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CODIFICATIONS OF THE LAW OF OBLIGATIONS IN CENTRAL AND SOUTHEAST EUROPE IN THE CONTEXT OF THE PROPOSED REGULATION OF THE FREEDOM OF CONTRACT IN A NEW POLISH CIVIL CODE

1. INTRODUCTION

The freedom of contract[1] is one of the fundamental principles of Polish private law. It allows the parties to a contractual relationship to decide whether or not to enter into a contract and to specify the content of a contract[2]. It is regulated in art. 353[1] of the Polish Civil Code of 1964 (PCC). This legal provision, in force since 1 October 1990[3], numbers among the general provisions of the law of obligations (Book Three of the Code). Art. 353[1] gives the parties the discretion to determine

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[1] The term "freedom of contract", when appropriate, should be understood as the freedom to conclude any legal transaction.

[2] R. Zimmermann: *The civil law in European codes* (in:) *Regional Private Laws and Codification in Europe*, H.L. MacQueen and others (Eds.), Cambridge 2003, p. 57.

[3] Added by art. 1 point 48 of Ustawa z dnia 28 lipca 1990 r. o zmianie ustawy — Kodeks cywilny (Dz. U. 1990, No. 55, item 321).

their legal relationship, provided that its aim or content does not contradict the nature of the (contractual) relationship, a statute or the principles of community life.

In addition, the parties' freedom of contract is restricted by certain general limitations that apply to the conclusion of any legal transaction[4]. Art. 58 PCC — set out in the General Part of the Code (Book One of PCC) — prohibits legal transactions which contradict a statute, circumvent a statute (art. 58 § 1 PCC) or contradict the principles of community life (art. 58 § 2 PCC).

Current regulations on limiting the freedom of contract and limiting the freedom to conclude legal transactions have been criticized in Polish legal literature. Firstly, scholars find that there is no need to supplement the provision constraining the freedom to conclude legal transactions with a separate provision restricting the freedom of contract[5], especially because the latter does not influence the interpretation of other legal provisions regulating obligations[6]. Moreover, nowadays — unlike in 1990, when adopting art. 353^1 PCC had a symbolic and ideological dimension — the significance of expressing the freedom of contract in a separate legal provision is being questioned[7]. Secondly, it has been argued that some limitations of this freedom are redundant, as they do not function independently of other limitations and have unclear meaning. This applies, in particular, to prohibitions against violating the nature of the (contractual) relationship[8] and against circumventing the law[9]. Thirdly, the general clause "principles of

[4] The term "legal transaction" is used interchangeably with the term "juridical act".

[5] Against removing art. 353^1 PCC from the current Civil Code, see e.g. A. Koch (in:) *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, M. Sawczuk (Ed.), Kraków 2006, pp. 264, 266.

[6] P. Machnikowski: *Zasada swobody umów jako problem kodyfikacyjny* (in:) *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, M. Sawczuk (Ed.), Kraków 2006, p. 229.

[7] *Ibidem*, p. 232. But see e.g. C. Żuławska: *Wokół zasady wolności umów (art. 353^1 k.c. i wykładnia zwyczaju)*, Acta Universitatis Wratislaviensis, No. 1690, Prawo CCXXXVIII, Wrocław 1994, pp. 175–176.

[8] For discussion of this issue, see e.g. Z. Radwański: *Prawo cywilne — część ogólna*, *System prawa prywatnego*, vol. 2, 2nd edn, Warszawa 2008, rozdział V § 23 para 29; P. Machnikowski (in:) *Prawo zobowiązań — część ogólna*, *System prawa prywatnego*, E. Łętowska (Ed.), vol. 5, 2nd edn, Warszawa 2013, rozdział VI § 29 para 133; M. Safjan: *Zasada swobody umów (uwagi wstępne na tle wykładni art. 353^1 k.c.)*, Państwo i Prawo 1993, No. 4, p. 15; K. Osajda (in:) *Kodeks cywilny. Komentarz*, K. Osajda (Ed.), vol. II, Warszawa 2013, art. 353^1 paras 80.2, 92, 96; P. Machnikowski: *Zasada…*, *op. cit.*, p. 225. Only a minority of scholars hold the position that the nature of a contractual relationship is an independent and autonomous limitation on the freedom of contract, see e.g. J. Guść: *O właściwości (naturze) stosunku prawnego*, Państwo i Prawo 1997, No. 4, pp. 16–17; K. Bączyk: *Zasada swobody umów w prawie polskim* (in:) *Studia Iuridca Toruniensia*, *Przemiany polskiego prawa*, vol. 2, E. Kustry (Ed.), Toruń 2002, p. 55; M. Gutowski: *Nieważność czynności prawnej*, Warszawa 2006, pp. 362–363, 368; K. Osajda: *op. cit.*, art. 353^1 para 97. This position is also expressed in some of the rulings of the Supreme Court of Poland, see e.g. Ruling of 20th May 2004, II CK 354/03, OSN 2005, No. 5, item 91.

[9] For arguments see e.g. G. Tracz, F. Zoll: *Przewłaszczenie na zabezpieczenie*, Kraków 1996, p. 75; Z. Radwański: *Prawo cywilne…*, *op. cit.*, rozdział V § 23 para 19. Against see e.g. W. Wąsowicz: *Obejście prawa jako przyczyna nieważności czynności prawnej*, Kwartalnik Prawa Prywatnego 1999, No. 1, p. 81; P. Karwat: *Obejście prawa podatkowego*, Warszawa 2002, p. 30; T. Stawecki: *Obejście prawa. Szkic na temat granic prawa i zasad jego wykładni* (in:) *Nadużycie prawa*, H. Izdebski and A. Stępkowski (Eds.), Warszawa 2003, p. 90; D. Miler: *Czynności mające na celu obejście ustawy na tle orzecznictwa sądów polskich*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2019, No. 4, pp. 118–119. Also, the Supreme Court of Poland distinguished in some of its rulings

community life" has been criticized as an ambiguous, anachronistic term that should be removed from Polish legislation[10].

