of Arbitration Agreements and International Arbitral Awards the New York Convention in Practice, Published by Cameron May, [https://www.skadden.com/sites/default/files/publications/Publications1421\\_0.pdf](https://www.skadden.com/sites/default/files/publications/Publications1421_0.pdf) (last visited June,1 2016).

<sup>59</sup> KOCH, Christopher, The Enforcement of Awards Annulled in their Place of Origin- The French and U.S. Exprience, 26 J.Int'l Arb. 271 (2009).

enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon'. Which means that if there is a more favorable rule for the party who asked for enforcement, that rule must be applied<sup>60</sup>.

#### IV) Turkish Arbitration Law

On 22<sup>nd</sup> January 2000 the Act Nr. 4501 relating the arbitration rules of public service concession agreements and on 5<sup>th</sup> June 2001 the Act Nr. 4686 International Arbitration Act came into force in Turkey. By this way the legal infrastructure of the international arbitration has been renewed in Turkey. The International Arbitration Act of Turkey is mainly based on the UNCITRAL Model law. The differences from the UNCITRAL Model Law are based on the Swiss Arbitration Code<sup>61</sup>. Turkey has ratified the The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the European Convention on International Commercial Arbitration 1961.

According to article 12/c of the International Arbitration Law, the parties of the dispute may choose 'rules of law' as the applicable law. This article proposes a very modern view which is accepted in French, Swiss, Dutch<sup>62</sup> and German law as well<sup>63</sup>. All in these countries parties can choose 'rules of law' besides the 'law' to be applied to their disputes.

A reference to 'rules of law' by the parties means that non-national rules can be applied to the dispute<sup>64</sup>. But if the parties hadn't mentioned anything about the applicable law, the arbitrators can't apply non-national rules by themselves. In a dispute where the parties doesn't make a choice of law the arbitrators have to apply the Private International Law of Turkey and find out the applicable law by conflict of law rules<sup>65</sup>. This situation is found very conservative which is precluding international disputes to be resolved according to purely international rules<sup>66</sup>.

It is indicated in article 4 of the Act Nr.4501 relating the public service concession agreements that; in an arbitral clause or an arbitration agreement 'the substantive law which would be applied to the dispute should be stated'. In this Act the legislator used another expression 'substantive law'. By using the expression 'substantive law' a reference has been made to national laws excluding the conflict of law rules of that national law<sup>67</sup>. It is clear that the legislator avoided to let *lex mercatoria* to be applied to the disputes arising from the public service concession agreements and therefore he preferred to use 'substantive law' expression instead of 'rules of law'.

If a dispute arising from an international contract is going to be resolved not by arbitration but by national courts then the judge will apply article 24/4 of the new Private International Law

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<sup>60</sup> Ibid at 269.

<sup>61</sup> AKINCI, Ziya, 'Why Center for Arbitration in İstanbul?' Journal of Yasar University Law Faculty, <http://journal.yasar.edu.tr/wp-content/uploads/2014/01/3-Ziya-AKINCI.pdf>, (last visited June, 1, 2016).

<sup>62</sup> See JIN, *supra*note 10 at 177-179.

<sup>63</sup> Deutsches Schiedsverfahrensrecht 98, § 1051/1.

<sup>64</sup> BERNARDINI, Piero, 'International Arbitration and A-National Rules of Law', 5 ICC International Court of Arbitration Bulletin 64 (2004), PRYLES, Michael, 'Application of the Lex Mercatoria in International Commercial Arbitration' 31 UNSW Law Journal, 327 (2008).

<sup>65</sup> AKINCI, Ziya, *Milletlerarası Tahkim*, 162 (Ankara, 2003).

<sup>66</sup> ERDEM, Ercüment, 'Turkey: In Support of Lex Mercatoria', *International Financial Law Review*, 1 April 2009, <http://www.iflr.com/Article/2176827/Turkey-In-support-of-lex-mercatoria.html>, (last visited June, 1, 2016).

<sup>67</sup> See AKINCI, *supra*note 55 at 159-160; NOMER, Ergin/ŞANLI, Cemal, *Devletler Hususi Hukuku*, İstanbul, 311, 502 (2008).

Act Nr. 5817 which came into force on 12<sup>th</sup> December 2007. According to this article the judge can only apply a state law in order to resolve the dispute.

On 26 October 2015 İstanbul Arbitration Center-Arbitration and Mediation Rules came into force in Turkey. In these rules only the procedural rules about this arbitration center has been regulated, but not the substantive rules which is going to be used in order to resolve the dispute.

The substantive rules which is going to be used in arbitration is found in the International Arbitration Act of Turkey, Act Nr. 4686. According to this law it is possible for the parties to choose *lex mercatoria* as the applicable law. If the parties haven't made a choice in order to apply the *lex mercatoria* the arbitratrors can't apply it directly.

According to article 25 of the Arbitration and Mediation Rules of İstanbul Arbitration Center the applicable law is determined so:

- 1.The arbitrators will give their decisions by applying the law rules which the parties choosed. If the parties haven't made such a choice then the arbitrators will apply the law rules which they deem appropriate.
- 2.The arbitrators can give their decisions according to *ex aqua e bono* if they are given explicit authority to do so.

As we understand from this article the İstanbul Arbitration Center's Arbitration and Mediation Rules allows *lex mercatoria* to be applied in a wide way.

## Conclusion

'Lex mercatoria' the law merchant is accepted as a legal rule by the state courts as well, as we see in *Pabalk v. Norsolor* case. This is a good news for the merchants who want their disputes to be resolved according to the most proper rules; according to *lex mercatoria*. Turkey's arbitration infrastructure has been renewed in the last fifteen years. Although the Act Nr. 4501 relating the arbitration rules of public service concession agreements doesn't allow the *lex mercatoria* to be applied to the dispute, the Act Nr. 4686 International Arbitration Act allow the parties to choose the *lex mercatoria* as the applicable law.

The İstanbul Arbitration and Mediation Center's rules also allow the parties to choose *lex mercatoria* as the applicable law. By this way we can say that there is not a legal obstacle to apply *lex mercatoria*; the only thing is the merchants may not have much knowledge about *lex mercatoria* and therefore hesitate to choose it as the applicable law. In order to come over this İstanbul Arbitration and Mediation Center may work hard to make *lex mercatoria* to be known widespread in Turkey.



## Said Edaich\*, Islamic Financial Contracts: New process of acculturation

Abstract: In the global era, contract discipline adopts a new rhetoric and postulation. It rejected the standards purely juridical focusing on economic effectiveness and instruments. In Islamic legal system, contract or "Al'aqd", as a binding commitment, takes a specific dimension. It is an institution providing fairness, stability and equity. In Islamic finance, contract under its participatory form or non participatory, preserves the idea of a realistic project and expression of parties will, establishing a regulatory based on objective legal rules. "Shari'ah" encourages human consciousness and liability, and awaked human awareness through exemplary conduct. From another side it inflicted deterrent sanction for the lack of fulfillment of obligations in bad faith. expression of will and consent confined in divine precepts preserving freedom of trade and property.

Keywords: contract, finance, effectiveness, divine precepts, transaction, regulatory.

The concept of the contract, as the main legal instrument, expressing parties will, and its accomplishment, from one side, and as the guaranteeing pillar of transaction stability as much as a proclamation of public power from another side, has been deeply influenced by the evolution of legal systems and societies.

The word contract comes from the Latin "*contractus*", a term that originally in Roman law meant a binding legal relationship generated by a lawful act. In the Napoleon Code, precisely in article 1101 contract is defined as following: "*The contract is an agreement by which one or more persons bind themselves to one or more persons, to give, to do or not do something*".

Forward the determination of legal elements, this code also has transposed the principle of "*solus consensus obligat*", which means that the simple consent of the parties "*nudum pactum*" is binding too.

Morton J. Horwitz in his essay titled "*The historical foundation of modern contract*", illustrates the historical evolution of the modern contract law through a miscellany of cases in Anglo-American system and through the French codification model<sup>1</sup>. Also he showed that the theory of the will has influenced the theory of contract reinforcing its immunity against external control. Beyond the doctrinal dialectic and theories, practices reveled that in majority of cases one of the parties, in the contracted transaction, usually dominates the second, that disparities in adhesion contracts increase alarmingly.

Jacques Ghestin in his essay "*useful and fair in contracts*" presented the contract as a legal institution based on the social utility and justice and not on the principle of autonomy. He emphasizes that the autonomy of will was useful for the liberal economy in the nineteenth century<sup>2</sup>. The contract cannot be perceived without being located into the concepts of social justice and interest since these factors contribute to the elaboration and the effectiveness of the massif contractual exchanges. The legal rhetoric sustained in the twentieth century, basically shown that the law finds its contents clean and specific, only in the notion of justice, as a

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<sup>1</sup> M. J. Horwitz "*The historical foundation of modern contract*", Harvard Law Review, Vol. 87, No. 5- pp. 917-956- USA, 1974.

<sup>2</sup> G. Alpa, "*L'avenir du contrat : aperçu d'une recherche bibliographique*", revue internationale de droit comparé. Vol. 37 N°1, pp. 7-26- FR. 1985.



primary irreducible notion. A notion that avoids harming other asserting a thought of equilibrium between conflicting interests<sup>3</sup>.

In the global era, contract discipline adopts a new rhetoric and postulation, legal rules analysis rejected the standards purely juridical focusing on economic functions and instruments. Jurists have almost abandoned the basic values proper to the theory of contracts as the autonomy of the will, the consent of parties, and fairness in reciprocal obligations. Globalization of the economy has led to relativize the role of law in determining what is right and fair in contrast of what is effective. New techniques hiding a total adhesion of the weak party, in contractual relationship, have been introduced to subdue the man and his reasoning. The most affected area and activities by this scourge remains the financial domain intended in all its aspects. There is no need to turn to the statistics to prove the failure and the crisis of a conventional financial system more threatening and menacing the stability of the global economic order.

Several analysis tried to fortify the weaknesses in the conventional financial system without a constant result, this is what is confirmed by the suspension of Basel III principles<sup>4</sup>. Somer financial instance openly criticize the conventional discipline and advance ideas about an alternative that would realize a certain balance between deflecting financial practices and the aspiration and expectation of a fair financial contracts. Among the alternatives in exam we find “*Shari’ah*” financial system, a functional technical rules and provisions that may limit the drifts of financial practices in the free market<sup>5</sup>. A probability, even if less realistic, is at least sustained by the effectiveness of this finance and the opinion some experts.

### Concept of contract in *Shari’ah* legal system

Islamic legal system as a set of legal rules aiming to realize equity and organize the life of mankind on earth to gain salvation in the hereafter, builds its identity around divine principles and provisions codified in the Quran<sup>6</sup>. The Islamic law or “*Shari’ah*”, governs the people worship, transactions and conduct. It defines the sense of responsibility and obligation up to a particular and proper dimension based on justice and fairness. Especially for financial transactions this system, except its theory of responsibility, imposes a certain formality ensuring contractual relationship.

Contract or *Al’aqd*, in Arabic, is used to mean “link”, “bind”, “proof”, “document”. In a general sense, contract is all commitment binding two or more parties, and can teak the aspect of an unilateral obligation as in the case of unilateral promise or vow. Contract is a binding relationship convened and performed by the contractor himself or convened by the contractor and performed by other person. In a particular way, the “*Hanafi*” school defines contract as “*the encounter of acceptance and the offer in a way to produce effects on the object of the*

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<sup>3</sup> F. Gény, “*Science et technique en droit positif : nouvelle contribution à la critique de la méthode juridique*”, vol. 1, Sirey, n:16, p 50, Paris 1914.

<sup>4</sup> Third Basel Accord: is a global, voluntary regulatory framework on bank capital adequacy, stress testing, and market liquidity risk. It was agreed upon by the members of the Basel Committee on Banking Supervision in 2010//2011, in response to the deficiencies in financial regulation revealed by the financial crisis of 2007–08. Its entry into force is suspended until 31 March 2019.

<sup>5</sup> “*Shari’ah*”: is the body of Islamic law regulating Muslims public and private aspects of life, including governance, finance, contracts, organization of power and the relation between Islamic sovereign model and the other.

<sup>6</sup> Quran: the word of God and the sacred text revealed to Muhammad the prophet of Islam. It is divided into 114 chapters, or “*Suras*”, and venerated as the foundation of faith, law, culture, politics and other organizational aspects of human life.

contract<sup>7</sup>. The achievement of parties' consent is necessary to give a legal existence to the contract, observing the fundamental and formal conditions for its elaboration.

“Maliki” school conserve the same meaning but had qualified the unilateral act from one party as a contract<sup>8</sup>. In a more complete perception the contract is a source of obligations and a legitimate cause binding parties that express their will and consent according to *Shari'ah* provisions ensuring rights and guaranteeing the fulfillment of obligation.

### *Shari'ah* provisions establishing stability and equity in contracts

Muslims, performing transactions, must observe the rules and provisions settled by *Shari'ah*, especially the concept of fairness sustained in Quran. It is a construction focusing on the guarantees required to establish an equal and just reciprocal exchange between parties. We read in the verse 282 in *suratu al-Baqarah* (Quran II verse 282) the following:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى  
فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْب كَاتِبٌ أَنْ  
يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيُمْلِلِ الَّذِي عَلَيْهِ الْحَقُّ  
وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا يَبْخَسْ مِنْهُ شَيْئًا فَإِنْ كَانَ الَّذِي عَلَيْهِ الْحَقُّ  
سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْطِيعُ أَنْ يُحْلِلَ فَوَلْيُمْلِلْ لِهُ بِالْعَدْلِ  
وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ  
فَرَجُلٌ وَامْرَأَتَانِ مِمَّنْ تَرْضَوْنَ مِنَ الشَّاهِدَاتِ أَنْ تَضِلَّ إِحْدَاهُمَا  
فَتُذَكَّرَ إِحْدَاهُمَا الْأُخْرَىٰ وَلَا يَأْبُ الشَّاهِدَاتُ إِذَا مَا دُعُوا وَلَا  
تَسْتَعْمُوا أَنْ تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰ أَجَلٍ ذَٰلِكُمْ أَقْسَطُ  
عِنْدَ اللَّهِ وَأَقْوَمُ لِلشَّهَادَةِ وَأَدْقُ الْأَلَا تَرْتَابُوا إِلَّا أَنْ تَكُونَ تِجَارَةً  
حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا  
وَأَشْهِدُوا إِذَا تَبَايَعْتُمْ وَلَا يُضَارَ كَاتِبٌ وَلَا شَهِيدٌ وَإِنْ  
تَفَعَّلُوا فَلَإِنَّهُ فُسُوقٌ بِكُمْ وَاتَّقُوا اللَّهَ وَيُعَلِّمُكُمُ اللَّهُ  
وَاللَّهُ بِكُلِّ شَيْءٍ عَلِيمٌ ﴿٢٨٢﴾

“O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. And let not the witnesses refuse when they are called upon. And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you, except when it is an immediate transaction which you conduct among yourselves. For [then] there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is [grave] disobedience in you. And fear Allah. And Allah teaches you. And Allah is Knowing of all things.”<sup>9</sup>

The world debt “*Dayn*” is intended in this verse as each transaction, and its registration in a document ensures stability and legitimates the commutative rights of the parties. As the debtor

<sup>7</sup> “Hanafi” school: is one of the four schools (*madhabs*) in Islamic jurisprudence “*fiqh*” within Sunni Islam. The “*Hanafi madhhab*” is named after the scholar “*Abu Hanifa-an-Nu‘man ibn Thābit*” (699 - 767CE /80 - 148 AH).

<sup>8</sup> “Maliki” school is one of the four schools (*madhabs*) in Islamic jurisprudence “*fiqh*” within Sunni Islam. It was founded by “*Malik Ibnu Anas*” (c.713-c.795).

<sup>9</sup> Translation from “*Sahih International*”, <http://quran.com/2/282>. 20-04-2014.

is entrusted in his own declaration, he had to dictate himself the terms and conditions of the transaction to the person who produces the document. In this way debtor knows about the his obligations on him charged and cannot deny the rights of the second. Islamic jurisprudence has established that The evidence is charged on the plaintiff and swearing is charged on the party denying the obligation.

*Shari'ah* also enhances Muslims to perform obligations deriving from contracts, and this principle is reflected in the order of God in the beginning of *Suratu al-mai'dah* saying:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ أُحِلَّتْ لَكُمْ بَيْعَةُ الْأَنْعَامِ  
إِلَّا مَا يَمْتَنِعَنَّ عَلَيْكُمْ خَيْرٌ مِمَّا يَحِلُّ الصَّيْدُ وَأَنْتُمْ حُرُمٌ إِنَّ اللَّهَ يَحْكُمُ مَا  
يُرِيدُ

“O you who have believed, fulfill [all] contracts. Lawful for you are the animals of grazing livestock except for that which is recited to you [in this Qur'an] - hunting not being permitted while you are in the state of ihram. Indeed, Allah ordains what He intends”<sup>10</sup>.

Performing the obligations deriving from contracts is seen in *Shari'ah* not only as an ethical behavior, as conceived in the majority of literature relative to the ethic in general. But it is a binding principle in the daily conduct and behavior of Muslims. Honoring the debt and performing obligations that we agree on is due to legal imperative rule and not due to some social behavior which can be violated and breached.

### Legal dimension of *Shari'ah* finance

Islamic finance is a system of legal rules, institutions, instruments and companies established in compliance with the goals of *Shari'ah* (*maqasid al- Shari'ah*). This concept means that all wellbeing is legitimated only observing a certain balance between efficiency and equity, that why transactions are governed by the principles responsabilizing all parties in sharing the risks and profits. The wellbeing of a person depends first on his lawful activities, second on a legitimate profit and fair repartition of wealth, third on a real economic activity (production, distribution). *Shari'ah* finance legal framework accepts the risk, when it is reasonable and measured, but prohibits the uncertainty and speculation deflecting the legal provisions.

Profits and interests are allowed only if they avoid hazardous practices, usury and harmful conducts. The Money in itself is not considered a source that can generate profits, except when it is associated to a productive process or to a labour. Islamic finance prohibits absolutely the investment in certain activities such as gambling industry, armaments, alcohol, and pornography<sup>11</sup>.

### Constant principles of *Shari'ah* financial contracts

- a) transparency: binding rule enhancing social responsibility providing a containment of speculation. Transactions, in general, and financial ones, in particular, must be open without secrets for people whom decide to undertake initiative, the access to information about the market and financial actors must be possible for all excluding fallacies and deceptions.

<sup>10</sup> Ibid.

<sup>11</sup> K. Gecheva , O. Pastré “*La finance islamique à la croisée des chemins*” Revue d'économie financière, Volume 92- pp. 197-213- FR, 2008.

- b) the strong link with the real economy: a rule imposing that every transaction must have a substantial (material) manifestation so that it can be determined and reported according to the *Shari'ah* legal provisions.
- c) ownership of assets: the asset of the operations must be owned or purchased by one of the counterparties. If we do not dispose of the asset, we must refrain the transaction to avoid speculative drift producing and using fallacies and scam.
- d) risk Sharing (*Tahamul al-makhter*) resulting from the transaction: as a basic rule and a unique legal form of a successful partnership, realizing an equitable redistribution of benefits.
- e) monitoring board: as additional consultative precaution and measure ensuring the safety of investments and the observance of the *Shari'ah* rules. The inference of such technical organ is appreciated to resolve conflicts and to avoid doubts about transparency, lawfulness, procedures to follow, misunderstanding and wrongful interpretation.
- f) Prohibition of all form of usury (*Tahrim al-Riba*): “*Riba*” means interest and payments related to the factor time, or a return resulting from a financial transaction unrelated to real activity including a certain level of risk. “*Riba is an unjustified increment in borrowing or lending money, paid in kind or in money above the amount of loan, as a condition imposed by the lender or voluntarily by the borrower. Riba defined in this way is called in Fiqh riba al-duyun (debt usury). Riba also is an unjustified increment gained by the seller or the buyer if they exchanged goods of the same kind in different quantities. This is called "riba al-fadl" or "riba-al-buyu" (trade usury)*”<sup>12</sup>.
- g) prohibition of speculation (*Tahrim al-Maysir*): in Islamic finance “*al-Maysir*” means gambling with the intention to make an easy profit. The goal of such prohibition is to ensure the stability of the market and incomes enhancing the labor and the real economy.
- h) prohibition of uncertainty (*Tahrim al-Gharar*): it is formally prohibited to perform contracts or transactions that provide for unreasonable uncertainty or ambiguity. It is a situation where a party benefits by the other's loss, because of uncertainty, best example of gharar is furnished by commercial insurance whereby the insured pays a premium and receives no countervalue, or the insurer pays more much on a claim than was received by way of premium. Also we have the case of gharar in the sell of a non-fungible asset, on which we do not dispose.
- i) exclusion of specific forbidden transaction (*Mu'amalāt muharamah*): including transactions and economic activities forbidden by the Quran, such as the distribution, production of alcohol, tobacco, weapons, pork, pornography, gambling<sup>13</sup>.

### Categories of financial contract in *Shari'ah*

In latest decades, conventional financial system engaged in a process of renovation dictated by the global crisis that altered the stability of financial institutions and menaced the market. Several prognosis, sustained by statistics, reflect a success of Islamic finance around the world. A new attitude of conventional financial instances and institutions give low importance to the historical identification that characterized the relationship between Islamic finance and the conventional one. In fact global financial industry focuses more on the capacity of Islamic potential providing resources (liquidity), and on the capacity of the “*halāl*” market than on the religious identification<sup>14</sup>.

<sup>12</sup> Definition By Dr. Abdel-Rahman Yousri Ahmad, Director General Institute of Islamic University Pakistan on: [http://www.islamic-banking.com/iarticles\\_8.aspx](http://www.islamic-banking.com/iarticles_8.aspx) , 24-03-2016.

<sup>13</sup> Deloitte “*Finanza Islamica Niente interessi ma grande intersse*” p 2- 10, Milano 2010.

<sup>14</sup> The term “*halāl*” may be used for foods, clothes and acts that must observe the precept of *Shari'ah* (rules), in general for eat, dress and acts is requested a legitimate source, that does not contrast Islamic law.

Specialists advocating Islamic finance proved that the impact of the latest crisis brought in evidence the effectiveness of this system, especially its equitable repartition of risks and profits and the stability transactions, investments and the markets. Generally Islamic financial instruments are contractual relationships classified in two large categories: participatory and non participatory contracts.

#### a) Participatory financing contracts

These products are similar to venture capital in providing capital to startup firms and small business. It aims to establish partnerships in which the owners of investment (capital) are treated as shareholders. The principle of sharing profits and losses, that is the spine of this category, is concretized in the two main instruments that are the contract of *al-Mudāraba* and contract of *Mushāraka*.

*Mudārabah*: is a partnership investment contract whereby the bank acts as an investor, financing the integral project, in return, the contractor is responsible on managing the project. The compensation is based on a scale fixed in advance as a percentage of the profits realized by the contractor, and losses should be borne solely by the provider of capital. The *Mudārabah* allows Islamic banks to play two roles, first they can act as investor second they can undertake initiative as entrepreneur. In practice there are 2 types of *Mudarabah* namely:

*Al Mudarabah Al Muqayyadah* (restricted): in this contract the bank may specify a particular business or a particular place for the contractor where he should invest the money.

*Al Mudarabah Al Mutlaqah* (unrestricted): a contract whereby the bank gives full freedom to the contractor to undertake whatever business he intends, however he cannot, without the consent of the bank, lend money, get another partner nor can join his own capital to the capital invested. And for more guarantees, Islamic bank in this partnership cannot set an interest rate without considering the interests of the entrepreneur; otherwise he may prefer conventional financing<sup>15</sup>.

*Al-Mushārakah*: is a contract between the Islamic bank and the customer whereby the bank and the customer provide the capital for a specific project. The terms of profit and losses sharing are predefined by mutual consent in the contract; the reimbursement obeys to an amortization schedule which includes the main capital and the profits realized by the bank in this transaction. Any losses are shared according to the proportion of the respective contribution of each co-shareholder in the supply of capital.

There are several forms of musharakah that can be grouped into two categories:

*al-musharakatu al-Moufawadah*: all stakeholders in the organization have the same initial contribution, the same privileges, and receive the same share of profits or losses.

*musharakatu al-'Inan*: the initial contribution of the partners is different, their rights and their share in the benefits are also different, they can be proportional or not according to their initial participation.

*Musharak al-mutanaqisah*: in the project on a small scale, financing is dominated by “Diminishing Musharakah” (*al-Musharak al-mutanaqisah*). It is a transaction in which the share of one of the partners is gradually acquired by the other partners. The terms of acquisition corresponds economically to the repayment of principal capital and interests to the lender.

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<sup>15</sup> Elmelki. A., *Le Principe De Partage Des Profits Ou Des Pertes Dans Le Cadre Des Banques Islamiques : Illustration Modélisée Des Contrats De Financement Participatifs Mudaraba Et Moucharaka* « Global Journal of Management and Business Research ». Volume 11, Cambridge 2011.

## b) Non participatory contracts

These instruments are characterized by a low risk relative to provided finance because of its characteristic generating a fixed return. However, the contract is concluded the amount of debt can never increase in a way comporting additional return for creditor. This financial sphere includes several financial relationships concretized in specific contracts, among them:

***Al-Murābaha***: is a sales contract with increasing margin known and agreed upon between the buyer and the seller. *Al-Murābaha* is a particular sale where the seller expressly mentions the cost he has incurred on purchase of the Asset(s) to be sold. He sells the asset to another person by adding some profit, which is known to the buyer. *Al-Murābaha*, generally, takes two forms:

- first form: is a direct transaction between a seller and a buyer.
- second form: can be a three parties transaction, between a latest buyer (or originator of purchase), a leading seller (supplier), and an intermediate seller (executor of the purchase order). The Bank acts as the first buyer, paying the same to the supplier and acts as retailer selling to the latest buyer (the client). The Bank sells the thing subject to the transaction, (for cash or for credit), to the customer for an agreed profit. *Al-Murābaha* is the more widespread product of the Islamic microfinance, and is considered more similar to the conventional loan, especially when the increase in the price is seen as an interest masked.

### Legal conditions requested for *al-Murābaha* contract

1. The contract *Murābaha* can not finance a thing prohibited by *Shari'ah* (*halāl activities and things*), as alcohol, pork, arms, pornography and hazard.
2. Prior acquisition of goods by the bank: basic principle of *Murābaha* is that the profit accruing to the Bank is justified only by the commercial act and non-financial transaction.
3. It is a sale and the credit is just a way of payment (secondary), even if the deferred payment comes into account in the price.
4. The final cost, profit margin of the bank and the payment terms must be known and accepted by both parties.
5. realizing the contract of *Murābaha*, the thing subjected to the transaction becomes the exclusive and permanent property of the final buyer.
6. In case of retard in payment, the bank may apply to the customer late penalties, but at no time can increase its profit margin in exchange timeout.

***Al'Ijāra***: or commission, is similar to the leasing finance contract. The bank buys the goods or equipment, and then leases it to the customer (with the intention to buy it or not). The customer becomes owner of the goods (if he decides to buy it), when he finished paying the amount to be staggered in time (rental), and paid into a savings account. The thing subject in '*Ijāra* contract has to be for inconsumable goods, must be in a state that allows its use for the Intended purpose and must use the subject in conformity to the conditions established in the contract without inflicting any harm to it.

***As-salam***: *As-salam* is a contract whereby the bank acts as an acquirer of goods that will be delivered at term by a partner with immediate cash payment. This transaction allows the partner to provide liquidity for his personal needs or because of the maintenance of his activity. It is noted that *Shari'ah* forbids any type of transaction in which the object does not exist at the time of the conclusion of the contract, and forbids the sale of what is not in our possession. However, this sale (*Salam*) was authorized to resolve difficulties facing individual and entrepreneur, in

base of the following hadith<sup>16</sup>: “Whoever does Salam, he does it for a known volume of a known weight and a known time”<sup>17</sup>.

## Conclusion

In *Shari'ah*, contract, in general and financial one particularly, is neither the expression of the public power nor the unlimited will of individuals. Considering Quran precepts, it's unperceivable to claim that the contract is a project unrealistic as are qualified the majority of contractual relationship in our days. *Shari'ah* for the reason to preserve the idea of contract as a realistic project and expression of parties will, established a specific regulatory based on objective legal rules. *Shari'ah* encourages human consciousness and responsibility, and awaked human awareness through exemplary education and conduct. It established also the writing and making proof inflicted deterrent punishment for the lack of fulfillment of obligations in bad faith. Considering human nature and his evolving practices, the contract couldn't be subjected only to the will and the dispositions of the party economically availing.

The State in its mission, should not afford to exclude the will of parties and simultaneously must ensure compliance with *Shari'ah* rules. Islamic governance has to provide the effectiveness of the legal system elaborated and developed not by the powers of the State, (especially not by the legislative one), but by divine provisions. In contractual relationship the State is a third party which role is different from the classical task of the Establishment as perceived in the positive legal system. Islamic State must ensure the free expression of parties will, must ensure the respect of rules enhancing equity and fair commutative exchange in transactions, and must guarantee public order. *Shari'ah* established the contract as an expression of individual will and consent but confined in divine precepts preserving the system, protecting weak parties, guarantying freedom of trade and property.

The contract, in particular way financial one, in *Shari'ah* cannot be subject to the absolute will of the parties as well as it cannot be subject to the legislative provisions in a system where the public interests is confused with the interests of individuals or with the interests of lobbies and concerns.

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<sup>16</sup> “*al-Hadith*”: contains daily practices of the Prophet and his interpretation of specific cases, hadith have been transmitted from generation to another via chains of narrators. al-hadith represents also a source of legislation. “*Al-Ahadith*”, plural of al-hadith are classified and organized up the evidence and the line of the narrators.

<sup>17</sup>*Al-Boukhari.M* “*Sahih al-bukhari*”, Volume 3, Book 34 n 265, edition Dar Ibn Kathir, Beirut 1993.

# Alessandro Hirata\*, Roman and Neo-Babylonian Private Law in a Comparative Legal History Perspective

Abstract: The Roman Private Law is, by its reception in the European continental law, the basis of our current private law system. For the study, and understanding of the Roman Private Law, is necessary to interpret the scriptures of classical Roman jurists (from 1st century BC to 3rd century AC), which make up the *Corpus Iuris Civilis*. In addition, the *Corpus Iuris Civilis* is the means by which such scriptures come to us. Furthermore, through the comparative legal history method, whether synchronous or diachronic, we want to search the identification of socio-economic phenomena, and last analysis, legal in many legal cultures, especially ancient and cuneiform law. Thus, our research is not just there is a history research with eyes to modern law. Applying a comparative legal history perspective, especially in our main search field, the cuneiform and Babylonian law, it must be asked, if these cuneiform sources are legal. Moreover, these documents bring situations typically governed by the law. Such situations are everyday economic activities of a primitive society of agricultural base.

Keywords: Comparative legal history; Neo-Babylonian Period; Contract Law

## 1. Introduction

The Roman Private Law is, by its reception in the European continental law, the basis of our current private law system. For the study, and understanding of the Roman Private Law, is necessary to interpret the scriptures of classical Roman jurists (from 1st century BC to 3rd century AC), which make up the *Corpus Iuris Civilis*. In addition, the *Corpus Iuris Civilis* is the means by which such scriptures come to us.

Furthermore, through the comparative legal history method, whether synchronous or diachronic, we want to search the identification of socio-economic phenomena, and last analysis, legal phenomena in many legal cultures, especially ancient and cuneiform law. Thus, our purpose is far beyond a simple historical research with eyes to modern law.

Applying a comparative legal history perspective, especially in our main search field, the cuneiform and Babylonian law<sup>1</sup>, it must be asked if these cuneiform sources are legal. Moreover, these documents bring situations typically governed by the law. Such situations are everyday economic activities of a primitive society of agricultural base.

## 2. The methodological question

By studying the cuneiform sources that have come down to us, we have a mass of several texts, and the vast majority (about 70%) presenting a legal content. There are contracts, codes,

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<sup>1</sup> The German term “Keilschriftrecht” (cuneiform law) was suggested by P. Koschaker, *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 89 (1935), p. 25, and also accepted by V. Korošec, *Handbuch der Orientalistik I-III – Orientalisches Recht*, Leiden-Köln, 1964, pp. 49ss. However, because of the numerous differences among the different juridical cuneiform cultures, the term “Keilschriftrechte” (cuneiform laws), in plural, is more adequate. See also, with the term in plural: G. Cardascia, *Les droits cunéiformes*, Paris, 1950, pp. 17ss.



procedures and other documents protocols that describe the economic and social daily life in Mesopotamia in the second millennium before Christ<sup>2</sup>.

The first question that arises is whether the object of such documents is "law"; that is, if we are facing legal content documents, or, even more, how to determine whether it is a kind of legal system or not. It is not the object of this little paper to define what is law or its contents, but we need to draw some methodological parameters for the analysis of this material in cuneiform writing.

In Rome, clearly we have to call the presence "science of law", "ius" which will reveal what was considered "law" for the Romans. This characteristic of Roman law and the study of Roman law, which, incidentally, is responsible for its importance to modern scholars of the matter, is crucial to the understanding of Roman sources and consequently the law in Rome<sup>3</sup>. This feature, however, is not common to Mesopotamia. You cannot find in cuneiform documents so far found no right of study activity signal (known documents reveal a vocational training activity of scribes, who were responsible for production contracts, procedural protocols etc.)<sup>4</sup>. Thus, we found in Mesopotamian society the activity of the "lawyer", the "cultivator of law", which would be an argument against the classification of documents to be legal content.

Moreover, these documents bring situations typically governed by the law. Such situations are everyday economic activities of a primitive society of agricultural base. Exchange of goods for a certain amount of precious metal or other goods, property use taking into consideration payment of precious metal and delivery of goods by the bride's father to the groom to the marriage union celebration are just a few examples of everyday situations.

The determining factor to consider these as legal documents is their link to a competent authority. These documents were provided, in most cases, witnesses and a seal of authority. Therefore, such contracts on clay could be made to a competent authority (depending on the case, the temple or the king)<sup>5</sup>, that in case of non-compliance with the provisions of any of the parties could apply the appropriate sanctions. These sanctions were often already provided in contracts, by determination of the parties and may include hot asphalt in the head of the party defaulted the contract or the leg of death<sup>6</sup>. In other words, we have binding obligations that must be respected by the parties. Thus, we would have an argument in favor of the legality of these sources.

Moreover, we have the major pieces of legislation. The so-called large legislative documents, such as the Laws of Ešnunna and the Laws of Hammurabi<sup>7</sup>, despite constant discussion can be

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<sup>2</sup> See for general informations about cuneiform laws: W. von Soden, *Einführung in die Altorientalistik*, Darmstadt, 1985, J. N. Postgate, *Early Mesopotamia – Society and Economy at the Dawn of History*, London-New York, 1992, pp. 275-291, and R. Westbrook, *A history of ancient Near Eastern law*, vol. 1 and 2, Leiden, 2003.

<sup>3</sup> M. Kaser, *Das römische Privatrecht I – Das altrömische, das vorklassische und das klassische Recht*, 2. ed., München, 1971, pp. 5ss. See also: M. Talamanca, *Il diritto fra giuristi e legge*, in *Harmonisation involves history?*, Milano, 2004, pp. 3-21, T. Mayer-Maly, *Juristische Reflexionen über ius I*, in *SZ (Savigny Zeitschrift)* 117 (2000), pp. 1-29, and *Juristische Reflexionen über ius II*, in *SZ* 119 (2002), pp. 1-28.

<sup>4</sup> See also about the formation of scribes: M. Civil, *Assyriological Studies* 16 (1965), p. 6 nt. 21, and J. Klíma, *Reallexikon der Assyriologie und Vorderasiatischen Archäologie I* (1928), pp. 251-252.

<sup>5</sup> See about the justice system in cuneiform laws: G. Lautner, *Die richterliche Entscheidung und die Streitbeendigung im altbabylonischen Prozessrechte*, Leipzig, 1922, pp. 3ss., A. Falkenstein, *Die neusumerischen Gerichtsurkunden I*, München, 1956, pp. 32ss., P. Koschaker, *Hammurabi's Gesetz VI*, Leipzig, 1923, pp. 147-148, and W. F. Leemans, *King Hammurabi as Judge*, in *Symbolae David II*, Leiden, 1968, pp. 107 ss.

<sup>6</sup> G. Ries, *Reallexikon der Assyriologie und Vorderasiatischen Archäologie V* (1976), pp. 391ss.

<sup>7</sup> See about legislative documents: M. T. Roth, *Law Collections from Mesopotamia and Asia Minor*, Atlanta, 1997.

classified as codes are unequivocally rules that prescribe behavior and sanctions, with the duration guaranteed by the constituted authority of the king<sup>8</sup>.

So we have enough information to classify this writing material cuneiform of Mesopotamia as legal content. Therefore, justified interest and the study of this material by lawyers, not causing injury, however, the historical aspects naturally intrinsic to matter.

Thus, we present the next problem for the study of these documents; this problem closely related to a Comparative Legal History Perspective: the study of private institutions of Roman law, taking as a base the Institutes of Gaius and Justinian, the dogmatic structure of Roman law studies. In the Institutes, together with the Digest, we have the main source of Roman law, and also the names of legal forms that make up the continental European private law.

For the cuneiform laws, however, there is no document that has the same character of the Institutes of Gaius, ie no manual of legal institutions, which hinders the work of the researchers.

### 3. Presentation of a case

Take the example of practical private documents on the Neo-Babylonian period underlying the establishment of business partnerships.

The Neo-Babylonian period is was marked by an outstanding development of Babylonian society. Of course, the legal phenomenon is marked so, so many examples of this legal development can be found. This period corresponds to almost a thousand years, from the beginning of the first millennium BC until the end of the Neo-Babylonian Empire. On the other hand, there is a stock of thousands of documents from the Neo-Babylonian period, which have not yet been published in their great majority. These documents, however, show that it was a sure legally and economically developed society. To understand this period, it is plausible to analyse the sources in a comparative legal historical perspective, especially with the Roman Private Law.

The characteristic expression search object in these documents is the word "ḥarrānu". This term meant before, as evidenced old Babylonian sources, "way street" and also "trip caravan." In the Neo-Babylonian period, such term shall have the meaning of "business venture". The word is written with the Sumerian cuneiform ideograms KASKAL showing crossroads<sup>9</sup>.

Sources on ḥarrānu societies are composed of contracts and legal protocols. Not surprisingly, there is no legal provision on this subject, since, in contrast to the oldbabylonian period, only one law fragment the Neo-Babylonian period<sup>10</sup> came to us. Chronologically, such ḥarrānu documents belong to the period between the reign of Assurpanipals until the beginning of Xerxes's reign. The last phase of the Babylonian history, also called later persian and Seleucid eras, did not have any ḥarrānu document<sup>11</sup>.

The corporate constitutional documents ḥarrānu were presented in detail by H. Lanz, in his monograph "Die neubabylonischen ḥarrānu-Geschäftsunternehmen", and can be divided into

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<sup>8</sup> G. Ries, Prolog und Epilog in den Gesetzen des Altertums, München, 1983.

<sup>9</sup> H. Lanz, Die neubabylonischen ḥarrānu-Geschäftsunternehmen, Berlin, 1976, p. 139 nt. 947.

<sup>10</sup> See about the New Babylonian law fragment: F. E. Peiser, Sitzungsberichte der Preußischen Akademie der Wissenschaften (1889), pp. 823ss., B. Meißner, Sitzungsberichte der Preußischen Akademie der Wissenschaften (1918), pp. 280 ss., E. Ebeling, Altorientalische Texte zum Alten Testament, Berlin, 1970, pp. 422-423, T. J. Meek, Ancient Near Eastern Texts Relating to the Old Testament, 3. ed., Princeton, 1969, pp. 197-198. G. R. Driver-J. C. Miles, The Babylonian Laws II, Oxford, 1955, pp. 324 ss.; H. Petschow, Reallexikon der Assyriologie und Vorderasiatischen Archäologie I (1928), pp. 276 ss.

<sup>11</sup> H. Lanz, Die neubabylonischen ḥarrānu-Geschäftsunternehmen cit., p. 1.

two distinct groups: companies with share capital hold by the two parties or share capital hold by only one of the parties.

As a ḥarrânu document case with equity participation of both parties, we have the certificate of the year 595. C., the tenth year of the reign of Nabû-kudurri-ušur (or Nabukodonosor) of Babylon:

Nbk 88 Babylon, 595 BC

1	2 MA.NA KÙ.BABBAR šá <sup>ld</sup> NÀ.ŠEŠ <sup>meš</sup> .GI	2 silver mines , which Nabu - aḥḥê - šullim ,
2	A-šú šá <sup>l</sup> re-ḥe-e-tú A <sup>ld</sup> EŠ.PAP	Rêḥêtu son of the son of syn- Nasir ,
3	2 MA.NA KÙ.BABBAR šá <sup>ld</sup> ŠA.DU A-šú šá	2 silver mines , which Kudurru the son of
4	<sup>l</sup> BA <sup>šá</sup> .a A <sup>l</sup> e.gi.bi it-ti	Iqîšâ son of Egibi , employed
5	a-ḥa <sup>meš</sup> a-na KASKAL <sup>II</sup> iš-ku-nu	together for a business venture.
6	mim-ma ma-la ina URU u EDIN	( In ) everything that he / they work / work in the city and the countryside, they will have the same plot .
7	ip-pu-šu a-ḥa-ta šú-nu	The rent of the house will be given to him of its business assets .
8	i-di E ina KASKAL <sup>II</sup> šú-nu i-nam-di-in	( Witnesses and date)
9	<sup>lu</sup> mu-ki-nu...	

Here, both Nabu-ahhe-Sulim as Kudurru gave each two silver mines and aims one ḥarrânu venture. The profits of that company will be shared equally between them. In line 5 is present the term "ana harrâni": the parties invested capital "ana harrâni" - that is in a business venture. This clause is characteristic for this type of document.

In line 8, we have a clause on the fruits of a property: "It will give the rent of your estate business." It is unclear, however, if "inamdin", the "give" verb, refers to the partner who does not manage the society. One cannot also know if the house belongs to a party or a third party. Lanz<sup>12</sup> suggests the interpretation that the clause refers to one partner who rented the property of a third party.

It is also not clear in this document if only one is working in this type of society or if both partners do. The profit sharing clause in line 6 uses the verb form "ippušu" which can either be the 3rd person singular present subjunctive ( "it works"), as well as the 3rd person plural ( "they work in"). If the first alternative is correct, it would have to admit that the member mentioned last - Kudurru - work alone. Therefore take would be to question why one of the partners would work alone, if we have a joint company with equal participation of two silver mines of both partners, and also that the two will receive the same share of the profits. Such a scenario would be possible if the partner that not work had given in addition to the capital something else of interest to the project (such as a customer or working tools, such as in a text Dario period<sup>13</sup>). In

<sup>12</sup> H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., pp. 86 ss.

<sup>13</sup> Dar. 280.

our document, there is no mention of something similar, which is a strong argument for the common work of both partners. It is, then, here, a society with common participation of both parties in the capital and profits.

As mentioned, it is also possible a partnership in which both parties invest capital, but only one of them works. This kind of society presents peculiarities in the equity investment. It is possible that the partner who will work invest less than his partner, thus having a society with an economically stronger partner and a worker or the non-working brings some special conditions, as in the cited document of Darius the period.

Furthermore, it should be mentioned that the profit-sharing clause is always present in the constitution document of a ḥarrānu society. In the above document, we have a simple clause, dividing profits equally between the partners, which is typical in a society with equity participation of the two partners. On the other hand, we also have other types of ḥarrānu partnerships with capital of only one of its partners<sup>14</sup>.

An example for this type of ḥarrānu partnership is the document of the year 611 a. C., first published by Lanz:

#### Babylon, 611 BC (Lanz 191)

1	5 MA.NA 16 GÍN KÙ.BABBAR <i>ul-tu</i>	5 mines 16 silver shekels of
2	ITI.DU <sub>6</sub> šá MU 13.KAM šá <sup>I</sup> DI	Tašrit of 13 year, Šullumu ,
3	A <sup>Id</sup> ŠEŠ.KAK- <i>ma-an-sum</i>	son of Nusku - mansum ,
4	<i>ina muḥḥi</i> IdNÀ.SE.PAP ù	the position of Nabu - nadin - ahi and
5	IdNÀ.ŠEŠ <sup>meš</sup> .GI	of Nabu - aḥḥê - šullim ,
6	A <sup>meš</sup> šá <sup>Id</sup> NÀ.KAR	the children of Nabu - ušêzi ,
7	A <sup>meš</sup> I <sup>I</sup> KAK.a.šá.ID.GÁL.ia	son of Bana - shan - Ilija ,
8	<i>a-na</i> KASKAL <sup>II</sup> <i>a-ḥi ina ú-tur</i>	for a business venture. An equal share of the profits
9	IdNÀ.SE.PAP	Nabu - nadin - ahi
10	<i>u</i> IdNÀ.ŠEŠ <sup>meš</sup> .GI	and Nabu - aḥḥê - šullim
11	<i>it-ti</i> <sup>I</sup> DI <i>ik-kal-lu</i>	take advantage with Šullumu .
12	<sup>Id</sup> <i>mu-ki-nu...</i>	( Witnesses and date)

In this document, Šullumu gave five mines and 15 silver schekels the brothers Nabu-nadin-ahi and Nabu-aḥḥê-šullim, with the purpose of a ḥarrānu, ie a business venture. The three partners share the profits equally. This is a typical ḥarrānu partnership with share capital of only one of the partners, while the other partners, in this case, two partners, only work. A invests the capital and do not take part in the administration; the other partners work and manage the company without having invested anything. The division of profits is made by means of the verb

<sup>14</sup> In such partnerships are also common where a fixed amount is paid to one of the partners. That is, there is no profit-sharing, but the predetermined value payment.

"akālum" which primarily means "to eat". In that document, however, it translates to "akālum" as "to profit". Therefore, it has the meaning that the partner "participates in the profits"<sup>15</sup>.

This document contains only the terms of formation of the enterprise and profit division. Moreover, there are documents that are even simpler, containing only the capital of training clause. Therefore, it is quite difficult to imagine that only such an undertaking the training clause is sufficient to regulate it, as can be found in various documents. Thus, it is plausible that there were legal rules on the subject, which would complement this simple training clause, or customary rules that treat this type of development, when the parties have not stipulated any special accessory clause. However, we do not have any traces of such rules.

More interesting is a document of the Bēl-eṭēri-Šamaš, published by M. Jursa<sup>16</sup>, from the reign of Nabonidus or Kyros<sup>17</sup>:

### Nbn/Kyr

1	[x M]A.NA 50 GÍN KÙ.BABBAR [šá <sup>ld</sup> AG-A-MU]	[X ] mine (s ) 50 silver shekels [ of Nabu - Aplu - iddin ]
2	[A]-šú šá IMU-GIN A <sup>lú</sup> ŠITIM [ina] m[uḫ-ḫ]i	son of Sumu - ukin of Itinnu family, [ the position of ]
3	<sup>ld</sup> EN-KAR- <sup>d</sup> utu A-šú šá <sup>l</sup> A-a	]
4	[u] <sup>ld</sup> AG-A-MU A-šú šá <sup>l</sup> IMU-GIN A <sup>lú</sup> ŠITIM	Bēl-eṭēri-Šamaš, son of Aplāja ,
5	[a]-na KASKAL <sup>ll</sup> mīm-ma ma-la ina URU	[ And ] Nabu - Aplu - iddin son of Sumu - ukin family Itinnu
6	[u] EDIN ina muḫ-ḫi ip-pu-šu-u	for a business venture. In all they in the city or field work ,
7	a-ḫi ina ú-tur <sup>ld</sup> EN-KAR- <sup>d</sup> UTU	Bēl-eṭēri-Šamaš
8	<<[ <sup>l</sup> ]EN-KAR- <sup>d</sup> UTU>> (Rasur) it-ti	split with Nabu - Aplu - iddin . Expenses
9	<sup>ld</sup> AG-A-MU ik-kal e-te-qa	They will not be paid by any of them.
10	ina lib-bi ul it-ti-iq	They are spinners each other .
11	1-en pu-ut 2-i na-šu-ú	Four silver shekels Nabu - Aplu - iddin took the business assets
12	4 GÍN KÙ.BABBAR <sup>ld</sup> AG-A-MU ul-tu KASKAL <sup>ll</sup>	without [ receipt? ] as expenses .
13	šá la [x] i-te-et-qa il-te-qé	Nabu - Aplu - iddin participate in the management of the company .
14	<sup>ld</sup> AG-A-MU na-áš-par-tu <sub>4</sub> šá KASKAL <sup>ll</sup> il-lak	( Witnesses and date)
15	<sup>lú</sup> mu-ki-nu...	

<sup>15</sup> Such translation is commonplace among scholars, so perfectly plausible to our document (H. Lanz, Die neubabylonischen harrānu-Geschäftsunternehmen cit., p. 4).

<sup>16</sup> Das Archiv des Bēl-eṭēri-Šamaš, in H.D. Baker/M. Jursa (coord.), Approaching the Babylonian Economy. Proceedings of the Symposium on the Economic History of Babylonia in the First Millennium Held in Vienna, Münster, 2005, pp. 197-268.

<sup>17</sup> It is not possible to determine precisely the date of this document, since this has not come full to us.

Nabû-aplu-iddin makes available at least nearly two silver mines<sup>18</sup> with purpose of a company in charge of himself, Nabû-aplu-iddin, and Bēl-eṭēri-Šamaš. The profits of this enterprise were divided between them and they guarantee each other. It is notable that Nabu-Aplu-iddin also participates in the management of the company. Thus, it is plausible that this is a model of society in which only one party invests capital, but both parties participate in the management of the company.

This is a certificate of debt, where the lender (the one that invests the capital) has simultaneously the role of the debtor, different of the other that just works. Such construction is unusual, but other documents prove that possibility.

In this paper, we also analyse the "heritage of society." As with other documents of the Neo-Babylonian period, we have the ḥarrānu business ventures probably had its own heritage<sup>19</sup>. This heritage was rated the word ḥarrānu, demonstrating the distinct identity of such assets in relation to the personal assets of the partners.

In line 11 we have a clause bail, often present in ḥarrānu forms: "išten pu-ut šina-i na-šu-ú", ie "they are guarantors of each other." This mutual guarantee clause is often used in the Neo-Babylonian period. However, it is interesting in this document the presence of several debtors. So we have a joint responsibility for sure: when several debtors guarantee to each other, we have a joint debt. Each joint debtor responds as liable only for its plot, but as guarantor he is liable for the portions of his co-debtors. In the above document, such a mechanism is even more interesting, since one of the debtors is also the lender.

In a ḥarrānu company with holdings in only one of the partners, we have the typical mutual structure: the partner who invests capital is the creditor and the other partner is the debtor who should return the value of that capital<sup>20</sup>. Here, however, as both partners are jointly liable, both assume the investment risk. The guarantee clause is not present, although, in all ḥarrānu contracts.

#### 4. Methodological aspects

The theme here clearly demonstrates the methodological difficulties of dogmatic character founded in scientific research in history of ancient law.

The nomenclature of the institutes are hard to clarify. The so-called ḥarrānu ventures, here treated as such, should be called that way? Societies? Companies?

Obviously, we know that this is not modern corporate law. Thus, there is a loss in terminological precision when we talk about a hypothetical "Neo-Babylonian corporate law." Similarly, there have had been problems in calling it "society," or any other name that refers to modern institutes (or not modern: it could not call these documents Neo-Babylonian law "societas", like the romans).

Moreover, there is no ideal solution to this problem. We could call these business "ḥarrānu ventures" or "ḥarrānu contracts" or "ḥarrānu documents." The problem, however, is clear: just Assyriologists and philologists would have access to that terminology, not reaching its main goal, which is to communicate with the receiver.

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<sup>18</sup> Recalling also here can not know the exact amount of invested silver.

<sup>19</sup> H. Lanz, Die neubabylonischen ḥarrānu-Geschäftsunternehmen cit., pp. 113 ss.

<sup>20</sup> H. Lanz, Die neubabylonischen ḥarrānu-Geschäftsunternehmen cit., pp. 18 ss.

Similarly, it would be a plausible solution writing such terms in quotation marks, which is always suggested in such discussions. So we would have to write virtually any term of comparative law in quotes, which is not possible.

Therefore, we believe that the use of modern dogmatic terminology, intelligible to the modern jurist, is the best alternative to this methodological problem. After all, no need to remember that not stated in no time, of course, that the society of writing cuneiform rights, ie the ḫarrânu society would be equivalent to the modern law society. Thus we have the use of dogmatic - quite simply - as a communication element in scientific research in history of ancient law. Even with losses as the terminological precision, there are common elements dogmatic enough for such use modern terms, adapting also the economic purpose of these legal forms. Only than can communication between researcher and reader be effective, creating a methodological approach to the interpretation of historical sources.

Thus, we understand that the concepts and Roman Private Law institutions should be used as a communication element in scientific research in history of ancient law. Even with losses as the terminological precision, there dogmatists common elements sufficient for such use modern terms, suiting also the economic purpose of these legal forms. In this way, we have a Comparative Legal History Perspective as approach to study the cuneiform sources and to help unveil the still unclear fields of those legal sources.

## Magdalena Rzewuska, Die Eurohypothek (Eurohypothec)

Abstract: The publication is devoted to the issues of the Eurohypothec, the idea of which was born 50 years ago. After a brief historical outline and analysis of the content of the Green Paper on Mortgage Credit, the author presents various proposals for the model of the Eurohypothec, opting for the non-accessory model. She then points to numerous advantages of a single Community security measure, including streamlining and making business transactions more flexible, development of securitization and syndicated lending.

Keywords: Eurohypothec, security for a debt, (non-)accessory nature, securitization, syndicated lending, land debt, mortgage

### Einleitung

Seit Jahren werden Versuche unternommen, ein einheitliches gemeinschaftliches Sicherungsinstrument einzuführen. Zu diesem Zweck analysierte man unterschiedliche Formen, die in den einzelnen Ländern in Gebrauch sind, mit dem Ziel, ein „goldenes Mittel“ zu finden. Die Verwirklichung dieser Aufgabe ist allerdings überaus nicht einfach. Erstens, ist die korrekte Gestaltung einer europäischen Sicherung mit vielen Problemen verbunden. Andererseits ist es fragwürdig, ob es sich dabei um einen Ersatzmechanismus für alle bisherigen in den jeweiligen Mitgliedsländern geltenden Forderungssicherungen handeln sollte oder ob man ein zusätzliches Instrument neben den bereits bestehenden eingeführt werden muss<sup>1</sup>.

Obwohl es bisher nicht gelungen ist, dem analysierten Rechtsmechanismus die richtige Form zu verleihen, so konnte man dennoch bei den mit diesem Prozess verbundenen Vergleichsarbeiten wesentliche Schritte unternehmen, die die Forderungssicherungen im Rahmen der internen Rechtssysteme der jeweiligen Länder verbessern. Als bestes Beispiel hierfür gilt bezeichnenderweise Polen. Dort wurde nämlich zum Zweck der Flexibilisierung der Hypothek die Novelle vom 26. Juni 2009<sup>2</sup> eingeführt, die u.a. die Berechtigung zu der Verfügung über den geleerten Hypothekraum beinhaltet. In Bezug darauf bemerkenswert sind die positiven Folgen der Überlegungen zu einer europäischen „goldenen Mitte“, die sich langsam auf die Novellierung der innenstaatlichen Mechanismen übersetzen. Die Zeit wird zeigen, ob die Gesetzgebung der EU denselben Weg verfolgen wird.

### Die Genese

Möchte man die Genese der Forderungen in Bezug auf die Schaffung eines einheitlichen EU-Rechtsinstrumentes zu den Forderungssicherungen analysieren, so lohnt sich der Blick in das Jahr 1966. Damals hat nämlich die Europäische Kommission eine Expertengruppe unter der Leitung von Prof. *Claudio Segre* berufen. Aus der Bezeichnung des von ihnen vorgelegten Berichtes „Der Aufbau der Struktur eines europäischen Kapitalmarktes“ geht unmittelbar

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<sup>1</sup> Siehe auch: A. Wudarski, *W poszukiwaniu konstrukcji eurohipoteki*, *Kwartalnik Prawa Prywatnego* 2009, H. 1, S. 205f.; Vgl. J. Smits, *The making of European Private Law. Toward a lus Commune Europaeum as a Mixed Legal System*, Antwerp-Oxford-New York, Intersentia 2002, S. 247ff.; Vgl. O. Stöcker, *The Eurohypothec-Accessoriness as legal dogma? [In:] Basic Guidelines for a Eurohypothec. Outcome of the Eurohypothec workshop. November 2004/April 2005*, edited by A. Drewicz-Tułodziecka, Mortgage Credit Foundation, Warsaw, May 2005, *Mortgage Bulletin* 21/2005, S. 39ff.; siehe auch, S. Nasarre-Aznar, O. Stöcker, *Eurohypothec and Eurotrust: Future Instruments of a Pan-European Mortgage Market*, [In:] *Innovations in Securitisation. Yearbook*, edited by J.J. de Vries Robbe, Paul A.U. Ali, The Netherlands 2006, S. 115ff.

<sup>2</sup> Gesetz vom 26. Juni 2009 über die Änderung des Gesetzes über das Grundbuch und Hypothek und ausgewählte andere Gesetze, (GBl. vom 19. August 2009, Nr. 131, Pos. 1075).



hervor, das Ziel ihrer Aktivitäten war die Integration der EU-Mitgliedsländer. Der *Segre 'report* enthielt folgende Hauptforderungen:

- die Vereinheitlichung der Vorschriften bezüglich des Immobilienpfandrechts in den einzelnen Mitgliedsländern,
- die Schaffung eines einheitlichen Instruments zur Forderungssicherung nach Vorbild der deutschen *Grundschild*,
- die Möglichkeit, in das Grundbuch eine Forderung in einer Fremdwährung einzutragen<sup>3</sup>.

Das vorrangige Ziel der Berufung der obigen Expertengruppe war jedoch die Gestaltung einer nichtakzessorischen Sicherung in Form einer sog. „Eurohypothek“, die für alle EU-Länder identisch sein sollte. Leider wurden die im Bericht vorgestellten Initiativen durch die Gesetzgeber der Mitgliedsländer nicht berücksichtigt<sup>4</sup>.

Eine eingehende Argumentation bezüglich der Eurohypothek ist in den Arbeiten der U.I.N.L.<sup>5</sup> zu finden. Die hier tätige Kommission unter dem Namen: „*Commission des Affaires de la Communauté Européenne (CACE)*“ befasste sich unter anderem mit der Prüfung der rechtlichen Möglichkeit bezüglich der Schaffung eines einheitlichen Forderungsschutzsystems für alle Mitgliedsländer. Die Folge war die Veröffentlichung durch die Kommission am 22. Mai 1987 eines Eurohypothekentwurfs, der durch das kommissionseigene Team ausgearbeitet worden war. Zum ersten Mal wurde außerdem eine Definition der Sicherung verfasst<sup>6</sup>.

Wie die Experten konstatierten, am besten geeignet wäre die Gestaltung eines neuen Rechtsmechanismus nach dem Vorbild des *Schuldbriefes*. Die Eurohypothek sollte also als eine nichtakzessorische Form der Forderungssicherung fungieren. Es wurde angenommen, dass diese als eine grenzüberschreitende Kreditsicherung benutzt werden könnte. Den Annahmen der Projektentwickler zufolge sollte dieses Hypothekenmechanismus wie eine Alternative für die existierenden innenstaatlichen Sicherungen behandelt werden<sup>7</sup>.

1998 begann der damalige Verband der Deutschen Hypothekenbanken mit einer Untersuchung der Vorschriften zu den Forderungssicherungen<sup>8</sup>. Anhand der durchgeführten Analysen wurde dabei auf die Fehlerhaftigkeit der Hypothek, insbesondere in Bezug auf die fehlende Flexibilität und ihre Differenziertheit hingewiesen. Der Verband berief eine Gruppe aus Wissenschaftlern und Fachleuten, die darauf Richtlinien für eine neue, nichtakzessorische Sicherung – für eine Eurohypothek erstellten. Die Vertreter der Arbeitsgruppe beschlossen, das neue Pfandrecht

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<sup>3</sup>O. Stöcker, *Die Eurohypothek-ein Sicherungsinstrument der Zukunft*, Immobilien Manager 2006, H. 6, S. 2ff., [http://www.de.Ehipoteka.pl/co\\_rporate.../Eurohipoteka\\_Stoeker.pdf](http://www.de.Ehipoteka.pl/co_rporate.../Eurohipoteka_Stoeker.pdf); siehe auch A. Wudarski, *W poszukiwaniu*, S. 210-211 und die dort zitierte Literatur - S. Kircher, *Grundpfandrechte in Europa. Überlegungen zur Harmonisierung der Grundpfandrechte unter besonderer Beachtung der deutsche, französischen und englischen Rechtsordnung*, Berlin 2004, S. 418ff.

<sup>4</sup>A. Wudarski, *W poszukiwaniu...*, S. 210-211.

<sup>5</sup>*Commission des Affaires de la Communauté Européenne/Union Internationale du Notariat Latin, (CACE/UINL), Le Cédula hypothécaire Suisse et la dette foncière allemande – Etude comparative, Base d'une future Eurohypothèque*, Amsterdam 1998; H. Wehrens, *Real Security Regarding Immovable Objects-Reflection on a Euro-Mortgage*, [In:] *Towards a European Civil Code*, edited by A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron, The Hague/London/Boston 1998, S. 551ff.

<sup>6</sup>A. Wudarski, *W poszukiwaniu...*, S. 211-212 und die dort zitierte Literatur; O. Stöcker, *Die „Eurohypothek“-Wegbereiter zu einem Binneemarkt für den Hypothekarkredit*, Zeitschrift für Finanzierung, Kapitalanlage und Immobilienwesen – Der Langfristige Kredit 1991, H. 16/17, S. 538ff.

<sup>7</sup>A. Wudarski, *W poszukiwaniu...*, S. 211-213 und die dort zitierte Literatur – R. Kaendl, *Die Eurohypothek*, Österreichische Notariatszeitung, 1993, H. 12, S. 278f; siehe auch O. Stöcker, *The Eurohypothec-Accessoriness...*, S. 39-40.

<sup>8</sup>H. Wolfsteiner, O. Stöcker, *A non-accessory Security Right over Real Property for Central Europe*, Notarius International 2003, S. 116-124.

nicht an die Forderung zu koppeln. Der fehlende akzessorische Charakter sollte dabei der Förderung der Wirtschaft dienen. Gegenstand dieser Belastung könnten somit, neben Immobilien, auch die im Grundbuch eingetragenen Rechte sein. Man sprach sich außerdem für die Möglichkeit aus, eine Eurohypothek zu Gunsten des Eigentümers selbst zu schaffen. Außerdem wurden zwei Formen dieser Sicherung vorgeschlagen: Grundbuchform und Briefform<sup>9</sup>. Diese Aufteilung wurde natürlich von der deutschen Grundschuld „abgeschrieben“, in der es die *Briefgrundschuld* und die *Buchgrundschuld* gibt. Das vom deutschen Verband ausgearbeitete Dokument wurde von zahlreichen anderen Wissenschaftlern „optimiert“, u.a. von den Experten aus dem sog. „*The Collateral Sub-Committee of the Forum Group*“<sup>10</sup>.

Im März 2003 wurde das „*Forum Group on Mortgage Credit*“ ins Leben berufen, das seine Aktivitäten vorrangig auf der Ermittlung von grenzüberschreitenden Hindernissen bei dem Transfer von Hypothekenkrediten und deren der Abwendung fokussierte. Die effektive Arbeit der Gruppe resultierte in der Empfehlung der Eurohypothek als wichtiges Werkzeug für die EU-Mitgliedsländer. Man optierte dabei für ihren nichtakzessorischen Charakter. Man plädierte zudem, die Eurohypothek zu einem Alternativinstrument für die Mitgliedsländer zu machen, da diese doch über die staatlichen Sicherungsinstrumente verfügen. Als Hauptvorteile, die mit der Einführung des neuen Rechtsmechanismus einhergehen würden, nannte man insbesondere:

- die Sicherung des grenzüberschreitenden Hypothekarkredits,
- die Verwertung der Immobilienabtretung, die mit Hypothek gesichert ist,
- die Möglichkeit der Sicherung von mehreren Krediten mit einer Eurohypothek,
- Förderung der Entwicklung der Verbriefung ,
- wirksame Möglichkeit, Bankkonsortien zu bilden<sup>11</sup>.

Der durch die genannte Gruppe erstellte Bericht erweckte das Interesse der Europäischen Kommission und gab Anlass zur vertieften Diskussion unter den Expertengruppen. Zu einem Treffpunkt für die Veranstaltung der Debatten wurde Berlin ausgewählt, wo auf Initiative des Verbands der Deutschen Hypothekenbanken unter anderen die Vertreter von: *The Eurohypothec: a common mortgage for Europe*“, „*Forum Group on Mortgage Credit (Collateral)*“, „*European Union Land Information System (EULIS)*“<sup>12</sup> und „*The European University Institute in Florence (EUI)*“<sup>13</sup> eingeladen wurden. Das Resultat dieser Gespräche war um die Wende 2004/2005 die Ausarbeitung von Richtlinien für die Eurohypothek, die daraufhin im Mai 2005 durch die polnische Stiftung für Hypothekarkredite (Polska Fundacja na rzecz Kredytu Hipotecznego) veröffentlicht wurden<sup>14</sup>. Erneut wurde der nichtakzessorische Charakter der neuen Sicherung zur Priorität erklärt. Sein Ziel sollte von dem sog. *security*

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<sup>9</sup>A. Wudarski, *W poszukiwaniu...*, S. 213-214; auch O. Stöcker, *The Eurohypothec-Accessoriness...*, S. 40; Vgl. O. Stöcker, *Die Eurohypothek...*, S. 3ff., [http://www.de.ehipoteka.pl/corporate.../Eurohipoteka\\_Stoeker.pdf](http://www.de.ehipoteka.pl/corporate.../Eurohipoteka_Stoeker.pdf).

<sup>10</sup>[http://www.de.ehipoteka.pl/corporate.../Eurohipoteka\\_Stoeker.pdf](http://www.de.ehipoteka.pl/corporate.../Eurohipoteka_Stoeker.pdf); siehe auch O. Stöcker, *The Eurohypothec-Accessoriness...*, S. 40; J. Köndgen, O. Stöcker, *Die Eurohypothek – Akzessorität als Gretchenfrage?*, Zeitschrift für Bankrecht und Bankwirtschaft 2005, H. 2, S. 113.

<sup>11</sup>[http://www.de.ehipoteka.pl/corporate.../Eurohipoteka\\_Stoeker.pdf](http://www.de.ehipoteka.pl/corporate.../Eurohipoteka_Stoeker.pdf); *European Communities, the Integration of the EU Mortgage Credit Markets-Report by the Forum Group on Mortgage Credit, 2004, VI. ANHANG*, <http://www.europa.eu.int>.

<sup>12</sup>Sein Ziel ist die Bildung eines grenzüberschreitenden Netzwerks der Grundbücher – siehe auch: [http://www.de.ehipoteka.pl/corporate.../Eurohipoteka\\_Stoeker.pdf](http://www.de.ehipoteka.pl/corporate.../Eurohipoteka_Stoeker.pdf).

<sup>13</sup>O. Stöcker, *The Eurohypothec-Accessoriness...*, S. 40; A. Wudarski, *W poszukiwaniu...*, S. 215ff.; S. Nasarre-Aznar, O. Stöcker, *Eurohypothec and Eurotrust...*, S. 117.

<sup>14</sup>*Basic Guidelines for a Eurohypothec. Outcome of the Eurohypothec workshop. November 2004/April 2005*, edited by A. Drewicz-Tułodziecka, Mortgage Credit Foundation, Warsaw, May 2005, Mortgage Bulletin 21/2005r., nr 2.

*agreement* mit Obligationscharakter bestimmt werden<sup>15</sup>. Ähnlich wie bei den früheren Konzepten sollte die Eintragung der Eurohypothek in das für den Standort der Immobilie zuständige Register obligatorisch sein<sup>16</sup>. Die 2005 ausgearbeiteten Richtlinien wurden zum Erfolg, der in der Aufnahme der Eurohypothek in das Grüne Buch des Hypothekarkredites der EU sichtbar wurde<sup>17</sup>.

## Das grüne Buch des Hypothekenkredites

Das Titeldokument wurde am 19. Juli 2005 unter dem Namen „*Green Paper-Mortgage Credit in the EU*“ veröffentlicht. Das Hauptziel des Aktes war die Integration des Hypothekenmarktes<sup>18</sup>.

In Anbetracht der wesentlichen Unterschiede auf dem Hypothekenmarkt zwischen den einzelnen Mitgliedsländern, die sich u.a. auf die Produktart, die Zahlungsfristen und die Höhe der Kredite, den damit verbundenen Prozentsatz, die Vielfalt der Kreditnehmer, die Art der Finanzierung etc. sollten folgende Probleme erörtert werden:

- Verbraucherschutz,
- rechtliche Zuständigkeit,
- Hypothekensicherung,
- Finanzierung des Hypothekarkredites<sup>19</sup>.

Im dritten Kapitel des Buches bemerkte die Kommission, der zuvor vorgeschlagene rechtliche Entwurf der Eurohypothek sei es wert, umfassend analysiert zu werden. Um diesen Rechtsmechanismus in der Praxis flexibler zu machen, wird grundsätzlich ein nicht akzessorischer Charakter empfohlen. Es wurde zudem darauf hingewiesen, dass in der Literatur betont wird, die fehlende Verknüpfung zwischen der Sicherung und dem Kredit sollte durch eine Reihe von Verfahren optimiert werden, die u.a. mit der Entstehung oder der Übertragung der Hypothek in Verbindung stehen. Die Folge wäre eine bessere Geldkapitalnutzung<sup>20</sup>.

Im selben Kapitel wurde außerdem auf die Relevanz der sog. Grundregister hingewiesen. Die Kommission konstatierte, dass das Verfahren bezüglich des Eintrags von Informationen über die allgemeinen Rechte, die das Eigentum belasten, optimiert werden sollte. Diese Register sollten zudem für jeden zugänglich sein, der das rechtliche Interesse daran hat. Aus dem Inhalt des analysierten Kapitels geht jedoch ein gewisse Befürchtung seitens der Mitglieder der EU-Kommission hervor, ob sich diese an derartigen Aktivitäten, wie z.B. *EULIS*<sup>21</sup> (die insbesondere auf die Erleichterung des grenzübergreifenden Zugangs zu Grundbüchern zielte) beteiligen sollte<sup>22</sup>.

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<sup>15</sup>Op. cit., S. 13ff.

<sup>16</sup>Op. cit.

<sup>17</sup>S. Nasarre-Aznar, O. Stöcker, *Eurohypothec and Eurotrust...*, S. 117.

<sup>18</sup>Das Grüne Buch. Kredithypothek in der EU, (vorgestellt durch die Kommission), (Text ist von Bedeutung für EOG), COM 2005, (327), S. 4ff. <http://www.ehipoteka.pl>.

<sup>19</sup>Op. cit.; siehe auch, *Working Document, Government Expert Group on Mortgage Credit (GEGMC), Brussels 23 May 2006*, [http://ec.europa.eu/internal\\_market/finservices-retail/docs/home-loans/gegmc/gp\\_followup-en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/gegmc/gp_followup-en.pdf).

<sup>20</sup>Das Grüne Buch. Kredithypothek in der EU..., S. 4f., <http://www.ehipoteka.pl>; siehe auch: [http://ec.europa.eu/internal\\_market/finservices-retail/docs/home-loans/gegmc/gp\\_followup-en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/gegmc/gp_followup-en.pdf).

<sup>21</sup> *European Union Land Information System*.

<sup>22</sup>Das Grüne Buch. Kredithypothek in der EU..., S. 4f., <http://www.ehipoteka.pl>; siehe auch: [http://ec.europa.eu/internal\\_market/finservices-retail/docs/home-loans/gegmc/gp\\_followup-en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/gegmc/gp_followup-en.pdf).

Die Vertreter von *Forum Group* plädierten für die umfassende Überprüfung durch die Kommission der Möglichkeit der Einführung von Eurohypothek sowie Finanzsicherungen in Form von einem paneuropäischen Trusts. Es wurde dabei beantragt, dass man der einheitlichen, gemeinschaftlichen Hypothekensicherung eine weitgehende Flexibilität gewährleistet. Man schloss zwar nicht aus, dass die Sicherung und der Kredit vollständig voneinander getrennt sein sollen, allerdings unter dem Vermerk, es müsse sich dabei um eine lose Verbindung handeln, die u.a. in der freien Verständigung zwischen dem Kreditgeber und Kreditnehmer zum Ausdruck kommt<sup>23</sup>.

Im August 2005 wurde das Grüne Buch des Hypothekarkredits der EU um ein Studium bezüglich der Kosten und Nutzen ergänzt, das durch *London Economics* erstellt wurde. Auf Grundlage der durchgeführten Untersuchungen schätzte man, dass das Integrationsverfahren der Hypothekmärkte zum Wachstum des Hypothek-Beutels beitragen wird (BIP)<sup>24</sup>.

Während der Debatten kam der Vorschlag bezüglich der Einführung der Eurohypothek oft zur Sprache. Erörtert wurden dabei generell die Chancen bezüglich deren Einführung und Zweckmäßigkeit. Eine positive Stellung bezogen dabei:

- 19% der Finanzinstitute und Vermittler,
- 31% der Mitgliedsländer,
- 43 % der übrigen Marktteilnehmer<sup>25</sup>.

Man sprach sich dafür aus, dass sich die Kommission bei den Richtlinien zur Eurohypothek vorrangig auf zwei Aspekte konzentriert, nämlich auf den rechtlichen und den wirtschaftlichen Aspekt dieses Konstrukts<sup>26</sup>. Das Finanzministerium Zyperns drückte sein Enthusiasmus besonders in Hinblick auf den nichtakzessorischen Charakter der einheitlichen Sicherung und die daraus folgende einfache Übertragung aus. Einen wesentlichen Vorteil des Systems sah man außerdem in der Möglichkeit, mit einer Hypothek mehrere Darlehen absichern zu können. Den Vertretern der irischen Regierung zufolge würde das neue, für alle Mitgliedsländer gemeinsame Sicherungsinstrument nachhaltig dazu beitragen, den Hypothekkreditmarkt zu vereinheitlichen<sup>27</sup>.

Das polnische Finanzministerium sprach sich in Anlehnung auf die Ergebnisse zahlreicher Analysen diverser Expertenkreise generell für die Idee der Entwicklung der Finanzinstitutionen in der EU aus. Es wurde allerdings Skepsis bezüglich der schnellen Integration der Hypothekmärkte geäußert<sup>28</sup>.

Relativ vorsichtig äußerte man sich zum Thema der Entstehung der Eurohypothek. Man betonte jedoch, dass diese grundsätzlich einen erwünschten Mechanismus bei der wirtschaftlichen Entwicklung der Gemeinschaft darstelle. Bei dessen Einführung sahen die polnischen Experten folgende Vorteile:

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<sup>23</sup>II. Anhang -Empfehlungen aus dem Bericht des Forum-, Anhang zu :Das Grüne Buch. Kredithypothek in der EU, (vorgestellt durch die Kommission), (Text ist von Bedeutung für EOG) COM 2005, (327), S. 4ff., <http://www.ehipoteka.pl>.

<sup>24</sup> *Feedback on the Consultation on the Green Paper on Mortgage Credit 2006*, Brussels, 23.05.2006, MARKT/H3/JR D(2006), [http://ec.europa.eu/internal\\_market/finservices-retail/docs/home-loans/feedback\\_gp-en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/feedback_gp-en.pdf).

<sup>25</sup>Op. cit.

<sup>26</sup>Op. cit.

<sup>27</sup>[http://ec.europa.eu/internal\\_market/finservices-retail/home-loans/integration\\_en.htm](http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm).

<sup>28</sup>Das Finanzministerium, FI/PTS/IE-3503/2005, Warszawa, 23.11.2005, [http://ec.europa.eu/internal\\_market/finservices-retail/docs/home-loans/comments/ms-pl\\_minfin-pl.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/comments/ms-pl_minfin-pl.pdf).

- effektive Nutzung der Finanzen,
- größere Wettbewerbsfähigkeit zwischen den Banken,
- attraktivere Kreditbedingungen für Kunden<sup>29</sup>.

Die Gruppe der polnischen Experten, die die sog. „*Basic Guidelines for a Eurohypothec (...)*“ ausgearbeitet hatte, hielt weitere eingehende Untersuchungen der hier behandelten Institution für begründet. Große Hoffnung wurde vor allem in dem nichtakzessorischen Charakter des Sicherungsinstruments gesetzt, das eine noch effektiveren Nutzung der Konsolidierungs- und Konsortiumskredite ermöglichen würde<sup>30</sup>.

Einige Vertreter der Doktrin sehen die Hauptursache für die geringe Effektivität des grenzüberschreitenden EU-Verkehrs in der Vielfalt der Steuerrecht- und Arbeitsrecht-Systeme der Mitgliedsländer. Sie sind der Meinung, dass die Vereinheitlichung zahlreiche Vorteile mit sich bringen könnte, wodurch man nicht gleich auf das Instrument der Eurohypothek zurückgreifen müsste. Andererseits erheben jedoch die Autoren, dass die Harmonisierung von dem *civil law* mit dem *common law* -System hier unmöglich wäre<sup>31</sup>.

Aus der durchgeführten Analyse geht hervor, dass die Anhänger der Eurohypothek den größten Vorteil in der Schwächung der Akzessorität von diesem Rechtsmechanismus sahen. Das Fehlen der engen Verknüpfung zwischen der Sicherung und dem Kredit würde die Entstehung und die Übertragung der Hypotheken einfacher gestalten, was wiederum den europäischen Kreditmarkt verbessern würde<sup>32</sup>.

Eine negative Stellung bezüglich der Einführung der einheitlichen, nichtakzessorischen Sicherung bezogen u.a. die Vertreter des österreichischen Finanzministeriums. Sie hielten stattdessen den akzessorischen Mechanismus der Hypothek für den besten Schutz des Schuldners. Sie äußerten auch wenig Überzeugung und Enthusiasmus bezüglich der vollständigen Harmonisierung der Hypothekarkreditmärkte. Die damit verbundenen Ängste bezogen sie auf die fehlende Möglichkeit, eine derart wirksames Grundbuchsystem zu schaffen, wie es in dem österreichischen Recht gibt<sup>33</sup>. Gewisse Konstruktionsmängel bei der Eurohypothek wurden auch von den Vertretern der belgischen Regierung erkannt, die sogar suggerierten, dieser Mechanismus könnte im Endeffekt einen negativen Einfluss auf die Wettbewerbsfähigkeit unter den Banken haben<sup>34</sup>.

Die deutsche Regierung wiederum äußerte vorrangig Zweifel bezüglich der ausreichenden Kompetenzen der Europäischen Union, die Eurohypothek rechtlich zu regeln. Außerdem sprach sie sich ausdrücklich für den nichtakzessorischen Charakter der neuen Immobiliensicherung aus. Sie wies auf die Vorteile dieser Lösung hin, indem sie die eigene Erfahrung mit der Grundschuld als Beispiel heranzog. Den deutschen Experten zufolge, könnte allerdings die übertriebene europäische Harmonisierung in dieser Materie viele Mitgliedsländer

<sup>29</sup>[http://ec.europa.eu/internal\\_market/finservices-retail/docs/home-loans/comments/ms-pl\\_minfin-pl.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/comments/ms-pl_minfin-pl.pdf).

<sup>30</sup>*Mortgage Credit in the EU*, response by the Polish Mortgage Credit Foundation to the EU Green Paper published by the European Commission on the 19<sup>th</sup> of July 2005, Warsaw 29.11.2005, [http://ec.europa.eu/internal\\_market/finservices-retail/docs/home-loans/comments/repr-pl\\_pmcf-en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/comments/repr-pl_pmcf-en.pdf).

<sup>31</sup>J. Pisuliński, *Kilka pytań o europejski kodeks cywilny*, *Transformacje Prawa Prywatnego* 2006, H. 2, S. 100-101; vgl. <http://usfiles.us.szc.pl/getfile.php?pid=5051>.

<sup>32</sup>*Feedback on the Consultation...*, [http://ec.europa.eu/internal\\_market/finservices-retail/docs/home-loans/feedback\\_gp-en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/feedback_gp-en.pdf).

<sup>33</sup>[http://ec.europa.eu/internal\\_market/finservices-retail/home-loans/integration\\_en.htm](http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm)

<sup>34</sup>Op. cit.



der Möglichkeit der wirksamen Durchsetzung der schon seit einiger Zeit in diesem Bereich geplanten gesetzgeberischen Pläne berauben<sup>35</sup>.

## Entwürfe für das Modell der Eurohypothek

Die erste Definition der Eurohypothek wurde im Entwurf der *CACE* -Kommission im Jahr 1987 veröffentlicht. Der Inhalt war folgend: „ein nichtakzessorisches Pfandimmobilienrecht, das von einer abstrakten Zahlungsverpflichtung für einen bestimmten Geldbetrag begleitet wird“<sup>36</sup>.

Weitgehend detaillierte Auffassung der Eurohypothek enthalten Richtlinien, die von den Mitgliedern der Gruppe *Mortgage Credit Foundation* im Jahr 2005 erstellt wurden. Vorgelegt wurde dabei folgendes Modell der neuen Absicherung: „die Eurohypothek ist eine nichtakzessorische Grundbelastung, die den Besitzer dazu berechtigt, einen freien Geldbetrag von dem Eigentumsrecht (die Vergütung) zu erlangen<sup>37</sup>. Angesichts dessen würde das neue Instrument wie eine Sicherung erscheinen, die keinen engen Zusammenhang mit der Forderung aufweist.

In der Genese des geprüften Instrumentes durchzieht sich ein Motiv, das ähnlich wie der Schuldbrief in der Schweiz oder die deutsche Briefgrundschuld aufgebaut ist. Deshalb erscheint es hier naheliegend, einige relevante Informationen über diese Rechte heranzuziehen. Das Grundprinzip der beiden Formen ist ihr nichtakzessorischer Charakter. Zu den wichtigsten Vorteilen dieser Rechtsinstrumente gehören insbesondere die Effektivität sowie die einfache Übertragung der gesicherten Forderungen, die sich u.a. in der fehlenden Anmeldepflicht äußert<sup>38</sup>.

Der *Schuldbrief* macht die Gläubigerforderungen abstrakt, d.h. von dessen wirtschaftlichen Bestimmungsgrund unabhängig. Es ist eine Belastung, die keine strikte Verbindung mit der gesicherten Forderung aufweist. Bei der Festlegung des Schuldbriefes ist neben dessen obligatorischer Grundbucheintragung, die Ausstellung eines Pfandtitels notwendig. Priorität hat hier jedoch die Eintragung, denn ab diesem Zeitpunkt können wir von der Wirksamkeit des Schuldbriefes sprechen (Art. 856 k.c.s.)<sup>39</sup>. Dieses Dokument wird durch den Grundbuchverwalter ausgestellt und unterschrieben (art. 857 k.c.s).

Die formellen Briefanforderungen werden von der Regierung, von dem sog. Bundesrat festgelegt. Da der *Schuldbrief* wie Wertpapier behandelt wird, kann seine Ausstellung auf den namentlich genannten Gläubiger, den Inhaber oder den Grundstückseigentümer selbst erfolgen (Art. 858 und 859 k.c.s.). Grundsätzlich ist der Schuldner verpflichtet, alle Forderungen am Wohnort des Gläubigers zu leisten. Falls dieser jedoch unbekannt ist, wird das Deponieren im Amt, das für den Wohnort des Schuldners zuständig ist, für richtig erkannt (Art. 861 k.c.s.).

Der beschriebene Mechanismus gewinnt an Relevanz, wenn der Gläubiger nicht existiert oder auf das Pfandrecht verzichtet. In diesem Fall wird das Schicksal dieser festgelegten Sicherung ausschließlich von der Entscheidung des Schuldners abhängig. Er kann dessen Streichung aus dem Grundbuch verlangen und dadurch zum Erlöschen dieser Belastung führen oder die den Schuldbrief festlegende Eintragung lassen und weiterhin diesen Pfandtitel nutzen (Art. 863 k.c.s.). Die Forderung aus dem Schuldbrief kann auch veräußert oder gepfändet werden (art.

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<sup>35</sup>Op. cit.

<sup>36</sup>Zitiert nach A. Wudarski, *W poszukiwaniu ...*, S. 212; Vgl.. O. *Stöcker, Die Eurohypothek-Wegbereiter...*, S. 538ff.

<sup>37</sup>A. Drewicz-Tułodziecka (edit.), *Basic Guidelines...*, S. 13.

<sup>38</sup>A. Drewicz-Tułodziecka, *Prawna infrastruktura finansowania nieruchomości w Polsce dziś i po wejściu do Unii Europejskiej*, *Prawo Bankowe*, Bankrecht 2003, Nr. 6, S. 38.

<sup>39</sup>*Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, Stand am 1. Februar 2010*), nachfolgend: k.c.s.

868 k.c.s.). Bezeichnenderweise handelt es sich dabei um eine Sicherung, die messbare Ergebnisse im Handelsverkehr durch das vereinfachte Übertragungsverfahren mit sich bringt. Es geht hier vor allem um das sog. Sicherungszertifikat. Nach Ansicht vieler Autoren hat der *Schuldbrief* eine besondere Rolle beim Schuldnerkonkurs. Der nichtakzessorische Charakter des Schuldbriefes ermöglicht seine einfache und vollständige Übertragung. Der Empfänger des Schuldbriefes sollte den Pfandtitel erhalten, wobei wenn wir es hier mit einem personalisieren Wertpapier zu tun haben (Schuldbrief), außerdem ein Übertragungsvermerk im Titel mit Angabe des Käufers notwendig wird (Art. 869 k.c.s.). Sollte diese Sicherung in vorbehaltener Form emittiert werden, gilt das Erlangen einer Bestätigung von dem Schuldner als Voraussetzung. Die Reihenfolge der Befriedigung wird durch die Eintragung im Grundbuch bestimmt, diese ist allerdings nicht streng genug, um deren Änderung zu eliminieren, z.B. durch Kündigung der Unterordnung durch einen konkreten Darlehensgeber. Wird der fällige Betrag durch den Schuldner an den Gläubiger nicht bezahlt, so kann der letztere mit gerichtlicher Hilfe den Titel oder die gesicherte Immobilie im Rahmen einer Versteigerung verkaufen und von dem erhaltenen Einkommen die ihm anfallende Schuld bezahlen. Daher sind viele Forscher der Meinung, es wäre das beste Instrument um die Wettbewerbsfähigkeit unter den Banken zu steigern<sup>40</sup>.

Den Vertretern der Doktrin zufolge sollte als weiteres bedeutsames Muster für den „Aufbau“ der Eurohypothek die deutsche Grundschuld in Schuldbriefform dienen. Die dortige Praxis deutet darauf hin, dass dieser Mechanismus das Sicherungsverfahren einfacher macht<sup>41</sup>. Die *Briefgrundschuld* sollte durch ein sog. *Grundbuchamt* ausgestellt werden. Der Erwerb der Sicherung erfolgt mit dem Zeitpunkt, an dem der Gläubiger den Schuldbrief von der Person erhält, die diesen erstellt hat. Es besteht außerdem die Möglichkeit, dieses Dokument am Grundbuchamt durch eine berechtigte Person abholen zu lassen. Bis dahin bleibt der Inhaber der Grundimmobilie der Gläubiger der Schuld<sup>42</sup>. Eine herausragende Rolle hat die erwähnte Grundschuld im Handelsverkehr, ähnlich übrigens wie der *Schuldbrief*. Für dessen wirksame Übertragung reicht nämlich die reine Herausgabe des Briefes an den Erwerber aus. Das Fehlen der Eintragungspflicht der Verfügung in das Grundbuch macht die Übertragung der Grundschuld deutlich einfacher, schneller und preiswerter. Die Briefschuld wird wie ein Wertpapier behandelt, das bestimmte Sachenrechte inkorporiert<sup>43</sup>.