A group of Polish scholars is preparing an Academic Draft of a New Civil Code (ADCC) that is supposed to replace the current Civil Code[11]. The draft of the General Part of the Civil Code — the only part of the Code that has been made public so far — was prepared by the Polish Codification Commission of the Civil Law (an advisory body of the Minister of Justice)[12]. The original draft was made public in 2006[13]. It was revised in 2015. However, because the members of the commission were relieved of their duties in December 2015, their work has been continued in the framework of the ADCC as an academic project.

The drafters of the new civil code must determine whether to explicitly articulate the principle of the freedom of contract in the new codification and how to limit it. Further, they must decide where to locate the provision prescribing the limitations, what acts they should apply to, what limitations should be provided and how to interpret them[14].

transactions in *fraudem legis* from transactions *contra legem*, see e.g. Ruling of 22nd December 1970, II CR 517/70, LEX No. 6841; Ruling of 27nd June 2001, II CKN 602/00, OSNC 2002, No. 2, item 28; Ruling of 30th September 2016, I CSK 858/14, LEX No. 2152382.

[10] For arguments see e.g. M. Safjan: *Klauzule generalne w prawie cywilnym (przyczynek do dyskusji)*, Państwo i Prawo 1990, No. 11, pp. 56–57; T. Justyński: *Nadużycie prawa w polskim prawie cywilnym*, Kraków 2000, pp. 111–112; T. Sokołowski (in:) *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, M. Sawczuk (Ed.), Kraków 2006, p. 269; M. Pilich: *Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej*, Studia Prawnicze 2006, No. 4, pp. 54–56; T. Zieliński: *Klauzule generalne w nowym porządku konstytucyjnym*, Państwo i Prawo 1997, No. 11–12, p. 144; L. Leszczyński: *Funkcje klauzul odsyłających a model ich tworzenia w systemie prawa*, Państwo i Prawo 2000, No. 7, pp. 11–12.

[11] Information about the academic draft of the new civil code is available at https://www.projektkc.uj.edu.pl/. The question whether to replace the current Civil Code with a new one is highly controversial, see e.g. E. Łętowska, A. Wiewiórowska-Domagalska: *The Common Frame of Reference — The Perspective of a New Member State*, European Review of Contract Law 2007, No. 3, p. 287. In favour of replacing the current Civil Code, e.g. M. Kępiński (in:) *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, M. Sawczuk (Ed.), Kraków 2006, pp. 55, 62. Against replacing the current code, e.g.: Redakcja: *Projekt Kodeksu cywilnego. Księga pierwsza. Sprawozdanie z dyskusji przeprowadzonej w Izbie Cywilnej Sądu Najwyższego*, Przegląd Sądowy 2010, No. 2, pp. 104–123; J. Poczobut: *Geschichtlicher Hintergrund, heutiger Stand und Perspektiven des polnischen Privatrechts* (in:) *Privatrechtsentwicklung in Zentral- und Osteuropa*, R. Welser (Ed.), Wien 2008, p. 138; A. Mączyński: *Die Entwicklung und die Reformpläne des polnischen Privatrechts* (in:) *Privatrechtsentwicklung in Zentral- und Osteuropa*, R. Welser (Ed.), Wien 2008, pp. 122–123 (but accepting a revision of the current Civil Code). See also Z. Radwański: *Kodifikationsprobleme des Zivilrechts in Polen* (in:) *Kodifikácia, europeizácia a harmonizácia súkromného práva*, P. Blaho and J. Švidroň (Eds.), Bratislava 2005, pp. 174–175.

[12] Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2002 r. w sprawie utworzenia, organizacji i trybu działania Komisji Kodyfikacyjnej Prawa Cywilnego (Dz. U. 2002, No. 55, item 476).

[13] Z. Radwański: *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, 2006.

[14] Hereinafter, only limitations constraining the parties' freedom to specify the content of their contract (contractual stipulations) are examined. Neither other constraints on the freedom of contract, including customer protection laws and standard terms supplied by one of the parties, nor the consequences of violating the limitations are discussed.

The drafters of civil codifications that have come into force in other Central and Southeast European countries were faced with the same questions. Since 1990, the law in post-communist countries has been recodified to adjust to new economic, social and political conditions: to "create more favourable legal conditions for the development of enterprises, to strengthen the protection of personal rights and freedoms, as well as to build an effective legal protection system and adapt their law to international law, especially EU law"[15]. For instance, a new civil code came into effect in Lithuania in 2001[16] and in Estonia in 2002[17]. In 2002, a new act regulating the law of obligations entered into force in Slovenia[18] and four years later the same occurred in Croatia[19]. The Czech Republic[20] and Hungary[21] have had new civil codes in force since 2014. All these countries encountered legal obstacles similar to those Poland has had to overcome during the last 30 years. Therefore, it seems justified to suggest that the legal solutions adopted in the codifications of these countries should be considered by the Polish scholars preparing the new civil codification.