Auf Grundlage der soeben dargelegten Ansichten formulierte die *Mortgage Group Foundation* die Grundrichtlinien zu dem Eurohypothekmodell. Zum Hauptziel der Schaffung einer neuen Sicherung wurden dabei die Verbesserung, Flexibilisierung und Erhöhung der grenzüberschreitenden Kreditierung erklärt. Den Gruppenmitgliedern zufolge sollte die gemeinschaftliche Hypothek einen nichtakzessorischen Charakter haben. Auf diese Weise wäre ihre Fertigstellung noch vor dem Abschluss eines Kreditvertrages möglich. Außerdem würde dieses Instrument einen besonderen Schutz für die Verbraucher bieten, dank der Berechtigung zur erneuten Nutzung derselben Hypothek für die Sicherung von neuen

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<sup>40</sup>D. Hunkeler, S. Baur Hürlimann, *Switzerland. Security and priorities*, Restructuring and Insolvency 2007, Nr 8, <http://www.practicallaw.com/9-237-7954>; siehe auch J. A. Bürgi, T. Meister, *The CMBS wave finally hits Switzerland*, Walder Wyss & Partners Attorneys at Law 2007, <http://www.practicallaw.com/2-201-8846>; por. J. Smits, *The making...*, S. 247ff.; siehe auch J. N. Druey, *Law of Property*, [In:] *Introduction to Swiss law*, edited by F. Dessemontet, T. Ansay Kluwer/Schulthess, 2004r. Kluwer Law International, S. 103ff.

<sup>41</sup>Kommentar des Bundesministeriums für Justiz, Berlin November 2005, zur *Integration der Hypothekenkreditmärkte in der EU* – Bemerkungen zum Grünen Buch der Europäischen Kommission, S. 21.ff., [http://ec.europa.eu/internal\\_market/finances-retail/home-loans/integration\\_en.htm](http://ec.europa.eu/internal_market/finances-retail/home-loans/integration_en.htm).

<sup>42</sup>H. Gaberdiel, M. Gladenbeck, *Kreditsicherung durch Grundschulden*, Erich Schmidt Verlag, 8. Auflage, Berlin 2007, S. 84ff..

<sup>43</sup>J. Pisuliński, *O dlugu na nieruchomości*, Transformacje Prawa Prywatnego, 2001, Nr 1, S. 16ff. und die dort zitierte Literatur.

Forderungen. Ein zusätzlicher Vorteil des vorgeschlagenen Modells, der auch für die Förderung der Finanzierung der Immobilien von Bedeutung ist, beruht auf der Möglichkeit, eine Schuld abzusichern, die oft einer Betragsfluktuation unterliegt. Der nichtakzessorische Charakter der Eurohypothek wird auch die Wettbewerbsfähigkeit unter den Darlehensgebern wesentlich erhöhen. Die fehlende Verknüpfung zwischen der Sicherung und der Forderung wird nämlich die Möglichkeit bieten, den Kreditgeber einfacher zu ändern. Dies wird sich wiederum positiv für die Darlehensnehmer auswirken, denen die Banken bessere Kreditkonditionen machen müssen werden. Man berücksichtigte außerdem den entscheidenden Einfluss dieses Absicherungsmodells auf die Entwicklung der Bankkonsortien durch die Möglichkeit eines schnelleren und einfacheren Transfers der Kredite von einer Bank in die andere und demzufolge auch auf die Kreditwürdigkeit, die höhere Beträge umfasst<sup>44</sup>.

Angesichts dessen lässt sich deutlich erkennen, dass die Mitglieder der Stiftung für den Hypothekenkredit das Gerüst der Eurohypothek und alle damit verbundenen Aspekte anderen Sachen auf Grundlage des nichtakzessorischen Charakters aufbauen möchten<sup>45</sup>. In Bezug auf die Möglichkeit der Festlegung dieser Sicherung wurde angenommen, dass diese nur dem Immobilieninhaber zustehen wird. Die Eintragung der Belastung in das Grundbuch sollte dabei obligatorisch sein. Wichtig ist, dass die formellen Voraussetzungen der Registrierung mit den Landesvorschriften übereinstimmen. Unter den wesentlichen Elementen der Eintragung erwähnte man u.a.: Die Bezeichnung des Inhabers der Eurohypothek, die Höhe und die Währung der fälligen Beträge, den Hinweis, ob das Recht zertifiziert ist oder nicht, die Bestimmungen, ob es hier um eine Gesamthypothek handelt usw. In Bezug auf den Aufbau des neuen Sicherungsinstruments wurde beschlossen, den Gesetzgebern der Länder einen gewissen Freiraum zu gewähren. Dieser sollte sich vor allem in der Bestimmung der Belastungsform zeigen, d.h. im Hinweis, ob hier das sog. *letter right* also zertifiziertes Recht vorliegt oder umgekehrt. In den Absichten wurde kein Vorbehalt zu der Währung der Eurohypothek festgelegt. Im Gegenteil, es wurde zugelassen, jede beliebige Währung zu verwenden, vorausgesetzt, dass diese in einem Mitgliedsland der EU verwendet wird. Als wichtig bezeichnete man auch die Anwendung bei der neuen Sicherungsform des Prinzips *lex rei sitae*, demnach das zuständige Recht das Recht des Staates ist, indem sich die Immobilie befindet<sup>46</sup>.

Grundsätzlich wurde betont, dass der Gegenstand der Eurohypothek jedes Grundstück sein kann, das sich auf dem Gebiet der Gemeinschaft befindet. Den Ideengebern zufolge sollte die Anwendung des neuen Instruments so umfassend, dass sie sowohl der Sicherung von internationalen Darlehen als auch den nationalen dienen könnte. Die Rechtsgrundlage dieser Handlung müsste sich direkt aus dem Kreditvertrag zwischen dem Gläubiger und dem Schuldner bzw. aus einem anderen beigelegten Dokument ergeben. In Anbetracht dessen, dass die Mitglieder der *Mortgage Credit Foundation* für den nicht akzessorischen Charakter des neuen „Rechtswesens“ optierten, würde die Eurohypothek die Unabhängigkeit von der gesicherten Forderung aufweisen. Wichtig ist dabei, dass der Versicherungsgeber bei der Bezahlung des Darlehens das Recht hätte, über das Schicksal der Eurohypothek zu entscheiden, z.B. diese erneut als Sicherung für eine neue Schuld nutzen<sup>47</sup>.

Außerdem wurden Rechtsbedingungen aufgelistet, die in jedem Mitgliedstaat vorkommen müssen, damit man die Eurohypothek einführen kann. Erstens wurde festgestellt, dass die Existenz der Eurohypothek nur in einem Land möglich ist, das ein glaubhaftes Registrierungssystem besitzt. Dieses sollte sämtliche Angaben über das Eigentumsrecht, die

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<sup>44</sup>A. Drewicz-Tułodziecka (edit.), *Basic Guidelines...*, S. 11ff.

<sup>45</sup>Ausführlicher siehe M. Kaczorowska, *Model eurohipoteki w podstawowych wytycznych Fundacji na Rzecz Kredytu Hipotecznego*, Rejent 2010, Nr. 6, S. 23ff.

<sup>46</sup>A. Drewicz-Tułodziecka (edit.), *Basic Guidelines...*, S. 13ff.

<sup>47</sup>Op. cit., S. 14ff.



Belastungen und andere Einschränkungen enthalten. Zweitens, der Vorrang der Befriedigung des Gläubigers sollte sich aus der Einordnung im Register ergeben. Über die Reihenfolge sollte das Landesrecht entscheiden, das jedoch den Zeitpunkt der Registrierung selbst bzw. der deren Antragstellung als maßgebend erkennen sollte. Man plädierte außerdem dafür, die Register für die Öffentlichkeit zugänglich zu machen. Auf diese Weise hätte jeder, der ein Rechtsinteresse vorweist das Recht, diese Dokumente einzusehen. Zusätzlich wurde vorgeschlagen, elektronische Registersysteme einzuführen, um den Zugang zu diesen Informationen zu erleichtern<sup>48</sup>.

Das Prinzip des nichtakzessorischen Charakters sollte auch bei Übertragung der Sicherungen angewendet werden. Es wurde nämlich angenommen, dass die Übertragung der Sicherung über keine strikte Verbindung mit der Forderungsübertragung verfügen sollte und umgekehrt. Des Weiteren wurden Unterschiede festgestellt, die vorkommen können, wenn wir über das zertifizierte Recht und den sog. *non letter right* verfügen. Bei der ersten Verfügungsform wird die Herausgabe des zertifizierten Briefes (Zertifikat) an den neuen Inhaber genügen. Formelle Anforderungen bezüglich der Willenserklärungen der jeweiligen Partei sollten dabei dem Landesrecht gem. der Zuständigkeit *lex rei sitae* entsprechen. Bei der Übertragung, die nach der zweiten Rechtsform erfolgt, wird allerdings die entsprechende Anmeldung verlangt. Vorgesehen wurde auch die Möglichkeit des Vorbehalts einer zusätzlichen Anforderung seitens eines bestimmten Mitgliedslandes, bezüglich der Notwendigkeit eines Vergleichsabschlusses zwischen dem vorherigen und dem neuen Eigentümer der Eurohypothek. Bei dieser Verfügung genießt vor allem der Erwerber, der im guten Willen handelt, einen besonderen Schutz. Es wurde nämlich hingewiesen, dass stets der Zustand als glaubwürdig gelten soll, der im Grundbuch veröffentlicht wurde. Im Fall des zertifizierten Rechts hingegen wird der Eigentümer des vorliegenden Dokuments wie der Eigentümer der Sicherung behandelt, vorausgesetzt, dass er in der Lage ist, seine Rechte zu beweisen<sup>49</sup>.

Der nicht akzessorische Charakter hatte auch einen entscheidenden Einfluss auf die Frage des Erlöschens der Eurohypothek. In Hinblick auf den vorgeschlagenen Rechtscharakter würde diese in Folge der Forderungsbezahlung nicht erlöschen. Für den Verlust der rechtlichen Wirksamkeit wäre das Streichen von diesem Recht aus dem entsprechenden Register notwendig. Für diese Rechtswirksamkeit würde man die Genehmigung des Inhabers der Eurohypothek und des Inhabers der belasteten Immobilie verlangen<sup>50</sup>.

Aus der obigen Analyse wird deutlich sichtbar, dass die Ansichtswiese der Mitglieder der Stiftung für den Hypothekenkredit grundsätzlich bei dem nichtakzessorischen Charakter der neuen Sicherung schwankte.

## Das Ziel der Einführung der Eurohypothek

Die Idee der Schaffung der Eurohypothek entstand, die schon erwähnt wurde, vor 50 Jahren. Bis heute gibt es allerdings Probleme, sie mit dem richtigen rechtlichen Gerüst auszustatten. Diverse Zweifel ergeben sich bei der Bewertung ihrer Rechtsform, deren Bearbeitung, der Autorin der vorliegenden Arbeit zufolge Priorität hat.

Von Anfang an konstatierte man, das Ziel der Einführung einer neuen einheitlichen Sicherung sei vorrangig die Harmonisierung des europäischen Hypothekmarkt<sup>51</sup>. Es wurde mehrmals hingewiesen, dass die Entstehung der Eurohypothek die Wettbewerbsfähigkeit unter den Darlehensinstituten erhöhen sollte. Diese Maßnahme würde wiederum messbare Vorteile

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<sup>48</sup>Op. cit., S. 18ff.

<sup>49</sup>Op. cit., S. 17ff.

<sup>50</sup>Op. cit.

<sup>51</sup>A. Wudarski, *W poszukiwaniu...*, S. 207ff.

für die Kreditnehmer mit sich bringen, denen eine breite Palette an Angeboten des Hypothekenmarktes zur Auswahl stehen würde. Außerdem wurde darauf hingewiesen, dass das gemeinschaftliche Sicherungsinstrument die Effektivität der europäischen Wirtschaft verbessern und zugleich einen Antrieb für die Einführung neuer, dynamischer Finanztechniken darstellen könnte<sup>52</sup>. Schließlich wird in der Literatur gerührt „(...) die Eurohypothek wäre mit Sicherheit ein Impuls für die weitere Harmonisierung des Zivilrechts“<sup>53</sup>.

Unter den vielen positiven Aspekten der Eurohypothek erwähnte man auch die Entwicklung des sog. *housing market*,<sup>54</sup> der mit der Steigerung der Häufigkeit des Kaufs von Wohnungen und Häusern verbunden ist. Unbestritten ist, dass für die meisten Menschen der Kauf einer Wohnung oft eine Lebensentscheidung darstellt. Wenn heutzutage Ehepaare, besonders die jüngeren, in eigenen vier Wänden leben möchten, müssen sie einen Kredit aufnehmen und damit rechnen, hohe Verzinsung in Kauf zu nehmen. Nicht selten kommt es vor, dass die Kreditnebenforderungen die Erwerbsmöglichkeiten des potenziellen Kreditnehmers übersteigen und das Eigentum der Immobilie, für die der Hypothekenkredit aufgenommen an den Kreditgeber übergeht. Trotz allen Anscheins wirken sich solche Fälle für beide Seiten negativ aus. Der Hypothekenschuldner wird nämlich zahlungsunfähig bzw. zieht sich noch vor der Kreditaufnahme (der künftige Schuldner) einfach aus dem Vorhaben zurück, wohl wissend, wie viel er bezahlen muss. Das wird wiederum bei der Bank den Verlust von vielen potenziellen Kunden und im Endeffekt den Kapitalrückgang verursachen. Eine Lösung dieses Problems sucht man somit in der Institution der Eurohypothek. Es wird nämlich mehrfach darauf hingewiesen, dass ein einheitliches Sicherungsinstrument die Wettbewerbsfähigkeit unter den Kreditgebern steigern wird. Auf diese Weise würde es dazu führen, dass auf dem Kredithypothekenmarkt unterschiedliche Angebote mit deutlich günstigerem Prozentsatz für die Kreditnehmer entstehen und somit die Möglichkeit der Refinanzierung der Hypotheken schaffen<sup>55</sup>.

Deshalb wird grundsätzlich betont, dass das Eurohypothekmodell auf folgenden drei Hauptfaktoren gestützt werden sollte:

- auf der Sicherheit,
- der Flexibilität sowie
- auf dem grenzüberschreitenden Charakter<sup>56</sup>.

Die Gruppe Forum sah in dieser Rechtsform einen besonders positiven Einfluss auf die Verbriefung der Hypothekenforderung. Sie verband mit dieser Konstruktion auch die Hoffnung auf die Steigerung der Anzahl der Bankkonsortien<sup>57</sup>. Da die Autorin diese Ansicht teilt, erinnert sie kurz an die Frage der Bankkonsortien und des Verbriefungsverfahrens. Sie ist der Meinung,

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<sup>52</sup>Op. cit., S. 209ff.; Vgl. Ch. v. Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, Schlechtriem, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll (edit.), *Draft Common Frame of Reference*, Interim Outline Edition, München 2008, <http://www.law-net.eu/>.

<sup>53</sup>A. Wudarski, *W poszukiwaniu...*, S. 238.

<sup>54</sup>S. Nasarre-Aznar, *Looking for a model for a Eurohypothec*, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Background%20Paper%20Eurohypothec.pdf>.

<sup>55</sup>Op. cit.; Berichterstatter: J. Purvis, Arbeitsdokument – Grünes Buch zu dem Hypothekenkredit der EU. Wirtschafts- und Währungsausschuss 30.03.2006, PE 369.875v02-00 2/7 DT\60944 8PL. doc, [http://www.europa.europa.eu/meet\\_docs/2004\\_2009/documents/dt/609/60944\\_8/609448pl.pdf](http://www.europa.europa.eu/meet_docs/2004_2009/documents/dt/609/60944_8/609448pl.pdf).

<sup>56</sup>S. Nasarre-Aznar, *Looking for...*, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Background%20Paper%20Eurohypothec.pdf>.

<sup>57</sup>*Report by the Forum Group on Mortgage Credit, 2004*, <http://www.europa.eu.int>; S. Nasarre-Aznar, *Looking for...*, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Background%20Paper%20Eurohypothec.pdf>.

dass das Ziel der Erhöhung des wirtschaftlichen Umsatzes die Entwicklung von beiden Finanzformen sein sollte. Höchstwahrscheinlich könnte bei der Umsetzung dieses Vorhabens die Eurohypothek hilfreich sein. Über die rechtliche Bedeutung der dargestellten Fragen überzeugt uns auch die Novelle des polnischen Gesetzes über Grundbücher und Hypothek vom 26. Juni 2009.

Die Konsortialfinanzierung gilt als eine besondere Art der Unterstützung für sämtliche Unternehmen. Sie wird vor allem und mit großer Wirksamkeit zur Ausführung von Investitionen genutzt, die sich auf große Beträge belaufen. Grundsätzlich wird darauf hingewiesen, dass die Bankenkonsortien eine besondere Rolle in der Entwicklung von kleinen und mittleren Banken spielen, denn mit vereinten Kräften sind sie in der Lage, Kredite zu erteilen, für die ihre eigenen Limits nicht ausreichend wären. Zweitens, bei gemeinsamen Aktivitäten dieser Art wird das Kreditrisiko auf alle teilnehmenden Subjekte aufgeteilt<sup>58</sup>.

In der Literatur wird darauf hingewiesen, dass der akzessorische Charakter der Hypothek kein effektives Instrument für die Konsortiensicherung sei, insbesondere im Fall der geheimen Konsortien<sup>59</sup>. Als Vorbild erscheint dabei die deutsche Grundschuld, bei der: „die Bank, die als Veranstalter fungiert, einen Teil der Forderung auf die übrigen Banken überträgt und die Sicherung (Grundschuld) nur bei ihm bleiben kann“<sup>60</sup>. Im Grundbuch ist nur der Bank-Veranstalter eingetragen. Diese Rechtslösung vereinfacht die freie Gestaltung der Verhältnisse unter den teilnehmenden Konsortien<sup>61</sup>. Die Wirksamkeit der *Grundschuld* spricht in diesem Zusammenhang auch für den nichtakzessorischen Charakter der neuen gemeinschaftlichen Sicherung.

Obwohl die Eurohypothek als Sicherungsform rechtlich noch nicht zugelassen ist, lohnt es sich zu betonen, dass die Überlegungen hierzu schon bei der Modernisierung von vielen internen Hypothekeninstrumenten in den Mitgliedsländern nützlich waren, beispielsweise des polnischen Rechts. Gemeint ist vor allem die oben erwähnte Novelle von dem u.k.w.h.- Gesetz vom 26. Juni 2009. Diese räumt nämlich u.a. die Möglichkeit der Nutzung des Hypothekenmodells zu Gunsten des Hypothekenverwalters ein.

Die Befürworter der Eurohypothek erwarten zusätzlich, dass ihre Einführung maßgeblich zur Entwicklung der Verbriefung der Hypothekenforderung beitragen wird<sup>62</sup>. Bei dem akzessorischen Charakter der Hypothek ist diese Finanzierungsart weitgehend eingeschränkt<sup>63</sup>. In der Literatur weist man dabei darauf hin, dass die Verbriefung zu den effektivsten und sich ständig entwickelnden Finanzierungsformen der Banken gehört<sup>64</sup>. Ihre Hauptvorteile sind:

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<sup>58</sup>K. Czerkas [In:] *Nieruchomość jako przedmiot obrotu i zabezpieczenia w Polsce; praktyczne aspekty stosowania prawa przy finansowaniu hipotecznym*, red. A. Drewicz-Tułodziecka, Fundacja na Rzecz Kredytu Hipotecznego, Warszawa 2008, Zeszyt Hipoteczny 27/2008, S. 200; vgl. Urteil des Obersten Gerichts vom 15.12.2005, V CK 425/05, LEX Nr 179743.

<sup>59</sup>Ein Geheimkonsortium liegt vor, wenn der Gläubiger, der in das Grundbuch eingetragen ist, ausschließlich als der Bank-Veranstalter des Konsortiums auftritt, so: A. Drewicz-Tułodziecka, A. Gregorowicz, *Dług gruntowy jako uzupełnienie katalogu zabezpieczeń na nieruchomościach*, Prawo Bankowe 2005, Nr 3, S. 40.

<sup>60</sup>A. Drewicz-Tułodziecka, A. Gregorowicz, *Dług gruntowy jako uzupełnienie...*, S. 40.

<sup>61</sup>Op. cit.

<sup>62</sup>So z.B. die Forum-Gruppe, siehe: [http://www.de.ehipoteka.pl/corporate.../Eurohipoteka\\_Stoecker.pdf](http://www.de.ehipoteka.pl/corporate.../Eurohipoteka_Stoecker.pdf).

<sup>63</sup>A. Drewicz-Tułodziecka, *The position of an owner of Real estate, which is encumbered with a non-accessory right to property, based on the example of regulations in Poland*, [In:] *Basic Guidelines for a Eurohypothec*, Outcome of the Eurohypothec works hop November 2004/April 2005, edited by A. Drewicz-Tułodziecka, Mortgage Credit Foundation, Warsaw, May 2005, S. 54ff.

<sup>64</sup>R. Jagiełło, *Bankowość korporacyjna*, [In:] *Współczesna bankowość. Tom 1.*, bearbeitet von Zaleska M., Warszawa 2007, S. 169.

- die Möglichkeit der Erlangung langfristiger Kapitalmittel für die Refinanzierung der Kredite,
- niedrige Kapitalerwerbskosten,
- Erhöhung der „finanziellen Liquidität“<sup>65</sup>.

Die meisten Vertreter der Doktrin bemerken treffend, dass für die Entwicklung der Verbriefung der Forderungen eine flexible Sicherung nach dem Vorbild der deutschen Grundschuld notwendig sei<sup>66</sup>. Bei einem *stricte* akzessorischen Charakter der Hypothek ist der Verkauf der Hypothekenforderung ein sehr kompliziertes, langfristiges und aufwändiges Verfahren. Die Übertragung der Hypothekenforderung ist nämlich mit gleichzeitiger Übertragung der Sicherung zu der sog. SPV<sup>67</sup> verbunden und demzufolge mit dem obligatorischen Eintrag ins Grundbuch. Diese Schwierigkeiten tauchen in dem deutschen Recht nicht auf, denn man verzichtete auf den engen Zusammenhang zwischen der Forderung und der Sicherung<sup>68</sup>.

Derzeit erleben viele Länder, besonders die, die den akzessorischen Charakter der Sicherungen entwickelten, eine Einschränkung im Verbriefungsverfahren. Man erwartet eine Verbesserung der Lage in Folge der Einführung der Eurohypothek und der damit verbundenen Möglichkeit der Refinanzierung der Kredite mit den Banken der EU-Mitgliedsstaaten. Bei dem gleichen Sicherungsinstrument sollte das Gläubigeränderungsverfahren deutlich einfacher werden. Bezeichnend ist außerdem die Zweckmäßigkeit der Einführung eines elektronischen Eigentumsübertragungsverfahrens sowie der damit verbundenen Belastungen. In der Zukunft würde das zur Aufnahme der Sicherung im Onlineverfahren berechtigen, die im beliebigen Land der Gemeinschaft gem. demselben Eurohypothekverfahren angeboten wäre. Diese Rechtslösung würde den Kreditgebern weitreichende Möglichkeiten einräumen, beispielsweise ein deutscher Bürger könnte bei einer schweizerischen Bank einen Kredit für den Bau einer in Italien gekauften Immobilie –aufnehmen<sup>69</sup>.

Nach Ansicht mancher Vertreter der Doktrin würde die flexible Eurohypothek eine wichtige Rolle bei dem Finanzveraltungsverfahren der zukünftigen Kreditprozeduren spielen. Wichtig ist dabei, dass die für Banken aus dieser Belastung anfallenden Einnahmen von den „institutionellen Investoren“ und nicht von den potentiellen Kreditnehmern stammen würden. Dadurch wäre bei der Festlegung einer Immobilienhypothek keine Erhöhung der Prozentsätze notwendig<sup>70</sup>. Die Rechtmäßigkeit der Einführung einheitlicher Forderungssicherung ist somit für die Entwicklung des Verbriefungsverfahrens von entscheidender Bedeutung.

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<sup>65</sup>Op. cit., S. 177-178; A. Drewicz-Tułodziecka, A. Gregorowicz, *Dług gruntowy jako uzupełnienie ...*, S. 39-40; siehe auch: A. Drewicz-Tułodziecka, *Prawna infrastruktura finansowania ...*, S. 36ff.

<sup>66</sup>A. Drewicz-Tułodziecka, A. Gregorowicz, *Dług gruntowy jako uzupełnienie ...*, S. 39ff.; Vgl. Ł. Reksa, *Ekonomiczne aspekty sekurytyzacji wierzytelności hipotecznych. Część I*, Bank i Kredyt. 2005, Nr. 3, S. 64ff.

<sup>67</sup>SPV- *Special Purpose Vehicle*, sog. Bestimmungs-Gesellschaft, die „die eingekaufte Vermögensrechte durch die Emission der Wertpapiere refinanziert (...)“ - so Ł. Reksa, *Sekurytyzacja wierzytelności na rynkach międzynarodowych*, Bank i Kredyt 2004, Nr. 2, S. 1ff..

<sup>68</sup>A. Drewicz-Tułodziecka, A. Gregorowicz, *Dług gruntowy jako uzupełnienie ...*, S. 39-40; siehe auch , A. Drewicz-Tułodziecka, *Prawna infrastruktura finansowania ...*, S. 36ff..

<sup>69</sup>S. Nasarre-Aznar, *Looking for ...*, <http://www.eui.eu/Documents/DepartmentsCentr es/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Background%20Paper%20Eurohypothec.pdf>.

<sup>70</sup>Op. cit.; vgl. L. Reksa, *Sekurytyzacja w krajach Unii Europejskiej oraz w polskim systemie bankowym*, Komisja Nadzoru Bankowego, Warszawa, September 2007, S. 6, [http://www.knf.gov.pl/Images/sekurytyzacja\\_tcm75-4773.pdf](http://www.knf.gov.pl/Images/sekurytyzacja_tcm75-4773.pdf).

## Zusammenfassung

Ohne die obigen Überlegungen zu diskreditieren, muss man hervorheben, dass die Frage der Rechtsform der Eurohypothek nach wie vor äußerst kontrovers bleibt. Zwecklose Diskussionen darüber werden in unterschiedlichen Kreisen geführt, sowohl von Theoretikern als auch von Praktikern und sogar von den Regierungsmitgliedern der jeweiligen Staaten. Ein Teil von ihnen spricht sich für den akzessorischen Charakter des neuen Sicherungsmechanismus aus, ein anderer Teil für den nicht akzessorischen Charakter, die Übrigen wiederum vertreten den mittleren Standpunkt, der auf der weitgehenden Flexibilisierung der Akzessorität, bzw. dem Abgang von einem nichtakzessorischen Charakter „in extremer Form“ beruht<sup>71</sup>.

Wie die durchgeführte Analyse der Ansichten über die Eurohypothek belegt, es dominiere die Meinung, bei der neuen Sicherung sollte es sich um ein Recht handeln, das mit der gesicherten Forderung nicht eng verbunden ist. In den vorherigen Punkten der vorliegenden Publikation wurde gezeigt, dass die häufigsten Vorbilder, die bei der Gestaltung des neuen Rechtsmechanismus berücksichtigt werden, das deutsche Grundrecht und der schweizerische Schuldbrief waren, also zwei Rechtsmittel, deren Hauptvorteil die Unabhängigkeit von dem Sicherungsgegenstand ist.

Bevor man sich für eines der oben beschriebenen Konzepte entscheidet, sollte man eine schwerwiegende Frage beantworten: „Kann ein Inhaber, der eine nichtakzessorische Sicherung nutzt einen gleichwertigen Schutz in Anspruch nehmen wie ein Inhaber, der eine akzessorische Hypothek verwendet?“<sup>72</sup> Die Vertreter von *Mortgage Credit Foundation*<sup>73</sup> haben es bejaht. Die Autorin teilt ebenfalls diese Meinung und ist der Auffassung, es sei durch die richtige Formulierung des Sicherungsvertrages bei der Grundschuld möglich.

In der polnischen Hypothekpraxis beginnt man allmählich, von einem strengen Akzessoritätsprinzip Abstand zu nehmen. Als Beispiel dafür gilt die Gesetzesnovelle von u.k.w.h. vom 26. Juni 2009, mit dem Ziel den wirtschaftlichen Verkehr zu verbessern und flexibler zu gestalten. Bei der Hypothek vor der Einführung der Novelle wurden zahlreiche Fehler festgestellt, die mit der Akzessorität verbunden waren. Deshalb würde die Gestaltung der Eurohypothek als ein Recht, das eng mit der Forderungssicherung verbunden ist, keine praktische Anwendung im polnischen Gesetz finden. Auf diese Weise sollte ihr rechtlicher Charakter den Eigenschaften der nichtakzessorischen Rechte ähneln, wobei die Autorin der Meinung ist, die Briefform dieser Sicherung könnte wesentlich weitergehende Folgen für die Entwicklung des europäischen Kreditmarktes haben.

Wie bereits dargelegt wurde umstritten bleibt auch die Frage, ob die Eurohypothek die bisher in der einzelnen Ländern der EU gültigen Sicherungen verdrängen oder als ein zusätzlicher Rechtsmechanismus gelten soll. Nach Ansicht der Autorin sollte sie als eine Alternativsicherung behandelt werden. Die Einführung von neuen Rechtsinstituten und deren praktische Anwendung wäre mit Sicherheit ein langwieriges Verfahren, was bei der innenstaatlichen Kreditierung den Erhalt von Hypothekenkrediten entscheidend verzögern würde. Außerdem gelten die Vielfalt der Forderungssicherungen und der damit einhergehenden Möglichkeit der Wahl einer für den konkreten Fall geeignetesten Sicherung als Werte, die in den Ländern der freien Marktwirtschaft nicht zu unterschätzen sind. Zum Schluss sei es zu bemerken, die Eurohypothek wäre vor allem dann eine ausgezeichnete Sicherung wenn alle

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<sup>71</sup>A. Wudarski, *W poszukiwaniu...*, S. 234, siehe auch: J. Köndgen, O. Stöcker, *Die Eurohypothek-Akzessorietät...*, S. 117.

<sup>72</sup>So O. Stöcker, *The Eurohypothec-Accessoriness...*, S. 42ff..

<sup>73</sup>Op. cit.

Mitgliedsstaaten der EU die Eurowährung einführen würden. Auf diese Weise könnte man zahlreiche Probleme mit der Währungsumrechnung vermeiden.

# Karolina Pasko\*, Gradual Convergence in the Field of Termination for Breach of Contract: A European Perspective\*\*

Abstract: National law on termination for breach of contract strictly depends on what is the concept of breach of contract and how the system of contractual remedies is structured. It also reflects the legislator's attitude towards the sanctity of contract principle and, at the same time, towards the need of protection of a debtor. Termination for breach of contract is said to be far from uniformity as each country has its own long tradition of contractual remedies reflected in national legislations. However, despite no formal convergence, the market practice, the doctrine and the jurisprudence seem to have developed some uniform trends in this field. The paper examines various national laws and their recent developments with an attempt to prove that, to some extent, a common European approach to termination for breach exists.

Keywords: termination, breach of contract, termination for breach, unification of private law.

## 1. Introduction

Termination for breach of contract, shortly called termination for breach, can be defined as a right of a creditor to escape from a contract in case of a breach of contract committed by the other party. Termination for breach touches upon the essence of any contract law system for it has been traditionally viewed as an exception to the iron rule of *pacta sunt servanda*<sup>1</sup>. It is claimed to be the sharpest consequence for a debtor and for a contract itself in the whole range of remedies available to a creditor in case of a breach of contract<sup>2</sup>.

The approach to termination for breach taken by national systems reflects not only their attachment to the sanctity of contract rule but also their attitude to the protection of the interests of a debtor.<sup>3</sup> In detail, the model of termination for breach of contract strictly depends on what is the concept of breach of contract and how the system of contractual remedies is structured. For these reasons the termination for breach might seem to be far from uniformity as each country has its own long tradition of contractual remedies reflected in national legislations.

At the same time, termination for breach is one of the most commonly used instruments in case of a breach of contract. The globalisation and international relations within the EU single market provoke questions about how termination for breach is shaped in different European systems. The attempts to harmonize this field of contract law at the EU level are still unsure in their outcome. Although the paper focuses on B2B transactions so it does not concern the consumer protection, it has to be noticed that in consumer EU law termination for breach has not yet (contrary to the consumer's right to withdrawal) gained much attention. However, it has been recently touched upon by the EU legislator in the Article 18 of the Consumer Rights

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<sup>1</sup> R. Zimmermann, *Remedies for Non-performance, Viewed against the Background of the Principles of European Contract Law* in R. Zimmermann, *The New German Law of Obligations. Historical and Comparative Perspectives*, 40, 67 (2005); S. Rowan, *Remedies for Breach of Contract. A Comparative Analysis of the Protection of Performance* 5, 88-90 (2012).

<sup>2</sup> P.S. Atiyah, *An Introduction to the Law of Contract*, 407-409 (1995); S. Rowan, *Remedies...* 5, 94; J. Birds et al., *Termination of Contracts* 5 (1995).

<sup>3</sup> On this aspect extensively S. Rowan, *Remedies... passim*.

Directive<sup>4</sup>. Moreover, different model laws, such as PECL<sup>5</sup> and DCFR<sup>6</sup> or the draft of the Common European Sales Law<sup>7</sup>, concerning B2B relations as well, all take a very similar approach to termination for breach.

Maybe termination for breach is thus not as divergent as one could think? Despite no formal harmonisation, European market practice, doctrine and jurisprudence seem to have developed some uniform trends in this field. The question arises whether Europe has a common approach to termination for breach of contract? In an attempt to answer this, various European national laws and their recent developments will be examined. The analysis includes English law, as it has been very influential for harmonisation projects and national regulations in other European countries, the Vienna Convention on Contracts for the International Sale of Goods<sup>8</sup>, German law and French law (as they both recently experienced profound changes in this field), and Polish law, which – by contrast – has not yet undergone any major developments on a legislative level.

There are different aspects of termination for breach in analysed systems in which a gradual convergence might be noticed. The paper focuses on the prerequisites of a right to terminate, the mechanism of termination and the legal effects of terminating a contract, since they are all crucial for the nature of termination for breach. Each of them is presented in light of a historical background and recent developments.

## 2. Breach of contract

### 2.1. Narrow and unitary approach

Initially, the selected systems differed in respect to what breach gives a creditor a right to terminate a contract. We can distinguish a unitary and a narrow approach to a breach of contract as a prerequisite of a right to terminate<sup>9</sup>.

The unitary approach means that any type of breach of contract can entitle a creditor to terminate – including a delay, imputable impossibility of performance or defective performance. The right to terminate may be then subject to some further requirements or limitations regarding for instance a seriousness of the contractual term that has been breached or a seriousness of the breach itself. The unitary approach of this kind can be found in English law and French law.

English law traditionally distinguishes among conditions – a breach of which gives a creditor a right to terminate a contract and to claim damages – and warranties – a breach of which entitles

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<sup>4</sup> Directive 2011/83 EU (the CRD) 2011, OJ L 304/64, 22.11.2011.

<sup>5</sup> Principles of European Contract Law (the PECL) 2002. Available at <http://www.cisg.law.pace.edu/-cisg/text/textef.html> (last visited on 27.07.2016).

<sup>6</sup> Principles, Definitions and Model Rules of European Contract Law. Draft Common Frame of Reference (the DCFR) 2009. Available at [http://ec.europa.eu/justice/policies/civil/docs/dcf\\_r\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcf_r_outline_edition_en.pdf) (last visited on 27.07.2016).

<sup>7</sup> Common European Sales Law draft of European Parliament and Council regulation (the CESL) 2011. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF> (last visited on 27.07.2016).

<sup>8</sup> United Nations Convention on Contracts for the International Sale of Goods (the CISG) 1980. Available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html> (last visited on 27.07.2016).

<sup>9</sup> A similar distinction is made by T. Pajor, *La résolution unilatérale du contrat en droit polonais* [Unilateral Termination of a Contract under Polish Law] in M. Pyziak-Szafnicka *Kierunki rozwoju prawa cywilnego we Francji, w Niemczech i w Polsce w perspektywie prawa europejskiego* [Development of Private Law in France, Germany and Poland in the European Law Perspective] 221-223 (2008).



only to compensation but not to termination<sup>10</sup>. In practice, this rule is far less apparent as a third category of contractual terms, called innominate or intermediate terms, has been developed in case law<sup>11</sup>. In an event of a breach of an innominate term, the aggrieved party is entitled to terminate the contract if the breach is so serious that it “goes to the root of the contract” and deprives that party from substantially the whole benefit that he or she was supposed to obtain according to the contract<sup>12</sup>. By introducing this third category of contractual terms the control over the admissibility of termination for breach shifted from the seriousness of the term breached to the seriousness of the breach itself<sup>13</sup>. The latter one is characteristic for French law. According to the French Civil Code any non-performance or improper performance can in theory justify termination, however, the requirement of the gravity of the breach is generally recognized by French courts and doctrine<sup>14</sup>.

A narrow approach means, by contrast, that only certain types of breaches specified by the legislator can give creditor a right to terminate a contract. This approach has been characteristic for German law and Polish law lacking a unitary concept of breach of contract. According to German general law of obligations prior to 2002, only imputable delay and impossibility of performance entitled a creditor to terminate the contract, whereas other forms of breaches, for instance improper performance, did not allow to terminate<sup>15</sup>. A similar solution can be found in general law of obligations in the Polish Civil Code<sup>16</sup>.

## 2.2. Towards a unitary concept of breach of contract

The convergence that might be observed is towards the unitary concept of breach of contract<sup>17</sup>. Some limitations of the right to terminate for breach are achieved or by referring to a minimum level of seriousness (essentiality, fundamentality) of a breach as a condition of a right to terminate or by excluding termination for breach in case of minor breaches.

The concept of fundamental breach as a basic condition of a right to terminate has been introduced in the CISG (*see* Article 25 of the CISG)<sup>18</sup>. Interestingly, the concept of fundamental breach has been inspired by the English case law, where it had been developed with regard to contractual clauses and according to which in case of a fundamental breach of contract the party in default could not rely on an exemption clause<sup>19</sup>. The doctrine of fundamental breach is no longer applicable in this sense<sup>20</sup>. However, looking at English cases, it is common for the courts to take into account the seriousness of a breach while deciding on cases on termination (which is also a clear influence of the innominate terms doctrine)<sup>21</sup>.

In Germany, the narrow approach was first partly cured by the doctrine of positive breach of contract (*positive Vertragsverletzung*). According to this doctrine, breaches other than delay or

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<sup>10</sup> P.R. Ellington, *Termination of Contracts under English Law*, 1997/7 *International Business Law Journal* 859 (1997); R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* 803 (1996).

<sup>11</sup> *Hong Kong Fir Shipping Company v. Kawasaki Kisen Kaisha Ltd* [1961] EWCA Civ 7.

<sup>12</sup> *Honk Kong Fir v. Kawasaki* [1961] at 62.

<sup>13</sup> R. Zimmermann, *The Law of Obligations...* 804; S. Rowan, *Remedies...* 74.

<sup>14</sup> C. Jamin, *Les conditions de la résolution du contrat: vers un modèle unique? Rapport français* in M. Fontaine, G. Viney *Les sanctions de l'inexécution des obligations contractuelles. Études de droit comparé* 453 (2001).

<sup>15</sup> See §§ 325, 326 of the German Civil Code (the BGB) prior to 2002 amendment.

<sup>16</sup> See Articles 491 *et seq.* of the Polish Civil Code.

<sup>17</sup> It is also called unitary concept of non-performance, B. Gsell, *Non-performance and Remedies in General* in S. Leible, M. Lehman *European Contract Law and German Law* 380-385 (2014).

<sup>18</sup> P. Huber, *CISG – The Structure of Remedies* 71 *RabelsZ* 18, 24-25 (2007).

<sup>19</sup> P.R. Ellington, *Termination of Contracts...* 861.

<sup>20</sup> P.R. Ellington, *Termination of Contracts...* 861; J.E. Stannard, D. Capper, *Termination for Breach of Contract*, 10-12 (2014).

<sup>21</sup> J.E. Stannard, D. Capper, *Termination for Breach...*, 10-11.

impossibility of performance, for example a breach of an ancillary duty like one arising from a confidential clause, can entitle a creditor, under certain circumstances, to some remedies for breach including a right to terminate the contract<sup>22</sup>. The positive breach of contract doctrine has served as a back-door tool to mitigate the rigidity of a narrow approach of the BGB<sup>23</sup>.

The clear effect of convergence was achieved by the 2002 modernisation of German law. The reform of the BGB introduced a unitary concept of breach of duty (*Pflichtverletzung*) and a concept of non-performance and performance not in conformity (§ 323 of the BGB) as a condition of a right to terminate the contract for breach. The German legislator did not adopt the fundamental breach approach, but limitations to termination for breach were achieved by requiring a creditor to set an additional time for cure (*Nachfrist*) before terminating for breach and, secondly, by excluding a right to terminate in case of a minor non-conformity (§ 323(5) of the BGB).

In Poland, there is still the narrow approach to termination for breach, however, some indirect shift towards the unitary approach can be observed in Polish jurisprudence. There is a growing trend of enlarging the scope of termination for breach, for example by referring to the fundamental breach doctrine<sup>24</sup>, but so far no legislative changes have been made.

### 3. Mechanism of termination

#### 3.1. Judicial and extra-judicial way of terminating for breach

The second aspect under analysis is the mechanism of termination for breach. One possibility is a judicial termination – by way of a court judgement in the proceedings initiated by a creditor who is willing to cease the contractual relationship due to a breach committed by the other party. Another one is a unilateral termination by way of a declaration of a creditor addressed to the party in default.

Initially, French law did not allow for an extra-judicial termination. The *a priori* judicial control was perceived essential because of the very strong attachment of the French Civil Code to the *pacta sunt servanda* principle<sup>25</sup>. According to Article 1184 of the French Civil Code, once the conditions of termination for breach are met, the contract is not terminated as of right, but termination must be applied for in court. An extra-judicial termination of contract has been accepted in English, German and Polish law.

#### 3.2. Unilateralisation of termination for breach

The convergence is towards the unilateralisation of termination for breach. The unilateral termination of contract is the approach taken by the CISG (Article 26 of the CISG) – termination is affected by a declaration of a creditor addressed to the other party.

In France, the courts have first developed some important exceptions to the rule of judicial termination. Since the landmark 1998 judgement of the French Supreme Court, the unilateral termination for breach has been allowed in case of a serious breach and at the risk of the creditor

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<sup>22</sup> P. Zumbansen, *The Law of Contracts* in M. Reimann, J. Zekoll *Introduction to German Law* 192-193 (2005); W. Fikentscher, *Schuldrecht* 267 (1992); R. Zimmermann, *Restitution after Termination for Breach of Contract in German Law*, 1997 *Acta Iuridica* 121, 123, note 13 (1997).

<sup>23</sup> B. Gsell, *Non-performance...* 380-381; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* 812 (1996).

<sup>24</sup> See for instance the Polish Supreme Court judgement of 24 June 2014, case no. I CSK 392/13.

<sup>25</sup> C. Jamin, *Les conditions...* 452, 511; S. Rowan, *Remedies...* 82.

(à ses risques et périls)<sup>26</sup>. The court could still control *ex post* the lawfulness of unilateral termination. The second step was made by issuing on February 2016 a presidential regulation on the reform of the French Civil Code<sup>27</sup> that, subject to the consent of the French parliament, will most likely enter into force on 1 October 2016.

The projected new law recognises the concepts already established in jurisprudence and ensures their general application. It explicitly provides for a two-fold mechanism of termination for breach upon the choice of a creditor – a unilateral termination of a contract by way of declaration (Article 1226 of the projected new law) or, as under the old law, a judicial termination of a contract in court proceedings (Article 1227 of the projected new law). The former mechanism is subject to a post-termination judicial control (Article 1228 of the projected new law). The amendments towards the unilateralisation of termination for breach, clearly inspired by jurisprudence and legal literature<sup>28</sup>, bring French law closer to all other analysed systems, since they all accept the extra-judicial mechanism of termination for breach.

## 4. Effects of termination

### 4.1. Problematic retroactive effects theory

The third aspect of convergence are the legal effects of termination for breach. Initially, most of the analysed systems recognised the concept of retroactive effects of termination. According to the retroactive effects theory termination operates *ab initio (ex tunc)*, creating a fiction as if the contract had never been concluded at all. Every performance received has to be returned according to unjustified enrichment regime and all the effects of the contract (including the transfer of goods, as in sales contract) are being annulated automatically.

The retroactive effects theory had been recognised in German doctrine, with a consequence than according to the old German law no contractual claim for damages could be brought after termination took place. The exclusion of a claim for damages was viewed as a logic consequence of the retroactivity theory – if a fiction of no valid contract is accepted, there is no ground for claiming damages in contractual regime<sup>29</sup>.

The retroactive effects theory had been also recognised in French law and Polish law, and although in both systems the legislators expressly allowed a claim for damages after termination for breach (Article 1184 of the French Civil Code, Article 494 of the Polish Civil Code), its ground and scope were disputable and the critics underlined the inconsistency of awarding damages with the retroactive effects of termination<sup>30</sup>.

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<sup>26</sup> See the Cass.(1)Civ. judgement of 13 October 1998, case no. 96-21485, Bulletin civil I 1998, no. 300, in which the French Supreme Court (*Cour de Cassation*) decided that the gravity of one party's behavior can justify that the other party unilaterally terminates the contract at her own risk. Similar decision was taken in the Cass.(1)Civ. judgement of 20 February 2001, case no. 99-15170, Bulletin civil I 2001, no. 40.

<sup>27</sup> Ordonance no. 2016-131 of 10 February 2016 on the reform of i.a. contract law (*Ordonnance no. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*). Available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004939&categorieLien=id> (last visited on 27.07.2016).

<sup>28</sup> P. Ancel, *La résolution pour inexécution: évolutions récentes du droit français* in S. Mazzamuto *Il Contratto e le tutele. Prospettive di diritto europeo* 398, 409-411 (2002).

<sup>29</sup> R. Zimmermann, *Restitution after Termination...* 121, 126.

<sup>30</sup> In French doctrine see G. Boyer, *Recherches historiques sur la résolution des contrats (Origines de l'Article 1184 C. Civ.)* 39 (1924); Y.-M. Serinet, *L'effet rétroactif de la résolution pour inexécution en droit français. Rapport français* in M. Fontaine, G. Viney *Les sanctions de l'inexécution des obligations contractuelles. Etudes de droit comparé* 590-594, 643-644 (2001); in Polish doctrine see, for instance, A. Klein, *Ustawowe prawo odstąpienia od umowy wzajemnej* [Statutory Right to Terminate a Reciprocal Contract] 181 *et seq.* (1964).

English law, by contrast, adopts a prospective effects theory, allowing for a claim for damages in contractual regime after termination for breach<sup>31</sup>. It has been underlined that the lack of retroactive effects is what distinguishes termination for breach from rescission, which – in cases of fraud, mistake or misrepresentation – operates *ab initio* and results in treating the contract as never having come into existence and in restoring the parties to their pre-contractual positions<sup>32</sup>. In fact, a party terminating for breach under English law is not allowed to claim for recovery of what that party had performed prior to termination (for example, a recovery of the purchase price paid under a sales agreement) unless the consideration for this performance had wholly failed<sup>33</sup>. The termination for breach in English law is thus not, as a rule, of a restitutionary nature.

#### 4.2. Towards the prospective effects of termination for breach

Convergence is towards the prospective effects of termination. In France, it was first proposed in doctrine to abandon the concept of retroactivity as a legal fiction and to understand the retroactivity only as a mere technique (the mutual obligations to return)<sup>34</sup>. In Germany, at the time when the retroactive effects theory still dominated, a back-door way was invented in order to enable a creditor to claim damages. The courts started to accept the view that it is possible for a creditor to claim restitution of his or her own performance and compensation for further loss based on a general provision on contractual responsibility for damages – restitution of the executed performance being the minimum element of contractual compensation. The further loss was calculated according to the so-called *Differenztheorie* (difference between a full value of performance promised to the creditor and the value of the performance that the creditor receives back)<sup>35</sup>. Later on, the retroactivity theory was overruled by the transformation theory, which is close to the prospective effects theory. According to the transformation theory, termination does not set a contract aside *ab initio* but rather transforms the obligations to perform into the mutual obligations to return<sup>36</sup>. Since the contract is not set aside but in a way continues to exist, termination would not exclude contractual claim for damages.

The CISG adopted the prospective effects theory and also introduced a new concept according to which the remedies for breach of contract that are not incompatible with each other (like termination and claim for damages) can always be accumulated.

Latest amendments in French and German law emphasize the shift towards the prospective effects of termination for breach. In § 325 of the BGB it is underlined that the right to demand (contractual) damages is not excluded by termination. The projected new French law explicitly provides that the remedies that are not incompatible might be accumulated (Article 1217 of the projected new law).

It is important to note that the prospective effects of termination for breach do not implicate the lack of restitution of what both parties had received from each other prior to termination. For instance, the mutual post-termination restitution is still a rule under German law (§§ 346 *et seq.*

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<sup>31</sup> *Howard-Jones v. Tate* [2011] EWCA Civ 1330.

<sup>32</sup> The distinction between rescission of a contract *ab initio* and termination of a contract for subsequent breach has been confirmed i.a. in *Johnson v. Agnew* [1980] AC 367. Nevertheless, a confusion in this field is still common, see for instance the decision in *Gunatunga v. DeAlwis* [1996] 72 P & CR 161 and its critical assessment in *Howard-Jones v. Tate* [2011] EWCA Civ 1330 at 17-42.

<sup>33</sup> *Howard-Jones v. Tate* [2011] EWCA Civ 1330.

<sup>34</sup> P. Ancel, *La résolution...* 415, note 71 and authorities cited therein.

<sup>35</sup> B. Gsell, *Non-performance...* 387, notes that '[t]he effects of the *Differenzmethode* (as the Author calls the *Differenztheorie*) were actually termination of the contract plus the compensation of further loss'.

<sup>36</sup> More about transformation theory and its development in German doctrine and jurisprudence see authorities cited by R. Zimmermann, *Restitution after Termination...* 126-128, the Author himself being skeptical about it.

BGB) as well as under the CISG (Article 81 of the CISG) despite they both adopt the prospective effects theory. What prospective theory changes are the legal grounds for such restitution – from the general unjust enrichment rules to a special post-termination regime<sup>37</sup>. The prospective theory is also consistent with a lack of proprietary effects of termination that is now accepted in all analysed systems<sup>38</sup>.

Of course, abandoning the concept of retroactivity facilitates explaining the lack of restitution, if this is the case. For instance, restitution is also a consequence of termination for breach under the projected new French law, though only as long as the performances executed prior to termination cannot find their utility unless the whole contract is completely performed. Otherwise, the restitution is limited to the last performance for which no consideration had been received (Article 1229 of the projected new law). Under the law that is yet still in force, where termination for breach is explained by the concept of a resolutive condition operating *ex tunc*, the lack of restitution would be hardly explainable. The new solution brings French law noticeably closer to the English law under which the restitution takes place only if the consideration for the executed performance had wholly failed<sup>39</sup>.

The Polish jurisprudence and scholars started to approve the transformation theory in place of retroactivity<sup>40</sup>. In a recent Polish Supreme Court judgement<sup>41</sup> it was stated that termination of contract for breach does not delete retroactively the obligations arising from the contract but rather transforms their content into the obligation to return the performances already executed and to make further compensation between the parties.

## 5. Conclusion

If we now look at the *status quo* in these three aspects of termination for breach – the concept of breach of contract, the mechanism of termination and the effects of termination – we can easily notice that termination for breach has experienced a serious development. Thanks not only to legislative changes, but also – if not mostly – to the evolution of legal literature and jurisprudence that have been likely both inspired by supranational regulations (for instance, the CISG), it has become much less divergent that it was just a few decades ago. It seems that this important instrument of a creditor's protection in case of a breach of contract starts to have a common shape in Europe, despite no formal harmonization has yet taken place. The national approaches to termination for breach are clearly approximating.

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<sup>37</sup> I. Schwenzer, *The Law of Contracts* in W.F Ebke, M.W. Finkin *Introduction to German Law* 185 (1996); R. Zimmermann, *Restitution after Termination...* 127.

<sup>38</sup> In France before the 2016 reform, termination for breach was regarded as operating retroactively and with proprietary effects which meant that a proprietary right conferred under the terminated contract was being reacquired by the transferor even if a third party had acquired this right by the time of termination. Cf. the French Supreme Court judgement of 15 October 2015, Cass.(3)Civ., case no. 14-18.077, ECLI:FR:CCASS:2015:C301103; M. Torsello, *Remedies for Breach of Contract* in J.M. Smits *Elgar Encyclopedia of Comparative Law* 615-616 (2006).

<sup>39</sup> See *Howard-Jones v. Tate* [2011], *supra* note 31; cf. M. Chen-Wishart, U. Magnus, *Termination, Price Reduction, and Damages* in G. Dannemann, S. Vogenauer *The Common European Sales Law in Context. Interactions with English and German Law* 652-653 (2013) who mention some exceptions to this principle, for instance with regard to installments contracts.

<sup>40</sup> G. Tracz, *Sposoby jednostronnej rezygnacji ze zobowiązań umownych* [The Means of Unilateral Resignation from Contractual Obligations] 77 *et seq.* (2008); F. Zoll, *Wykonanie i skutki niewykonania lub nienależytego wykonania zobowiązań* [Performance and Remedies for Non-performance or Improper Performance of Obligations] in A. Olejniczak *System Prawa Prywatnego* (red. Z. Radwański), *Tom 6. Prawo zobowiązań – część ogólna* [System of Private Law (edited by Z. Radwański), Volume 6. Law of Obligations – General Part] 1229, 1230 (2014).

<sup>41</sup> The Polish Supreme Court Judgment of 25 February 2015, case no. IV CSK 395/14.

To conclude by answering whether this common approach really exists and if yes, what are its profits, we can have a look at the harmonized EU law of consumer contracts.

Article 18 of the Consumer Rights Directive that has been already mentioned above provides a consumer with a right to terminate a sales contract in case of a delay in delivering goods. According to Article 18 p. 2 of the CRD, 'where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1 (30 days from the conclusion of the contract – K.P.), the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract.

Following provisions contain the exceptions to the requirement of setting an additional period of time and regulations on the effects of termination. According to Article 18 p. 3 and 4 of the CRD, 'upon termination of the contract, the trader shall, without undue delay, reimburse all sums paid under the contract' and the consumer may, in addition to termination, recourse to other remedies provided for by national law. Article 18 of the CRD is undoubtedly an example of termination for breach.

This provision has been implemented in all analyzed systems<sup>42</sup>. In Germany and Poland, it has been unified with the general law regime of termination for breach. It seems that a common approach to civil law institutions, even if it precedes a formal harmonization of general contract law, results in making the harmonized EU law more effective and valuable in sense of legal certainty, coherence and equality. If not for the gradual convergence of termination for breach discussed in this paper, the right provided for a consumer in Article 18 of the CRD would probably be understood differently in all examined systems.

Not only does the common approach undertaken by scholars, courts, and legislators enhance the uniformity in the sphere of general civil law, but it can also improve the effectiveness of already harmonized instruments of private law.

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<sup>42</sup> In England, see Section 28 of Consumer Rights Act 2015; in France, Articles L 138-1 – L 138-6 of *Code de la Consommation* [Consumer Code], in Germany, § 474(3) together with § 323 of the BGB, and in Poland, Article 543(1) § 1-2 of Polish Civil Code.

# Edyta Sokalska\*, Historical Background and the Main Ideas of the American Uniform Commercial Code of 1952

Abstract: The Uniform Commercial Code of 1952 is an example of set of laws governing transactions that has been enacted by state legislatures. The initial draft was proposed by the National Conference on Commissioners on Uniform State Laws, but each legislature may modify the provisions when adopting the Code. The Code itself was drafted by some top legal scholars. Courts interpreting the Code generally seek to harmonize their interpretations with those of other states that have adopted the same or similar provision. During the process of drafting The Uniform Commercial Code there was a vivid discussion and there were presented different points of view concerning the need of such a code in the American legal system. Especially the dialogue between Professor of Law – Frederick K. Beutel and the proponents of the code was in the centre of attention.

Keywords: law, administration, history, commercial code, unification, transaction

## Introduction

American law and the judicial system are strictly connected with the federal structures and the administrative division of the country. The law of the United States was originally largely derived from the *common law* system of the English law, which was in force at the time of the Revolutionary War<sup>1</sup>. The colonists who moved to the New World brought with them the legal traditions of their homelands. The vestiges of each system – Dutch, English, French and Spanish – can be found in the laws of the various states. The history of the system of law is largely the history of the borrowings of legal materials from other legal systems and of assimilation of materials from outside the law. The supreme law of the land under the Constitution's Supremacy Clause is the United States Constitution, as well as laws enacted by the U.S. Congress. The Constitution forms the basis for federal laws. In the beginning, federal law traditionally focused on areas where there was an express grant of power to the federal government, like military, money, foreign affairs (especially international treaties), tariffs, intellectual property and mail. Everybody should agree that since the beginning of the 20-th century federal law has expanded into such areas as aviation, telecommunications, railroads, pharmaceuticals, antitrust and trademarks. States delegate lawmaking powers to thousands of agencies, counties, cities and special districts.

The law in the United States is derived from four sources. These four sources are: constitutional law, statutory law, administrative regulations and common law. The most important source of law is the United States Constitution. All other law falls under and is subordinate to that document. No law may contradict the Constitution. If Congress enacts a statute that conflicts with the Constitution, the Supreme Court may find that law unconstitutional and declare it invalid. It should be taken into account that there are some attempts at „uniform” laws. Efforts by various organizations to create „uniform” state laws have been partially successful<sup>2</sup>. The two leading organizations are the American Law Institute and the National Conference of

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<sup>1</sup> For more about English influence on the American law see Edyta Sokalska, *The influence of British law tradition on the American legal system*, (in:) *Comparative Law in Eastern and central Europe* 152-165, eds. B. Sitek, J. J. Szczerbowski, A. W. Bauknecht (2013). See also Edyta Sokalska, *Wpływ brytyjskiej tradycji prawnej na rozwój amerykańskiej kultury prawnej (wybrane aspekty)*, (in:) *Ze studiów nad tradycją prawa* 274-290, ed. E. Kozerska, P. Sadowski, A. Szymański (2012).

<sup>2</sup> Edyta Sokalska, *Federalizm and the American Court Organization*, 13 *Studia Prawnoustrojowe* 397-398 (2011).

Commissioners on Uniform State Laws. The most successful and influential uniform laws are the *Uniform Commercial Code*<sup>3</sup> and the *Model Penal Code*. Apart from model codes, the American Law Institute has also created Restatements of the Law which are widely used by lawyers and judges to simplify the task of summarizing the current status of the common law<sup>4</sup>.

The literature on the subject of the unification of the American commercial law is quite impressive. For example, there can be mentioned here articles and works of Robert Braucher<sup>5</sup>, Carl Felsenfeld<sup>6</sup>, Frederick K Beutel<sup>7</sup>, Grant Gilmore<sup>8</sup>. It should be indicated here that some of the American lawyers were for the process of unification, and some were opposed to. The aim of this essay is primarily the presentation of some aspects of the history of the American law, especially – the attempts in the sphere of creation of some uniformity in commercial law in the XX-th century. In the first section there are pointed out some events concerning the historical background, and then some approaches to and the structure of the *Uniform Commercial Code* of 1952 and its purpose.

## The organization of codification works

Commercial law in a broader sense refers to the law that governs all business transactions. It also includes the body of law that affords special protections and rights to consumers. As Donald J. Rapson assumes, „*consumer* transactions are generally those affecting personal, family, or household matters. In narrower but still very broad sense *commercial law* means the *Uniform Commercial Code*, which is a state law that is in effect in all the states. Commercial law in the broadest sense extends far beyond the UCC”<sup>9</sup>. Historically, the source of it was the judge-made common law, particularly known as the law merchant. To understand the pressing need of the attempts to put in a one place all relevant law concerning transactions, it should be underlined that American law followed the common law tradition inherited from England with precedent-setting decisions. Commercial law, like other areas of law such torts and contracts, was largely non-statutory and was developing differently from state to state. It was deeply problematic for business enterprises, for example finance companies, banks, and corporations. There were two key problems that the drafters of the code wanted to resolve: „First, the law of commercial transactions was an uncertain mixture of case decisions and occasional statutes, and second, commercial law was not uniform from state to state. and a more abstract level, there was a growing concern that increasingly fast-paced world of commercial transactions in America could not be longer fettered by the common law and its old English rules of offer/acceptance, consideration, writing requirements, and the <mailbox rule>”<sup>10</sup>. With the development of the American economy and complexity of business transactions there was a need of creation some common approach that resulted in the legislative enactment of numerous statutes at federal and state levels. They aimed at solving particular problems and they provided

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<sup>3</sup> Hereinafter UCC.

<sup>4</sup> About changes in the American comprehension of law see also idem, *Amerykański federalizm w połowie XX w. Teoria i praktyka* 107-120, (in:) *Państwowość konstytucyjna XIX i XX wieku*, ed. E. Hull, E. Sokalska (2015).

<sup>5</sup> Robert Braucher, *The Uniform Commercial Code – Documents of Title*, 102/7 *University of Pennsylvania Law Review* (1954); idem, *The 1956 Revision of the Uniform Commercial Code*, 2/1 *Villanova Law Review* (1956).

<sup>6</sup> Carl Felsenfeld, *But the Proposed Uniform (?) Commercial Code Was Adopted*, 26/597 *Loyola of Los Angeles Law Review* (1992).

<sup>7</sup> Frederick K. Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted* 334-363, 61 *Yale Law Journal* (1952).

<sup>8</sup> Gilmore Grant, *The Uniform Commercial Code: A Reply to Professor Beutel* 364-379, 61 *Yale Law Review* (1952).

<sup>9</sup> Donald J. Rapson, *Commercial Law* 365, (in:) *Fundamentals of American Law*, ed. Alan B. Morrison (2004).

<sup>10</sup> Douglas E. Litowitz, *Preface*, (in:) *Perspectives on the Uniform Commercial Code* 13, ed. Douglas E. Litowitz (2007).



special treatment for certain areas of commerce. Federal legislation had to deal with banking, aviation, transportation, consumer credit protection, payment system and agriculture. Some of the statutes were enforced by federal regulatory agencies. The states have also enacted statutes on many subjects. „As a matter of American constitutional law, a federal statute preempts a state law governing the same subject. Sometimes, however, the federal statute does not deal with a particular question or expressly defers to state law, in which event it is necessary to consult state law, either statutory or common law”<sup>11</sup>. In the half of the twentieth century the law of commercial transactions was fragmentary and non-uniform among the states. Commercial law still reflected common law principles and formalities that were increasingly outdated.

The Uniform Commercial Code was a long-term joint project of the American law Institute and the National Conference of Commissioners on Uniform State Laws. Drafting began in the 1940s and led to a final draft of the code in the early 1950s, and finally to enactment in the 1960s. It was published in 1952 after a long work on the draft. Leading American scholars, including Grant Gilmore, William A. Schnader and Karl N. Llewellyn<sup>12</sup> have been working on the project. The world – code- designated that the code was a unified and coherent statute which was intended to cover the entire field of commercial law. It was the set of laws that provided legal rules and regulations governing commercial or business dealings and transactions<sup>13</sup>. The UCC regulated the transfer or sale of personal property. The act consisted of 10 articles. Article 1 of the code included only general provisions – definitions and rules of interpretation. The rest of the articles encompassed all major segments of commercial activity: article 2 concerned sales of goods; article 3 – commercial paper (promissory notes and drafts); article 4 – bank deposits and collections (banks and banking, check collection process); article 5 – documentary letters of credit (transactions involving letters of credit); article 6 – bulk transfers (auctions and liquidations of assets); article 7 – warehouse receipts, bills of lading and other documents of title (storage and bailment of goods); article 8 – investments securities (securities and financial assets); article 9 – secured transactions, sales of accounts, contract rights and chattel paper (transactions secured by security interests); article 10 – effective date and repealer<sup>14</sup>. The underlying purposes of policies of the UCC were: „to simplify, clarify and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; to make uniform the law among the various jurisdictions”<sup>15</sup>.

The American Law Institute and the National Conference of Commissioners on Uniform State Laws have established a permanent editorial board for the UCC. The board has drawn up a number of official comments and published papers. It is significant that the code is not itself the law. There are only some recommendations of the laws that should be adopted by the states<sup>16</sup>. The code had the effect of law only when was adopted by different states. The states adopted the UCC but there could have been made also some specific changes. The UCC enacted by a state is codified into the state’s code of statutes. The main goal of the UCC was to harmonize the law of sales and other commercial transactions across the United States of America. Some states have adopted the whole text of the code, but some of the states have made

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<sup>11</sup> Donald J. Rapson, *Commercial Law*, op.cit., 366.

<sup>12</sup> See Fred R. Shapiro, *The Most- Cite Legal Scholars*, 29(1) *Journal of Legal Studies* 409-426 (2000).

<sup>13</sup> For more about the legislative history of UCC see Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 2 *American Business Law Journal* 137-154 (May 1964).

<sup>14</sup> American Law Institute, *Uniform Commercial Code: Official Draft 1952* (1952).

<sup>15</sup> UCC §1.

<sup>16</sup> More about the content of the UCC see, for example, James V. Calvi & Susan Coleman, *American Law and Legal Systems* 274-179 (2009); William Burnham, *Introduction to the Law and Legal System of the United States* 384-402 (2002).

some changes due to the alternative technical language and structural modifications to conform to the local customs. The UCC has been adopted by all 50 states of the U.S., although with variations. These days it seems to be the longest and most elaborate of the uniform acts. The UCC can be considered a statutory program under the law of administering, legalizing and recording contracts and lien instruments. It can be treated as a comprehensive modernization of various statutes relating to commercial transactions<sup>17</sup>.

Despite the broad scope of the UCC, it was also necessary to integrate the code with the common law system. One of the key provisions states as follows: „unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions”<sup>18</sup>. The UCC was a model law that was drafted by experts who sought to have the same set of provisions adopted in every state. As Douglas E. Litowitz assumes: „Karl Llewellyn, the principal architect of the code, asserted that the code stood a good chance of adoption by various state legislatures because its subject matter (namely, transactions involving personal property and payments) was <very largely non-political in character>. This claim was untrue when it was made, and has become even less credible over the time, especially in intellectual climate where legal scholars rightfully view every area of laws as an inherently contested and political arena. To the extent that law shapes social ontology and constrains legal actors by allocating benefits and burdens, every arrangement of law is active choice among possible worlds, each with its own moral, political and economic landscape. That is to say, the code does not hover above a preexisting world of commercial practices, but represents a commitment to bring a particular commercial world into existence”<sup>19</sup>.

The UCC contains separate articles that cover different topics but there is an overall relationship among the various articles. Indeed, at its inception the drafters of the UCC stated that “the concept of the present Act is that <commercial transactions> is a single subject of the law, notwithstanding its many facets. A single transaction may very well involve a contract for sale, followed by a sale, the giving a check or draft for a part of the purchase price, and the acceptance of some form of security for the balance. The check or draft may be negotiated and will ultimately pass through one or more banks for collection. If the goods are shipped or stored the subject matter of sale may be covered by a bill of lading or warehouse receipt or both. Or it may be the entire transaction was made pursuant to a letter of credit either domestic or foreign. Obviously, every phase of commerce involved is but a part of one transaction, namely, the sale of and payment for goods. If instead of goods, the transaction involved stocks or bonds, some of the phases of the transaction would obviously be different. Others would be the same. In addition, there are certain additional formalities incidents to the transfer of stocks and bonds from one owner to another. This Act purports to deal with all the phases which may ordinarily arise in the handling of commercial transaction, from start to finish”<sup>20</sup>. It is significant, that there is sometimes necessary to interpret and apply the provisions of the UCC in accordance with the principles of common law that are applicable to all areas of law. It is also worth to say, that in some cases the UCC expressly codifies common law concepts<sup>21</sup>.

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<sup>17</sup> *Uniform Commercial Code*, available at <http://uniformcommercialcode.uslegal.com>.

<sup>18</sup> UCC §1-103.

<sup>19</sup> Douglas E. Litowitz, *Preface*, op.cit., 10.

<sup>20</sup> *General Comment of National Conference of Commissioners on Uniform States Laws and the American Law Institute, 1957 Official Text of the Uniform Commercial Code*.

<sup>21</sup> For example, „good faith is an important concept in American commercial law, not limited to the UCC. It is generally defined to mean <honesty in fact and the observance of reasonable commercial standards of fair dealing>, although the UCC in some instances limits the definition to <honesty in fact>. The doctrine of good

As far as commercial law is concerned, Donald J. Rapson assumes that „although the range of federal and state statutes is very broad, there are still some commercial subjects that are governed by the common law. For example, common tort rules generally govern the liability of manufacturers, distributors, and retailer-sellers for personal injury or property claims caused by negligence in the design, construction, manufacture, installation and marketing of goods and services. There are also a more recent common law doctrine known as <strict liability in tort> which imposes liability in certain circumstances for putting defective products into the market-place, irrespective of whether there has been negligence. Another example of the common law on commercial transactions is the law governing guaranties and other arrangements for credit support known as <suretyship>”<sup>22</sup>. Donald J. Rapson further underlines that „accordingly, in researching and analyzing a question of commercial law, one must first determine whether there is an applicable federal statute. The next step is to review statutes of the particular state to see if there is applicable legislation. If there is no federal or state statute covering the issue, it is necessary to examine the common law of the jurisdiction. In some circumstances, there will be overlapping and simultaneous coverage of a particular subject, with a federal statute, a state statute, and the common law all having some applicability. In those instances, all three bodies of law must be considered and integrated. An important example is the subject of liability for defective goods where federal and state statutes provide for warranty liability, but the common law of tort and strict liability may also be applicable”<sup>23</sup>. Then he adds that if federal or state statute deals with the subject, sometimes it is necessary to interpret, apply and then enforce the statute in accordance with common law principles. It can be understood as not only the substantive rules applicable to a particular topic, but also those principles of jurisprudence that are applicable to American law generally, such as capacity to contract, equity, and good faith<sup>24</sup>.

The UCC was supplemented by Official Comments to every section. There are explained the purpose and operation of the section in the context of specific examples. The Official Comments are not enacted as a part of the statutory law but they are very useful and persuasive in understanding the UCC and are relied upon by lawyers and judges as the aid in applying and interpreting the Code’s provisions.

## UCC in academic discourse

It should be underlined that during the process of drafting UCC there was a vivid discussion and there were presented different points of view concerning the need of such a code in the American legal system. Especially the dialogue between Professor of Law – Frederick K. Beutel and the proponents of the code was in the centre of attention. Professor Beutel in his works and articles criticized the content and the adoption of the UCC<sup>25</sup>. He leveled a number of charges against the proponents of the code. There were not only concerning the substance, but also some personal accusations. In 1952 he stated that „the code was a spare time occupation. The draftsmen and advisors had full time work elsewhere, most of them as teachers in University Law Schools. Professor Llewellyn, the chief draftsman, during the time the code was in process taught a full time schedule at Columbia and Harvard Law Schools was an

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faith is implied in all contracts and constitutes a standard of behavior by which the parties must perform and enforce that contract”, see Donald J. Rapson, op.cit., 369.

<sup>22</sup> Ibidem, 366.

<sup>23</sup> Ibidem, 366.

<sup>24</sup> Ibidem, 367.

<sup>25</sup> Frederick K. Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted*, op.cit., 334-363; Idem, *The Proposed Uniform Commercial Code as a problem in Codification*, 16 Law and Contemporary Problems (1951); Idem, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted in Ohio* 3-31, 14/1 Ohio State Law Journal (1953); Idem, *Interpretation, Construction, and Revision of the Commercial Code: The Presumption of Holding in Due Course* 381-414, 1966/4 Washington University Law Quarterly (Dec. 1966).

Executive Committee as President Elect and President of the Association of American Law schools and carried on numerous other professional activities”<sup>26</sup>. Professor Beutel assumed that it was a mistake for the states to adopt the UCC. Among the defects of the code there were: „The subject matter covered by the code is exceedingly broad embracing within its terms the heart of what are now the successful Uniform Commercial Statutes. It is, therefore, too large a project to be dealt with experimentally. The Process by which it was created was not one calculated to reach fair or expert balancing of the conflicting interests sought to be resolved by the commercial law. Article 4 on Bank Collections is such a vicious piece of class legislation that discredits the process by which the entire code was created. The peculiar vocabulary and erratic use of language would be certain to cause trouble if this draft were enacted. Because it lacks unity, its adoption would be certain to create extensive confusion in a field which is now governed by established uniform statutes. Article 9 on Secured Transactions represents a radical departure from any known system of law and is too experimental to be included at this time in a code for uniform adoption”<sup>27</sup>. And at the end he added: „the entire code should be returned to the Institute for unification, correction of obvious defects in draftsmanship, and for further studies on the unique problems which it will create”<sup>28</sup>. In his reception, the terminology in the code was highly technical including a new set of terms. He also notes that the European codes have practically no definitions and the UCC was willed with them Articles of the code were also analyzed in detail. For professor Beutel the adoption of the UCC was a huge mistake and effected on the American law in a destructive way.

Professor of law, Yale Law School – Grant Gilmore - who was a member of the drafting staff for the UCC from 1948 to 1951 published in Yale Law Review a reply to professor Beutel. He stated that nobody could pretend that the code was perfect. On the pages of the article he undertook an affirmative defense of the code. Professor Gilmore assumed, that „Beutel knows the code well. He has been a regular attendant at the meetings of Conference and institute and has taken an active part in discussions. His conclusions are based on long study and expert knowledge. In his paper he has presumably made the strongest possible case for rejection of the Code; he has put forward what he considers to be the most serious objections, the basic errors and fundamental flaws. Although there may be a great many left-overs, we are justified in assuming that this is the main dish; what Beutel did not choose to serve up here would be a pot-pourri of detail. If there is not a great deal to Beutel’s major points, we may conclude that there is at least nothing seriously wrong with the code: nothing as bad as the dream sequence of being out in public with no clothes on. I shall not deal with each and every Butelism”<sup>29</sup>. As far as a new language is concerned, the UCC by codifying a wide area of commercial law should have included a wide range definitions and terms<sup>30</sup>. The basic purpose of the code was to state principles under which business transactions could be carried out, and the task was fulfilled fully.

Professor of Law, Fordham University School of Law – Carl Felsenfeld – also took part in the discussion on the UCC and he supported professor Gilmore by writing an essay related to Beutel’s major points and describing his actual experience under the UCC. „Professor Beutel’s objections carry little weight today. Some of them - the UCC is not really a code – were not relevant to the passage of the UCC in the first place. Others – it does not improve on existing law – were at worst only modest objections to the UCC. Some – the UCC is too complicated – may not have been true in 1952 and have disappeared into mists of time. Some articles, Article

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<sup>26</sup> Idem, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted*, op.cit., 334.

<sup>27</sup> Idem, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted in Ohio*, op.cit., 3.

<sup>28</sup> Ibidem, 4.

<sup>29</sup> Gilmore Grant, *The Uniform Commercial Code: A Reply to Professor Beutel*, op.cit., 364.

<sup>30</sup> Ibidem, 367.

8 for example, have become suitable for new commercial devices through the amendment process. At last one article, Article 9, is generally perceived as a legislative triumph. Probably as well as any law of its size and scope, the UCC has been a success<sup>31</sup>.

## Conclusions

Transformations in relation to the role of a modern state reflect changes in the relationship and interactions occurring between the central government and the lower administrative and political units. The process of globalization imposes different behavioral patterns on local cultures and traditions. Societies have to face the challenges of the twenty first century. They must adopt new principles of competition and cooperation in the sphere economy and government. In the United States of America, the UCC's goal of uniformity in the sphere of commercial law has been achieved. The states and the District Columbia have enacted the UCC with relatively few variations. Since 1952 the UCC underwent some revisions in order to bring it current with the modern commercial practices and the changes in technology<sup>32</sup>. Articles 2A and 4A are new, articles 3,5,8 – have been revised completely, article 4 – substantially amended, article 6 has repealed in most states, article 2 and 9 were revised and modernized.

The Uniform Commercial code uniformed the law encompassing and supplanting all of the prior uniform commercial laws. It was adopted by the states and ensured the modern formulation of commercial law. As Douglas E. assumes: „because the original drafters were legal realists who knew that law in action was different from law on the books, they sought to create a legal framework that could evolve to reflect changing commercial practices in the marketplace instead of conforming to the structures and formalities of black letter contract law. The code project sought to create something that was simultaneously comprehensive and capable of evolution<sup>33</sup>.

It is significant that in most American law schools commercial law courses are structured around the Articles of the UCC. The knowledge of the provisions is essential for the practice of commercial law<sup>34</sup>. It should be also underlined that certain fragments and provisions of the UCC have been highly influential outside the United States.

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<sup>31</sup> Carl Felsenfeld, *But the Proposed Uniform (?) Commercial Code Was Adopted*, op.cit., 597-606.

<sup>32</sup> See, for example Robert Braucher, *The 1956 Revision of the Uniform Commercial Code* 2-15, 2/1 Villanova Law Review (1956); *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana: A Student Symposium – Foreword* 89, 16/1 Louisiana Law Review (1955).

<sup>33</sup> Douglas E. Litowitz, *Preface*, op.cit., 14.

<sup>34</sup> About the future of the Uniform Commercial Code see for example Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68/349 Ohio State Law Journal 349-402 (2007).



# Bronisław Sitek\*, Good Faith: Intersystemic Factor of Business Integration

Abstract: The good faith is a general clause of private law from the time of Roman law. The phrase “good faith” includes a reference to the legal solutions in the business to the irrational, values and beliefs. The main task of good faith is to specify the desired types of parties' behaviour during contracting and fulfilment of contractual provisions and to define the content of the agreement if there are doubts to its interpretation. The Anglo-Saxon system has not adopted the concept of good faith. In this system, the individual cases are decided separately. The systematization of location of good faith in continental law and the non-systematics of common law found their common denominator in international regulations or in attempts to develop broader projects of the law of obligation. The good faith is a mandatory element of the agreements. Bona fides is tied with such values as: loyalty, honesty and cooperation between the parties of legal action, or business parties. In this way, the phrase “good faith”, even though it comes from the non-rational argumentation, it plays a very important role in many jurisdictions, including the international law. It contributes to the improvement of modern business transactions.

Keywords: bona fides, Roman law, rationalism, business law, international law

## 1. Introduction

Can business be rational? Putting this question is justified in the optics of changes of the era axiology in which we live currently, often referred to as the era of rationalism and scientific method. Starting from R. Descartes (1596-1650), it is assumed that the human reason is an important instrument of knowledge and development of reality<sup>1</sup>. Since then, a strong belief in progress is recorded, which should bring a solution to many difficult economic problems (for example: the fight against crises), financial problems (for example: the inflation), social problems (for example: unemployment), health problems (for example: the epidemic) or even political problems (for example: building of democracy in the feudal states). Thus, the cognitive methods, concepts or solutions that are considered to be irrational, for example: the dependence of decisions from inexplicable in nature phenomena (lightning), the origin of the power from the transcendent being, solving the economic problems by supernatural powers, or subordination of the statutory laws under the natural law, are eliminated from the scientific, political and business live. The basis for this process is that what is not possible to investigate by human reason should be ignored. As a consequence, the scientific knowledge is separated from the pre-scientific, everyday cognizance which is based beliefs or faith.

This new view of the world, based on reason, translates into economics and politics. A. Smith (1723-1790) believed that the labour, capital and land - the largest source of the possibility of getting rich are the most important values for economy. In this perspective, there was no place for the irrational categories of thought.

This new look at reality was reflected in the area of understanding the law. Today, the views voiced by H. Kelsen (1881-1972) had a significant influence on the relations of the legal system to the moral standards. According to him, there are not absolute values, and therefore only the relative morality can serve as a legal assessment<sup>2</sup>.

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<sup>1</sup> See: W. Tatarkiewicz, *Historia filozofii*, vol. 2, Warszawa 1997, pp. 52-53.

<sup>2</sup> H. Kelsen, *Czysta teoria prawa*, Polish translation and elaboration T. Przeorski, reprint, Warszawa 2014, pp. 137-1389.

But you cannot fail to notice that the rationalism contains a number of references to concepts or non-rational ways of thinking. The rationalism is nothing else but building a logical axioms of the analysed reality. The history of science shows, however, that many of these axioms became false when time was passing. We should recall here numerous instances of research inspired by the so-called. scientific Marxist philosophy or fascist ideology. The value systems, derived from these schools of thought, have become the anti-human, and the legal standards based on them, although formally correct from the legislative techniques, proved to be essentially irrational<sup>3</sup>.

Also in the area of business, all kinds of activities that the business logic recognized as rational have been eliminated since long time. The basic value of modern business is profit and its multiplication<sup>4</sup>. For these reasons, the business should not be dealing with such areas as charitable or educational activities. This typical behaviour for the business of the original epoch of formation of modern capitalism is mitigated by the concept of the social market economy, which is mentioned, among others, in article 20 of the Polish Constitution, and therefore by the concept of business which also takes into account not only the interests of the owners, shareholders or their employees, but also other members of the society in which the business is growing. This concept has its roots mainly in the Catholic Social Teaching<sup>5</sup>.

The concept of good faith is one of the extremely important concepts for modern legal systems in Europe derived from Roman law. In fact, it is a term derived from the sphere of religious and ethical concepts. The phrase "good faith" consists of two elements. The first is the concept of "good", while the second is "faith." Both of these concepts combine three invisible worlds. The first is the world of ethical values, which belongs to the notion of the good, the second is the concept of faith, which is a typical concept for the language of religion. The third world, hiding behind the concept of good faith, is the relationship between people. Hence, we can say that the term "good faith" means the belief that the other physical person or the legal entity respects the values that embodies the concept of "good" and "faith". Otherwise, we can say that the relationship between people are strongly characterized by a belief in everything what is meant by "good".

The phrase "good faith" is not about faith in the existence of supernatural Being, but it is about the good or bad intentions of the other side of social or legal relation. A fail that can be met by the person having good faith from the part of the other person is his or her behaviour contrary to the content that exists in the concept of "good". Hence, it is said that such a person is acting in bad faith.

## 2. Good faith in the Roman law

One of the specific features of the ancient world, especially Roman world, was the dynamic development of production and trade, in particular starting from the Punic Wars. At that time, the driving force for the economy was the growth of the military needs, but also the formation of large urban centres with the most diverse needs. To this days, the basic studies on the

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<sup>3</sup> Quite an interesting example of an irrational legal argument pursued by argument of principles of rational thinking is Aragona story about a German professor of law, who was a fascist judge. Based on the rational and logical thinking, he drew the concept of justifying the killing Nazism enemies.. See: M. Kuryłowicz, *Symbol prawa ludzkiego. Szkice o prawie rzymskim w utworach Luisa Aragona i Mieczysława Jastruna*, Lublin 2008.

<sup>4</sup> See: M. Friedman, *Spoleczną powinnością biznesu jest pomnażanie zysków*, [in:] *Z klasyki współczesnej myśli amerykańskiej*. Choice and edition L.V. Ryan CSV, J. Sójka Poznań 1997, pp. 49-59.

<sup>5</sup> See: B. Sutor, *Etyka polityczna*, 1994, pp. 280-289.



development of the Roman economy are the works done by such authors as: M.I. Rostovtzeff<sup>6</sup> and M.I. Finley<sup>7</sup>.

I think, the supplies of grain, which is necessary to meet the needs of the food supply of Rome numbering more than one million inhabitants in the time of Augustus and the growing numbers of the Roman army was the biggest part of contemporary economics. The organization of these supplies was entrusted to first republican and then imperial officials (magistratus). However, the ordering supplies to private entrepreneurs on the basis of contracts concluded by tender was the essence of this system<sup>8</sup>.

In ancient Rome, in addition to the supply of grain, they developed the sector of small businesses, as well as the sector of big corporations implementing the procurement of supplies for the army or the cities with the food, equipment, materials for construction of roads, temples and other public facilities. Many manufactures producing tiles, cloth, shoes, etc.<sup>9</sup> was formed. Also, the banking system<sup>10</sup>, for which an important value was to build public trust - *fides publica*<sup>11</sup>, was well developed. The surviving source texts, the person engaged in such business activities was called as *mercatores*, *aratores*, *negotiatores*, *pecuarii* or verbal *negotium gerere*<sup>12</sup>.

Due to the fact that in the business relations, the political or cultural boundaries have been broken down by the practice of forming customs and customary law, a clause of good faith was one of the important instruments in this regard. According to A.F. de Bujan<sup>13</sup>, *bona fides* entered into the Roman law together with the creation praetor legal protection.

Earlier legal rigorism or otherwise religious formalism, left no room for the free development of relations in the area of contracting. The parties taking legal action had to know each other, so it was not, in the oldest period of Roman history, too much space for the development of relationships based on mutual trust. For this reason, the oldest Roman law was available only for Roman citizens - *quirites*. Therefore, most often, in the original *jus civile*, the legal actions based on *stipulatio* or *mancipatio* were used.

The conquests of new territories by the Romans contributed to the development of international trade. For its needs, the system of Roman law implemented a number of new legal solutions used by the enslaved nations subjugated. These law regulations the Romans began to be called *ius gentium*. Merchants from different parts of the empire more and more frequently appeared in Rome. The relations between them were increasingly based on mutual trust<sup>14</sup>.

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<sup>6</sup> *The social and economic history of the Roman Empire*, vol. 2. Oxford 1957.

<sup>7</sup> *The ancient economy*, Berkeley 1973.

<sup>8</sup> See: L. Casson, *Ancient trade and society*, Detroit 1984, pp. 96-108; B. Sitek, *De administratione rerum ad civitates pertinentium. Zasady wydatkowania środków publicznych na przykładzie zakupu zboża*, *Studia Prawnoustrojowe* 13(2011), pp. 355-368.

<sup>9</sup> See: J.L. Zamora Manzano, *Derecho comercial Romano*, Madrid 2013, p. 33 and the following; F. Serrao, *Impresa e responsabilità a Roma nell'età commerciale*, Pisa 1989, p. 17 and the following.

<sup>10</sup> A. Petrucci, *Profili giuridici delle attività e dell'organizzazione delle Banche Romane*, Torino 2002, p. 13 and the following.

<sup>11</sup> D. 2.13.10.1. See: A. Petrucci, P. Cerami, A. di Porto, A. Petrucci (ed.), *Diritto commerciale romano. Profilo storico*, Torino 2000, p. 104.

<sup>12</sup> See: J.H. D'Arms, *Commerce and social standing in ancient Rome*, Harvard 1981, pp. 26-27.

<sup>13</sup> *Derecho provado Romano*, Iustel, Madrid 2010, pp. 174-177.