The author presents the limitations of the freedom of contract adopted in the most recent codifications in Central and Southeast Europe in the context of proposals made in the (academic) draft of a new Polish Civil Code[22]. In addition, for purposes of comparison, the text briefly presents legal provisions adopted in selected instruments proposing the harmonization of European private law, as well as in the BGB, the Dutch Civil Code and the Civil Code of Quebec.

[15] N. Mizaras: *Das neue Zivil- und Zivilprozessrecht in Litauen*, Zeitschrift für Europäisches Privatrecht 2002, pp. 466–467.

[16] *Lietuvos Respublikos civilinis kodeksas*, Act VIII-1864 of 18 July 2000, Žin 2000, 74-2262; entry into force on 1 July 2001.

[17] The Estonian Civil Code is comprised of acts that were adopted at different points of time. The last two acts whose adoption and entry into force completed the codification process were the Law of Obligations Act (*Võlaõigusseadus*, RT I 2001, 81, 487; adopted on 26 September 2001, entered into force on 1 July 2002) and the General Part of the Estonian Civil Code Act (*Tsiviilseadustiku üldosa seadus*, RT 2002, 35, 216; adopted on 27 March 2002, entered into force on 1 July 2002). See H. Mikk: *Zur Reform des Zivilrechts in Estland*, Jahrbuch für Ostrecht 2001, No. 42, pp. 31–52; M. Käerdi: *Estonia and the new civil law* (in:) *Regional Private Laws and Codification in Europe*, H.L. MacQueen and others (Eds.), Cambridge 2003, p. 251.

[18] *Obligacijski zakoniik*, ULRS 83/2001, No. 83-4287/01; adopted on 25 October 2001, entered into force on 1 January 2002. Consolidated text of the Code of Obligations: *Uradni list RS*, No. 97/2007.

[19] *Zakon o obveznim odnosima*, NN 35/2005, adopted on 25 February 2005, entered into force on 1 January 2006. It should be noted that neither Slovenia nor Croatia has a single legislative act systematically codifying the entire private law regime. In both countries the law applicable in each area of civil law is regulated separately. In Slovenia such an act is traditionally referred to as a 'code'. See e.g. V. Trstenjak: *Zivilrecht in Slowenien: Entwicklung und Stand der Dinge heute*, Zeitschrift für Europäisches Privatrecht 2000, p. 88.

[20] *Zákon* 89/2012 Sb, *Občanský zákoník*; entry into force on 1 January 2014.

[21] *2013 évi V törvény a Polgári Törvénykönyvről*, MK 2013/31; adopted on 11 February 2013, entered into force on 15 March 2014.

[22] Due to the language barrier, the author's analysis relies mostly on secondary sources. The limitations are discussed in the chronological order in which the acts regulating them came into effect, unless another order is more appropriate in relation to the issue under discussion.

2. INSPIRATIONS AND HISTORICAL BACKGROUND OF THE CODIFICATIONS

Western codifications were considered by the drafters of all the examined legislative acts.

The German BGB had a significant impact on the shape and content of the new civil codes adopted in Central and Southeast European countries. Scholars have identified it as a source of inspiration for the Lithuanian[23], Czech[24] and Hungarian[25] Civil Codes. Also, the Estonian Law of Obligations Act was prepared after considering the proposals for the revision of the German law of obligations[26]. Drafters of the Slovenian Code of Obligations referred to German case law[27].

The Dutch Civil Code was considered as a source of inspiration for the Estonian Law of Obligations Act[28], as well as for the Lithuanian[29], Czech[30] and Hungarian[31] codifications.

The Swiss ZGB was examined by drafters of the Lithuanian[32] and Hungarian codifications[33]. The Swiss Code of Obligations influenced the preparation of the Estonian law on obligations[34] and the Czech Civil Code[35].

The drafters of the new codifications also familiarized themselves with solutions adopted in the Civil Code of Quebec. They were considered during

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[23] D. Steinke: *Die Zivilrechtsordnungen des Baltikums unter dem Einfluss ausländischer, insbesondere deutscher Rechtsquellen*, Osnabrück 2009, p. 220.

[24] P. Bohata: *Neugestaltung des tschechischen Zivilrechts — Teil 1 — Allgemeiner Teil des zukünftigen BGB*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2011, p. 354.

[25] L. Vékás: *Über die Expertenvorlage eines neuen Zivilgesetzbuches für Ungarn*, Zeitschrift für Europäisches Privatrecht 2009, p. 539.

[26] See e.g. V. Kõve: *Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act*, Juridica International 2001, p. 36; M. Käerdi: *Estonia…*, *op. cit.*, pp. 258–259.

[27] V. Trstenjak: *Das neue slowenische Obligationenrecht*, WGO — Monatshefte für Osteuropäisches Recht 2002, p. 90.

[28] See e.g. H. Mikk: *Zur Reform…*, *op. cit.*, pp. 39–40; I. Kull: *Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law*, Juridica International 2008, pp. 122, 127–128.

[29] U. Schulze: *Das litauische Zivilrecht — Entwicklung, IPR und Allgemeiner Teil*, WGO — Monatshefte für Osteuropäisches Recht 2001, p. 332.

[30] J. Bejcek: *Das ABGB und das tschechische Zivil- und Handelsrecht* (in:) *200 Jahre ABGB — Ausstrahlungen. Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen*, M. Geistlinger and others (Eds.), Wien 2011, p. 180.

[31] L. Vékás: *Über die Expertenvorlage…*, *op. cit.*, p. 540; G. Hamza: *Geschichte der Kodifikation des Zivilrechts in Ungarn*, AFDUDC 2008, No. 12, p. 543.

[32] U. Schulze: *Das litauische…*, *op. cit.*, p. 332.

[33] L. Vékás: *Über die Expertenvorlage…*, *op. cit.*, p. 539.

[34] See e.g. P. Varul: *Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia*, Juridica International 2000, p. 114; V. Kõve: *Applicable…*, *op. cit.*, p. 36.

[35] L. Tichý: *Stand und Entwicklung des Privatrechts und der Tschechischen Republik* (in:) *Privatrechtsentwicklung in Zentral- und Osteuropa*, R. Welser (Ed.), Wien 2008, p. 27. For more possible sources of the Czech Civil Code, see D. Elischer: *The New Czech Civil Code. Principles, Perspectives and Objectives of Actual Czech Civil Law Recodification: On the Way to Monistic Conception of Obligation Law?*, Dereito 2010, No. 19, p. 437.

the preparation of the Lithuanian[36], Estonian[37], Czech[38] and Hungarian[39] legislation.

The Austrian ABGB was considered by drafters of the Hungarian Civil Code[40]. It also indirectly influenced the Slovenian and Croatian Codes of Obligations, as well as the Czech Civil Code[41]. The solutions adopted in the ABGB strongly impacted the Yugoslav Obligations Act of 1978, which served as a model for laws on obligations adopted in the post-Yugoslav countries, particularly for the Slovenian Obligations Code and the Croatian Obligations Act. As the Yugoslav Obligations Act of 1978 was inspired by solutions adopted in the ABGB, so was Croatian and Slovenian law[42]. A similar situation took place during the preparatory work on the Czech Civil Code. The leading source of solutions adopted in the newest Czech Civil Code — the revised draft of the Czechoslovak Civil Code of 1937 — was inspired by the ABGB[43].

The French Civil Code was referred to during the preparatory work on the Lithuanian[44] and Hungarian[45] Civil Codes. During the preparation of the Lithuanian[46], Czech[47] and Hungarian[48] codifications, legal solutions adopted in the Italian Civil Code and the Russian Civil Code were taken into account.

Moreover, American common law can be identified as impacting the legislative content of the Czech Code[49]. Louisiana's rules on the law of obligation were treated as an additional source of inspiration during the reform of Estonian private law[50].

EU law was explicitly listed as a source of inspiration for the Slovenian Obligations Code[51]. However, EU legal norms have been considered and applied in all EU Member States.

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[36] U. Schulze: *Das litauische…*, *op. cit.*, p. 332.

[37] See e.g. P. Varul: *Creation of New Private Law in Estonia*, Rechtstheorie 2000, No. 3–4, p. 363; P. Varul: *Estonian Private Law and the European Union* (in:) *Tiesību transformācijas problēmas sakarā ar integrāciju Eiropas Savienībā: starptautiskās konferences materiāli: Problems of Transformation of Law in Connection with European Integration*, J. Lazdiņš (Ed.), Riga 2002, p. 200.

[38] L. Tichý: *Stand…*, *op. cit.*, p. 27.

[39] H. Küpper: *Ungarns neues BGB — Teil 1: Entstehung und Inhalt*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2014, p. 131.

[40] L. Vékás: *Über die Expertenvorlage…*, *op. cit.*, p. 539.

[41] E.g. J. Bejcek: *Das ABGB…*, *op. cit.*, p. 180.

[42] V. Trstenjak: *Das neue slowenische Obligationenrecht…*, *op. cit.*, p. 110.

[43] See e.g. K. Csach, M. Laclavikova: *Das ABGB und das slowakische Zivilrecht* (in:) *200 Jahre ABGB — Ausstrahlungen. Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen*, M. Geistlinger and others (Eds.), Wien 2011, p. 167.

[44] U. Schulze: *Das litauische…*, *op. cit.*, p. 332.

[45] L. Vékás: *Über die Expertenvorlage…*, *op. cit.*, p. 539.

[46] U. Schulze: *Das litauische…*, *op. cit.*, p. 332.

[47] L. Tichý: *Stand…*, *op. cit.*, p. 27; J. Bejcek: *Das ABGB…*, *op. cit.*, p. 180.

[48] H. Küpper: *Ungarns neues BGB — Teil 1…*, *op. cit.*, p. 131.

[49] L. Tichý: *Stand…*, *op. cit.*, p. 27.

[50] See e.g. V. Kõve: *Applicable…*, *op. cit.*, p. 36; P. Varul: *Creation of New Estonian Private Law*, European Review of Private Law 2008, No. 1, p. 105.

[51] V. Trstenjak: *Das neue slowenische Obligationenrecht…*, *op. cit.*, p. 110.

Further, legislative solutions made in documents proposing the harmonization of European private law have influenced the considered legal acts[52].

The UNIDROIT Principles significantly influenced the content of the Lithuanian Civil Code[53] and the Estonian Law of Obligations Act[54]. The comments made in the Commentary to the UNIDROIT Principles were even directly transplanted into the legislative text of the Lithuanian Civil Code[55]. The Principles were also considered by the drafters of the Hungarian codification[56].

The Principles of European Contract Law (PECL) impacted the preparation of the Estonian Law of Obligations Act[57] and the Hungarian Civil Code[58].

The Draft Common Frame of Reference (DCFR) was mentioned as a source of inspiration in the context of the preparatory works on the Hungarian codification[59].

The United Nations Convention on Contracts for the International Sale of Goods (CISG) affected the shape of the Estonian Law of Obligations Act[60], the Slovenian Obligations Code[61] and the Hungarian Civil Code[62].