<sup>14</sup> There are many studies on bona fides in Roman law. Zob. R. Cardilli, *La "buona fede" come principio de diritto dei contratti: Diritto romano e America Latina*, [in:] *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea atti del Convegno internazionale di studi in onore di Alberto Burdese Padova, Venezia, Treviso, 14-15-16 giugno 2001*: Convegno internazionale di studi in onore di Alberto Burdese. 2003.

The cases of violation of the principles of good faith between *cives Romanorum* and *peregrines* were solved by *praetores peregrines* or by a special tribunal called *recuperatores*. The tribunal *recuperatores* started to regulate trade relations between the Romans and *peregrines*.

For better visibility of contents and functions of the Roman *bona fides* it is necessary to refer first to the text of Cicero.

Cic. de off. 3,70: Nam quanti verba illa: UTI NE PROPTER TE FIDEMVE TUAM CAPTUS FRAUDATUSVE SIM! quam illa aurea: UT INTER BONOS BENE AGIER OPORTET ET SINE FRAUDATIONE! Sed, qui sint "boni" et quid sit "bene agi," magna quaestio est. Q. quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis, in quibus adderetur EX FIDE BONA, fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, fiduciis, mandatis, rebus emptis, venditis, conductis, locatis, quibus vitae societas contineretur; in iis magni esse iudicis statuere, praesertim cum in plerisque essent iudicia contraria, quid quemque cuique praestare oporteret.

In the above quoted text, Cicero cites the Q. Scaevola's doctrine. At the beginning of the text, there are two opposing formulations. The first one relates to the treatment of the other party of an act in a fraudulent way. This behaviour was described by two adjectives *captus* and *fraudatus*, which in this case can be treated synonymously. Opposite of this attitude is the right attitude of both sides of legal action (*inter bonos*) to each other. In this case, the parties are characterized by honesty (*sine fraudatione*). In both cases, it refers to the system of values, to the axiology, which included such attitudes as honesty or good. Any underhanded actions of one side to another were rejected.

Farther, Cicero shows some legal actions, where, due to their legal-dogmatic construction, it is necessary that the parties take action in the spirit of good faith. These activities included: care, partnership agreement, order, purchase, lease, or trusteeship. In the case of these legal actions, the judge deciding the dispute takes into account the interest of the parties, rather than strictly the content of the agreement - ... , *quid quemque cuique praestare oporteret*<sup>15</sup>.

Almost similar enumeration of legal actions, where the parties should be guided by good faith, is in the text of Gaius.

G. 4.62-63: 62. Sunt autem bonae fidei iudicia haec: ex empto uendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, rei uxoriae. 63. Liberum est tamen iudici nullam omnino inuicem compensationis rationem habere; nec enim aperte formulae uerbis praecipitur, sed quia id bonae fidei iudicio conueniens uidetur, ideo officio eius contineri creditur.

Comparing the two texts - Cicero and Gaius, in the second text, there is another fact where it is required that the parties should act in good faith. Namely, it was the return of the dowry to wife by her husband. The husband should return to the wife all the components of the dowry, if the wife, due to the fact of divorce or the death of her husband applied with *actio rei uxoriae* for the issuance of her assets<sup>16</sup>. This complaint was one of the actions of good faith, and thus it gave the opportunity to the parties of the dispute and to the judge to quite flexibly determine the value and components of the dispute. This idea about the flexibility of all the actions of good faith (*iudicia bonae fidei*) was given by Gaius in the second verse of the quoted above text.

Another example of the use of good faith as an instrument for increasing the flexibility in trade relations in the Roman law was the Publicianus' claim (*actio Publiciana*).

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<sup>15</sup> A. Petrucci, *Lezioni di diritto privato Romano*, Torino 2015, p. 242.

<sup>16</sup> See: K. Cychlarz, *Instytucje prawa rzymskiego*, Warszawa 1922, pp. 326-327.

D. 6.2.17 (Neratius l. 3 membranarum): Publiciana actio non ideo comparata est, ut res domino auferatur: eiusque rei argumentum est primo aequitas, deinde exceptio "si ea res possessoris non sit": sed ut is, qui bona fide emit possessionemque eius ex ea causa nactus est, potius rem habeat.

The Publicianus' claim was entitled to the holder in good faith who is on the way to the acquisitive prescription of property rights. Such a situation occurred in the case of acquisition of *res Mancipi* without making the quite archaic ritual activity used for transfer of ownership - *mancipatio*. The basic part of the dogmatic structure of these actions was the adoption of a legal fiction, namely that the time necessary for prescription of ownership for the things has elapsed<sup>17</sup>.

In this case, the good faith is shown in connection with another extremely important in Roman law value, namely the rightness - *aequitas*. According to Neratius, it is reasonable that good faith was an important instrument of procedural protection granted by the Praetor to the holder in order to protect the actual acquisition of property rights by the passage of time. The good faith of purchaser made the praetor's decision to grant this legal protection.

This classical, fairly narrow legal status for the use of good faith in the course of trade has been extended by Diocletian's in the rescript of 7<sup>th</sup> October 290.

C. 4, 10, 4 Impp. Diocletianus et Maximianus AA. Licinae : Bonam fidem in contractibus considerari aequum est. PP. non. Oct. ipsis IV et III AA. Conss.]

According to Diocletian, the principle of good faith should be used in all contracts, and thus also in the case of *iudicia stricti iuris*. This solution has been considered as appropriate - *aequum est*. This meant that the parties, regardless of the type of legal action, should be guided by good faith. W. Dajczak analysing the use of the notion of *bona fides* in the imperial constitutions, following the opinion of some Romanists, argues that the wording contained in C.4, 10,4 ... is an aimless and meaningless saying coming from the post-classical period ...<sup>18</sup>. It seems, however, that the proposed by Diocletian solution, in the individual case, is of great importance for the contemporary interpretation of the agreements. The reference to good faith in the interpretation of the content of the agreement allows the judge to better define the content of the interest of each party of the legal action.

Further analysis of the preserved sources of law shows that *prudentes*, nor emperors in their constitutions, have not developed a uniform concept or definition of good faith. This term was used intuitively quite often and it was taken or clarified in the specific situation of its use<sup>19</sup>.

### 3. Good faith in the Polish legal system

The good faith is one of the general clauses of civil law. This term is not clearly described by the legislature. In the literature, the good faith is defined as the inner conviction of the individuals about a specific law or legal relationship belonging to him. This belief must be justified, it means that the entity does not know, despite exercising due care, about the existence of circumstances that may have a significant impact on the facts differently shaped than the one

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<sup>17</sup> G. 4.36.

<sup>18</sup> W. Dajczak, *Pojęcie bona fides w konstytucjach Dioklecjana dotyczących prawa kontraktów*, [in:] *Honeste vivere...* . Księga pamiątkowa ku czci Profesora Władysława Bojarskiego, Trouń 2001, p. 30. W. Dajczak is an author of numerous studies on the use of the concept of good faith in the Roman law - Idem, *Die Wendung 'bona fides' im Schuldrecht der römischen Kaiserkonstitutionen*, *Orbis Iuris Romani* 6/2000, pp. 7-28.

<sup>19</sup> More about other cases of using the good faith in Roman law, see: R. Świrgoń-Skok, *The impact of consumer law towards domestic law in the example of the timesharing contract*, *Law and Forensic Science* 10/2015(2), p. 42.

that exists in the consciousness of this entity. On the other hand, the existence of awareness of the existence of those circumstances gives rise to bad faith on the side of a particular entity. It has an impact on the occurrence of such legal consequences. M. Sośniak rightly notes that there is a concept of good faith in the subjective sense <sup>20</sup>.

The existence and functioning of good faith in the course of civil law is based on a presumption of law (*iuris praesumptio*), it means on the directive requiring the adoption by the one who carrying out the inference that the theorem is true assuming the veracity of other claims. In article 7 of the Civil Code, the legislator said that *if the law makes legal effects contingent upon good or bad faith, good faith is presumed*. The presumption of good faith is therefore nothing else but the backing of reasoning on entrusting in the truth of another proposition. This action is no longer fully rational, but it is also extremely helpful to the smooth functioning of trade.

Hence, the good faith does not have to be proved by the court, only it is necessary to prove the bad faith. This obligation is incumbent on the one who asserts that the opposing party had no good faith at the time of legal action and on the contrary, the party acted fraudulently. Such regulation of law shows, however, that the Polish legislature has adopted a much narrower application of good faith than it has been introduced in already mentioned above, the Diocletian's constitution in Roman law, according to which the good faith should be appropriate in all contracts.

The case law follows the views of legal doctrine. In its judgment, the Court of Appeal in Wrocław of 31<sup>st</sup> July 2013, ACa 718/13 (Lex), stated that the good faith is a matter of consciousness. Thus, the Court of Appeal pointed to the psychological aspects of good faith in human activities both in individual and group terms.

In good faith, one can be an owner of the property. According to the statement of reasons to the judgment of the Court of Appeal in Wrocław of 17<sup>th</sup> October 2014, ACa 1041-1014 (Lex), the holder in good faith remains even the one who administrates a particular thing, despite the fact that he is in the mistaken belief that he is entitled to certain subjective right to the thing, for example: the tenant remaining in error as to the date of the end of the lease. This misconception affects the relationships with other entities, in this case with the rightful owner. It is important to define the point to which the holder is in good faith, and in when he is in bad faith. These findings have significant importance due to the further consequences of the mutual settlements between the holder in good faith and the owner. The situation of the holder in good faith changed when his consciousness reached in any form the information that the right, however, does not belong to him.

The good faith in the Polish legal system plays two important functions. The first of these is the role of the interpretation directive of the content of the agreement and the law regulation. But the most important function of good faith is to play the role of behaviour criterion of the other party when concluding contracts. Consequently, it improves the functioning of economic activities.

#### 4. Good faith at the service of business

The good faith has been a core value of the business or trade since the immemorial time. Also today, when we are dealing with the economy without borders, the relations between the parties containing the agreements are largely based on mutual trust. It is not possible to check the trade information for only occasional stay on the other side of the world. The behaviour according to the rules of good faith of any party of the legal action largely depends on the other values

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<sup>20</sup> See: M. Sośniak, *Prawo cywilne i rodzinne w zarysie*, vol. I: *Część ogólna prawa cywilnego*, Katowice 1985, p. 99.

present or not in the society, especially in the local community. In this perspective, it must be repeated after R.C. van Caenegem that the good faith is always present in conjunction with such values as the loyalty, the honour and the sense of community. These values are often undermined by other political, social or economic factors. The author points to the situation in Germany in which they find themselves after the Treaty of Versailles of 28<sup>th</sup> June 1919. This treaty de facto caused the Germans a sense of national humiliation. Thus, in times of Nazi, Germans started to build a sense of superiority, which in turn, has led not only to mass crimes, but also to depredations of the assets of private and state property of the conquered nations. Subsequently, to the German economy, there was the introduction of the new rules, based on the dominance of the Germans toward the Jews, Poles and other nationalities. In these circumstances, we could not speak about loyalty nor about a sense of community<sup>21</sup>.

H.J. Loewen noted that the system of values, which are used by the legal language and by the business, including good faith, should be seen also in optics of clashing the religions and secularization processes. In this perspective, a sequence of questions raises. Is it possible that Christian values could function in a secularized world of business? What is the meaning of the use of such concepts as the vocation or the identity with the workplace? These questions are important from the point of view of integration processes not only in the local communities but also even in the global societies as in Europe or Asia. In this perspective, can the business be an element uniting as it is done by the faith in religion? Moreover, the faith or religion itself does not unite the followers but within the same religion, the various factions, and sections, as for example in the Christianity and Islam are created<sup>22</sup>.

The similar situation is in the business world, where there are many extremely different concepts. Like in religion, business functions, despite existing different views on the possibility of conducting business, the boundaries to make profits, to maximize profit and the role of the state in the economy. Despite doctrinal differences in the northern part of the world, the groups of rich very quickly multiply their property but this cannot be done by those who do not possess anything. This situation is changing with the new technologies and the new ways of accumulation of goods. The current situation is justify by building the appropriate theories designed to excuse such action by reference to the value system. These are not directly religious values anymore, but it is the value of economic freedom.

Business, or in the narrower sense trade, is an essential part of social life in any political system. People make legal actions regardless of the ideological envelope. We can point to many examples, like the development of a small trade even in communism, fascism or now in the Islamic State. The economic activity in any form requires mutual confidence of the parties acceding to make one or another legal action. Thus, since the Roman law, the good faith recognized as one of the general clauses of civil and commercial law, has been an important element.

## 5. Good faith in the regulations of national laws

The good faith, in many jurisdictions, including the Polish civil law, is treated as a basic legal principle. But this is not the rule commonly used, there are many differences in the understanding and application of the good faith.

In the system of the German law, the content of § 242 BGB has the fundamental importance for the understanding of the concept of good faith. According to this section, a debtor is required

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<sup>21</sup> See: R.C. van Caenegem, *European Law in the Past and the Future*, Cambridge 2004, p. 108.

<sup>22</sup> See: H.J. Loewen, *Biblical Faith and the Business World: The Crisis and the Challenge*, Direction a Mennonite Brethren Forum 1/11/1982, pp. 9-18.

to fulfil its obligations in accordance with the principle of good faith (*Treu und Glauben*). It is clear and obvious, what is emphasized by D. Medicus, that the obligation to respect the good faith rests on obliged party. The interests of the creditor are protected stronger than the interests of the debtor. In addition, the good faith is emphasized only in the phase of implementation of the commitments and not at the stage of creating the agreement.<sup>23</sup>

In the French Civil Code in the article 1134, the legislature stated that any agreement concluded in conformity with the law should be enforced in accordance with the principles of good faith. This provision is extremely important because of the principle of interpellation of contractual provisions contained in the next article 1135, according to which the parties are obliged not only to what is written in the contract, but also to what follows from the principle of equity, from the customs and which results from the nature of the obligation. So wide interpellation of the agreement is not possible without observing the principles of good faith.

The Italian Civil Code regulates separately the use of good faith on the stage of contracting and it regulates separately on the stage of implementation of the existing commitments. In article 1337 of *codice civile*, the Italian legislature decided that the parties conducting negotiations in order to conclude an agreement should follow the principles of good faith. This good faith binds the parties also after the conclusion of the contract, which follows from the article 1366 of *codice civile*. The good faith is, however, in this case, an auxiliary tool in the interpretation of the content of the obligation. The judge takes it into account when not the contents of the will of parties to the agreement is not clear<sup>24</sup>.

A relatively new Civil Code of Quebec, a state with a fairly large European traditions may be another example. In article 6 of the Civil Code of Quebec, the legislature has committed any person – it means both the physical person and the legal entity, to exercise their civil rights in good faith. In the article 7, it was decided that no one can exercise its rights with the intention of causing harm to another or perform them through abuse or unreasonable manner which is contrary to the principles of good faith. The legislator therefore decided that the good faith assumes the rational action and the absence of bad faith on the side of acting.

In turn, in the Spanish law in article 1258 of the Civil Code, the legislator decided that the parties are linked not only to the content of the agreement, but also by this which results from the nature of the obligation, from the good faith, the customs and from the law regulations. In this case, the good faith is regarded as a complement to the contractual provisions, in addition to custom or legal provisions. In the case law and in the doctrine, there are developed the types of behaviour characterized by people who act according to the requirements of good faith<sup>25</sup>.

At the end, it is worthy to take a look at the legal system of one of the most developing Asian countries with great human and economic potential - India. Existing there legal system is built on the *common law*, but with the connections to the local customs. In Anglo-Saxon countries there is no obligation to act in accordance with good faith. The good faith is therefore not a general clause and, therefore, each case is considered individually, at least according to the meter of honest operation (*fair dealing*). The Indian Civil Code was enacted in 1872, so during the colonial period, and operates until today. In the Code, the concept of *good faith* is connected not with the legal action but with the agent's activity. According to the article 223 of the Indian Contract Act, 1892, the agent has the right to claim compensation for acts done in good faith

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<sup>23</sup> See: D. Medicus, *Bürgerliches Recht*, Köln 1999, p. 151.

<sup>24</sup> See the commentary do the article 1366 *codice civile* F. Bartolini, P. Dubolino, *Il codice civile*, Piacenza 2001, p. 1111. Also see: P. Trimarchi, *Istituzioni di diritto privato*, Milano 2011, pp. 166-167.

<sup>25</sup> See: C. Lasarte, *Compendio de derecho civil*, Madrid 2010, p. 171 and following.

for his *principal*<sup>26</sup>. For the Indian legal system, a matter of fulfilling all the requirements necessary for the existence of legal action is far more important than the good faith. First of all, the parties must have the will in order to the certain action brought the legal effects. Only then, the question of the existence or not of good faith on either side of the agreement can be considered casuistically<sup>27</sup>.

## 6. Good faith in the regulations of the international law

The debate on the concept of good faith in the civil or commercial legal system is extremely important due to the ongoing processes of globalization or integration in the European Union<sup>28</sup>. Two organizations having a strong leadership role in this field can be pointed. The first of these is the United Nations, and in fact the Commission on international trade law with its registered office in Vienna (UNCITRAL - *United Nation Commission on International Trade Law*) and the European Union. The International Institute for the Unification of Private Law in Rome also plays an important role in the process of harmonization of contract law (UNIDROIT - Institut international pour l'unification du droit privé).

The basic act of unifying the rules of international trade is the United Nations Convention on Contracts for the International Sale of Goods, which was signed on 11<sup>th</sup> April 1980 in Vienna, hence it is also known as the Vienna Convention (*CISG*). In this act of good faith has been recognized as one of the key principles of international law. In article 7, paragraph. 1 of the CISG, the parties signing the Convention undertaken to comply with the good faith in international trade. The reference to this clause at this point was not accidental, since the beginning of article 7 decided that the Convention is intended to standardize the rules used in the trade. The parties to the Convention recognized that good faith is precisely the instrument that best enables and streamlines these very actions<sup>29</sup>.

In turn, the Roman institute UNIDROIT issued in 1994 the *Principles of International Commercial Contracts* which had the subsequent revised editions in 2004 and 2010. The article 1.7.1 decided or rather proposed that in international trade agreements, to apply the principle according to which the obligation to conduct of the parties in accordance with the rules of good faith, when making a legal action, cannot be waived or limited by the will of either party. The good faith should be retained both at the time of the closing contract and at the implementation phase of the obligations arising from it. On this occasion, in the official commentary to the Rules, there was the reference to the issue of a possible conflict of good faith in the meaning of national and international legislation. It is believed that the national rules in international trade may be used if it can be demonstrated that they do not conflict with international standards<sup>30</sup>.

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<sup>26</sup> In India, a popular form of business is to be an agent - the person who undertakes to his principal to arrange a contract between the principal and the third party. See: M.C. Kuchhal, V. Kuchhal, *Business Law*, Delhi 2013, p. 191.

<sup>27</sup> Ibidem, pp. 85-95.

<sup>28</sup> It should be noted that some actions aiming to harmonize the law of obligations on the international arena were undertaken in the interwar period of the twentieth century. See: A. Moszyńska, *Międzynarodowe ujednolicanie prawa zobowiązań w okresie międzywojennym*, *Studia Iuridica Toruniensia* 11/2012, pp. 129-145. Also see: G. Alpa: A. Tizzano (ed.), *Il diritto privato dell'Unione Europea* vol. II, Torino 2006, pp. 713-748.

<sup>29</sup> See: M. Pilich, *Dobra wiara w Konwencji o umowach w międzynarodowej sprzedaży towarów*, Warszawa 2006, pp. 263 and following.

<sup>30</sup> See: G. Luchetti, A. Petrucci, *Fondamenti romanistici del diritto europeo. Le obbligazioni e i contratti dalle radici romane al Draft Common Frame of Reference*, I, Bologna 2010, 34. Also see: *Unidroit Principles of International Commercial Contracts*, p. 21. Online text: <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> [access: 2016-05-13].

Within the European Union, so far the broadest attempts to standardize the law of obligations were taken twice. The impetus for these actions was to issue the EP Resolution of 26<sup>th</sup> May 1989 on European contract law (*Endeavours to Harmonise Private Law in the Member States*)<sup>31</sup>. The first of these trials was initiated in 1982 by the Commission on European Contract Law created by the Danish lawyer O. Lando. The fruit of the work of this committee are the Principles of European Contract Law (PECL) issued in the final version in 2004. In article 1:102 of the Principles, two fundamental values of civil law - the freedom of entities containing legal actions and obligation of good faith have been brought together. The parties are free to sign the contract and to shape its content. The good faith is the limiting factor of that freedom, as the parties must follow the rules of good faith. Thus, the parties to a legal action cannot exclude or limit the application of good faith in this case. In 2011, the European Council and the Commission issued a common European regulations on sale (*Regulation of the European Parliament and of the Council on a Common European Sales Law*)<sup>32</sup>, which also underlines the importance of good faith in the trade<sup>33</sup>.

In turn, the Principles of International Commercial Contracts of 2004, in the article 1:201, similar to the regulations proposed by UNIDROIT, it is stated that the parties cannot exclude or limit their conduct required good faith.

The most important EU's initiative to unify the rules of contract law was the creation in 1998, by Ch. v. Bar, the Study Group for European Civil Code. The purpose of this group was to develop a European civil code, which would be a framework for the solutions and for the use of private law within the European Union<sup>34</sup>. The result of the work of this Group was developing of Common Frame of Reference (DCFR - *Draft Common Frame of Reference*) in 2009. According to the authors of this study, the good faith is associated with values such as: loyalty, honesty and cooperation from the beginning of the negotiation of the contract. In art. I - 1:103, paragraph. 1 of the DCFR, the *good faith* was connected with another extremely important concept for business, namely fair trade (*fair dealing*). Both of these concepts are archetypes that characterize the proceedings carrying out such qualities as honesty, openness and taking into account the interest of the opposite parties.

## 7. Conclusions

Today's reality is built on the rationalism that rejects all irrational concepts and ways of thinking. However, the history of science of the twentieth century, when adopted rational premises led to the genocide of millions of people denies this paradigm. In fact, it is impossible to escape from the concepts of ethical, moral and even religious outlooks. One of these phrases is the concept of "good faith", applicable in civil law, but above all it is a basis for business ranging from Roman law, going through Polish law and contemporary international law.

The good faith, as a general clause of civil law, is functioning in the system of continental law since Roman times. The phrase "good faith" includes a reference to the world of values and beliefs. One of the fundamental values commonly recognized is good that should be inherent in every person being a member of the social relationship, and therefore a member the legal or

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<sup>31</sup> Official Journal of the European Union C 158 of 26.06.1989, p. 400. See: M. Zachariasiewicz, *Projekt rozporządzenia w sprawie wspólnych europejskich przepisów dotyczących sprzedaży a krajowe przepisy imperatywne*, [in:] J. Poczobut (ed.), *Współczesne wyzwania prawa prywatnego międzynarodowego*, Warszawa 2013, p. 373 and following.

<sup>32</sup> COM(2011) 635 final.

<sup>33</sup> See: M.J. Golecki, *Game Theoretical Perspective in the Unfairness of Contracts in a Common European Sales Law*, *Law and Forensic Science*, 7.2014, p. 8 and following.

<sup>34</sup> See: R. Mańko, *Prawo prywatne w Unii Europejskiej. Perspektywy na przyszłość*, Warszawa 2004, pp. 51-57.



business relationships. At the same time, it is assumed that the existence of this good does not have to be proved. This is possible through the faith in the sincere intentions of the other party. Thus, despite the highly saturated modern thinking based on rational premises, the legal and business relations are also saturated with irrational elements.

The good faith plays different roles in the legal system and business relationships. Its main task is specification of the desired types of parties' behaviour during contracting and fulfilment of contractual provisions and it is the role to define the content of the agreement if there are doubts as to its interpretation. The judge deciding the dispute, may take into account the legitimate interests of both parties. Therefore, Diocletian, in 290, decided that it is right that the good faith is taken into account in all contracts and agreements. The significant systematic position of the good faith among other general clauses is due to the fact that it has been served as an instrument to streamline business relationships since the time of Roman law.

The Anglo-Saxon system has not adopted the concept of good faith. In this system, the individual cases are decided separately. An example of this is the system of Indian law. The systematization of location of good faith in continental law and the non-systematics of common law found their common denominator in international regulations or in attempts to develop broader projects of the law of obligation. In the initiatives undertaken by the UN, the EU or the UNIDROIT, the good faith is a compulsory part of the agreements and it is present at the stage of contracting. Bona fides is tied with such values as: loyalty, honesty and cooperation between the parties of legal action, or business parties. In this way, the phrase "good faith", even though it comes from the non-rational argumentation, it plays a very important role in many jurisdictions, including the international law. It contributes to the improvement of modern business transactions.

# Irmina Miernicka\*, Interdisciplinary Approach to Labour Law – Necessity or Redundancy?

Abstract: The common approach to law is nowadays, on the one hand, a trend and, on the other, a necessity. It allows to go beyond the limits of particular scientific disciplines and thus describe the reality from various perspectives. Labour law is a branch of law, in which an interdisciplinary approach is especially visible. The influences of such disciplines as sociology, psychology and economics are easy to notice. One can indicate for instance the work-life balance (WLB) conception *flexicurity* model and brand management together with employer branding. The aim of this paper is to show, how other disciplines can affect labour law and to assess whether this impact is really needed.

Keywords: labour law, employment, work-life balance, flexicurity, brand management, employer branding

## 1. Introduction

The common approach to law has nowadays become both a trend and a need for creating and applying law. This approach allows to go beyond the limits of particular scientific disciplines and describe the reality from various perspectives. It makes it easier to deal with contemporary problems, such as economic and social crisis.

Labour law regulates not only employment itself, but also social relations connected with employment. This is why in this particular branch of law an interdisciplinary approach is especially visible. There are many examples of how other branches of not only law, but also other sciences affect labour law. The influences of such disciplines as sociology (the study of social behavior or society, including human resource management), psychology (the study of behavior and mind, embracing all aspects of human experience) and economics (understood as the social science that describes the factors that determine the production, distribution and consumption of goods and services) are very noticeable. One can indicate for instance the work-life balance (hereinafter also WLB) conception and *flexicurity* model or brand management together with employer branding, which are present in legislators' intentions for some time.

In this article the author will show, how other disciplines can affect labour law and assess whether this impact is really needed and wanted.

## 2. The work-life balance conception

### 2.1 General issues

The work-life balance conception is present in legislators' intentions for some time. Expansion of this idea was caused by socio-cultural changes, such as entry of women into the labour market and their need for professional development and division of household duties, rapid progress of economy, technology and numerous career opportunities. It has been noticed that the efficiency of the employees is not necessarily proportional to the hours spent at work but is connected also with factors relating to their private lives. The WLB conception helps to reconcile professional duties and private life of employees. The aim of this idea is to find a balance between work and private life, including family, health and entertainment and to

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prevent such negative social syndromes as workaholism or occupational burnout. It is proven that lack of balance between work and private life can lead to a significant deterioration of the mental health and higher level of stress among employees<sup>1</sup>. Moreover, surveys have shown that this imbalance can reduce commitment to professional tasks and satisfaction derived therefrom. This can also result in decreased productivity and efficiency of employees and, in some cases, lead to quitting job<sup>2</sup>. On the contrary, well-balanced relation between work and privacy helps to function properly in marriage and family and is connected with greater happiness and equal division of responsibilities between spouses<sup>3</sup>.

At the beginning, the balance between work and life was defined as the lack of conflict between work family life<sup>4</sup>. Researchers recognized that the conflict takes place when the requirements imposed on a person in one of these areas adversely affect his ability to meet the requirements of the second area<sup>5</sup>. Netemeyer and others also noticed, that the work-family conflict includes two types of conflict which do not exclude each other. It may arise when requirements connected with work affects one's ability to deal with family responsibilities and vice versa<sup>6</sup>. Afterwards, researchers observed that work and family life can also affect each other positively (so called "work-family enrichment", when experience gained from one role improves the quality of life in other role<sup>7</sup>). Eventually, it has been noticed that not everyone is engaged in family life, but still needs to have a space for self-fulfillment other than work. According to one of the latest surveys, there are three spheres of private lives of the employees, which especially collide with work: health, family and leisure activities<sup>8</sup>.

Maintaining a proper balance among employees is a win-win solution. It is beneficial not only for employees and employers but also for the whole society. This is why this conception is like a layer cake – it is a combination of several elements, such as legal regulations, programs implemented by employers concerning personal and organisational policy of companies and developing personal skills that help to combine various life roles.

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<sup>1</sup> *Inter alia*: A.G. Bedeian, B.G. Burke, R.G. Moffett, R. G., "Outcomes of work-family conflict among married male and female professionals" *Journal of Management* [1988] 14, 475-492; M.R. Frone, J.K. Yardley, K.S. Mrkel, "Developing and testing an integrative model of the work-family interface" *Journal of Vocational Behavior* [1997] 50, 145-167; E.J. Grant-Vallone, S.I. Donaldson, "Consequences of work-family conflict on employee well-being over time" *Work and Stress* [2001] 15, 214-226.

<sup>2</sup> *Inter alia*: E.E. Kossek, C. Ozeki „Work-family conflict, policies, and job-life satisfaction relationship: A review and directions of organizational behavior human resources research" *Journal of Applied Psychology* [1998] 83, 139-149; R.G. Netemeyer, J.S. Boles, R. McMurrin, R. "Development and validation of work-family conflict and work-family conflict scales" *Journal of Applied Psychology* [1996] 81, 400-410; Frone and others, "Developing...".

<sup>3</sup> *Inter alia*: Frone and others, "Developing..."; M.A. Milkie, P. Peltola, "Playing all the roles: Gender and the work-family balancing act" *Journal of Marriage and the Family* [1999] 61, 476-490; T.D. Allen, D.E.L. Herst, C.S. Bruck, M. Sutton "Consequences associated with work-to-family conflict: A review and agenda for future research" *Journal of Occupational Health Psychology* [2000] 5, 278-308.

<sup>4</sup> R. L. Kahn, D.M. Wolfe, R. Quinn, J.D. Snoek, R.A. Rosenthal "Organizational stress: Studies in role conflict and ambiguity" (New York: Wiley 1964), 19.

<sup>5</sup> J. H. Greenhaus, N.J. Beutell, "Sources of conflict between work and family roles" *Academy of Management Review* [1985] 10, 77.

<sup>6</sup> R.G. Netemeyer and other "Development (...), 400-401.

<sup>7</sup> J. H. Greenhaus, G.N. Powell, "When work and family are allies: A theory of work-family enrichment" *Academy of Management Review* [2006] 31, 73.

<sup>8</sup> The survey was conducted among 5000 graduates of Michigan State University, A. Henion, A.M. Ryan, "Wanted: A life outsider the workplace" [2013],<http://msutoday.msu.edu/news/2013/wanted-a-life-outside-the-workplace/>, online access: 26 July, 2016.

## 2.2. The work-life balance conception in Polish labour law – selected examples from Polish Labour Code

The variety of measures taken to apply the WLB conception in Polish labour law is so wide that it is not possible to list and describe all of them in one article. This is why the author will give only a few examples of regulations from Polish Labour Code<sup>9</sup> (hereinafter also PLC), which visualize this idea in the best way.

First of all - flexible working schedules and organization of working time. In PLC there are some solutions that help to adjust working time to needs of both employees and employers. A part time job is one of them. It is a job performed by employees, whose standard working time per week or average working time in an accounting period is lower than the standard working time. It is also possible to conclude an employment agreement for a fixed period. Due to the fact that this kind of contracts were very often misused by employers, there were some significant changes in PLC, which entered into force on February 2016<sup>10</sup>. At present, this kind of agreement can be concluded maximum 3 times or for 33 months between the same parties, with some exceptions. Moreover, its notice periods are equated with notice periods of contracts for indefinite period. Then, PLC in Articles 129, 135 - 150 regulates various types of working time systems, such as basic working time, task-based working time, compressed working week or weekend work. Furthermore, at the written request of the employee, the employer may determine an individual schedule of his working time under the applied working time system (individual working time schedule - Art. 142 of PLC). Last but not least, PLC provides employers and employees with telework, work regularly performed outside the workplace by using electronic ways of communication to provide the employer with results of work (Art. 67<sup>5</sup>-67<sup>17</sup>). Despite some obvious advantages, this form of employment is not used very often in Poland<sup>11</sup>. The abovementioned regulations may be a great tool to adjust time spent at work to individual preferences and reconcile professional duties with family life. Moreover, it increases the chance of finding a job, returning to work or maintaining it after leave<sup>12</sup>.

Going forward, PLC ensures a lot of solutions, which facilitate working parents reconciling professional and family obligations. These are for example protecting continued employment, which means that the employer may not dismiss or terminate employment during pregnancy and maternal leave<sup>13</sup> and various leaves related to maternity and paternity regulated in Division Eight of PLC. Current legal provisions aim for equating mothers and fathers possibility to take parental leaves, splitting the leaves in time and between parents and other members of family and combining leaves with work<sup>14</sup>. They should help parents to reconcile their professional duties with childcare and then come back smoothly to work.

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<sup>9</sup> The Act of 26 June 1974 Polish Labour Code (Dz.U.2014.1502), hereinafter PLC.

<sup>10</sup> The Act of 25 June 2015 changing the Polish Labour Code and other acts (Dz.U.2015.1220). This kind of contracts were very often concluded for a long periods, e.g. 5 or more years with no justification. This situation was disadvantageous for employees, because in principle these contracts could not have been terminated, and if they could have, the notice period was only 2 weeks.

<sup>11</sup> I. Miernicka „Elastyczne formy zatrudnienia jako element gospodarowania kapitałem ludzkim” in: A. Rogozińska-Pawelczyk (ed.) „Gospodarowanie kapitałem ludzkim. Wyzwania organizacyjne i prawne” (Łódź 2015) 170-171.

<sup>12</sup> Z. Hajn, „Elastyczność popytu na pracę w Polsce. Aspekty prawne” in: E. Kryńska (ed.) „Elastyczne formy zatrudnienia i organizacji pracy a popyt na pracę w Polsce”/”Flexible forms of employment as a way to get efficiency for companies” (Warsaw 2003) 81.

<sup>13</sup> C. Sadowska-Snarska “Work-life balance. Comparative study Finland-Poland-Spain” (Białystok 2007) 36.

<sup>14</sup> In January and March 2016 there were some significant changes in PLC concerning leaves for parents – The Act of 24 July 2015 changing the Polish Labour Code and other acts (Dz.U.2015.1268).

One should also mention regulations concerning rest periods and annual, continuous, paid holiday leave, which guarantee employees right to rest and cannot be changed unfavorably for them. They are undoubtedly an instrument helping to balance time spent at work and time needed for rest and private life.

At the end, the Art. 11<sup>3</sup> of PLC states that any discrimination in employment, direct or indirect, in particular in the area of gender, age, disability, race, religion, nationality, political opinion, trade union membership, ethnic origin, sexual orientation, as well as due to employment for a definite period or an indefinite period or full or part-time work – is forbidden. Moreover, employees should be treated equally in the area of establishment and termination of employment, conditions of employment, promotion and access to training in order to raise qualifications, particularly regardless of sex, age, disability, race, religion, nationality, political opinion, trade union membership, ethnic origin, sexual orientation and regardless of employment for a definite or indefinite period or full or part-time work (Art. 18<sup>3a</sup> par. 1).

### 3. The *flexicurity* model

#### 3.1 General issues

The term “*flexicurity*” is a combination of two words: “flexibility” and security” It can be defined as a flexible social security, including flexibility of employment and security of maintaining job<sup>15</sup>. It was first introduced in Denmark by the social democratic Prime Minister Poul Nyrup Rasmussen in the 1990s. The Danish model of *flexicurity*, also called a “golden triangle”, is a three-sided mix of such components as: flexibility of the labour market together with social security and an active labour market policy with rights and obligations for the unemployed<sup>16</sup>.

There are many other scientific definitions of this model. One can indicate for example a description used by Ton Wilthagen and Frank Tros: “*Flexicurity* is (1) a degree of job, employment, income and combination security that facilitates the labour market careers and biographies of workers with a relatively weak position and allows for enduring and high quality labour market participation and social inclusion, while at the same time providing (2) a degree of numerical (both external and internal), functional and wage flexibility that allows for labour markets' (and individual companies') timely and adequate adjustment to changing conditions in order to maintain and enhance competitiveness and productivity”<sup>17</sup>. According to the European Commission, *flexicurity* is “a policy approach that effectively combines different aspects of a more flexible labour market with employment security and social protection”<sup>18</sup>. Although flexibility and security of employment are very often perceived as opposite features, they can complement and support each other.

In European Union, *flexicurity* has become one of the most important and desired employment strategies. For instance, the Guideline No.21 of the Employment Policy Guidelines, adopted by the European Council for period 2005-2008, called on Member States to “promote flexibility combined with employment security and reduce labour market segmentation, having due regard

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<sup>15</sup> G. Sołtysiak, J. Kokot, „*Flexicurity*, teoria i praktyka”/ “*Flexicurity*, theory and practice” (Toruń 2011) 6.

<sup>16</sup> The Official Website of Denmark, online access: 26 July, 2016, <http://denmark.dk/en/society-welfare/flexicurity>.

<sup>17</sup> T. Wilthagen, F. Tros, “The Concept of Flexicurity: A New Approach to Regulating Employment and Labour Markets” Transfer, European Review of Labour and Research [2004] Vol. 10, No. 2, 170.

<sup>18</sup> European Commission, “European Employment and Social Policy Summary” (2006) 4, [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs261\\_summary\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs261_summary_en.pdf) online access: 26 July, 2016.

to the role of the social partners<sup>19 20</sup>. However, it has been noticed that this strategy should be implemented by Member States in their own ways, taking into account needs and possibilities of each state. So called “national *flexicurity* pathways” should nevertheless implement a set of common principles of *flexicurity*, such as flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective active labour market policies and modern social security systems<sup>21</sup>.

### 3.2. Flexicurity in Polish labour law – selected examples

*Flexicurity* in Polish labour law was implemented in diverse ways. Firstly, the author would like to give a few examples of introducing flexibility. Some solutions, such as telework, flexible employments agreements or organization of working time and various working time system have already been described in subsection 2.2. Searching for other flexible examples, one can indicate also temporary work, which is performing for an user-employer for a period not longer than specified in the act, the tasks (1) which are seasonal, periodic or temporary, (2) which performance on time by regular employees of user-employer would not be possible or (3) the performance of which is within responsibilities of the absent employee of user-employer<sup>22</sup>. Temporary work helps to adjust number of employees to the tasks that have to be completed in a specified period. There are over 5.000 temporary work agencies registered in Poland. In 2014, as a result of agencies’ activity, 220.422 persons were employed<sup>23</sup>. Furthermore, according to Art. 129 § 2 of PLC, in every kind of working time system, it is possible to prolong calculation of working time to maximum 12 months if it is justified by objective, technical or organizational reasons. It is used especially for seasonal work by e.g. construction companies. In this case, employer is obliged to ensure protection of employees’ health and security. The other flexible solution are work training contracts, which are beneficial especially for young employees and give opportunity to improve qualifications and function in the labour market at the same time<sup>24</sup>.

Moving on to security solutions, one can indicate many guarantee provisions for employees in PLC that cannot be modified to their disadvantage. These are e.g. maximum length of employment agreements for a fixed period, maximum working time limit, right to overtime allowance, right to continuous, paid, annual leave or antidiscrimination clauses. These regulations guarantee that flexibility of employment will not be abused by employers. There are also institutions regulated by other acts, such as minimum wage<sup>25</sup>, unemployment benefit

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<sup>19</sup> “Employment policy guidelines (2005-2008)” online access: 26 July, 2016, <http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=URISERV:c11323>.

<sup>20</sup> Moreover, in 2007, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions titled “Towards Common Principles of Flexicurity: More and better jobs through flexibility and security” {SEC(2007) 861} {SEC(2007) 862}, Document 52007DC0359 was published. Flexicurity strategy was also present in the European Economic Recovery Plan of November 2008 and Communication “Driving economic recovery” published in March 2009.

<sup>21</sup> European Commission Official Website, online access: 26 July, 2016, <http://ec.europa.eu/social/main.jsp?catId=102>, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - “Towards Common Principles of Flexicurity: More and better jobs through flexibility and security.”

<sup>22</sup> The Act of 9 July 2003 of temporary employment (Dz.U.2016.360).

<sup>23</sup> Ministry of Labour and Social Policy, Labour Market Department, “Information on activity of employment agencies in 2014”, online access: 26 July, 2016, <https://psz.praca.gov.pl/documents/10828/1499107/INFORMACJA%20Agencje%20Zatrudnienia%20w%202014.pdf/4376c8f8-7d56-4941-9bd7-f11b8cd2e3d0?t=1434366015000>.

<sup>24</sup> M. Kucharski, „Koncepcja *flexicurity* a elastyczne formy zatrudnienia na polskim rynku pracy”/”*Flexicurity* concept and flexible forms of employment in Polish labour market” (Warszawa 2012) 211.

<sup>25</sup> The Act of 10 October 2002 of minimum wage for work (Dz.U.2015.2008).

or career counseling<sup>26</sup>. They ensure social security for employees (minimum wage) and for those who are unemployed (unemployment benefit helps to function financially during unemployment and career counseling is a tool which enables finding an appropriate work).

## 4. Brand management and employer branding

### 4.1. Brand management and employer branding – general issues

Brand management (also known as branding) is, in brief, a technique of creating and maintaining a good perception of the brand in the market. It is used by companies especially to influence consumers' purchase decisions. Brand management can be defined as a capability to develop, support and maintain strong brands<sup>27</sup>. In other words, it is a process of creating a connection between the product and emotional perception of the customer for the purpose of generating segregation among competition and building loyalty among customers<sup>28</sup>.

The term "employer branding" (also known as talent branding) whereas was first used in 1990s and can be defined as "the package of functional, economic and psychological benefits provided by employment, and identified with the employing company". As a result, the relationship between company and employees is created and this provides a series of exchanges of mutual benefit. It is also an integral part of the company's total business network<sup>29</sup>. Employer branding can be also described as the image of the organisation as a great place to work in the mind of current employees and other groups, such as active and passive candidates, clients, customers and other key stakeholders<sup>30</sup>. Employer branding actions can be divided into two types, according to whom they are addressed. Internal employer branding includes all advantages for ones already employed in a company. These are facilities and benefits provided by employer which are dedicated to improve working conditions and efficiency of employees, such as additional trainings and courses, wage and non-wage motivators, internal communication, career path, assessment of employees and their satisfaction from work or integrating activities<sup>31</sup>. On the other hand, external employer branding is addressed mainly to future employees and consists of two kinds of activities – image enhancement and recruitment. Image enhancement aims to informing about a company and benefits it offers, increasing awareness of candidates about employer or presenting company's competition advantage. Recruitment activities are undertaken to reach candidates for employees and to encourage them to submit an application. This includes participation in job fairs, active promotion at universities and taking care of effective recruitment advertisement<sup>32</sup>.

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<sup>26</sup> The Act of 20 April 2004 of promotion of employment and institutions of labour market (Dz.U.2016.645).

<sup>27</sup> P.A. Rauschnabel "The Psychology of Brands. Empirical Investigation Through Lens of Social and Cognitive Theories" (Bamberg 2014) 4 and literature cited therein.

<sup>28</sup> M. Hislop "Dynamic Logic's Branding 101: An Overview of Branding and Brand Measurement for Online Marketers" [2001] 1-22.

<sup>29</sup> T. Abler, S. Barrow "The employer brand" The Journal of Brand Management [1996] Vol. 4 No 3 187.

<sup>30</sup> B. Minchington "Employer Brand Leadership – A Global Perspective" (Torensvile SA Australia 2010) 24.

<sup>31</sup> M. Kozłowski „Employer branding. Budowanie wizerunku pracodawcy krok po kroku”/”Employer branding step by step” (Warszawa 2012) 51-52.

<sup>32</sup> *Ibidem*, 92-94.