The degree of the impact of foreign codifications and documents proposing the harmonization of European private law on the norms adopted in the examined acts differs.

Foreign legal solutions had the strongest impact on the content of the Lithuanian and Estonian legislation. Many of these solutions were transplanted directly into the text of the new legal acts, enabling these countries to adopt proven and efficient legal solutions[63]. These post-Soviet countries neither had enough (human) resources and time to prepare legislative drafts that would reflect their legal culture, nor did they have any legislation or drafts that had been prepared before the Soviet occupa-

[52] Interestingly enough, these documents — in particular the UNIDROIT Principles, the PECL and the DCFR — played no significant role in the drafting of the Czech Civil Code, see L. Tichý: *Stand…*, *op. cit.*, p. 27.

[53] V. Mikelenas: *Unification and Harmonisation of Law at the Turn of the Millennium: The Lithuanian Experience*, Uniform Law Review 2000, No. 2, p. 251. See also M. Käerdi: *Die Neukodifikation des Privatrechts der baltischen Staaten in vergleichender Sicht* (in:) *Zivilrechtsreform im Baltikum*, H. Heiss (Ed.), Tübingen 2006, pp. 22–23; T. Zukas: *Reception of the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania* (in:) *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification. Reports of the ISDC colloquium (8/9 June 2006)*, E. Cashin-Ritaine and Eva Lein (Eds.), Zürich 2007, p. 232.

[54] E.g. M. Käerdi: *Die Neukodifikation…*, *op. cit.*, p. 22. For details see I. Kull: *Reform…*, *op. cit.*, pp. 127–128.

[55] T. Zukas: *Einfluss der «Unidroit Principles of International Commercial Contracts» und der «Principles of European Contract Law» auf die Transformation des Vertragsrechts in Litauen*, Bern 2011, pp. 62–63.

[56] L. Vékás: *Über die Expertenvorlage…*, *op. cit.*, p. 540; G. Hamza: *Geschichte…*, *op. cit.*, p. 543.

[57] E.g. H. Mikk: *Zur Reform…*, *op. cit.*, pp. 39–40. For details see I. Kull: *Reform…*, *op. cit.*, pp. 127–128.

[58] E.g. G. Hamza: *Geschichte…*, *op. cit.*, p. 543.

[59] L. Vékás: *Über die Expertenvorlage…*, *op. cit.*, p. 540.

[60] E.g. M. Käerdi: *Die Neukodifikation…*, *op. cit.*, p. 22. For details see I. Kull: *Reform…*, *op. cit.*, pp. 127–128.

[61] V. Trstenjak: *Das neue slowenische Obligationenrecht…*, *op. cit.*, p. 110.

[62] E.g. G. Hamza: *Geschichte…*, *op. cit.*, p. 543.

[63] P. Varul: *Creation…*, *op. cit.*, p. 358.

tion started, which could have been used as a basis for the new law[64]. After regaining their independence, these countries needed law that would replace the Soviet Union legislation, reflect the principles of private law of democratic countries and regulate areas that were not regulated under the previous regime[65]. The introduction of new legislation — in particular, a new civil code — was one of the highest priorities[66].

It seems accepted in legal literature that the currently applicable Slovenian Obligations Code is only a slightly modernized and expanded — but not significantly changed — version of the Yugoslav Obligations Act of 1978[67]. Similarly, most of the provisions of the Croatian Obligations Act are transplants from the Yugoslav Act[68]. Such a strong impact of the Act on the legislation of post-Yugoslav countries can be understood if it is considered that the solutions adopted in the Act have been characterized as "very modern" and "very capable of functioning under the changed economic circumstances"[69]. The transplanted provisions were, however, enhanced by general standard provisions that were not regulated in the Act but were seen as necessary in the newer legislation[70].

Legislation found in other countries affected the Czech and Hungarian Civil Codes to the least degree. Both codes are based primarily on these countries' own unique legal heritage. As already mentioned, the Czech Civil Code was influenced by the draft of the Czechoslovak Civil Code of 1937. The most recent Hungarian Civil Code draws mostly from the Hungarian Civil Code of 1959 and the uncodified law in force before 1959[71]. After the 1990 transformation, neither of these two countries faced an immediate need to replace their earlier codifications[72]. It was sufficient to amend the existing civil codes and introduce supplementary legislation. The relative autonomy that each of these countries enjoyed after World War II allowed

[64] *Ibidem*, p. 98.

[65] *Ibidem*, p. 349.

[66] L. Tichý: *Processes of Modernisation of Private Law Compared, and the CFR's Influence*, Juridica International 2008, p. 36; P. Varul: *The Impact of Harmonisation of Private Law on the Reform of Civil Law in the New Member States* (in:) *The Foundations of European Private Law*, R. Brownsword and others (Eds.), Oxford, Portland 2011, p. 287.

[67] C. Rudolf: *Slowenien: Neues Schuldgesetzbuch in Kraft*, WGO — Monatshefte für Osteuropäisches Recht 2002, p. 8; D. Možina: *Harmonisation of Private Law in Europe and the Development of Private Law in Slovenia*, Juridica International 2008, pp. 174–175. Similarly V. Trstenjak: *Das ABGB in Slowenien* (in:) *Festschrift 200 Jahre ABGB*, vol. 1, C. Fischer-Czermak and others (Eds.), Wien 2011, pp. 298–299. See also A. Polajnar-Pavcik: *Neukodifikationen des Privatrechts in Slowenien* (in:) *Kodifikácia, europeizácia a harmonizácia súkromného práva*, P. Blaho and J. Švidroň (Eds.), Bratislava 2005, pp. 204–205.