#### 4.2. Possible legal problems connected with brand management and employer branding – selected examples

In recent years, brand management and employer branding gained in importance and have become more popular. They are used by both large and small companies as a part of their marketing strategies. Even small employers are aware of advantages derived therefrom and bring these activities to life in workplaces. Probably in a couple of years employer branding will become an indispensable part of companies' marketing. However, one should bear in mind that using this kind of actions may cause some legal problems.

Recruitment processes nowadays take more time and are more complex than they used to be. Properly prepared recruitment helps to reduce risk of employing a person without sufficient skills or knowledge. However, it needs to be emphasized that no matter how recruitment process is conducted, there are some provisions in PLC that cannot be violated, such as antidiscrimination clauses or protection of personal data. Furthermore, employers caring for their image and reputation want increasingly to undertake legal actions to protect their personal rights. This may happen for example when employees or other persons lie away reputations of companies in social media. On the other hand, questions arise – to what extent can employers infringe employees' right to privacy? Can they require them to remove opinions concerning work from their private accounts or to behave in a certain way in their leisure time? Answers to these questions are not clear and have to be given in particular case, taking into account all facts and interests of both parties. Last but not least, many employers introduce requirements concerning appearance of employees in the workplace – their outfit, grooming, body modification, etc. It is important to remember that these actions have to be justified and implemented in an appropriate way, so that all employees were aware of them. They also cannot infringe personal rights of employees or discriminate them.

#### 5. Summary

The aim of this article was to present some examples of how other scientific disciplines affect labour law. It is also important to assess, whether this impact is really needed. In my opinion, interdisciplinary approach to labour law is inevitable in modern society. Without deriving from other disciplines, like sociology, economy or psychology and surveys conducted in these areas, it would not be possible to introduce proper legal solutions, which can help to find balance between work and private life, ensure flexibility and security of employment or develop a positive perception of employers without infringement of employees' freedoms. These are of course only a few most evident examples of mutual interactions between scientific disciplines. However, the analysis of them lets us draw a conclusion that interdisciplinary approach contributes to adapting law to current social and economic situation and dealing with contemporary problems.



# Tereza Kyselovská, Interaction of Intellectual Property Rights and Private International Law. Need for a Common Approach and Solutions

**Abstract:** The aim of this article is to provide an overview of legal sources for private international law and intellectual property rights. The governing rule in this area is the principle of territoriality and connecting factor *lex loci protectionis*. In this short paper, I would like to present arguments on the current legal norms from the perspective of the EU law and Czech Private International Law Act.

**Keywords:** private international law, intellectual property, law applicable, principle of territoriality, *lex loci protectionis*

## Introduction

The relationship between private international law and intellectual property rights is no “new news”.<sup>1</sup> Many authors have dealt with this subject of law.<sup>2</sup> Nevertheless, many issues in this area remain unanswered.

Intellectual property refers to creations of human mind; these creations are protected by law.<sup>3</sup> This protection enables people to earn recognition or financial benefit from what they invent or create. It is said that we have already witnessed the third (or fourth) industrial revolution.<sup>4</sup> Our society is based on knowledge and information. Our intellectual property is the most valuable possession we have.

The area of intellectual property rights is regulated by a vast number of laws; of international, regional or national origin. The system of protection of intellectual property rights tries to find a balance between the interests of innovators and the public interest on innovations.<sup>5</sup> Private international law and intellectual property rights are both based on the *principle of territoriality* and on the *lex loci protectionis* principle; i.e. the law applicable to the intellectual property and infringement of intellectual property rights is the law of the country in which legal protection for the intellectual property is claimed.

Today, the relationship and interaction between private international law and intellectual property is even more important and challenging. Due to globalization, electronization,

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<sup>1</sup> In 19th century, Carl Ludwig von Bar dealt with conflict of laws rules and intellectual property rights in his treatise on private international law. In: TRIMBLE, Marketa. Advancing National Intellectual Property Policies in a Transnational Context. *Maryland Law Review*, Vol. 74, No. 2, 2015, p. 208.

<sup>2</sup> FAWCETT, James, J; TORREMANS, Paul. *Intellectual Property and Private International Law*. 2nd ed. Oxford: Oxford Private International Law Series, 2011, 1056 p.; DINWOODIE, Graeme, B. Developing a Private International Intellectual Property Law: The Demise of Territoriality? *William and Mary Law Review*. 2009 – 2010, Issue 51, pp. 711-800; TRIMBLE, Marketa. Advancing National Intellectual Property Policies in a Transnational Context. *Maryland Law Review*, Vol. 74, No. 2, 2015, pp. 203.

<sup>3</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta a kol. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 526; *What is Intellectual Property?* [online]. World Intellectual Property Organization, WIPO Publication No. 450(E). Available from: [http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)

<sup>4</sup> SMITH, Bradford, L. *The Third Industrial Revolution: Law and Policy for the Internet*. In: *Recueil des Cours. Académie de Droit International*, 2000, Vol. 282. Netherlands: Martinus Nijhoff Publishers, 2000, pp. 229 – 464.

<sup>5</sup> *WIPO Intellectual Property Handbook: Policy, Law and Use* [online]. World Intellectual Property Organization. Available from: <http://www.wipo.int/about-ip/en/iprm/>

economic integration and internet<sup>6</sup>, activities involving intellectual property cross borders, and the number intellectual property disputes and litigation increases. Infringements of intellectual property occur on multiple territories, thus raising questions about jurisdiction of courts, law applicable and recognition and enforcement of judgments. Due to this development, it is possible to ask whether the principle of territoriality is still reasonable ground.

## Legal characteristics of intellectual property rights

The intellectual property rights have certain characteristics that greatly influence the creation and content of the conflict of law rules. These characteristics can be sometimes viewed as the main obstacles for the creation of truly uniform conflict of laws rules.

Intellectual property is a “property”.<sup>7</sup> They are rights given to persons for creations of their minds; they have both a moral and a commercial value. The intellectual property rights can be characterized also as “absolut” rights. They give their creator an exclusive right over the use of the creation for a certain period of time; every other person shall refrain from infringing these rights.<sup>8</sup>

The intellectual property rights are limited and governed by the “territoriality principle”.<sup>9</sup> This principle is the “founding” element of private international law since late 17<sup>th</sup> century<sup>10</sup> and the main principle in intellectual property rights.

The territoriality principle has not a uniform definition; it may be influenced by national policies and legal traditions (the main differences may be visible in comparison of the civil law and common law legal systems).<sup>11</sup> The territoriality principle (in intellectual property rights) can be understood in positive and negative meaning.<sup>12</sup> In the negative meaning, the relevant national law governs the creation, content, permissions for other persons to use such IP right (*lex loci protectionis*)<sup>13</sup>; the national law applies only on the territory of the respective state. In the positive meaning, and from the private international law perspective, each legal order has its own legal rules governing intellectual property rights. Creation of mind, an invention (patent) for instance, must fulfill certain conditions under national law in order to be recognized, and thus protected, as intellectual property right - patent. These conditions may differ in various

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<sup>6</sup> KYSELOVSKÁ, Tereza. *Vybrané otázky vlivu elektronizace na evropské mezinárodní právo soukromé a procesní : (se zaměřením na princip teritoriality a pravidla pro založení mezinárodní příslušnosti soudu ve sporech vyplývajících ze smluvních závazkových vztahů)*. Brno: Masaryk University, Faculty of Law, 2014, p. 228.

<sup>7</sup> Some authors speak about „propertization“ of intellectual property. In: CARRIER, Michael, A. *Cabining Intellectual Property through a Property Paradigm*. *Duke Law Journal*, Vol. 54, No. 1 (Oct. 2004), pp. 1- 145.

<sup>8</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et. al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 271; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta a kol. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 526.

<sup>9</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et. al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 271; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta a kol. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 526.

<sup>10</sup> KYSELOVSKÁ, Tereza. *Vybrané otázky vlivu elektronizace na evropské mezinárodní právo soukromé a procesní : (se zaměřením na princip teritoriality a pravidla pro založení mezinárodní příslušnosti soudu ve sporech vyplývajících ze smluvních závazkových vztahů)*. Brno: Masaryk University, Faculty of Law, 2014, p. 47.

<sup>11</sup> KRÁLÍČEK, Jaroslav. *Zásada teritoriality práv k duševnímu vlastnictví ve vztazích s mezinárodním prvkem – je načase ji opustit?* In *K některým vývojovým otázkám mezinárodního práva soukromého*. Brno: Masaryk University, 2013, p. 87.

<sup>12</sup> Ibid.

<sup>13</sup> Recital 26 of the Rome II Regulation.

states; in one state, an invention may fulfill all the conditions necessary as to be recognized and protected as patent; and in other state not.

From the point of view of the private international law, for the intellectual property rights as such, no “conflict” between laws applicable and their infringement is able to exist due to the *lex loci protectionis* principle (conflicts of course may occur for the contractual aspects of intellectual property, such as international license contracts).

Provisions on protection of IP rights are mainly mandatory. They shall be applied irrespectively of any other rules; they are limited to the territory of state that recognizes and protects a particular intellectual property right. The protection of IP rights is “temporary”, limited in time, for there were no limits and obstacles to the development of the society.<sup>14</sup>

Creations of mind expressed in manner perceivable by human sense can be used anywhere all around the world without the need to move the physical object in which it is expressed<sup>15</sup>. In that sense, its position is unlimited. If a creator of certain intangible property is interested in its protection, it is necessary to seek protection in every state where the protection is wanted.<sup>16</sup> This “potential ubiquity” characteristic is, in my opinion, one of the most significant. It is “easy” to enter into relationship with international (cross-border) element. Today, thanks to internet, it is even easier. The intellectual property assets are of a global character and they see no borders. Intellectual property has very important consequences on national cultural, social and economic development.

## Intellectual property rights and private international law

The protection of various intellectual property rights is governed by wide range of international conventions and EU regulations.<sup>17</sup> These conventions and EU regulations are directly applicable before national laws.<sup>18</sup> As said above, due to the legal nature of the IP rights, no “conflicts” between applicable laws, in principle, is possible. With regards to the territorial

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<sup>14</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et. al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 273; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta a kol. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 527.

<sup>15</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et. al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 272.

<sup>16</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta a kol. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 527.

<sup>17</sup> Protection of industrial property: *Paris Convention for the Protection of Industrial Property; The Madrid Agreement Concerning the International Registration of Marks; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration; Patent Cooperation Treaty; Trademark Law Treaty*. EU regulations on industrial property: *Regulation on the Community Trade Mark; Regulation on Community Designs; Regulation on quality schemes for agricultural products and foodstuffs; Regulation on Community plant variety rights; Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection*.

Protection of copyright and rights relating to copyright: *Berne Convention for the Protection of Literary and Artistic Works; Universal Copyright Convention; World Intellectual Property Organization Copyright Treaty; Directive on the legal protection of computer programs; Rome Convention for the Protection of Performers, Producers of Phonographs and Broadcasting Organizations; Convention for the Protection of Producers of Phonographs against Unauthorized Duplication of Their Phonographs; Beijing Treaty on Audiovisual Performances*.

<sup>18</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta a kol. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 527.

limitations of the IP rights, the relevant national laws govern the creation, content, permissions for other persons to use such IP right (*lex loci protectionis*).<sup>19</sup>

Conflicts between applicable laws may arise in contractual obligations with cross-border element (for instance in international patent license agreements); and non-contractual obligations with cross-border element (for instance infringement of copyright).<sup>20</sup> For these legal relationships with international (cross-border element), it is necessary to apply conflict-of-laws rules and determine law applicable.

For the relationship between intellectual property rights and private international law, it is therefore necessary to distinguish two areas: (1) law governing the intellectual property right itself; and (2) law governing the contractual and non-contractual aspects of intellectual property rights.<sup>21</sup>

### Conflict-of-laws rules for contractual obligations and intellectual property rights

Within the EU, the law applicable to intellectual property contracts is governed by the Rome I Regulation<sup>22</sup>. Parties may choose law applicable (Article 3). In the absence of choice of law, Article 4 is applicable.<sup>23</sup>

Rome I Regulation does not contain any specific connecting factor for license contracts in Article 4. In that case, the connecting factor „*country where the party required to effect the characteristic performance of the contract has his habitual residence*“ shall be applicable (with regards to escape clauses in Article 4 Para 3 and 4).<sup>24</sup>

The absence of express conflict of laws rule for intellectual property contracts, typically international license contracts, may be perceived as problematic. Some contracts may be classified as franchise contracts or distribution contracts, but this approach is, in my opinion, not in accordance with the legal predictability and certainty.

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<sup>19</sup> ROZEHNALOVÁ, Naděžda; DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st. edition. Brno: Masaryk University, Faculty of Law, 2015, p. 193.

<sup>20</sup> Ibid.

<sup>21</sup> ROZEHNALOVÁ, Naděžda; DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st. edition. Brno: Masaryk University, Faculty of Law, 2015, p. 192.

<sup>22</sup> Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:32008R0593&rid=1>

<sup>23</sup> For analysis of the Arts. 3 and 4 Rome I Regulation see: ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer ČR, 2013, pp. 85 – 114.

<sup>24</sup> ROZEHNALOVÁ, Naděžda; DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st. edition. Brno: Masaryk University, Faculty of Law, 2015, p. 202.

## Conflict-of-laws rules for non-contractual obligations and intellectual property rights

Within the EU, the law applicable to infringement of intellectual property rights is governed by Rome II Regulation<sup>25</sup> in Article 8.<sup>26</sup> The provision is based on the “universally acknowledged” principle of territoriality and *lex loci protectionis*.<sup>27</sup>

Article 8 distinguishes between intellectual property rights in general (Para 1) and unitary Community intellectual property rights (Para 2). Choice of law is explicitly excluded due to the characteristics of the intellectual property rights (Para 3). The rule in Article 8 is *lex specialis* to the general conflict rule in Article 4; it contains the *lex loci protectionis* connecting factor instead of the *lex loci damni infecti*, as general connecting factor. Article 8 Para 1 governs all types of intellectual property rights, irrespective of registration.<sup>28</sup>

Article 8 Para 2 Rome II Regulation regulates unitary Community intellectual property rights. The application of the unitary Community instruments in relation to third states is governed by Art. 8 Para 1.<sup>29</sup>

Article 8 of the Rome II Regulation is fully based on the territoriality principle and the *lex loci protectionis* principle.

## Intellectual property rights and the Czech Private International Law Act

The Czech Private International Law Act<sup>30</sup> contains general provisions on conflict of laws rules for contracts in § 87. This provision is fully in accordance with the EU law, namely with the Rome I Regulation.

Conflict of laws rule for intellectual property rights in the Czech Private International Law Act is provided for in § 80: “*The intellectual property rights are regulated by the law of the State, which recognizes and protects such a right*”. This provision is in accordance with the international conventions and the international system of intellectual property rights. The

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<sup>25</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?-uri=OJ:L:2007:199:0040:-0049:EN:PDF>.

<sup>26</sup> Rome II Art. 8: „*Infringement of intellectual property rights:*

1. *The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.*

2. *In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.*

3. *The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.*”

<sup>27</sup> This rule is confirmed in Recital 26 of the Rome II Regulation: „*Regarding infringements of intellectual property rights, the universally acknowledged principle of the lex loci protectionis should be preserved.*”

<sup>28</sup> ROZEHNALOVÁ, Naděžda; DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st. edition. Brno: Masaryk University, Faculty of Law, 2015, p. 202.

<sup>29</sup> For analysis of Art. 8 Rome II Regulation: VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. 1<sup>st</sup> ed. Praha: C.H.Beck, 2012. 277 p. 200 – 202; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer ČR, 2013, pp. 182 – 183; HUBER, Peter (ed). *Rome II Regulation. Pocket Commentary*. Sellier: European Law Publishers, 2011, p. 230.

<sup>30</sup> Act No. 91/2012 Coll., Private International Law Act. In: *ASPI* [legal information system]. Wolters Kluwer Czech Republic.

provision expressly recognizes the principle of territoriality and *lex loci protectionis*, thus fully confirming the *status quo*.<sup>31</sup>

## Conflict of laws rules for intellectual property rights – need for reform?

As mentioned above, nowadays, it is possible to see increasing interest in cross-border cases involving intellectual property rights. Intellectual property rights are territorial. Each state projects into national rules on intellectual property rights its national policies and priorities.

There is a valid question, whether this “single-country” perspective is still suitable; due to globalization and economic integration, cross-border intellectual property activities are assuming a more important role in national economies.<sup>32</sup> It is very important also for the international trade; whether country is oriented on exports on imports, then it will adopt relevant legislation on more strict or more lenient approach to protection of intellectual property.

In cases of infringement of intellectual property right, the plaintiff has to seek redress in each country, where the protection is claimed and the right was infringed. This may amount to multiple actions in multiple jurisdictions. Therefore, the application of the *lex loci protectionis* principle may be against the idea of protection of intellectual property and may be against the interests of the plaintiff. Králíček presents example of the problem of determination of “original author”. The *lex loci protectionis* principle may lead to result, that under national rules there can be several different “original authors”. Third parties then have no certainty as to with whom they may enter into, for instance, license contract. “*This notion of territoriality leads to protection of state’s interests rather than individual’s.*”<sup>33</sup>

Usually, conflict of laws rules and rules on protection of intellectual property rights are dealt with separately, no interaction between these two issues exists. As Trimble argues, “*legislators need to seek advancement of national intellectual property policies not only through substantive intellectual property laws but also through conflict of laws rules.*”<sup>34</sup>

The role of conflict of laws rules promoting national policies is increasing. Conflict of laws rules are often characterized as “*blind*” or “*value-neutral*”; they do not take into account the outcome of the application of foreign law applicable.<sup>35</sup> In private international law, there are, nevertheless, certain areas of law, typically consumer contracts, where legislators project into conflict of laws their policies on protection of weaker contractual party. These “*materialized conflict of laws rules*” contain connecting factors entailing certain policies or values. More substantial example could be the interest analysis developed by the American choice of law revolution. This approach requires the courts to assess the content of the potentially applicable laws and evaluate the state’s interest in promoting its national policies.<sup>36</sup> For intellectual property, the implementation of national policies and interest (materialization) into conflict of

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<sup>31</sup> ROZEHNALOVÁ, Naděžda; DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st. edition. Brno: Masaryk University, Faculty of Law, 2015, p. 203.

<sup>32</sup> TRIMBLE, Marketa. Advancing National Intellectual Property Policies in a Transnational Context. *Maryland Law Review*, Vol. 74, No. 2, 2015, p. 210.

<sup>33</sup> KRÁLÍČEK, Jaroslav. Zásada teritoriality práv k duševnímu vlastnictví ve vztazích s mezinárodním prvkem – je načase ji opustit? In *K některým vývojovým otázkám mezinárodního práva soukromého*. Brno: Masaryk University, 2013, p. 95-96.

<sup>34</sup> TRIMBLE, Marketa. Advancing National Intellectual Property Policies in a Transnational Context. *Maryland Law Review*, Vol. 74, No. 2, 2015, p. 206.

<sup>35</sup> ROZEHNALOVÁ, Naděžda; DRLIČKOVÁ, Klára et al. *Czech Private International Law*. 1st. edition. Brno: Masaryk University, Faculty of Law, 2015. p. 40. Publications of Masaryk University; theoretical series, edition Scientia, file No 544.

<sup>36</sup> SYMEONIDES, Symeon, C. *Codification and Flexibility in Private International Law*. Willamette University – College of Law, 2011, p. 40.

laws rules could be the next step.<sup>37</sup> This approach would also intensify the legal predictability and certainty.<sup>38</sup>

It may be objected to use the conflict of laws rules to achieve the goals of substantive national policies.<sup>39</sup> Nevertheless, the conflict of laws rules should be created with help of national policies to achieve the effective territorial reach the legislators deem optimal.<sup>40</sup>

As mentioned above, the number of cross-border intellectual disputes is increasing. For the legal predictability and certainty, it is very important to have clear private international law rules. Rome I Regulation does not contain specific rules for intellectual property contracts.

In designing their conflict of laws rules, states are affected not only by their national policies, but also by their international treaties obligations, principles of international law (comity) and principles of international commercial law (principle of national treatment and most-favored-nation principle).

## Soft law instruments and proposals for private international law rules and intellectual property rights

The World Intellectual Property Organization (WIPO) issued in 2015 document called “Private International Law Issues in Online Intellectual Property Infringement Disputes with Cross-Border Elements”<sup>41</sup>. It is an analysis of national approaches in several countries based on their legislation and case law. WIPO understands the need for common approach to create and harmonize rules for the intersection between intellectual property rights and private international law and the challenges that is globalization, electronization and internet.

There are also other international organizations and groups that address the issues of cross-border intellectual property disputes and create soft law proposal or initiatives in this area. For instance, The American Law Institute (ALI) issued in 2008 “Principles Governing Jurisdiction, Choice of Law, and Judgments in Intellectual Property in Transnational Disputes”; the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) issued in 2011 “Principles on Conflict of Laws in Intellectual Property”<sup>42</sup>.

Both the ALI and the CLIP Principles are based on the *lex loci protectionis* principle, but contain also exemptions to this general rule.

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<sup>37</sup> NEUMANN, S. Intellectual Property Rights Infringements in European Private International Law: Meeting the Requirements of Territoriality and Private International Law. *Journal of Private International Law*. 2011, Vol. 7, Iss. 3, p. 585.

<sup>38</sup> In law, there is an eternal struggle between legal certainty and predictability on one hand and equity and sovereignty on the other. This struggle is visible especially in intellectual property rights and their legislation. See NEUHAUS, P., H. Legal Certainty versus Equity in the Conflict of Laws. 28 *Law and Contemporary Problems*. 1963, pp. 795-807.

<sup>39</sup> TRIMBLE, Marketa. Advancing National Intellectual Property Policies in a Transnational Context. *Maryland Law Review*, Vol. 74, No. 2, 2015, p. 212.

<sup>40</sup> TRIMBLE, Marketa. Advancing National Intellectual Property Policies in a Transnational Context. *Maryland Law Review*, Vol. 74, No. 2, 2015, p. 213.

<sup>41</sup> CHRISTIE, Andrew, F. *Private International Law Issues in Online Intellectual Property Infringement Disputes with Cross-Border Elements. An Analysis of National Approaches*. World Intellectual Property Organization: 2015. 31 pp.

<sup>42</sup> Available at [http://www.cl-ip.eu/\\_www/files/pdf2/Final\\_Text\\_1\\_December\\_2011.pdf](http://www.cl-ip.eu/_www/files/pdf2/Final_Text_1_December_2011.pdf).

## Conclusion

The principle of territoriality has a substantial role in both private international law and intellectual property rights law. In its consequences, it does not entirely correspond with the predictability and certainty in legal relationships. To rely on this principle *pro futuro* is not ideal. As Dinwoodie states: “*Territoriality is a principle with strong prescriptive appeal, both in intellectual property and beyond. However, its operation in intellectual property law has always played too substantial a role in preventing the proper development of principles of private international law. The time has come for that to change.*”<sup>43</sup>

We need a common approach to deal with this issue. The increasing interdependence of global economies, globalization and the rising number of costly multinational intellectual property rights disputes will make the principle of territoriality one of the major obstacles to international trade.

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<sup>43</sup> DINWOODIE, Graeme, B. Developing a Private International Intellectual Property Law: The Demise of Territoriality? *William and Mary Law Review*. 2009 – 2010, Issue 51, p. 800.



## Articles

Abstract: The subject of the analysis in the present article is the latest of the amendments to the Act on Juvenile Delinquency Proceedings, passed with the legislation of August 30th, 2013 on the change of the Act on Juvenile Delinquency Proceedings and other Legislation and the Act of August 5th, 2015 on the Issuance of Opinions by Forensic Specialist Teams. The latest Acts for implementing legislation include, among other things, a directive from the Minister of Justice of July 6th., 2016, changing the directive on remand centres and sheltered accommodation for minors and these have also been taken into consideration. The analysis carried out leads to the general conclusion that the basic direction of changes, implemented in the Act on Juvenile Delinquency Proceedings, deserves approval. The above-mentioned amendments should also be seen as a milestone towards working out a complex and autonomous codification of the legislation on minors, the need for which is becoming ever more apparent.

Keywords: juvenile delinquency, law reform, criminal procedure

## Introduction

The Act on Juvenile Delinquency Proceedings, passed on 26<sup>th</sup>. October 1982<sup>1</sup> (hereinafter: AJDP), is a basic normative Act on the issue of juvenile demoralisation and delinquency in our legal system. Despite numerous amendments, the model for counteracting the negative social phenomena adopted by the legislature with the adoption of the above Act retains, in essence, its validity. However, it is subject to certain modifications whose aim is the adjustment of statutory objectives and the implementation of measures into a rapidly changing legal and social context.

The aim of this article is to present and analyse the most recent amendments of the subject Act of August 30<sup>th</sup>., 2013, '*on amending the Act on Juvenile Delinquency Proceedings and other Acts*' which entered into force on January 2<sup>nd</sup>., 2014<sup>2</sup> and the Act of August 5<sup>th</sup>., 2015, which entered into force on January 1<sup>st</sup>., 2016, '*on consultative teams of forensic experts*'.<sup>3</sup> Also, the latest regulations implemented into the Act, including, *inter alia*, the Directive of the Minister of Justice of July 6<sup>th</sup>., 2016, amending the Directive on Remand Centres and Sheltered Accommodation for Minors.<sup>4</sup>

## Amendment to the Act on Juvenile Delinquency Proceedings, dated August 30<sup>th</sup>., 2013

The Act of August 30<sup>th</sup>., 2013, indicated above, is one of the most extensive and, at the same time, most important amendments to be introduced into the legislation on juvenile delinquency in recent years and therefore, is deserving of more detailed discussion. The justification to the draft amendment emphasised that the aim of the solutions proposed was to adjust the existing rights of minors to the jurisprudence of the Constitutional Court and the European Court of Human Rights and, consequently, to the directives and recommendations of international legislation, '*aimed at empowering the juvenile and increasing procedural guarantees both at*

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<sup>1</sup> Consolidated text: Legal Journal of 2014, pos. 382.

<sup>2</sup> Comp.: Legal Journal of 2013, pos. 1165.

<sup>3</sup> Comp.: Legal Journal of Sept 18th, 2015, pos. 1418.

<sup>4</sup> Comp.: Legal Journal of July 8th, 2016, pos. 995.

*the stage of the examination of proceedings and in enforcement proceedings*".<sup>5</sup> According to the legislator, the above objective required changes to the very model of proceedings in juvenile cases, as well as changes, or modifications, to rulings on so-called juvenile psychiatric observation and the use of coercive measures.

Far-reaching changes to the model of judicial proceedings are paramount. The Act on Juvenile Delinquency Proceedings, from 1982, introduced a complex, albeit patchy, model of such proceedings based on Art. 20 of the AJDP. Under this provision, the rules of civil and criminal procedures are applied respectively during the proceedings. Before the amendment of August 30<sup>th</sup>, 2013 entered into force, the Act provided for successive phases of the proceedings, initiated by the appropriate decision and issued by a family court or a family judge: 'to initiate proceedings' (Art. 21 § 1 of the AJDP), 'to initiate the explanatory procedure' (Art. 34 § 1 of the AJDP) and 'to examine cases in care-educational or corrective proceedings' (Art. 42 § 1 and 2 AJDP).<sup>6</sup> All proceedings before a juvenile court were divided into two main phases *viz.* - the preliminary investigation and the examination. The latter, depending on the actual circumstances, could be either in the form of care and educational proceedings, found mainly where rules of civil procedure were applied, or in the form of reformatory proceedings using criminal procedures. The amendment discussed here unified preliminary investigation, eliminating the aforementioned duality. The provision of Article 20 of the AJDP, as modified by the amendment discussed, introduces a uniform procedure in juvenile cases, run by the family court. As a rule, this takes place on the basis of the Code of Civil Procedure appropriate for custody issues. The amendment preserves the appropriate application of the provisions of the Code of Criminal Procedure only within a strictly defined scope, namely the collection, recording and conducting of evidentiary actions carried out by the Police (Art. 20 § 1 of the AJDP), the appointment of a legal representative for the defence where this has not been regulated separately, facilities for the interrogation of minors, where quality standards for the interrogation of such witnesses are higher (Art. 20 § 2 of the AJDP) and the handling of factual evidence seized (Art. 20 § 3 of the AJDP) which appears, at first sight, to be undertaken mostly by the police.

The proposal for such a uniform approach in juvenile cases has been postulated in the policy for a long time<sup>7</sup>. At the same time, there is a requirement to abandon certain forms of examination along with certain care and educational and corrective proceedings. There is also the need, one might even say *the necessity*, to depart from the dualism of procedural solutions involving the partial adjustment of problems in the AJDP and the system of referring to the provisions of the Code of Civil Procedure and the Code of Criminal Proceedings. Among others, P. Górecki opted for the unification of procedures in juvenile proceedings clearly indicating that the focus should be shifted towards solutions typical for the educational function of the Act, that is, regulation close to that of the civil procedure<sup>8</sup>. Criticism of this procedural

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<sup>5</sup> Cf. justification of the government draft legislation of Feb 15<sup>th</sup>, 2013 amending the Act on Juvenile Delinquency Proceedings and the Legislation on Common Courts (printout no. 1130).

<sup>6</sup> More on the topic, cf.: W. Stojanowska. J. Sołek, Expertise prawna dotycząca rządowego projektu zmiany Ustawy o postępowaniu w sprawach nieletnich oraz ustawy – Prawo o ustroju sądów powszechnych (Legal expertise on the government's draft amendment to the Act on Juvenile Delinquency Proceedings and the Act, *viz.* Legislation on Common Courts (printout no. 1130), [www.sejm.gov.pl](http://www.sejm.gov.pl).

<sup>7</sup> More on the topic, cf.: W. Stojanowska. J. Słyk, Ekspertyza prawna dotycząca rządowego projektu zmiany Ustawy o postępowaniu w sprawach nieletnich oraz ustawy – Prawo o ustroju sądów powszechnych (Legal expertise on the government's draft amendment of the Act on Juvenile Delinquency Proceedings and the Act on the Law on Common Courts (printout no. 1130), [www.sejm.gov.pl](http://www.sejm.gov.pl).

<sup>8</sup> P. Górecki, Raz jeszcze na temat ustawy o postępowaniu w sprawach nieletnich On the Act on Juvenile Delinquency Proceedings once again (comments on the background of the article by K. Adamiak and M. Lisicki), *Przegląd Sądowy /Judicial Review/* 1998, no. 7-8, pp. 176-177. Cf. also A. Mudrecki, *Prawo nieletniego do*

dualism, adopted in the Act before its amendment, was also expressed by M. Korcyl-Wolska from the point of view of the norms of international law<sup>9</sup>.

Taking into consideration the views and opinions quoted above, the changes introduced by the amendment to the Act on Juvenile Diligence Proceedings, as discussed here, should be positively evaluated to the extent that they eliminate the separation of examination proceedings into 'care and educational' mode and 'correctional' mode. Regardless of the above assessment, some critical remarks should be spelt out as well. Elimination of the forms of examination proceedings, as with 'care-educational' and 'correctional' proceedings, does not fully eliminate the complications associated with the duality of referrals to the provisions of criminal and civil proceedings. Article 20 of the AJDP, as modified by the amendment discussed, leaves to the Police, unchanged, the relevant provisions of the Code of Criminal Procedure for the collection and taking of evidence, along with the assignment and deployment of defence counsel. Thus, the Act still refers, in principle, to the provisions of the Civil Procedure Code, and exceptionally, to the Code of Criminal Procedure which renders the demand for a complex and autonomous codification of the rights of minors still valid. I have drawn attention to this problem in the above-mentioned expertise, developed at the request of the Polish Parliament *à propos* the draft of the law in question. Unfortunately, the proposals and postulates formulated, regarding the issues discussed here, were not included in any further work of the parliamentary committee.

The amendment discussed also provides additional normalisations for increasing procedural guarantees. First of all, in Art. 18a of the AJDP, the fact that a minor has the right to a defence and the right to remain silent has been highlighted, together with the rights to be instructed prior to the hearing or interrogation. '*Expressis verbis*' indicates the obligation to inform the juvenile of his/her rights and should be assessed positively. Similarly, the provisions of Article 32c should be assessed. Even though it is a repetition of the circumstances for obligatory defence, provided for in the existing Art. 36 § 1 of the AJDP, they were supplemented by additional circumstances where, for instance, the juvenile is deaf, dumb or blind or where there is reasonable doubt concerning his/her mental health. Some doubts may, however, be raised concerning the provisions of Art. 32c of the AJDP, namely its construction in §3. I have already drawn attention to them in the aforementioned expert's report prepared for the Sejm of the Republic of Poland<sup>10</sup>. This provision provides for the establishment of a defence council at the request of the minor, if the President of the Court deems it necessary for the participation of the council and where the juvenile or his/her parents are unable to bear defence costs. The wording of this provision indicates that the circumstances or prerequisites laid out therein are cumulative in character. In practice, this means that both of them have to appear together in order for the request to be positively considered, in order to provide defence counsel for a juvenile. The acceptability of the second of the statutory pre-requisites is concerned, chiefly, that the inability of the juvenile or his/her parents to bear the defence costs is beyond doubt; however, the first of these requirements, *viz.* the conviction of the President of the Court of the need to establish

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rzetelnego procesu przed sądami rodzinnymi (The juvenile's right to a fair trial before family courts), Opole 2008, p. 107.

<sup>9</sup> M. Korcyl-Wolska, *Postępowanie w sprawach nieletnich* (Proceedings in juvenile cases), Krakow 2004, p. 203 and further, pp. 242-243. Cf. *ibidem*, *Opinia w przedmiocie projektu ustawy o zmianie ustawy o postępowaniu w sprawach nieletnich oraz ustawy – Prawo o ustroju sądów powszechnych* (Opinion on the draft law amending the Act on Juvenile Delinquency Proceedings and the law - Act on Common Courts, [www.sejm.gov.pl](http://www.sejm.gov.pl) (especially pp. 4-5 of the opinion).

<sup>10</sup> More on the topic, cf.: W. Stojanowska. J. Słyk, *Ekspertyza prawna dotycząca rządowego projektu zmiany Ustawy o postępowaniu w sprawach nieletnich oraz ustawy – Prawo o ustroju sądów powszechnych* (Legal expertise on the government's draft amendment of the Act on Juvenile Delinquency Proceedings and the Act on Law on Common Courts (printout no. 1130), [www.sejm.gov.pl](http://www.sejm.gov.pl)., (page 10 of the opinion)

a defence, raises reasonable doubt. This means that the establishment of a council for the minor, who himself/herself is not able to bear the defence costs, will depend on the decision of the court, and thus, as I emphasised in the above-mentioned expert opinion, “*it will be judicially possible to limit rights to a defence. The regulation remains at variance with Art. 18a proposed and quoted above*”.<sup>11</sup>

This assessment will not be changed by the addition of any amendment in the course of further legislation regarding the possibility of a minor to complain about the refusal to establish a defence

As has been mentioned above, the amendment also introduced some changes to the regulations governing juvenile psychiatric observation and the use of juvenile coercive measures. The legislator has supplemented the contents of the amendments to the proposals of the existing provisions of Art. 25a with the formulation of additional conditions determining the observation of a juvenile in medical institutions in order to examine the state of his/her mental health. Until the present time, the administration of such observations could only have been made at the request of psychiatric experts. This proposal was the only premise formulated in this provision prior to its amendment. Under the current wording of Art. 25a of the AJDP above, placing a juvenile under judicial observation depended on the following premises *viz.* the high probability, arising from the evidence collected, that the juvenile is demoralised to a high degree and also depended on the criminal acts committed by the juvenile as referred to in article 1, §2 point 2, letter a, of the AJDP above, as well as on the juvenile's hearing by the court and on the submissions of other parties and the defence. Furthermore, the basic, acceptable observation time is reduced to four weeks. It is possible to extend it for the time necessary to complete the observation for up to six weeks.

The main motive for the change, as outlined in the explanatory memorandum of the Act, is to prevent abuse of observational measures for “*trivial matters*”. It has also been indicated that the change is dictated by the Constitutional Court's judgment of July 10<sup>th</sup>, 2007 (Act ref. no. SK 50/06), in which the Court declared the unconstitutionality of the provisions of Art. 203 §1 and 2, of the Criminal Procedure Code. As has been highlighted in the justification of the draft amendment, the above-mentioned provisions had content similar to Art. 25a of the AJDP in the earlier wording, before the amendment was discussed. According to the Constitutional Court, the conditions for the application of such drastic research methods as the combination of psychiatric examination and detention-under-observation in a medical institution, should be the high probability that the accused could very well repeat the criminal act of which he/she stands arraigned.<sup>12</sup>

In the aforementioned expert opinion on the draft law<sup>13</sup>, I pointed out that “the possible abuse of placing minors in therapeutic institutions for observation should be assessed negatively. Therefore, the expansion of this provision with additional conditions, in order to minimise this danger should be assessed positively.”<sup>14</sup> I also pointed to the different nature of the regulations within the Act on Juvenile Delinquency Proceedings *vis-a-vis* the provisions of the Code of Criminal Procedure which is not without impact on the assessment of the changes in the content of Art. 25a of the AJDP. It should be remembered that the guiding directive of the Act on

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<sup>11</sup> Ibid.

<sup>12</sup> More information on the Tribunal's judgment of July 10<sup>th</sup>, 2007. (SK 50/06); cf. W. Stojanowska. J. Słyk, Ekspertyza prawna dotycząca rządowego projektu zmiany Ustawy o postępowaniu w sprawach nieletnich oraz ustawy – Prawo o ustroju sądów powszechnych (Legal expertise on the government's draft amendment of the Act on Juvenile Delinquency Proceedings and the Act - Law on Common Courts (printout no. 1130), [www.sejm.gov.pl](http://www.sejm.gov.pl).

<sup>13</sup> Ibid, p. 5.

<sup>14</sup> Ibid.

Juvenile Delinquency Proceedings is primarily "juvenile welfare" (Art. 3 § 1 of the AJDP) and, as a consequence, the implementation of the educational function. From this point of view, "determination of the status of the mental health of a minor is, in accordance with the principles of the Act, a value worth protecting to a greater extent than for adult perpetrators of criminal acts. These arguments are in favour of more flexible conditions for the application of the forced observation of a juvenile."<sup>15</sup>

Attention should also be drawn to another important element of this provision. As has already been indicated, one of the conditions of the forced observation of a minor is the high probability, resulting from the evidence collected, that the juvenile is demoralised to a high degree. Meanwhile, in accordance with Art. 2 of the AJDP, the activities provided for are undertaken, in cases where the juvenile shows signs of demoralisation. The combination of these regulations would suggest, as I emphasised in the expert opinion cited above, that there is a category of minors which is demoralised to the extent that it enables the Act on Juvenile Delinquency Proceedings to be applied to them but is not high enough to apply observation. It seems that the inconsistency of Art. 25a of the AJDP *vis-a-vis* existing regulations, as described above, should be removed in the course of work on the Act discussed. However, this has not happened.

The project of the amendment of August 30<sup>th</sup>. 2013 discussed here also included detailed proposals for changes in the use of coercive measures against minors placed in remand houses and shelters for minors. In the opinion of the expert appointed above, these proposals (Art. 95a-c) were, generally speaking, assessed positively, especially the directive aimed at protecting the dignity of the juvenile, prohibiting humiliation and the use of demeaning techniques - Art. 95a § 3). I also pointed out some gaps and inconsistencies in the regulations drafted.<sup>16</sup> In the course of further legislative work on the amendment discussed, the regulations on this issue were abandoned. They re-appeared in the course of work in the Act of May 24<sup>th</sup>., 2013 on the *measures of direct coercion and firearms*.<sup>17</sup> The existing provision of Article 95a of the AJDP constitutes a reference to the provisions of that law and indicated in its character. This method of regulating this delicate matter in the Act on Juvenile Delinquency Proceedings raises doubts. It would seem more appropriate to regulate the subject issues in detail in the AJDP and treat them by enacting special legislation in relation to the provisions of the Law on Direct Coercion and Firearms. Such a possibility is provided for in Article 2 of the Law indicated which contains a list of specific Acts in respect of which it is not in use. This solution is supported by basic principles and directives adopted in the AJDP.<sup>18</sup>

In discussing the issue of the use of coercive measures in remand houses and shelters for minors, one should mention the latest Regulation of the Minister of Justice (of July 6<sup>th</sup>., 2016), amending the regulation on remand houses and shelters for minors.<sup>19</sup> This includes changes, among other things, to the placement of minors into open institutions, changes to certain types

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid, pp. 5 et seq. of the opinion.

<sup>17</sup> Legal Journal of 2013, pos. 628.

<sup>18</sup> However, this issue would require a detailed analysis, beyond the scope of this article. First of all, the jurisdiction of the Constitutional Tribunal on the compatibility of such legislation with the Polish Constitution should be considered. The Attorney General drew attention to these issues in the Opinion on the draft law on direct coercion and firearms (Sejm Printout no. 1140 of Feb 26th, 2013) pointing to the need for comprehensive regulation of this problem in the AJDP. The regulations in force at that time (Art. 95c of the AJDP) were appealed against by the Attorney General to the Constitutional Tribunal due to their fragmentary character since the case was cancelled due to the annulment of the provision contested. Any possible change to the model of the regulation discussed and any return to the provisions contained in the draft amendment of August 30<sup>th</sup>., 2013 should take into account the objections raised in the writings of the Attorney General mentioned above. More on this subject in: Decision of the Constitutional Tribunal of November 7<sup>th</sup>., 2013 file ref. no. K 3/12, OTK ZU no. 8A/2013, pos. 130.

<sup>19</sup> Legal Journal of 2016 pos. 995.

of correctional facilities and changes to the remit powers of the President of the District Court in the framework of the supervision, by the Minister of Justice, of correction homes and shelters for minors.<sup>20</sup> Attention should be drawn to the change in §4 of the regulation and the addition of §7<sup>1</sup>, enabling the placement into open institutions of minors who have committed an offence or were in prison or custody where the current process of social rehabilitation is positive. This change, as is clear from the justification for the draft regulation, will contribute to an increase in the individual educational impact on the juvenile.<sup>21</sup> The assumption that underlies the change implemented, should be assessed positively. In practice, however, the decision to include the category of minors indicated, in open institutions, is preceded, in any such case, by a detailed assessment of the current process of their social rehabilitation and a positive outlook for the continuation of this process under non-custodial conditions. This change therefore, requires special mindfulness from those carrying out such an assessment and forecast.

Changes to the type and structure of correctional facilities rely, among other things, on the abandonment of so-called rehabilitation homes, *q.v.* repeal of the existing §3, point 4, of the Regulation and enlargement of that group of minors who may be placed into rehabilitation-therapeutic institutions. A new category of "*those addicted to psycho-active substances*" has been introduced. The new category includes minors addicted to alcohol, in addition to those addicted to narcotic drugs and psychotropic substances. The powers of the President of the District Court have become limited to the area associated with co-operation with the Police where the safety of the institution is under threat. Other tasks under total supervision - *q.v. the changes to §13 section 2, §14 section 2, § 77 point 1* - were assumed by the supervising authority or institution manager.

## Amendment to the Act on Juvenile Delinquency Proceedings of August 15th., 2015, on Consultative Teams of Forensic Experts

On August 5th, 2015, the Sejm passed a law *on consultative teams of forensic experts*.<sup>22</sup> This is new legislation, without counterpart in earlier, normative legislation. Before outlining the changes that this legislation introduced into the proceedings, in juvenile cases, it is worth presenting its genesis, albeit briefly.