[68] Y. Slakoper: *Allgemeines Bürgerliches Gesetzbuch (ABGB) und kroatisches bürgerliches Recht* (in:) *200 Jahre ABGB — Ausstrahlungen. Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen*, M. Geistlinger and others (Eds.), Wien 2011, p. 109.

[69] L. Tichý: *Processes…*, *op. cit.*

[70] Y. Slakoper: *Allgemeines Bürgerliches Gesetzbuch…*, *op. cit.*, p. 109.

[71] For example, many provisions of the law of obligations adopted in the newest Code reflect the solutions provided under the Civil Code of 1959, see H. Küpper: *Ungarns neues BGB — Teil 1…*, *op. cit.*, pp. 131, 133.

[72] A. Kisfaludi: *The Influence of Harmonisation of Private Law on the Development of the Civil Law in Hungary*, Juridica International 2008, pp. 130, 131–132; P. Varul: *The Impact…*, *op. cit.*, p. 286.

them to limit the influence of Soviet law on the private law codifications they adopted during the era of communism[73]. However, unlike the Hungarian Civil Code of 1959 that was held in high regard for its high quality, the Czech Civil Code of 1964 was strongly criticized as "the most distinct attempt to deviate from the concept of civil law found in Roman law"[74].

The explanatory memorandum to the General Part of the Academic Draft of the Polish Civil Code does not list the legislation or other documents that were considered during the preparatory work. Only the participation of experts from the Netherlands is explicitly mentioned. The draft is based on the current Polish Civil Code "as much as possible"[75]. Nevertheless, the Draft incorporates the necessary EU law. Moreover, chosen provisions of German, Dutch, French and Swiss law, as well as solutions adopted in English law, are mentioned in the context of the discussion of arguments supporting the adoption of particular legal provisions proposed in the Draft. In the explanatory memorandum to the Draft, there are also comparative comments in relation to the Austrian, Lithuanian, Russian and Ukrainian Civil Codes. Furthermore, it is clear from the content of the memorandum that the drafters were aware of the instruments harmonizing European private law. Special references are made to the content of the DCFR. Additionally, it is likely that also the content of the Quebec Civil Code was examined by the drafters, as the norms regulated in this act (and in the German, Swiss and Dutch Civil Codes) were referred to during the preparation of the new book governing the law of obligations[76].

3. EXPLICIT REGULATION OF THE PRINCIPLE OF THE FREEDOM OF CONTRACT

In Lithuania, the principle of the freedom of contract is recognized in the country's Constitution (art. 46 of the Lithuanian Constitution). The Lithuanian Civil Code lists it as one of the principles regulating civil relationships (art. 1.2.) and provides a detailed explanation thereof (art. 6.156)[77]. The definition of the prin-

[73] L. Tichý: *Processes…*, *op. cit.*

[74] *Ibidem.*

[75] E. Łętowska, A. Wiewiórowska-Domagalska: *The Common Frame…*, *op. cit*., p. 288.

[76] J. Pisuliński: *Struktura części ogólnej prawa zobowiązań (wprowadzenie do dyskusji)*, Transformacje Prawa Prywatnego 2017, No. 2, pp. 42–43. Also, for the same reason, the regulations included in the newest Czech and Hungarian codifications might have been considered during the revision of the draft in 2015.

[77] Art. 6.156. Principle of freedom of contract: "1. The parties shall be free to enter into contracts and determine their mutual rights and duties at their own discretion; the parties may also conclude other contracts that are not established by this Code if this does not contradict laws. 2. It shall be prohibited to compel another person to conclude a contract, except in cases when the duty to enter into a contract is established by laws or a free-will engagement. 3. The parties may form a contract which contains elements of contracts of several classes. Such contract shall be governed by norms regulating the separate classes of contracts unless otherwise provided for by the agreement of the parties, or this contradicts the essence of the contract. 4. The conditions of a contract shall be established

ciple was transplanted from the UNIDROIT Principles and provided with "greater detail by defining its content and limits"[78]. Art. 1.1. of the UNIDROIT Principles states only that: "The parties are free to enter into a contract and to determine its content". The objective of introducing the more detailed provision to the Lithuanian Civil Code was to facilitate the principle's "authentic interpretation" and "more efficient application"[79]. Moreover, it aimed at assisting a change in the manner of thinking about law. The freedom of contract was a novelty in the Lithuanian legal system. The principle was not recognized in legal acts or legal doctrine binding under the Soviet occupation[80]. A detailed definition thereof supported the notion that not all legal provisions are mandatory[81]. Furthermore, adopting provisions with detailed content was supposed to limit the disputes about its interpretation and application. Even though the same arguments — regarding the novelty of the principle in the legal system[82] and legal culture[83] — could be applied in the case of Estonian law, the principle was not explicitly stated in the text of the Estonian codification. The only other presently considered codification in which the meaning of the principle of the freedom of contract is explained in the text of the act is the Hungarian Civil Code (section 6:59)[84].

In the other examined jurisdictions, the applicable acts do not include provisions dedicated exclusively to specifying the content of the freedom. The principle is stated together with the limits restricting the parties' discretion. Similarly, the German BGB, the Dutch Civil Code and the Civil Code of Quebec, as well as the PECL and DCFR, do not contain provisions stating only a definition of the freedom of contract.

Article 54 of the General Part of the Academic Draft of the Polish Civil Code explicitly prescribes the parties' freedom to arrange their legal relationship at their

by the parties at their own discretion, except in the cases where certain conditions of a contract are determined by the mandatory rules of law. 5. Where the conditions of a contract are established by a non-mandatory law rule, the parties may agree on non-application of these conditions, or they may agree on any other conditions. If the parties do not enter into such agreement, the conditions of the contract shall be determined in accordance with the non-mandatory norm. 6. Where some conditions of a contract are regulated neither by laws nor by agreement of the parties, in the case of a dispute such conditions shall be determined by a court on the basis of usages, principles of justice, reasonableness and good faith, also by application of analogy of statutes and the law".

[78] V. Mikelenas: *Unification…*, *op. cit.*, p. 253. But see T. Zukas: *Einfluss…*, *op. cit.*, pp. 62–63.

[79] V. Mikelenas: *Unification…*, *op. cit.*, p. 253.

[80] V. Mikelenas: *The Influence…*, *op. cit.*, p. 147.

[81] T. Zukas: *Einfluss…*, *op. cit.*, p. 63.

[82] I. Kull: *Effect of Harmonisation of European Civil Law on Development of Estonian Law of Obligations*, Juridica International 1998, pp. 98–102.

[83] Kull states that it is part of the Estonian legal culture to "write down in law everything that is covered in the developed countries by the laws and the legal dogmatics outside written law, [to] avoid disputes over the application and substance of law" (I. Kull: *European and Estonian Law of Obligations — Transposition of Law or Mutual Influence?*, Juridica International 2004, p. 33). See also M. Luts: *Textbook of Pandects or New Style of Legislation in Estonia?*, Juridica International 2001, pp. 157–158.

[84] Section 6:59 [Freedom of contract] "(1) The parties are free to conclude a contract and to choose the other party. (2) The parties are free to determine the contents of the contract. The parties may depart from the provisions relating to their rights and obligations with mutual consent, unless prohibited by this Act".

discretion. According to comments included in the explanatory memorandum to the Draft, unlike art. 353[1] of the current Polish Civil Code, which it is supposed to replace, the proposed provision expresses the freedom to determine the content of any legal transaction (and not only of a contract) and does not set out any limitations. Further, it is to be included in the General Part of the Code rather than — as art. 353[1] PCC — in the part dedicated to the law on obligations[85].

The freedom of contract (or, more generally, the freedom to conclude any legal transaction) is one of the fundamental principles of private law. As it is so endemic to private law, it could be questioned whether it is necessary to explicitly articulate it in a separate legal provision. It can be argued that, in Poland, the principle, its content and its scope of application are already so firmly established in the legal system that it seems redundant to state the content of the principle in the text of the new civil code, even if it serves to expand its scope of application beyond contracts. Further, incorporating the principle of the freedom of contract (as was done in the Czech Civil Code or in the acts found in Croatia and Slovenia) into the provision regulating the consequences of defects of a legal transaction (instead of regulating it in a separate provision) would be difficult due to the structure adopted in the proposed General Part. Namely, the limitations are prescribed in a section dedicated to regulating the legal consequences where a legal transaction contradicts the law.

4. LIMITATIONS ON THE FREEDOM OF CONTRACT

All the legal acts adopted in the discussed jurisdictions provide for limits on the freedom of contract.

4.1. RELEVANT PROVISIONS

Articles 1.80. and 1.81. of the Lithuanian Civil Code regulate the limitations on concluding a legal transaction and the legal consequences for violation of these limits[86]. Art. 1.80.1. provides: "Any transaction that fails to meet the requirements of mandatory statutory provisions shall be null and void." Art. 1.81.1. states: "A transaction that is contrary to public order or norms of good morals shall be null and void". The relation between the limitations regulated in these two provisions seems disputable[87].

[85] *Kodeks cywilny. Księga I. Część ogólna. Projekt z objaśnieniami*, https://www.projektkc.uj.edu.pl/index.php/projekty accessed 22 January 2020.

[86] For details on the legal consequences, see L. Didžiulis: *Contract Law in Lithuania*, 2019, p. 133, para 296.

[87] Didžiulis explains that it has been stated in Lithuanian legal literature that any violation of a legal provision will always constitute a violation of public order (public policy, in French *ordre publique*) and good morals. Nev-

Under Estonian law, limitations on the freedom to conclude legal transactions are regulated in §§ 86 and 87 of the General Part of the Civil Code, as well as in § 5 of the Law of Obligations. § 86 (1) of the General Part states: "A transaction which is contrary to good morals or public order is void"[88]. § 87 of the General Part provides: "A transaction contrary to a prohibition arising from law is void if the purpose of the prohibition is to render the transaction void upon violation of the prohibition, especially if it is provided by law that a certain legal consequence must not arise"[89]. Additionally, § 5 of the Law of Obligations Act articulates: "Upon agreement between the parties to an obligation or contract, the parties may derogate from the provisions of this Act unless this Act expressly provides or the nature of a provision indicates that derogation from this Act is not permitted, or unless derogation is contrary to public order or good morals or violates the fundamental rights of a person". The content of the provisions is based on the principle that "anything not prohibited is allowed"[90]. Therefore, as stated by Kull, "any restrictions concerning the content must be justified socially and economically, because interference into contractual relations means recognition of [a] certain way of life, standards, convictions and models of conduct"[91].