The enactment of this legislation, as discussed here, is the result of an appeal to the Constitutional Court against §11 Section 1 of the Regulation of the Minister of Justice, dated August 3<sup>rd</sup>., 2001 *on the organisation and responsibilities of diagnostic and consultative family centres*<sup>23</sup>. The above provision entitled these centres to give an opinion "*in other cases*", in addition to juvenile cases, especially where these relate to the family. According to the Prosecutor General, the disputed provision went beyond the framework of the statutory delegation resulting from Art. 84 § 3 of the AJDP, in the version prior to the amendment of 2015. Anticipating the decision of the Tribunal<sup>24</sup>, the government prepared a draft amendment

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<sup>20</sup> For more on the subject of the need and the extent of changes in the regulation cf. Justification of the draft amendments to Regulation of the Minister of Justice on remand houses and shelters for minors. Justification is available on the website of the Ministry of Justice in the "Legislative proposals" tab ([www.ms.gov.pl](http://www.ms.gov.pl)).

<sup>21</sup> *Ibid.*, p. 2.

<sup>22</sup> *Comp.*: Legal Journal of Sept 18th, 2015, pos. 1418

<sup>23</sup> Legal Journal no. 97, pos. 1063

<sup>24</sup> Taken on October 28<sup>th</sup>., 2015 (file ref. No. U 6/13 Act). According to the Tribunal, "§ 11 section 1 of the Regulation of the Minister of Justice dated August 3<sup>rd</sup>., 2001 on the organisation and responsibilities of diagnostic and consultative family centres (Legal Journal no. 97, pos. 1063) to the extent it relates to opinions issued by diagnostic-consultative family centres on matters other than the case of minors, is incompatible with Art. 84 § 3 of the Act of October 26th, 1982 on proceedings in juvenile cases (Legal Journal of 2014, pos. 382) and thus to Art. 92 section 1 of the Polish Constitution."

to the law on common courts and some other Acts<sup>25</sup>. In support of this project, *ratio legis* for the changes proposed, was formulated. It is worth quoting the relevant passage here as it captures, succinctly, the essence of the problem and the need for new legislation. The following was stated in the explanatory memorandum: "*A change of status and location for diagnostic and consultative family centres, as proposed in the draft legislation, arises from the need to use them, not only to diagnose minors and their family environment in the guidance and specialist care of minors, as well as diagnosis and guidance for the prevention of demoralisation, but also to provide opinions for the common courts in divorce cases and disputes concerning contacts with children, including civil and criminal matters. The adoption of this provision will legitimise the long-term practice by centres, of providing opinions in various categories of cases.*"<sup>26</sup>

The change of status and location of diagnostic-consultative family centres mentioned in the above-cited passage, from the justification, hereinafter referred to as DCFC, found expression in Art. 157a §1 of the project according to which "*a diagnostic-consultative family centre is a subsidiary body of the district court. The activities of the Centre are funded by the budget of the district court.*"<sup>27</sup>

The project also stipulated that the scope of activities of the diagnostic and consultative family centres will include:

- 1) diagnosis of minors and their family environment, guidance and specialist care of minors as well as diagnosis and counselling for the prevention of the demoralisation of minors for the purpose of proceedings in juvenile cases;
- 2) diagnosis of minors and their family environment, counselling and specialist care of minors in order to provide opinions for courts of law in divorce and separation cases and in disputes concerning contacts with children;
- 3) diagnosis of minors and their family environment, counselling and specialist care of minors in order to provide opinions for care related cases, in non-litigious matters of minors, in parental responsibility and regarding changes to decisions issued in this regard.<sup>28</sup>

In the course of further legislative work, the regulation model in question, namely, the changes to the Law on Common Courts and to the authority of diagnostic-therapeutic family centres in the structure of the district court, was eventually abandoned. The above issue was indeed questioned<sup>29</sup> and a decision was taken to develop a completely new bill.

The essence of the new regulation has been included in Art. 1, 2 and 25 of the Act discussed, defining the legal status of teams, the scope of their activities and the situation of the DTFC. Pursuant to Art. 1.1. Act, "*in district courts there are consultative teams of forensic specialists*

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<sup>25</sup> Comp.: Sejm Printout no. 3058.

<sup>26</sup> Cf. justification of the Bill amending the Act - Law on Common Courts and certain other Acts (Sejm Printout no. 3058).

<sup>27</sup> Ibid.

<sup>28</sup> Cf. Art. 157g of the bill (Sejm Printout no. 3058).

<sup>29</sup> The National Council of the Judiciary in its opinion of April 17<sup>th</sup>., 2015 on the parliamentary draft of the law amending the Act - Law on Common Courts and certain other Acts (Sejm Printout no. 3058) stated, among other things,: "*KRS accept the need to regulate the legal status of diagnostic and consultative family centres, hereinafter referred to as DCFC. However, after reviewing the solutions projected, the Council assesses negatively, the concept of inclusion of the said centres into the structure of courts of law as subsidiary bodies of the district courts. According to the assumptions of the Act, the opinions of the DTFC would have the value of expert opinion for the court. These basic assumptions contradict the principle that authors of expert opinions should be independent of the court.*" The above opinion is available on the website of the Polish Sejm ([www.sejm.gov.pl](http://www.sejm.gov.pl)), in the section documenting legislative work on the draft law discussed (Sejm printout no. 3058).



*whose task is to opine on family and care matters, as well as on juvenile cases, based on psychological, pedagogical or medical examinations, on the order of a court or a prosecutor."* The above teams - in accordance with point of 2 Art. 1 – may, also, at the request of the court, mediate, carry out social enquiries in cases involving minors and run specialised counselling for minors, juveniles and their families. Specialists working in such teams retain their autonomy when carrying out their activities and imparting their expertise. The President of the District Court, as stated *expressis verbis*, in Art. 2 of the Act, may not instruct the teams when carrying out their remit. Supervision of the activities of teams, in accordance with Art. 4 of the Act, is carried out by the Minister of Justice, who is legally obliged to specify, in detail and by regulation, the manner in which teams are to be supervised, taking into account *"the need to ensure the efficient and effective functioning of the teams"* (Art. 4 section 5 of the Act) - and the *"methodology standard for the issuing of opinions by teams"* (Art. 4 section 4 of the Act). With the entry of the Act into force, on January 1<sup>st.</sup>, 2016.) as provided for in Art. 25 of that Act, diagnostic-consultative family centres become advisory teams of forensic experts and the teachers, psychologists and family doctors employed in them, become specialists in these teams.

There is no doubt that the Act discussed, requires detailed analysis beyond the scope of this article, not only in the context of the DTFC but in dealing with the complex of issues relating to the so-called subsidiary bodies of the court, the meaning of which is difficult to overestimate, especially in family matters. I have pointed to the above, repeatedly, in studies conducted on the basis of my own empirical research.<sup>30</sup> In this context, the adoption of the above Act and, by implication, the resolution of the problem of the legal basis accorded to the opinion of the DTFC in family matters, should certainly be positively assessed.

Coming back to the main discussion, it should be noted that the present Act introduced some procedural changes in cases involving minors. These changes are the consequence of the general guidelines adopted in the Act discussed and rely on the enactment of the provisions of the Act on Juvenile Delinquency Proceedings into the legislation of August 5<sup>th.</sup>, 2015, as discussed above. The name *"diagnostic-consultative family centres"* occurring in the regulations (Art. 24§ 2 point 3, Art. 25§ 1 and § 3, Art. 32 § 2) was replaced by the new term *"consultative forensic expert teams."* At the same time, the provisions of Art. 84 § 2 § 3 of the AJDP, authorising the Minister of Justice to create and abolish DTFC and containing the statutory powers to regulate issues concerning these entities, were repealed.

It is also worth mentioning that on February 1<sup>st.</sup>, 2016, the Ordinance of the Minister of Justice *on the establishment of methodological standards for opinions issued by consultative teams of forensic experts*, came into force<sup>31</sup>. This contains, among other things, provisions on the issuing of opinions in juvenile cases. These regulate the composition of the team which must contain at least two specialists; they also detail the deadlines for the opinion which must be provided no later than within 14 days from the end of the study and also regulate the range of activities that make up the study. Among other things, this also includes analysis of the case and of the interview with the minor and his/her parents or guardians, analysis of the family environment and of the educational, psychological and physical development, the education process, the causes and symptoms of demoralisation, diagnosis of the mental processes of the minor and an

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<sup>30</sup> Cf. especially W. Stojanowska, Contribution of diagnostic and consultative family centres in the activities of family courts in the light of the surveys of judges, Scientific Papers of the Institute of Research on Judicial Law No. 31/1989; *ibidem*, Evidence from the opinion the diagnostic and consultative family centre in matters of divorce and its impact on the content of the judgment in the light of findings from court files, Scientific Papers UKSW 2002 no. 2.1; cf. also *ibidem*, The protection of the child from the negative effects of parental conflict, Warsaw 1997, p. 7, 114 et seq.

<sup>31</sup> Official Journal of the Ministry of Justice 2016, pos. 76.

explanation of the psychological mechanisms of his/her functioning and also proposals with the directions of influence on the juvenile (point 7.3 of the Ordinance).<sup>32</sup>

## Closing remarks

In summing up the issues which are the subject of in this article, it should be noted that the main direction of changes to the Act on Juvenile Delinquency Proceedings deserves approval. This also applies to the regulation on the legal basis for the operation of the existing diagnostic and consultative family centres, not only in juvenile cases, but primarily in family matters.

Assessing the amendments discussed, we should not lose sight of the basic conclusion to be drawn in the context of the issues analysed. These amendments should be seen as a step towards developing a comprehensive and autonomous codification of the rights of minors. This requirement is becoming ever more apparent. It can be assumed that further amendments will lead to this goal after verification of the changes analysed in the Act on Juvenile Delinquency Proceedings which will be introduced in the course of judicial practice and in their application.

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<sup>32</sup> The Ordinance of the Ministry of Justice discussed here, also regulates the issuing of opinions in family matters. It is understood as a "*comprehensive diagnosis of the family system*" taking into account, among other things, "*analysis of the personality of parents or carers*" (point 8 of the Ordinance). Such a broad approach to the subject of the study is undoubtedly justified by the specificity of family matters and the need for a comprehensive assessment of the child's situation.

# Maciej Koszowski\*, The Scope of Application of Analogical Reasoning in Statutory Law\*\*

**Abstract:** This article addresses the scope of the potential applications of an analogical argument in the domain of statutory law. The author thus shows how analogy leads to the liquidation of different sorts of legal gaps: *extra legem*, *intra legem*, *contra legem*, technical, logical and constructional. He also highlights the role which analogy can play as a universal method of applying particular statutory provisions in concrete cases, the way of coping with obsolete statutes with the help of an analogical inference, or the clarification of the wordings of statutory rules by recourse to reasoning from similarity. In the article, allowance has also been made for the linking of an analogical pattern of thinking with specific legislative techniques such as the ‘*ejusdem generis* canon of construction’ and ‘pertinent application of statutory law.’ In addition, the analogical basis of comparative arguments, the possibility of expanding the domain of statutory law with the use of analogy at the expense of the room reserved for customary and precedential law as well as special forms of analogical reasoning: *argumentum a fortiori* and *analogia iuris* have been discussed.

**Keywords:** analogy, analogical, reason, reasoning, statute, statutory, gaps, legal, law, applying, application, scope, pertinent, notions, conflicts, rules, lacuna, *iuris*, *legis*, *a fortiori*, *ejusdem generis*

## 1. Introduction

Analogical reasoning is commonly associated with precedential law, the core idea of which – exactly like analogy itself – consists in proceeding from the particular to the particular, from one case to another. The province of precedential law may – without exaggeration – thus be considered the natural home of analogical reasoning.<sup>1</sup> Inference from analogy, however, features in the domain of statutory law as well. As MacCormick points out, “argument from analogy is by no means uncommon or unimportant in the application and interpretation of statutes”.<sup>2</sup>

In this paper, I subscribe to the aforementioned thesis, endeavoring to highlight all the possible usages of analogical reasoning in the area of statutory law. Analogy employed here – apart from being preceded by the adjective *statutory* – is sometimes called “*argumentum a simile* (*a*

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<sup>1</sup> Cass R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press: New York 1996, p. 62.

<sup>2</sup> Neil MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press: Oxford 1978, p. 193.

An interesting comparison is made by Gunnar Bergholtz and Aleksander Peczenik, who compare precedential law to a casuistic statute, by stating that: “In interpreting precedents, use is made of a number of reasons which in part resemble argument by analogy in statutory interpretation. Practice as a source of the law resembles a markedly casuistic statute, the application of which calls for conclusion by analogy on a large scale”, see Gunnar Bergholtz and Aleksander Peczenik, *Precedent in Sweden, Interpreting Precedents : A Comparative Study*, eds. Neil MacCormick, Robert S. Summers, Ashgate/Dartmouth: Aldershot 1997, p. 305.

*simili*)”,<sup>3</sup> i.e. an argument from similarity (or an inference based upon similarity), argument/reasoning “*a pari*”<sup>4</sup>, “*argumentum a similibus ad similia*”<sup>5</sup> or “*argumentum (inference) per analogiam*”.<sup>6</sup> Moreover, it can also be conflated with an argument *ab exemplo* (i.e. an argument from paradigmatic examples).<sup>7</sup>

## 2. Filling the gaps

In the province of statutory law, analogical reasoning is recognized above all as a means for the liquidation of the so-called legal gaps (*lacunas*), which – incidentally – can be of a different, and sometimes quite sophisticated and sublime, sort.

### 2.1. Extra legem gap

According to the orthodox theory, a legal gap occurs whenever there is no statutory rule that can be applied to the case at hand, although it is socially desirable to have such a rule and the case at hand being provided for.<sup>8</sup>

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<sup>3</sup> Lech Morawski, *Zasady wykładni prawa*, 1<sup>st</sup> ed., Dom Organizatora: Toruń 2006, p. 196, 203, Lech Morawski, *Wstęp do prawoznawstwa*, 10<sup>th</sup> ed., Dom Organizatora: Toruń 2006, p. 192, Lech Morawski, *Wykładnia w orzecznictwie sądów : Komentarz*, TNOiK Dom Organizatora: Toruń 2002, p. 288, 293, Tatiana Chauvin, Tomasz Stawecki and Piotr Winczorek, *Wstęp do prawoznawstwa*, 7<sup>th</sup> ed., Wydawnictwo C.H. Beck: Warszawa 2012, p. 248, Oktawian Nawrot and Filip Przybylski-Lewandowski, *Wnioskowania prawnicze*, in: *Leksykon współczesnej teorii i filozofii prawa: 100 podstawowych pojęć*, ed. Jerzy Zajadło, Wydawnictwo C.H. Beck: Warszawa 2007, p. 345, Ryszard Mastalski, *Stosowanie prawa podatkowego*, Oficyna a Wolters Kluwer business: Warszawa 2008, p. 118, Zbigniew Pulka, *Podstawy prawa : Podstawowe pojęcia prawa i prawoznawstwa*, Wydawnictwo Forum Naukowe: Poznań 2008, p. 142, Kazimierz Opalek and Jerzy Wróblewski, *Zagadnienia teorii prawa*, Państwowe Wydawnictwo Naukowe: Warszawa 1969, p. 317, Sławomira Wronkowska and Zygmunt Ziemiński, *Zarys teorii prawa*, Przedsiębiorstwo Wydawnicze Ars boni et aequi: Poznań 1997, pp. 168-169, Andrzej Redelbach, Sławomira Wronkowska and Zygmunt Ziemiński, *Zarys teorii państwa i prawa*, Wydawnictwo Naukowe PWN: Warszawa 1992, p. 208, Chaim Perelman, *Logika prawnicza : Nowa retoryka*, translated by Tomasz Pajor, Państwowe Wydawnictwo Naukowe: Warszawa 1984, p. 37 (he uses this term also in relation to the analogy employed in precedential law; see p. 38), Marek Lechniak, *Elementy logiki dla prawników*, Wydawnictwo KUL: Lublin 2006, p. 96, 97, Jerzy Stelmach, *Kodeks argumentacyjny dla prawników*, Zakamycze: 2003, p. 72, Jolanta Jabłońska-Bonca, *Wprowadzenie do prawa : Introduction to law*, LexisNexis: Warszawa 2008, p. 166, 167, Andrzej Korybski, Leszek Leszczyński and Antoni Pieniążek, *Wstęp do prawoznawstwa*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej: Lublin 2007, p. 178, Zygmunt Ziemiński, *Problemy podstawowe prawoznawstwa*, Państwowe Wydawnictwo Naukowe: Warszawa 1980, p. 294, Władysław Wolter and Marta Lipczyńska, *Elementy logiki : Wykład dla prawników*, 3<sup>rd</sup> ed., Państwowe Wydawnictwo Naukowe: Warszawa 1980, p. 237, Józef Nowacki, *Analogia legis a sprawiedliwość legalna*, in: *Valeat aequitas: Księga pamiątkowa ofiarowana Księdzu Profesorowi Remigiuszowi Sobańskiemu*, ed. Maksymilian Pazdan, Wydawnictwo Uniwersytetu Śląskiego: Katowice 2000, p. 325.

<sup>4</sup> See Chaim Perelman, *Imperium retoryki : Retoryka i argumentacja*, translated by Mieczysław Chomicz, ed. by Ryszard Kleszcz, Wydawnictwo Naukowe PWN: Warszawa 2004, p. 90 and Jacques Lenoble, *The Function of Analogy in Law: Return to Kant and Wittgenstein*, in: *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p. 117.

<sup>5</sup> See Giuseppe Zaccaria, *Analogy as Legal Reasoning – The Hermeneutic Foundation of the Analogical Procedure*, in: *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p. 51.

<sup>6</sup> Stelmach, p. 72, Chauvin, Stawecki and Winczorek, p. 248, Nawrot and Przybylski-Lewandowski, p. 345, 346.

<sup>7</sup> Stelmach, p. 73, 76.

<sup>8</sup> As for the notion of legal gap in general see: Jerzy Wróblewski, *The Judicial Application of Law*, Kluwer Academic Publisher: Dordrecht 1992, pp. 224-225, Józef Nowacki, *Normy sprzeczne a problematyka luk w prawie*, in: *Studia z teorii prawa*, Zakamycze: Kraków 2003, pp. 305-320, Nowacki, *Koncepcja luk contra legem*,

This type of gap is commonly termed an *extra legem* or *praeter legem* gap<sup>9</sup>, or “extrinsic gap”<sup>10</sup>, or simply “statutory gap”<sup>11</sup>. It stands also in close affinity to the division into regulated cases/disputes and unregulated ones<sup>12</sup> *alias* to the distinction between provided cases/disputes and unprovided ones (the occurrence of the so-called “*casus omissus*”).<sup>13</sup> Sometimes gaps of this type may also be called: “an insufficiency gap”<sup>14</sup> and “inconsistency or evolutionary gap.”<sup>15</sup> Additionally, in certain circumstances, it can be linked with the phenomenon of

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in: *Studia z teorii prawa*, Zakamycze: Kraków 2003, pp. 321-334, Józef Nowacki, O tzw. pionowych „lukach” w prawie, *Zeszyty Naukowe Uniwersytetu Łódzkiego*, v. 85 (1972), pp. 55-62, Józef Nowacki, O tzw. konstrukcyjnych lukach w prawie, *Zeszyty Naukowe Uniwersytetu Łódzkiego*, v. 51 (1967), pp. 4-7, Chauvin, Stawecki and Winczorek, p. 137, 138, Opalek and Wróblewski, *Zagadnienia...*, pp. 108-111, Eugeniusz Smoktunowicz, *Analogia w prawie administracyjnym*, Państwowe Wydawnictwo Naukowe: Warszawa 1970, pp. 31-38, 46-58, Robert Summers, *Precedent in the United States (New York State)*, in: *Interpreting Precedents: A Comparative Study*, eds. Neil MacCormick, Robert S. Summers, Ashgate/Dartmouth: Aldershot 1997, p. 333, D. Neil MacCormick, *Rhetoric and the Rule of Law : A Theory of Legal Reasoning*, Oxford University Press: Oxford 2005, pp. 206-207, Joseph Raz, *The Authority of Law : Essays on Law and Morality*, Oxford University Press: Oxford 1979, pp. 181-183, 193-194, Morawski, *Wstęp...*, pp. 178-179, Andrzej Municzewski, *Reguły interpretacyjne w działalności orzeczniczej Sądu Najwyższego*, Wydawnictwo Naukowe Uniwersytetu Szczecińskiego: Szczecin 2004, pp. 170-171, Andrzej Redelbach, Sławomira Wronkowska and Zygmunt Ziemiński, *Zarys...*, pp. 221-223, Maciej Koszowski, O lukach w prawie rzadko spotykanych słów kilka, *Archiwum Filozofii Prawa i Filozofii Społecznej* no. 1/2013, pp. 111-112. In Polish law see: Morawski, *Zasady...*, pp. 131-133, 208-211, Morawski, *Wykładnia...*, pp. 314-318, Jerzy Wróblewski, *Statutory Interpretation in Poland*, in: *Interpreting Statutes. A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 268-269; cf. also Józef Nowacki, *Luki w prawie. Ideologia*, *Studia Prawno-Ekonomiczne*, v. IV (1970), pp. 29-52. In Polish Administrative law see Smoktunowicz, pp. 38-46. In Polish tax law see: Mastalski, pp. 121-124. In Swedish law see: Aleksander Peczenik and Gunnar Bergholtz, *Statutory Interpretation in Sweden*, in: *Interpreting Statutes. A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 313-314. In UK law see: Bankowski and MacCormick, *Statutory Interpretation in the United Kingdom*, in: *Interpreting Statutes. A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 362-364. In USA law see: Robert S. Summers, *Statutory Interpretation in the United States*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 411-412. In German law see: Robert Alexy and Ralph Dreier, *Statutory Interpretation in the Federal Republic of Germany*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 78-82. In Finnish law see: Aulis Aarnio, *Statutory Interpretation in Finland*, in: *Interpreting Statutes. A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 131-132. In French law see: Michel Troper, Christophe Grzegorzczak and Jean-Louis Gardies, *Statutory Interpretation in France*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 175-179. In Italian law see: Massimo La Torre, Enrico Pattaro and Michele Taruffo, *Statutory Interpretation in Italy*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 218-220, 224-225.

<sup>9</sup> See Smoktunowicz, p. 34, Morawski, *Wstęp...*, p. 178, Opalek and Wróblewski, *Zagadnienia...*, p. 108, Nowacki, *Normy sprzeczne...*, p. 317, Nowacki, *Koncepcja...*, p. 322, Pulka, p. 76, Adam Jamróz, *Wprowadzenie do prawnoustawstwa*, 2<sup>nd</sup> ed., LexisNexis: Warszawa 2011, p. 204, Koszowski, *O lukach...*, p. 111.

<sup>10</sup> Enrique Zuleta-Puceiro, *Statutory Interpretation in Argentina*, in: *Interpreting Statutes. A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, p. 38.

<sup>11</sup> Aarnio, *Statutory...*, pp. 131-132.

<sup>12</sup> See Raz, pp. 181-182.

<sup>13</sup> See La Torre, Patarro, Taruffo, *Statutory...*, p. 225, Summers, *Statutory...*, pp. 420-421.

<sup>14</sup> Peczenik and Bergholtz, *Statutory...*, p. 313.

<sup>15</sup> Smoktunowicz, pp. 52-54.

undergenerality of the language that is implemented in the wording of a statute in relation to the purpose of this statute.<sup>16</sup> That kind of gap is sometimes tagged also as: “axiological” (“evaluative”) or even “seeming” or “false” gap.<sup>17</sup>

The filling of such gaps by resorting to analogical reasoning consists in principle in finding a statutory rule that embraces cases that are similar to the case at hand and then – although this case does not fall under its coverage – applying the so-selected rule to the case at hand.<sup>18</sup> In consequence, in such a setting, an argument from analogy may be said to “extend the force of existing rules beyond their direct range of application.”<sup>19</sup> Such an extension can be justified here by the very requirement of equal treatment, known also as the so-called principle of formal justice, which prescribes that: when in a similar position one should be treated as others are. Having transferred this idea to legal matters, it means the cases that are alike ought to be decided on in the same or similar manner [regardless of their being provided for or not]. That requirement/principle is all the more important when combined with the assumption that the events transpiring in the law are universalizable in the sense of their capability of being brought under the general categories (kinds, classes, genera). The filling of *extra legem* gaps by analogy

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An “inconsistency gap” is linked with the situation in which the case is unregulated by the law although the need of consistency within legal system calls for this case being provided for. An “evolutionary gap”, in turn, pertains to the setting in which a changed social environment has yielded a new factual configuration (of previously unknown shape) that should be regulated by the law yet, due to its unpredictability at the time of enactment of a pertinent statute, it is not. See Smoktunowicz, pp. 52-54.

Considered from a slightly different angle, gaps consisting in the lack of legal regulation for a given sort of cases are also divided into subjective and objective ones. According to Bobbio, the former results from “inadequate legislative regulation”, whereas the latter results from “the new formation of the relationship and of an institution”. See Patrick Nerhot, *Legal Knowledge and Meaning (The Example of Legal Analogy)*, in: *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, pp. 188-189.

<sup>16</sup> See Summers, *Statutory...*, p. 412, 420.

An undergenerality gap can be filled by treating instances that literally would be outside the scope of statute as regulated ones. Such a maneuver, as is said, often “will call for little more than characterization and reclassification of instances otherwise outside the statute.” See Summers, *Statutory...*, p. 420.

<sup>17</sup> See Munczewski, pp. 170-171, Morawski, *Wykładnia...*, p. 314, Morawski, *Zasady...*, pp. 131-132, Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 221-222, Pulka, pp. 76-77, Andrzej Korybski and Lesław Grzonka, *Wiedza o państwie i prawie : Zarys wykładu*, a Wolters Kluwer business, Warszawa 2014, p. 134, Chauvin, Stawecki and Winczorek, pp. 139-140. As to the question whether all types of legal gaps are evaluative (value-laden) see Nowacki, O tzw. konstrukcyjnych..., pp. 3-17 and Nowacki, O tzw. pionowych..., pp. 55-62.

<sup>18</sup> Thus Robert S. Summers and Michele Taruffo point out that “when a case is not provided for or is only at best dimly provided for in statute, the case is to be treated in the same fashion that closely analogous case are treated in the statute” (see Robert S. Summers and Michele Taruffo, *Interpretation and Comparative Analysis*, in: *Interpreting Statutes. A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, p. 467). Wróblewski states that “[i]f the existence of gaps is admitted, the task of court is to fill them by using statutory provisions which regulate essentially similar problems or cases.” (see Wróblewski, *Statutory...*, p. 268). Peczenik and Bergholtz maintain that “[b]y virtue of ‘analogia legis’, a statute should be applied not only to the case covered by its linguistic meaning but also to relevantly similar cases” (see Peczenik and Bergholtz, *Statutory...*, p. 318). And Summers notes that “[s]ometimes a statute will purport to treat a topic exhaustively but an ‘unprovided case’ will arise. Here the court may treat this case analogously to the way in which ‘provided’ case are treated in the statute” (see Summers, *Statutory...*, p. 420). See also Smoktunowicz, pp. 23-24, Józef Nowacki, *Analogia legis*, Państwowe Wydawnictwo Naukowe: Warszawa 1966, p. 9, Morawski, *Zasady...*, p. 203, Morawski, *Wykładnia...*, p. 294.

<sup>19</sup> Raz, p. 199.

also has its foundation in the pursuit – in legal practice and theory – of the coherence and completeness [closure] of the legal system.<sup>20</sup>

The sort of analogy that is used to fill this kind of gap sometimes takes its own name, then being called: “*analogia legis*”<sup>21</sup> or “statutory analogy”.<sup>22</sup> One may also – as Nowacki and Jamróz do – use a more precise term here: “*analogia extra legem*.” The latter terminological proposition arises from the fact that the analogy (its conclusion) that liquidates the gap goes here beyond the very “lex” [Eng. law], by which one should understand valid statutory rules; not to mention the fact that the gap which analogy is used to fill here also has the name “*extra legem*”.<sup>23</sup>

Although usually perceived as an instance of judicial development<sup>24</sup> or even the creation<sup>25</sup> of the law, *analogia legis* (statutory analogy) is well-known in civil law countries, in time receiving a relatively favorable reception. Its use is, for instance, recognized in: Argentina, France, Germany, Sweden, Finland, Poland and Italy.<sup>26</sup> At the same time, as Summers and

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<sup>20</sup> Thus Summers and Taruffo contend that the relatively universal appeal of statutory analogy “is presumably rooted not only in considerations of coherence and unity but also in the ideal of equality before law”. See Summers and Taruffo, p. 467; see also Zaccaria, p. 55 and Cornelis Willem Maris, *Milking the Meter – On Analogy, Universalizability and World Views*, in: *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p. 73, 74. On principle of universalisability (equal treatment) in ethics cf. Maris, pp. 88-101, 103-104.

<sup>21</sup> See James Holland and Julian Webb, *Learning Legal Rules*, 7<sup>th</sup> ed., Oxford University Press: Oxford 2010, p. 382, Chauvin, Stawecki and Winczorek, p. 248, Nowacki, *Analogia legis*, pp. 9-44, Józef Nowacki and Zygmunt Tobor, *Wstęp do prawoznawstwa*, 3<sup>rd</sup> ed, Oficyna a Wolters Kluwer business: 2007, pp. 182-184, Morawski, *Wstęp...*, pp. 192-194, Morawski, *Zasady...*, p. 203, Morawski, *Wykładnia...*, p. 293, Peczenik and Bergholtz, *Statutory...*, p. 318, Troper, Grzegorzczuk and Gardies, *Statutory...*, p. 201, La Torre, Pattaro and Taruffo, *Statutory...*, p. 218, Mastalski, pp. 118-119, Jamróz, p. 204, Jabłońska-Bonca, p. 166, 167, Andrzej Korybski, Leszek Leszczyński and Antoni Pieniążek, *Wstęp do prawoznawstwa*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej: Lublin 2007, p. 178, Sławomira Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, 3<sup>rd</sup> ed., Przedsiębiorstwo Wydawnicze Ars Boni et Aequi: Poznań 2005, p. 96, Munczewski, p. 169, Ziemiński, *Problemy...*, p. 294, Wolter and Lipczyńska, p. 237, Pulka, p. 142, 143, 144-146, 151, Leszek Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Zakamycze: Kraków 2004, p. 249, Zaccaria, pp. 49-50, Maris, p. 75.

Such a meaning of *analogia legis*, i.e. as reasoning leading to the application of a statutory provision to similar instances that are unprovided for in the statutory law, is said to date back to the end of the 17<sup>th</sup> century and became almost completely accepted by the 19<sup>th</sup> century. See Nowacki, *Analogia legis*, p. 9 footnote 1.

<sup>22</sup> See Aleksander Peczenik, *On Law and Reason*, 2<sup>nd</sup> ed., Springer: 2009, p. 320, Pulka, p. 144, Jamróz, p. 204, Chauvin, Stawecki and Winczorek, p. 248 and Holland and Webb, p. 382.

In German legal theory, statutory analogy (*analogia legis*) is termed: “*Gesetzesanalogie*”; see Alexy and Dreier, *Statutory...*, p. 89 and Holland and Webb, p. 382.

<sup>23</sup> See Nowacki, *Analogia legis*, p. 11 footnote 2 and Jamróz, p. 204; see also Józef Nowacki, *Problem prawotwórczego charakteru rezultatów wnioskowania per analogiam*, *Zeszyty Naukowe Uniwersytetu Łódzkiego*, v. 62 (1969), pp. 28-29, Nowacki, *Prawotwórczość a „stosowanie” prawa per analogiam i a fortiori*, *Studia Prawno-Ekonomiczne*, v. 3 (1969), pp. 31-32 and Opalek and Wróblewski, *Zagadnienia...*, p. 317, 318.

<sup>24</sup> MacCormick, *Rhetoric...*, p. 206.

As for the question of whether the court still only applies the law in unregulated cases (legal gaps) or in fact creates (makes) it cf. Raz, pp. 181, 182, 193-195, 197-201.

<sup>25</sup> Cf. Nowacki, *Analogia legis*, pp. 47-50.

<sup>26</sup> See Summer and Taruffo, p. 467 (“This type of argument [statutory analogy] is in fact recognized to some degree in all countries within our study”) and p. 471.

As to the permissibility and obligation of a judge to fill a gap *extra legem* by recourse to analogical reasoning cf. however Munczewski, pp. 170-171, 209, Morawski, *Wykładnia...*, pp. 314-317, Morawski, *Zasady...*, pp. 131-132, Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 221-222, Raz, pp. 199, 202-206.

Taruffo point out, this analogy seems far less influential in the UK and USA. Here, an unregulated case may be counted as belonging to the province of common law and as such resolved in the manner typical of that law, i.e. without any necessity or need to refer to some statutory rule that addresses similar case or cases.<sup>27</sup>

## 2.2. Technical gap

Another kind of legal gap that can be filled by reference to analogy consists not in the lack of a single statutory rule, but in the lack of a larger part of statutory law. For instance, this can be the non-existence of some section in a statute (especially when, judging by the structure, table of contents or headings and subheadings, this section should be included therein). Similarly, the lack of the procedure in which members of a public organ or agency should proceed, make a decision or be appointed testifies to the occurrence of just such a gap. The same applies to the non-existence of rules following which the institution or legal act which is envisaged by law is to be established/issued. The most extreme instance of such a gap seems, however, to be the lack of the whole legal regulation (e.g. statute, regulation, ordinance) that should be adopted in accordance with a statutory or constitutional provision.<sup>28</sup>

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<sup>27</sup> See Summers and Taruffo, pp. 471-472.

<sup>28</sup> See Summers, *Statutory...*, pp. 411-412, 420, Zuleta-Puceiro, *Statutory...*, p. 38 and Troper, Grzegorzczuk and Gardies, *Statutory...*, p. 177, Koszowski, O lukach..., p. 119.



This kind of gap is called: an “intrinsic gap”<sup>29</sup>, “technical gap”<sup>30</sup>, “constructional gap”<sup>31</sup>, “gap of passivity”<sup>32</sup>, “vertical gap”<sup>33</sup> or “sui generis gap”.<sup>34</sup> It might also be termed: “instrumental gap”, i.e. the gap that makes it impossible to execute the goals of a statute.<sup>35</sup>

To fill such a gap, one looks for statutory provisions or provisions that are comprised in other statutes, regulations, ordinances, decrees etc. which – thanks to addressing similar matters or serving similar goals – may constitute a model for supplementing the legal regulation which is lacking. Specifically, the provisions one may pattern may come from the so-called “uniform act”, “model act” or “federal prototype”, particularly as regards the legal system of the USA.<sup>36</sup> In turn, in civil law countries, another part of a legal act is usually used for that purpose, particularly a legal code, and regulates related matters in other branches of law. For instance, in this manner some provisions of the code of civil procedure can be applied *per analogiam* to the criminal proceedings in questions which, despite being vital, are unregulated by the code of criminal procedure.

Analogy which leads to the closure of this kind of gap might be called: *analogia intra legem* [analogy within the law].<sup>37</sup>

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<sup>29</sup> Zuleta-Puceiro, *Statutory...*, p. 38, Jerzy Wróblewski, *The Judicial Application of Law*, Kluwer Academic Publisher: Dordrecht 1992, p. 225.

<sup>30</sup> Troper, Grzegorzczak and Gardies, *Statutory...*, p. 177, Morawski, *Wykładnia...*, p. 292, 296, Morawski, *Zasady...*, p. 131, Pulka, p. 148.

<sup>31</sup> Mastalski, pp. 120, 126-127, Morawski, *Wykładnia...*, p. 292, 296, Morawski, *Zasady...*, p. 131, Munczewski, p. 170, Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 222-223, Pulka, p. 78, 148, Korybski and Grzonka, p. 135 and Kamil Zeidler, *Luka w prawie*, in: *Leksykon współczesnej teorii i filozofii prawa: 100 podstawowych pojęć*, ed. Jerzy Zajadło, Wydawnictwo C.H. Beck: Warszawa 2007, p. 184.

<sup>32</sup> Smoktunowicz, p. 52.

<sup>33</sup> Nowacki, O tzw. pionowych..., p. 57.

<sup>34</sup> Morawski and Opalek as well as Wróblewski, distinguish “technical” gaps from “sui generis” gaps. Accordingly, in their view, technical gaps encompass such instances in which the defects of statutes make it impossible to render a legal decision – for example the statute may have set up some institution but it does not provide for any provision referring to the way in which the members of this institution are to be appointed. The gaps “sui generis”, in turn, denote the lack of statutory provisions whose enacting/issuing is required by some other statute. This distinction is, moreover, to be of this practical value that in the view of these authors, “sui generis” gap cannot be liquidated by recourse to analogy. See Morawski, *Wstęp...*, pp. 178, Morawski *Zasady...*, pp. 131, 132, 208, 210-211, Opalek and Wróblewski, *Zagadnienia...*, p. 109, Morawski, *Wykładnia...*, p. 292, 296, 318, see also Pulka, pp. 78-79, 148 (he understands this differentiation in a very similar manner, in addition adding also that “technical” and “sui generis” gaps constitute two possible forms of the so-called “constructional gap”), Jamróz, pp. 208-209, Chauvin, Stawecki and Winczorek, pp. 138-139 and Koszowski, O lukach..., p. 119.

Incidentally, a constructional gap is defined in a similar vein by Munczewski, Ziemiński, Wronkowska and Redelbach, who understand under this notion a situation when the statutory law envisages the possibility of conducting some ‘conventional act’, yet it does not comprise any legal regulation as to how this act ought to be done. See Munczewski, p. 170, Zygmunt Ziemiński, *Wstęp do aksjologii dla prawników*, Wydawnictwo Prawnicze: Warszawa 1990, p. 196, Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 221-222; cf. also Nowacki, O tzw. konstrukcyjnych..., pp. 11-16.

<sup>35</sup> See Morawski, *Wykładnia...*, p. 318.

<sup>36</sup> Summers, *Statutory...*, pp. 420.

<sup>37</sup> Opalek and Wróblewski, *Zagadnienia...*, p. 317.

As an aside, one may note that “constructional gap” is sometimes counted as an actual (real) gap – i.e. gap which is not ‘evaluative’ or only ‘seeming’ – and hence the possibility of its filling by recourse to analogical reasoning remains beyond doubt; see Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 222-223, cf. also Nowacki, O tzw. konstrukcyjnych..., pp. 3-17, Nowacki, O tzw. pionowych..., pp. 57-62 and Pulka, p. 143

### 2.3. Contra legem gaps

The next kind of legal gap that can be liquidated by recourse to analogical reasoning is linked to the situation in which, although the case at hand is undoubtedly within the scope of the application of a given statutory rule, one prefers not to apply this rule to the case at hand, applying instead to it a rule under whose scope it does not fall at all.<sup>38</sup> The reason for doing so lies here in the presupposition that this latter rule is more adequate for the case at hand, especially because it addresses cases that are more similar to those at hand than the ones usually handled by the rule which is directly applicable to this case.<sup>39</sup>

Gaps of this kind are called an “axiological gap”<sup>40</sup>, since the ascertainment of its occurrence is anchored in evaluation (is value-laden), or a “*contra legem* gap”, since it is aimed against the operating law, i.e. contradicts an already existing valid rule the case at hand falls under.<sup>41</sup>

An analogy which is employed to fill a gap of this sort is counted as “*analogia intra legem*”, since the cases it affects were previously regulated by law and remain so after it has been used<sup>42</sup>, or “*analogia contra legem*.”<sup>43</sup> By referring to the rule which regulates cases similar to the case at hand, one resolves not only the case which has already been provided for but also those contrary to the legal consequence which – at least *prima facie* – the law prescribes for it. Such an analogy is also sometimes numbered amongst the so-called systemic arguments.<sup>44</sup> However, this does not seem accurate.

It is particularly noteworthy that the aforementioned kind of analogy is even more creative than *analogia extra legem* which helps with liquidating *extra legem* gaps, for not only does it expand the already existing laws but it also corrects and improves them if they are not optimal or just.<sup>45</sup>

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<sup>38</sup> As MacCormick states, “[w]hat is true is that a system of enacted positive law may be enacted in terms which are of such considerable generality that the application of a given enacted rule to a particular dispute situation may appear to unjust, unjust because the categories envisaged in the rule are insufficiently subtle. In such a circumstances it is obvious enough that there are good reasons for not applying the rule literally to the instant case, and that an exception ought to be made.” And as Douglas Walton explains, “[w]e also require that rules should not be rigidly applied by a thoughtless bureaucracy. If an exception is reasonably judged to be a relevantly different enough case to fairly qualify as an exceptional case, then we require that the rule should be broken.” See MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press: Oxford 1978, pp. 97-98 and Douglas Walton, *Informal Logic: A Pragmatic Approach*, 2<sup>nd</sup> ed., Cambridge University Press: Cambridge 2008, p. 316 respectively.

<sup>39</sup> See Nowacki, *Analogia legis*, p. 58-61, Smoktunowicz, pp. 24-27, Koszowski, *O lukach...*, pp. 112-113.

<sup>40</sup> Peczenik and Bergholtz, *Statutory...*, pp. 313-314, Pulka, pp. 76-77.

<sup>41</sup> See Smoktunowicz, p. 34, Morawski, *Wstęp...*, pp. 178-179, Opalek and Wróblewski, *Zagadnienia...*, p. 108, Nowacki, *Koncepcja...*, pp. 323-334, Pulka, pp. 76-77, Jamróz, p. 208.

<sup>42</sup> Nowacki, *Analogia legis*, pp. 45-61, Opalek and Wróblewski, *Zagadnienia...*, p. 317, cf. also Nowacki, *Prawotwórczość...*, p. 32.

<sup>43</sup> Nowacki, *Analogia legis*, pp. 60-61 footnote 35.

<sup>44</sup> Aarnio, *Statutory...*, p. 140.

<sup>45</sup> On the critique of the concept of “*contra legem*” gap based upon the charge that the admittance of such gaps would diminish reverence for law, threaten the legal order and violate the very requirement that everyone is required to abide by the law, see Nowacki, *Koncepcja...*, pp. 333-334.

### 3. Extending statutory provisions at the expense of precedential and customary law

In Anglo-Saxon legal systems, analogy may also be used in order to diminish the sphere of the so-called precedential law (case law, common law). That is, the statutory rule can be extended by analogy at the expense of the existing or will-to-be judicial precedent(s). The same, *mutatis mutandis*, applies to truncating the range of customary law by analogy.

In general, such an extension can be done in a twofold manner. First, a case hitherto controlled by a judicial precedent may be regarded as similar to cases falling under a particular statutory provision with the effect of having applied such a provision to this case despite its scope of application not embracing it. Second, when there is no constraining precedent for the case at hand, one may seek a solution not among other precedential cases that resemble the case at hand, but among the statutory provisions which regulate cases similar to it.<sup>46</sup>

The question of whether and when to use an analogy which restricts the current ambit of precedential law seems, however, to be debatable in Anglophone countries.<sup>47</sup> It is also quite plausible that the classifying of a concrete case under those which belong to the domain of precedential law or those which belong to the province of statutory law can prove difficult in practice and hence analogies to precedential cases may be regarded as equally good to those provided for by the statute.<sup>48</sup>

### 4. Crystallizing the meaning of a statutory rule (provision)

Quite another way of using analogical reasoning in statutory law is connected with the act of comparing two or more statutory provisions (the rules derived from them) in order to establish their appropriate meaning. The juxtaposition of such provisions enables us to see both or one of them in the light of the other and thus crystallizing or harmonizing their wordings. Such a maneuver can be particularly useful when one of the statutory provisions used for comparison is – due to some reason – much plainer, determined or understandable than the second. Then, the proper meaning of an equivocal word or phrase included in the latter may be ascertained by turning to an identical or similar word or phrase that occurs in the former. Incidentally, in this process, the circumstances of the enactment (the context) of the provisions being compared should also be taken into account and only if these circumstances (contexts) are sufficiently similar will the aforementioned fashion of finding the meaning be well-founded.<sup>49</sup>

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<sup>46</sup> See, Summers, *Statutory...*, pp. 421-422, Bankowski and MacCormick, *Statutory...*, pp. 362-364; cf. also Summers and Taruffo, pp. 471-472 and Rupert Cross, *Precedent in English Law*, 2<sup>nd</sup> ed., The Clarendon Press: Oxford 1968, pp. 164-166, 168.

<sup>47</sup> See Summers, *Statutory...*, pp. 421-422.

<sup>48</sup> Thus, for instance, Cross asserts that: “Whether the courts regard legislation as the equal or superior of judge-made law when it is cited as an analogy upon which to found a decision must be regarded as an open question”... “Legislation should surely only be regarded as the superior of case-law in this respect when there are competing analogies of equal force from each of these sources.” See Cross, p. 168.

As for the relation in which the province governed by precedential law stands to the province governed by statutory law in the UK and the USA see: Bankowski and MacCormick, *Statutory...*, pp. 362-364, Summers, *Statutory...*, pp. 421-422 and Summers and Taruffo, pp. 471-472.

<sup>49</sup> “One statute may be construed on analogy to the way another statute is construed” (Summers and Taruffo, p. 467). “The terms of one statutory provision may be used as the ground of a conclusion concerning the construction of another statutory provision” (Cross, p. 167). “The governing idea here is that, if a statutory provision is significantly analogous with similar provisions of other statutes, or code, or another part of the code in which it appears, then, even if this involves significant extension of or departure from ordinary meaning, it may properly be interpreted so as to secure similarity of sense with the analogous provision either considered in themselves or

Naturally, one can employ analogical reasoning in order to establish the meaning of the wording of a given statutory provision (rule) also through likening the words used in such a provision to identical or similar words from other statutes that have been explained in judgments, especially those among them that have the status of so-called binding or persuasive precedents.<sup>50</sup> With reference to common law countries, however, it must be noted that a judicial decision which interprets statutory provisions are not considered here as binding with regard to other statutes, even if they involve exactly the same word or phrase. Such judicial interpretations can only be of some guidance, leaving room for other more justified interpretive propositions if they arise.<sup>51</sup>

Utilizing analogical reasoning in statutory law in the above-mentioned way might be termed interpretive analogy or rule(norm)-comparing analogy or even – as Nowacki terms it – “*analogia intra legem*.”<sup>52</sup> This usage of analogical inference can also be counted among systemic methods of interpretation (systemic arguments), i.e. the methods that base upon the observation that legal rules operate not in a vacuum as separate entities, but are interconnected with each other, composing a bigger picture.<sup>53</sup>

## 5. Drawing a comparative argument

Analogy also constitutes the basis for the other forms of comparative argument that one may employ in statutory law. To determine the meaning of the provisions of a domestic statute, the interpreter sometimes refers to foreign statutory regulations. The precondition of such a venture is, however, the assumption that first the foreign regulation deals with the same or similar matter as the matter regulated by the domestic law and, second, that the foreign legal system (milieu) resembles the one in which the reference is made.<sup>54</sup> Thus, if the foreign conditions, including cultural, social and political factors, are analogues to those that prevail in the state of the interpreter, comparative arguments based upon foreign statutes will be of some force. If not, however, arguments of this kind seems more or less pointless. The same principle applies to situations in which in order to elucidate the canonical text, one refers not to statutes from other jurisdictions but to the foreign judicial or doctrinal interpretations of them.<sup>55</sup>

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considered in the light of prior judicial interpretations of them” (MacCormick and Summers, *Statutory...*, pp. 513-514).

See also Bankowski and MacCormic, *Statutory...*, p. 369, Summers, *Statutory...*, p. 414, Nowacki, *Analogia legis*, pp. 51-54, Smoktunowicz, pp. 24-25 and Municzewski, pp. 202-203; cf. however Opalek and Wróblewski, *Zagadnienia...*, pp. 108-109 (where these authors maintain that in case of gap *intra legem* analogy is not at work).

<sup>50</sup> In such a setting, argument by analogy does its work in the following manner: “a word should be interpreted in a given way because this will treat similar cases similarly under related statutory provisions” (see Summers, *Interpreting statutes...*, p. 414). That does, however, not impair Cross’s warning that “[i]t is fatally easy to adopt some such line of reasoning as the following: the instant case is concerned with the meaning of such and such an expression. That expression was interpreted in such and such a way in a previous case, therefore that interpretation should be applied in the instant case. It is unnecessary to enlarge upon evils of such an approach” (see Cross, p. 189).

<sup>51</sup> See Bankowski and MacCormick, *Statutory...*, p. 378.

<sup>52</sup> Nowacki, *Analogia legis*, pp. 47-50, Jamróz, pp. 204-205.

<sup>53</sup> See, MacCormick and Summers, *Statutory...*, p. 513; cf. also Zaccaria, p. 59.

<sup>54</sup> See Bankowski and MacCormic, *Statutory...*, p. 369.

<sup>55</sup> As to the question of the admittance of out-of-jurisdiction statutes and judicial opinions in legal argumentation in the USA see Michael D. Murray and Christy Hallam DeSanctis, *Legal Research and Writing*, Foundation Press: 2005, pp. 79-80, Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Harvard University Press: Cambridge 2009, pp. 79-80, Richard A. Posner, *How Judges Think*, Harvard University Press: Cambridge 2008, pp. 348-353.

## 6. Coping with obsolete statutes

One more usage of analogical reasoning in statutory law may be discerned in the following settings. The case at hand falls under an old statute that, despite its obsolescence, is still in force. The new statute addressing the similar subject matter has been enacted, yet it does not make the older one invalid and is not directly applicable to the case at hand. Nonetheless, in lieu of applying a provision from the older statute which the case at hand falls under, a court resolves to base the decision upon the new statute, i.e. its provisions that embrace cases similar to the case at hand, its underlying principles or its spirit (ideas, purposes, leading thoughts). The court may also be enlightened here by the governmental note that was attached to the bill (draft) of the new statute in order to explain the need and reasons for its being subsequently enacted by the legislature. *Mutatis mutandis*, the same goes for the application of the provision(s) of a new statute which would be directly applicable in the case at hand, but have not come into force at the time of the judicial decision.<sup>56</sup>

### 1. Application of statutory law

The most controversial is, however, the presence of analogical reasoning in the general process of the application of statutory law. According to this idea, there are obvious (typical) instances which a given statutory rule applies to and whenever the case at hand is not identical to such obvious/typical instances, one has to ascertain whether it is relevantly similar to at least one of them or not. If such a similarity obtains, it means that the statutory rule should be applied to the case at hand as well. The typical/obvious instances of the application of a given statutory rule may have their origin in the intention of the legislator, be cases which have already been qualified by the courts as falling under this rule, be grounded in the common understanding of words used in this rule, or just be those that naturally come to mind.<sup>57</sup>

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<sup>56</sup> Cf. Smoktunowicz, pp. 24-25.

<sup>57</sup> Thus, for instance, Edward H. Levi announces that: "It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three" (see Edward H. Levi, *An Introduction to Legal Reasoning*, The University of Chicago Press: Chicago 1949, p. 6). Murray and DeSanctis note that: "Often the legal rules used in the rule-based reasoning syllogism require explanation and illumination to demonstrate for the reader why your prediction of the outcome is legally sound and likely to occur. Analogical reasoning is used within the rule-based reasoning syllogism to further the overall discussion by showing how the rule itself or elements of the rule are supposed to work by discussing and analogizing to or from certain actual circumstances (cases) where the rule was applied to produce a certain outcome" (see Murray and DeSanctis, p. 10). Eileen Braman points out that: "In statutory construction, for instance, when the "plain language" of a disputed provision is ambiguous, judges often look to previous application of the law, seeking to draw connections and/or distinction between past and pending scenarios. Using analogy in this way helps judges make reasoned decisions about whether or not a particular rule should apply to circumstances giving rise to litigation" (see Eileen Braman, *Law Politics & Perception. How Policy References Influence Legal Reasoning*, University of Virginia Press: Charlottesville 2009, p. 84). Bankowski and MacCormick elucidate that: "Where the problem is whether or not to qualify a problematic phenomenon as instantiating some statutory term or another, analogy to less problematic instances covered by prior decisions is relevant" (see Bankowski and MacCormick, *Statutory...*, p. 369). Sunstein makes the observation that: "In hard statutory cases, the issue is sometimes resolved by something like this: We know that the statute applies to case X. We do not know if it applies to case Y. To resolve the issue, we have to decide whether case Y is relevantly like, or relevantly unlike, case X. We have to think analogically" (see Cass R. Sunstein, *Commentary on Analogical Reasoning*, Harvard Law Review no. 106 (1992-1993), footnote 147 on p. 785). And Steven J. Burton captures this issue in the following manner: "[A]nalogical reasoning may be used to help interpret and apply an enacted rule. The analysis begins with the enacted text. It may help to find base points in the context that can be used to reason analogically in a problem case"(see Steven J. Burton, *An Introduction to Law and Legal Reasoning*, 3<sup>rd</sup> ed., Wolters Kluwer: Austin 2007, p. 77).

The paradigm example of using analogy in the aforementioned way is the ascertainment of the meaning of words occurring in a statute that are vague and value-laden or where the statutory meaning for some other reasons is dependent on judicial assessment (adjustment).<sup>58</sup> The occurrence of words of that kind is even comprehended in terms of the legal gap, however specific a one. Scholars call it “*intra legem*”<sup>59</sup> (“*inter legem*”<sup>60</sup>), “interpretational”<sup>61</sup> or “indeterminacy”<sup>62</sup> gap.<sup>63</sup> The recourse to analogical reasoning in order for its liquidation is also widely accepted.<sup>64</sup> The analogy that serves to this aim can be in turn termed: “analogy in interpretation (construing) of the law” or counted as a type of “*analogia intra legem*”, as Wróblewski and Nowacki (together with Jamróz) do respectively.<sup>65</sup>

Evidently more far reaching, however, is the thesis that statutory law is always or nearly always applied via an analogical inference. As Weinreb argues, “[f]or both reasons – because words, as symbol with meaning, are general and phenomena, as such, are particular, and because words, however precise, do not fully distinguish phenomena in all their variety – there remains a gap between a rule and its applications that no further statement of the rule or specification of the facts will close completely.”<sup>66</sup> Likewise, Friedrich V. Kratochwil contends that “norm-

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See also: Sunstein, *Legal...*, pp. 79-90, Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, *Harvard Law Review* no. 109 (1995-1996), pp. 990-1003, Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge University Press: 2005, pp. 88-94, Levi, pp. 6-8, 27-102, MacCormic, *Rhetoric...*, pp. 212-213, Nowacki, *Analogia legis*, pp. 49-51, 62-67, Herbert Lionel Adolphus Hart, *The Concept of Law*, 2<sup>nd</sup> ed., Oxford University Press: Oxford 1994, p. 127, Martin P. Golding, *Legal Reasoning*, Broadview press: Peterborough 2001, pp. 104-107 and Burton, pp. 65-74.

<sup>58</sup> According to Alexy and Dreier, a particular term is said to be vague “when there are some subjects that indubitably fall within its scope (positive candidates), some subjects that indubitably do not fall within its scope (negative candidates) and a third class of subjects cannot be said to belong to one or the other with certainty (neutral candidates)”. Evaluative openness [being value-laden] characterizes, in turn, those terms which have “but little descriptive contents over and above their evaluative component” and in relation to which the task of the judiciary is “to fill them with descriptive meaning to match as well as possible their evaluative component, a task likely to be performed differently by different judges” – as examples of such terms one may thus invoke: ‘good faith’, ‘reprehensible’ or ‘sensible reason’ (see Alexy and Dreier, *Statutory...*, pp. 74-75).

See here also: Brewer, p. 937 footnote 35 and pp. 993-994, Bartosz Brożek, *Rationality and Discourse : Towards a Normative Model of Applying Law*, a Wolters Kluwer business: Warszawa 2007, pp. 25-28, Hart, pp. 124-154, Burton, p. 52, Tomasz Gizbert-Studnicki, *Wieloznaczność leksykalna w interpretacji prawniczej*, Drukarnia Uniwersytetu Jagiellońskiego w Krakowie, pp. 43-73, Morawski, *Wstęp...*, pp. 128-130, Maciej Zieliński, *Wykładnia prawa : Zasady, reguły, wskazówki*, 3<sup>rd</sup> ed., Wydawnictwo Prawnicze LexisNexis: Warszawa 2006, pp. 169-181 and Walton, p. 290-293.

<sup>59</sup> Nowacki, *Normy sprzeczne...*, p. 318, Nowacki, *Koncepcja...*, p. 322, Jamróz, p. 208, Koszowski, *O lukach...*, p. 112.

<sup>60</sup> Smoktunowicz, p. 34, Morawski, *Wstęp...*, pp. 178-179, Opalek and Wróblewski, *Zagadnienia...*, pp. 108-109, Nowacki, *Koncepcja...*, p. 322, Nowacki, *Normy sprzeczne...*, p. 318

<sup>61</sup> See Nowacki, *Normy sprzeczne...*, p. 318 and Aarnio, *Statutory...*, p. 132 (he defines “interpretational gap” as the situation “where we cannot say for certain what provision would be applicable to the case at hand”).

<sup>62</sup> Peczenik and Berghotz, *Statutory...*, pp. 313-314.

<sup>63</sup> The configuration known under the concept of *intra legem* gap is qualified as a kind of a legal gap mainly in civil law legal systems. However, in common law legal systems, it can be regarded as such as well. For instance, in relation to the USA, Summers elucidates that “[a] gap in statutory scheme may be said to exist when a statute includes a general clause or other terms which grant discretion to courts or administrators.” See Summers, *Statutory...*, p. 411.

<sup>64</sup> Cf. however, Opalek and Wróblewski, *Zagadnienia...*, pp. 108-109.

<sup>65</sup> Nowacki, *Analogia legis*, pp. 47-50, Jamróz, p. 208

<sup>66</sup> Weinreb, pp. 89-90.

application is never a mere subsumption, but always entails an evaluation on the basis of analogies which are held to be relevant.”<sup>67</sup>

The prevailing stance – at least pertaining to civil law legal families – seems, however, that the place of the main method of applying statutory law is taken by legal deduction (especially in the form of the so-called legal syllogism). Nonetheless, when an *intra legem* gap occurs, the interpreter appears here to be fully entitled to take advantage of analogical reasoning in order to decide whether a given statutory provision (a rule derived from it) should be applied to the case at hand: through the comparison of the facts of the case at hand with typical instances of the application of the provision (rule) which applying to this case is dubious.

## 7. Resolving conflicts between statutory rules

Analogical reasoning may also be of help when one is faced with two or more conflicting statutory provisions (rules one may derive from them).

In general, clashes between statutory rules may be of a different sort. For instance, one statutory provision may impose an obligation or right that excludes the obligation or right envisaged by another statutory provision. One statutory provision may prescribe behavior whose performance impairs or cancels the effect which results from abiding by another statutory provision, though these provisions do not contradict each other from the logical point of view. As an example, the two following directives might be invoked: open the window while it is closed and close the window when it is open. Finally, one statutory provision, despite not being in overt conflict, pursues goals that are at odds with the goals being ascended by another.<sup>68</sup>

The collisions between statutory rules are also sometimes regarded as legal gaps. Depending on its kind and terminological convention, this can be a gap of conflict or collision<sup>69</sup>, praxeological (teleological) gap<sup>70</sup>, logical gap<sup>71</sup> or a gap by contradiction<sup>72</sup>.

In order to cope with such gaps, different principles are envisaged that are based mainly upon the hierarchy of legal acts, the time of enactment or the degree of vagueness (concreteness).<sup>73</sup>

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<sup>67</sup> Friedrich V. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press: Cambridge 1989, p. 226.

<sup>68</sup> On possible types of conflicts between statutory provisions (rules derived from them) see: Nowacki, *Analogia legis*, pp. 62-67, Nowacki, *Normy sprzeczne...*, pp. 311, 318-319, Nowacki, *Koncepcja...*, pp. 322-323, Morawski, *Wstęp...*, pp. 177-178, Pulka, pp. 80-82, Zeidler, p. 184; cf. also Raz, p. 201.

<sup>69</sup> Smoktunowicz, p. 34, Nowacki, *Normy sprzeczne...*, pp. 318, Koszowski, *O lukach...*, pp. 119-120.

<sup>70</sup> See Nowacki, *Normy sprzeczne...*, pp. 311, 315-316, 318-319, Nowacki, *Koncepcja...*, pp. 322-323 and Morawski..., *Wstęp...*, pp. 177- 178.

<sup>71</sup> Munczewski, p. 171, Redelbach, Wronkowska and Ziemiński, *Zarys...*, p. 222, Zeidler, p. 184, Chauvin, Stawecki and Winczorek, p. 140; cf. also Nowacki, *O tzw. konstrukcyjnych...*, pp. 7-11, Nowacki, *Normy sprzeczne...*, pp. 310, 318-319, Nowacki, *Koncepcja...*, p. 322, Korybski and Grzonka, p. 134.

<sup>72</sup> See Nowacki, *Normy sprzeczne...*, pp. 310, 318.

In the context of two or more conflicting statutory provisions (rules) one may also encounter the notion of “alternative gap”. This name presupposes, however, that one of the conflicting provisions (rules) should be selected and the case at hand is to be decided upon it (the option that these provisions/rules may cancel each other out). See Nowacki, *Normy sprzeczne...*, pp. 311, 318-320.

As to the doubts as to the aptness of using the term gap on such occasions see Nowacki, *O tzw. konstrukcyjnych...*, pp. 8-11. On the problem of the evaluative nature of gap resulting from the conflict of statutory provisions (rules/norm derived from them) see Nowacki, *Normy...*, pp. 313-320.

<sup>73</sup> On specific principles by which the conflicts between statutory provisions (rules inferred from them) may be resolved see: Nowacki and Tobor, pp. 153-158, Morawski, *Wstęp...*, pp. 71-74, Mastalski, pp. 133-149, Morawski,

Among these principles, however, one may also find such that orders the determination of which of the conflicting statutory provisions (rules) is – in essence – more adequate for the case at hand. In turn it may follow that priority should be given to those rules that are in dissonance with regards to typical or obvious instances of application that are more similar to the facts of the case at hand.<sup>74</sup> Moreover, a gap arising from the conflict of statutory provisions (rules) can also be resolved not by rendering an analogy to one of the provisions (rules) which collide with each other but by analogy to yet another statutory provision (rule) that regulates cases similar to the case at hand.<sup>75</sup> A lateral question – parenthetically – is here whether the colliding rules cancel each other, one of them annuls the other one (the rest) or, despite being in conflict, they still remain in force.<sup>76</sup>

One should note, however, that recourse to analogy in order to fill the gap stemming from the collision of statutory provisions (rule) is usually deemed possible only if other rules of settling conflicts cannot be availed of or turn out to be unsuccessful.<sup>77</sup>

## 8. Untangling the *ejusdem generis* canon of statutory construction

Another place in which the employment of reasoning via analogy in statutory law can be discerned is the so-called “*ejusdem generis* canon of statutory construction [interpretation]”,<sup>78</sup> a canon which may be regarded as a technique of composing canonical texts or construing them.

According to Hunter, the phrase: *ejusdem generis* means: of the same kind, genus and nature, and when featured in a statute, it takes the form of: “*x, y, z* or other”.<sup>79</sup> While the terms: *x, y* and *z* are precise and specific, the word “other” is by definition of indeterminate nature. Apart from this word, the presence of *ejusdem generis* may also be inferred from placing some other expression in the statute indicating that next to the instances enumerated also some other expressly unmentioned are at stake. For instance, such statutory expressions could have a form: “..., particularly *x, y* and *z*”. Reverting to the question of the mediation of analogical reasoning in the *ejusdem generis* canon of construction, this reasoning may be used in order to determine – upon the similarity discerned between it and these instances – whether the case at hand which is not any *x, y, z* falls under “other” (belongs to the category which *x, y, z* are particular examples). That is, one may assume that the word: “other” (category specified by enumeration of its examples) present in *ejusdem generis* include – at least *inter alia* – instances that are

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*Zasady...*, pp. 225-239, Pulka, pp. 82-84, Opalek and Wróblewski, *Zagadnienia...*, pp. 100-104, Wronkowska and Ziemiński, *Zarys...*, pp. 174-179, Jabłońska-Bonca, pp. 164, 165, Zygmunt Ziemiński, *Problemy podstawowe prawoznawstwa*, Państwowe Wydawnictwo Naukowe: Warszawa 1980, pp. 304-309, Ziemiński, *Wstęp...*, pp. 196-198, Peczenik, *On Law...*, pp. 340-344, Jamróz, pp. 198-202; against the background of the EU law see also: Anna Kalisz, *Wykładnia i stosowanie prawa wspólnotowego*, Oficyna a Wolters Kluwer business: Warszawa 2007, pp. 91-96.

<sup>74</sup> Albeit respecting the collision of precedential rules, see Weinreb, p. 98, 104.

<sup>75</sup> See Nowacki, *O tzw. konstrukcyjnych...*, p. 8 and Nowacki, *Normy sprzeczne...*, pp. 308, 315.

<sup>76</sup> See Nowacki, *Normy sprzeczne...*, p. 314 (he points out that when the collision of two norms [rules] occurs there are three possibilities: 1. the elimination of one of these norms, 2. the elimination of both of them, 3 keeping both in force and regarding them as valid despite acknowledging their being in conflict).

<sup>77</sup> Cf. Munczewski, p. 171, Redelbach, Wronkowska and Ziemiński, *Zarys...*, p. 222, Nowacki, *Normy sprzeczne...*, pp. 306-307.

<sup>78</sup> See Brewer, pp. 927-928, 937-938 and Weinreb, footnote on page 19.

<sup>79</sup> Dan Hunter, *Teaching and Using Analogy in Law*, Journal of the Association of Legal Writing Directors vol. 2, <http://ssrn.com/abstract=1089669>, p. 154.



similar to those which have been explicitly listed.<sup>80</sup> Incidentally, the same apply to another known canon of construction, “*noscitur a sociis*”, which can be translated as “a thing known by its associates”.<sup>81</sup>

Though *ejusdem generis* is traditionally associated with common law legal systems, it appears in civil legal systems as well. This mainly concerns the second form invoked above, i.e.: “..., especially *x, y, z*” or even more conspicuously, “*x, y, z* or the like”.<sup>82</sup> Moreover, statutes, especially those enacted in private law, may be deemed here as often comprising so-called ‘typological notions’. Notions of this kind specify a certain set of features that give a picture of a typical object or state. To fall under them, however, a given object or state needs not correspond with all the features enumerated. It suffices that this object/state is merely relevantly similar to its typical (ideal) counterpart. This possibility makes ‘typological notions’ essentially different from the so-called: ‘classifying notions’, in case of which a complete fulfillment of all the defining features is required. The ‘classifying notions’ are thus maintained to be more adequate for tax and criminal law, while the ‘typological notions’ are associated with the province of private law.<sup>83</sup>

## 9. The pertinent application of law

In the domain of statutory law, analogical reasoning can also be linked with a specific technique of composing canonical texts, namely the so-called “pertinent application of law”.

In the text of a statute, in order to avoid repeating the same or very similar provisions, it is sometimes deliberately stated that the set of specific statutory provisions should also be applied to some other scope of circumstances despite these provisions literally not encompassing them. For example, it can thus be directed that the provisions that regulate the contract of the sale of goods are to be applied to the contract of the exchange of goods. As a result, the provisions primarily designated for one legal institution in fact regulate two legal institutions: one directly and one due to the statutory reference made to this aim. Such reference can be here to one or several statutory provisions, but equally it can encompass a larger group of such provisions or even concerns the whole statute. Interestingly, however, the provisions the reference is made to may be stated to have to be applied or to be applied pertinently (properly); in this second case, however, it is done without any further specification of what the pertinent/proper

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<sup>80</sup> Thus Brewer argues that: ‘This interpretive norm [the *ejusdem generis* canon of construction] instructs the interpreter of a series of terms that are either relatively more specific or more precise (or both) followed by a term that is either relatively more specific or more precise (or both) followed by a term that is either more generally or more vague (or both) to read the last term in a series as being “of the same “genus” as the previous, more specific terms. Often, it is exemplary reasoning that interpreter uses to discover the “genus”, that is, the category, to which both the series of specific (or precise) terms and the general (or vague) term belong.’ See Brewer, p. 937.

Likewise, Levi states that “[t]he specification of particular instances indicates that similar but unmentioned instances are not to be included. But the specification of particular instances, when in addition a word of general category is used, may be the indication that other like instances are also intended; hence the *ejusdem generis* rule.” See Levi, p. 28.

Hunter, however, maintains that “the *ejusdem generis* rule clearly relies on inductive inference” and disagrees thus with Brewer’s stance invoked above; see Hunter, p. 154.

On *ejusdem generis* (*eiusdem generis*) see Holland and Webb, pp. 267-268, Bankowski and MacCormick, *Statutory...*, p. 380, Summers, *Statutory...*, p. 418 and Hunter, p. 154.

<sup>81</sup> See Summers, *Statutory...*, p. 418.

<sup>82</sup> As to the latter see Pulka, p. 146.

<sup>83</sup> See Morawski, *Wstęp...*, pp. 131-132; cf. also Kratochwil, p. 225.

application stands for. As expounded in legal doctrine, such an application shall mean that all of the relevant differences and similarities that exist between the institutions to which these provisions apply directly and the institution to which these provisions apply only upon the reference should be taken into account. In consequence, in relation to the latter institution, particular provisions can then be applied without any modification, with some (they may concern a consequent as well as an antecedent)<sup>84</sup> or even not applied at all. These three possibilities give sense to the phrase of ‘pertinent application’ and differentiate it from direct (as they are) application of the provisions referred, which technique – as already mentioned – is also used in drafting legal acts.<sup>85</sup>

Because the results of “pertinent application” are dependent on the comparison of the nature (gist) of the involved institutions and the similarities and dissimilarities between them, analogical reasoning is said to be at work here. Moreover, the legislative decision that some institutions are to be regulated by the same or a similar set of statutory rules, one directly and one upon the reference, suggests that the Legislator considers them to be alike. In addition, it is notably that “pertinent application” does not entail the filling of a gap; this time the resort to similar statutory provision(s) is ordered by the statutory law itself.<sup>86</sup> It must, however, be intimated that not everyone sees in the “pertinent application of law” room for an analogical argument to be employed.<sup>87</sup>

## 10. Argumentum *a fortiori*

As one more example of the employment of analogical reasoning in statutory law one may consider the so-called “*argumentum a fortiori*”.<sup>88</sup> Namely, this argument/mode of inference is occasionally perceived as a version of reasoning by analogy<sup>89</sup> or even as “an amplified reasoning by analogy.”<sup>90</sup> Indeed, *argumentum a fortiori* and analogical reasoning have much in common. First, both are applied in configurations in which a legal gap (unprovided case) occurs. Second, the outcome of *argumentum a fortiori* – as with analogical conclusions – is dependent on evaluation (assessment). Third, both the *a fortiori* and analogy used in statutory

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<sup>84</sup> Frequently such modifications are pretty obvious and slight, but sometimes they can also be of a fairly complex and sophisticated nature; see Nowacki, „Odpowiednie” stosowanie przepisów prawa, Państwo i Prawo, no. 3 (1964), pp. 370-371, 372-375, Nowacki, *Analogia legis*, pp. 142-143, 144, 147-150.

<sup>85</sup> See: Morawski, *Zasady...*, p. 215, Morawski, *Wykładnia...*, pp. 294, 299-302, Nowacki, *Analogia legis*, pp. 135-162, Nowacki, „Odpowiednie”..., pp. 367-376, Smoktunowicz, pp. 78-85, Opalek and Wróblewski, *Zagadnienia...*, pp. 320-321.

<sup>86</sup> Nowacki, „Odpowiednie”..., pp. 369-370, Nowacki, *Analogia legis*, p. 140 and Korybski and Grzonka, pp. 134-135 (they even comprehend it in terms of *analogia legis*).

<sup>87</sup> See Opalek and Wróblewski, *Zagadnienia...*, p. 320; cf. also Nowacki, *Analogia legis*, pp. 153-162.

<sup>88</sup> In general *argumentum a fortiori* is regarded as having two forms. The first is the so-called “*argumentum a maiori ad minus*” (from the greater to the smaller). It works then in the way: “who may more, all the more so may less” and concerns those statutory provisions that permit to do something. Alternatively it works in the way: “who is ordered more, all the more so, is ordered less”, and then it relates to the provisions that order something. The second, “*argumentum a minori ad maius*” (from the smaller to the greater), runs as follows: “who is forbidden less is all the more so forbidden the more”, and it pertains to those statutory provisions which prohibit to do something. See Morawski, *Zasady...*, pp. 219, 220, Pulka, pp. 154-155, Nawrot and Przybylski-Lewandowski, p. 348, Chauvin, Stawecki and Winczorek, pp. 246-247, Korybski and Grzonka, p. 134, Peczenik, *On Law...*, p. 328, Stelmach, pp. 74-76, Jamróz, p. 206; as for examples which are illusive in the sense that they only seemingly lead to the *a fortiori* conclusions see Perelman, *Imperium...*, p. 88 and Stelmach, pp. 75-76.

<sup>89</sup> Alexadner and Sherwin, p. 76.

<sup>90</sup> Peczenik and Bergholtz, *Statutory...*, p. 320, Peczenik, *On Law...*, p. 328.

law back themselves by reference to some valid statutory rule or rules.<sup>91</sup> Additionally, each of them may have examples/instances as their point of departure whose legal consequences are uncontested.<sup>92</sup> The difference between these two argumentative forms lies, however, in the sort of the similarity that has to obtain between cases being compared. That is, while reasoning *a fortiori*, one argues that the regulated and unregulated cases should be treated alike not because they merely sufficiently resemble each other, but because the unregulated case deserves the certain kind of treatment in a higher degree than the regulated case. In other words, it might be said that the unregulated case presents itself here as more similar to the regulated case than this case is to itself.<sup>93</sup> In *a fortiori*, the facts of an unprovided case thus constitute not an equal but stronger support for ascribing to this case the legal consequence envisaged for the case which is provided for.<sup>94</sup> As a corollary, the need for maintaining the coherence within the legal system also calls here for assigning this legal consequence to an unprovided case if compared with ordinary analogical legal reasoning.<sup>95</sup>

Because of the need to compare “the relative strength of two sets of facts” or because of the ascertaining of a degree in which both cases, regulated and unregulated one, deserve such-and-such treatment, an *a fortiori* inference is considered as a form of analogical thinking.<sup>96</sup> Parenthetically, it may be also noted that *argumentum a fortiori* inference is not exclusive to the province of statutory law, being employed in precedential law as well.<sup>97</sup>

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<sup>91</sup> See Nowacki, *Prawotwórczość...*, pp. 36-37, Wróblewski, *Judicial...*, p. 227.

Perelman maintains even that *argumentum a fortiori* – as analogy – bases upon the spirit of a statute; see Perelman, *Logika...*, pp. 37-38. Lechniak points out that the arguments: *a fortiori* and a *simile* overlap in that both require referring to the intention of Legislator; see Lechniak, p. 97. La Torre, Pattaro and Taruffo, in turn, intimate that *a fortiori* as well as analogy could be defined as ‘incomplete’, i.e. since both of them have to be accompanied by others arguments in order for a legal decision can be made (each of these argument needs some “substantive criteria of evaluation” that are not provided by this argument itself); see La Torre, Pattaro, Taruffo, *Statutory...*, p. 232-233.

<sup>92</sup> As for an argument by example enhanced by (combined with) argument *a fortiori* see Perelman, *Imperium...*, p. 123.

<sup>93</sup> See Peczenik and Bergholtz, *Statutory...*, p. 320, Peczenik, *On Law...*, p. 328, Nowacki and Tobor, p. 185, Morawski, *Wstęp...*, pp. 195-196, Morawski, *Zasady...*, pp. 219-222, Mastalski, pp. 127-132, Leszczyński, pp. 247-248, Wronkowska and Ziemiński, *Zarys...*, p. 174, Perelman, *Logika...*, pp. 38, 91-92, Lechniak, pp. 96-97, Pulka, pp. 153-156, Stelmach, pp. 74-75, Nawrot and Przybylski-Lewandowski, pp. 347-348, Jabłońska-Bonca, pp. 168, 169, Korybski, Leszczyński and Pieniążek, p. 176, Morawski, *Wykładnia...*, pp. 334-344, Ziemiński, *Problemy...*, pp. 303-304, Ziemiński, *Wstęp...*, pp. 192-194, Redelbach, Wronkowska, and Ziemiński, *Zarys...*, p. 213.

<sup>94</sup> Cf. Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning*, Cambridge University Press: Cambridge 2008, p. 76.

<sup>95</sup> See Peczenik, *On Law...*, p. 329.

<sup>96</sup> See Peczenik and Bergholtz, *Statutory...*, p. 320, Peczenik, *On Law...*, p. 329, Alexander and Sherwin, p. 76.

<sup>97</sup> “If the old case was a suitable case for the decision that was actually taken in it, and the new case is just as suitable or even more suitable for such a decision, there is reason to take this decision in the new case too” (Jaap Hage, *Studies in Legal Logic*, Springer: Dordrecht 2005, p. 114). “If the facts of a new case provide support for the outcome reached in the precedent case that is stronger than the support provided by the facts of precedent case itself, then it follows, a fortiori, that the new court should reach a parallel result” (Alexander and Sherwin, p. 76). See also Grant Lamond, *Precedent and Analogy in Legal Reasoning*, in: *The Stanford Encyclopedia of Philosophy*, first published 2006, <http://www.science.uva.nl/~seop/entries/legal-reas-prec/>, pp. 12-14.

## 11. Analogia iuris

More mysterious and puzzling than *analogia legis* is its relative called: “*analogia iuris*” (“*analogia juris*”). Other names one may encounter to denote it are: law-analogy, legal-system analogy and – however this one is less accurate – legal induction.<sup>98</sup>

In general, *analogia iuris* is said to be based upon general principle(s) or idea(s)/value(s)<sup>99</sup>, “fundamental thought of legislator”,<sup>100</sup> or even the very spirit [soul] of the law<sup>101</sup> *alias* the legal order (system) comprehended as such.<sup>102</sup> As its basis, there a pack/set of statutory rules,<sup>103</sup> a larger part of a statute or the whole one can also be used.<sup>104</sup>

Whether such a reasoning (argument/inference) as *analogia iuris* involves an analogical mode of thinking seems, however, to be an open question. It is sometimes even claimed that the very name: “*analogia iuris*” is in essence misleading and erroneous.<sup>105</sup> Hence a better term would be here: “free gap-filing”, i.e. the filling of the gap with “due consideration to all the circumstances of the case [at hand]”<sup>106</sup>, or “free creation of law.”<sup>107</sup> Be it a form of analogy or not – *analogia iuris* is commonly associated with axiology and the need for keeping coherence within the legal system. Notably, the general justification of using it and the main reason for

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<sup>98</sup> See Peczenik, *On Law...*, p. 321-322, Pulka, p. 149, 151, Jamróz, p. 204, Chauvin, Stawecki and Winczorek, p. 248.

In German legal theory, *analogia iuris* is called “*Rechtsanalogie*”; see Alexy and Dreier, *Statutory...*, p. 89 and Holland and Webb, p. 382.

<sup>99</sup> See Zuleta-Puceiro, *Statutory...*, p. 62, Alexy and Dreier, *Statutory...*, p. 89; La Torre, Pattaro and Taruffo, *Statutory...*, pp. 218, 219, La Torre, Pattaro and Taruffo, *Statutory...*, p. 225, Holland and Webb, p. 382, Smoktunowicz, pp. 28-29, Nowacki, *Analogia legis*, pp. 124-126, Nowacki and Tobor, p. 184, Morawski, *Zasady...*, p. 211, Morawski, *Wykładnia...*, p. 295, Jabłońska-Bonca, p. 166, 167, Korybski, Leszczyński and Pieniążek, p. 178, Maris, p. 76, 78, Peczenik, *On Law...*, p. 322, Opałek and Wróblewski, p. 110, Pulka, p. 149, 151, Jamróz, p. 205, Chauvin, Stawecki and Winczorek, p. 248.

On the notion of legal principle see Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press: Cambridge 1977, pp. 22-28, 71-80, 90-100, Brożek, pp. 21-24, MacCormick, *Legal...*, pp. 152-161, 166-167, 178-180, Smoktunowicz, pp. 154-164, Opałek and Wróblewski, *Zagadnienia...*, pp. 92-96, Morawski, *Zasady...*, pp. 71-81, 115-121, Alexander and Sherwin, pp. 88-103, Tomasz Gizbert-Studnicki, *Zasady i reguły prawne, Państwo i Prawo* no. 3/1988, pp. 16-26, Lamond, pp. 21-22, Aarnio, *Statutory...*, pp. 142-143, Leszczyński, pp. 249-252.

<sup>100</sup> Wolter and Lipczyńska, p. 237.

<sup>101</sup> Troper, Grzegorzczuk and Gardies, *Statutory...*, p. 201, Nowacki and Tobor, p. 184, Korybski, Leszczyński and Pieniążek, p. 178.

<sup>102</sup> Stelmach, p. 72 and Jamróz, p. 205.

<sup>103</sup> Alexy and Dreier, *Statutory...*, p. 89; see also Nowacki, *Analogia legis*, pp. 68-71, 122-124 and Pulka, p. 151.

<sup>104</sup> Nowacki, *Analogia legis*, pp. 123-126, Nowacki and Tobor, p. 184, Mastalski, pp. 118-119, Morawski, *Zasady...*, p. 211, Morawski, *Wykładnia...*, p. 295.

As for *analogia iuris* (juris), including the difficulties in distinguishing it from *analogia legis*, see: Holland and Webb, pp. 381-382, Nowacki, *Analogia legis*, pp. 121-134, Smoktunowicz, pp. 27-29, Morawski, *Zasady...*, pp. 211-214, Morawski, *Wykładnia...*, p. 295, Leszczyński, pp. 249-255, Munczewski, pp. 203-205, Maris, pp. 75-77, 102, Peczenik, *On Law...*, pp. 321-322, Wronkowska, pp. 95-96, Nawrot and Przybylski-Lewandowski, pp. 346-347, Chauvin, Stawecki and Winczorek, p. 248, Pulka, pp. 149-151, Jamróz, p. 205, Korybski and Grzonka, pp. 134-135.

<sup>105</sup> See Smoktunowicz, p. 29, Opałek and Wróblewski, *Zagadnienia...*, p. 110; cf. also Nowacki, *Analogia legis*, pp. 132-133.

<sup>106</sup> Aarnio, *Statutory...*, p. 132.

<sup>107</sup> Aarnio, *Statutory...*, p. 161.

employing it in a given case are deemed to stem from the axiological consistence which as such is supposed on the part of the rational Legislator.<sup>108</sup> Values or goals that are present/pursued in the legal system speak here for treating the unprovided case in the same or similar manner as the regulated case or cases.<sup>109</sup>

Regardless of the above-mentioned terminological reservations, taking advantage of *analogia iuris* is allowed in civil law legal systems to an extent identical to *analogia legis* (statutory analogy), i.e. to liquidate a legal gap [especially *extra* or *contra legem*]. However, there seems to be an order of preference established in the sense that *analogia iuris* can be used only when *analogia legis* has proved insufficient for making a legal decision in the case at hand.<sup>110</sup>

Incidentally, as a bow towards *analogia iuris*, one may also treat Dworkin's theory of the judge Hercules, a theory which assumes that legal decisions are to be delivered upon a coherent set of abstract general legal principles which justify all common law precedents (excluding those that are considered as mistakes) and statutory and constitutional provisions.<sup>111</sup> This theory is regarded as being founded upon analogical reasoning, for instance, by Raz and Maris. The former overtly states that "Dworkin's theory of adjudication is the most extreme case of total faith in analogical arguments" (i.e. in the sense that Dworkin "propounded a view according to which judges are obliged to solve all legal cases on the basis of a total analogy – to all the existing statutory and common law rules").<sup>112</sup> The latter, in turn, discerns in the Dworkinian proposition something which 'can be labeled as reasoning by "*super analogia iuris*"'.<sup>113</sup>

## 12. Analogy in legal proof and legal fictions

Undoubtedly, analogical reasoning can also be of use in the process of proving the facts of a case. As a good example, one may invoke the determination whether an alleged infringement of copyright took place through a comparison of the original item with the materials that are supposed to be its illegal copies. Contingent on the ascertained degree of the similarity between

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<sup>108</sup> Wronkowska and Ziemiński, *Zarys...*, pp. 173-174, Redelbach, Wronkowska and Ziemiński, pp. 212-213, Munczewski, p. 168, Leszczyński, pp. 250, 252-253. On the concept of the assumption that the Legislator is rational see Ziemiński, *Wstęp...*, pp. 162-170 and Leszek Nowak, *Interpretacja prawnicza: studium z metodologii prawoznawstwa*, Państwowe Wydawnictwo Naukowe: Warszawa 1973, pp. 35-46, Chauvin, Stawecki and Winczorek, p. 248, Nawrot and Przybylski-Lewandowski, p. 347, Pulka, p. 149.

Incidentally, *analogia iuris* resting on the preferences of particular values on the part of the Legislator may also be linked with an *argumentum a fortiori* whose basis is the extent to which a given value is protected; see Morawski, *Wykładnia...*, p. 335, Ziemiński, *Problemy...*, pp. 303-304, Ziemiński, *Wstęp...*, pp. 192-194, Wronkowska, pp. 96-97.

<sup>109</sup> See Korybski, Leszczyński and Pieniążek, p. 178, Ziemiński, *Problemy...*, p. 303, Ziemiński, *Wstęp...*, pp. 194-196, Munczewski, p. 171, Wronkowska, pp. 95-96, Wronkowska and Ziemiński, *Zarys...*, p. 173, Redelbach, Wronkowska and Ziemiński, *Zarys...*, p. 213, Leszczyński, pp. 249-250, 252-253, Pulka, p. 149.

<sup>110</sup> See La Torre, Pattaro and Taruffo, *Statutory...*, p. 225, Morawski, *Zasady...*, p. 213, Morawski, *Wykładnia...*, pp. 295, 302, Pulka, p. 151, Jamróz, p. 205.

<sup>111</sup> See Dworkin, pp. 110-123.

<sup>112</sup> Raz, pp. 205-206 footnote 19.

<sup>113</sup> See Maris, pp. 81-84. Lamond also hints – not without critical remarks – at an analogy that is based upon principles that underlie existing cases in the sense of justifying and explaining their legal outcomes; see Lamond, pp. 21-22. As to the critical assessment of the reasoning from principle with focus mainly on the Dworkinian theory see Alexander and Sherwin, pp. 88-103.

them, the question of infringement may be resolved: the greater the similarity, the more probable the illegal character of a copy would be.<sup>114</sup>

Also fictions, i.e. legal concepts that are – at face value – unrealistic (false), are sometimes deemed to be a manifestation of analogy. Thus, for instance, an institution of adoption assumes a similarity between an adoptee and the siblings, mandating their equal treatment.<sup>115</sup>

### 13. Conclusions

Analogical reasoning evidently has enormous scope for plausible applications in the domain of statutory law. This scope can be even likened – if not equated – to the ambit of the employment of analogy in the field of precedential law.<sup>116</sup> Not only is analogy used in statutory law in order to fill divergent kinds of gaps, but it can be also useful in resolving conflicts between statutory rules and clarifying the meaning of their wordings. It can also serve as a universal means by which one may apply particular statutory provisions in concrete cases. Such an omnipresence of analogical reasoning remains in statutory law, however, quite opaque and hidden – at least when referring to civil law countries. Due to the complex conceptual apparatus and premium that is traditionally placed on legal deduction and other kinds of quasi-logical mental operations on general rules in these countries, an analogical pattern of inference must often be extracted from argumentative forms and notions that not necessary at first glance suggest its involvement. As it appears, its presence there may also remain sometimes more a psychological fact than something which is openly admitted in the theory and practice of law.

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<sup>114</sup> See Walton, p. 312.

<sup>115</sup> See Kratochwil, p. 224.

<sup>116</sup> See Maciej Koszowski, *The Scope of Application of Analogical Reasoning in Precedential Law*, *Liverpool Law Review* no. 1/2016 (v. 37), pp. 9-32.