The Slovenian Obligations Code regulates limitations on the freedom of contract in two provisions. Art. 2 states: "Participants may regulate their obligational relationships in a manner different to that set out in the present Code unless the contrary follows from an individual provision of the present code or from the meaning of an individual provision". Art. 3 provides: "Participants shall be free to regulate obligational relationships, but may not act in contravention of the Constitution, compulsory regulations or moral principles". Art. 86 and the following provisions of the Code regulate the legal consequences of violating any of the limitations.

Article 2 of the Croatian Obligations Act limits the parties' freedom of contract by stating: "The parties are free to regulate their obligations, and these must be in compliance with the Constitution of the Republic of Croatia, mandatory laws and the morals of the society". Violating any of the limitations leads to the invalidity of a contract[92].

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ertheless, she argues that a violation of a mandatory legal provision does not have to involve a violation of the public order. Firstly, only the most significant mandatory laws that involve fundamental values constitute laws relating to public order; secondly, arts. 1.80 and 1.81 provide for different legal consequences (L. Didžiulis: *Contract…*, *op. cit.*, p. 130, para 287).

[88] This paragraph was adopted on 25 February 2009 and entered into force on 1 May 2009 (RT I 2009, 18, 108).

[89] As observed by Paul Varul, "the general rules on legal acts as provided in the GPCCA [General Part of the Civil Code Act] are of the greatest relevance to the law of obligations" (P. Varul: *Creation…*, *op. cit.*, p. 102).

[90] I. Kull: *Effect…*, *op. cit.*, pp. 98–102.

[91] I. Kull: *Principle of Freedom of Contract in European Civil Law and Reform of Law of Obligations in Estonia* (in:) *Tiesību transformācijas problēmas sakarā ar integrāciju Eiropas Savienībā: starptautiskās konferences materiāli: Problems of Transformation of Law in Connection with European Integration*, J. Lazdiņš (Ed.), Riga 2002, pp. 232–233. See also P. Varul: *Legal Policy Decisions…*, *op. cit.*, p. 112.

[92] S. Nikšic: *Contract Law* (in:) *Introduction to the Law of Croatia*, T. Josipović (Ed.), The Netherlands 2014, pp. 148, 152.

It can be noted that, like the last two acts, the Yugoslav Obligations Act (which served as a model for both acts), also listed "the principles of social organization established by the constitution, mandatory laws and the morals of the socialist self-governing society" as limitations on the freedom of contract (arts. 10 and 103).

Paragraph 2 of section 1 of the Czech Civil Code restricts the freedom to conclude any juridical act by providing that: "Unless expressly prohibited by a statute, persons can stipulate rights and duties by way of exclusion from a statute; stipulations contrary to good morals, public order or the law concerning the status of persons, including the right to protection of personality rights, are prohibited". As stated in legal literature, it is only the violation of mandatory (and not dispositive) statutory provisions or good morals that results in the invalidity of an undertaken juridical act[93].

The Hungarian Civil Code regulates the limitations on the freedom of contract in two provisions. Section 6:95 states: "Any contract which is incompatible with the law or that was concluded by circumventing the law shall be null and void, unless the relevant legislation stipulates another legal consequence. […]". Section 6:96 adds: "A contract shall be null and void if it is manifestly in contradiction to good morals".

Art. 70 of the General Part of the ADCC proposes to limit the freedom to conclude any legal transactions. § 1 of this provision states: "A legal transaction whose content or purpose contradicts a statute or decency (*boni mores*) is invalid, unless the law provides otherwise or because of the purpose of the violated norm, a different sanction is appropriate (effective and proportionate)". § 2 of the provision further stipulates that "A legal transaction whose conclusion is contrary to a statute or decency is invalid only if the statute so provides or when invalidity is the appropriate sanction because of the purpose of the violated norm […]". Art. 70 is based on the interpretation of articles 58 and 353[1] PCC. The provision explicitly states that the limitations apply to the content[94] and purpose[95] of a legal transaction and therefore provides clarity in these respects. Further, it includes only two limitations (law and decency (good morals)) rather than — as the current PCC — four limitations (a statute, the principles of community life, the nature of a contract and the prohibition against circumventing a statute). Moreover, it replaces the general clause of "the principles of community life" with the general clause of "decency"[96].

[93] J. Petrov: *Občanský zákoník: komentář*, Praha 2017, art. 1 paras 38–44. But see the exceptions listed in art. 1 para 45.

[94] As stated in the explanatory memorandum to the General Part of the Academic Draft of the Polish Civil Code "The content of a legal transaction is its provisions, i.e. the decisions expressed in the declaration of intent (declarations of will) regarding individual, normatively relevant issues".

[95] As stated in the explanatory memorandum to the General Part of the Academic Draft of the Polish Civil Code "The purpose of a transaction is a state of affairs which is to be achieved by concluding the legal transaction". The purpose must be common to all the parties to a juridical act or, at least, known to them. It is only if one of the parties acts with an objective directed against the interests of another party that this objective can be regarded as the purpose of the juridical act, although the other party is not aware of it.

[96] Z. Radwański: *Zielona Księga…*, *op. cit.*, p. 58; Z. Radwański: *Zielona Księga. Optymalna wizja kodeksu cywilnego Rzeczypospolitej Polskiej*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2007, No. 1, p. 9.

Unlike the drafters of most other codes applicable in Central and Southeast Europe, the drafters of this new Polish Civil Code dedicated only one provision to setting limitations on the freedom of concluding legal transactions. This solution can be seen as contributing to the clarity and accessibility of the legal text.

4.2. PLACEMENT OF LEGAL PROVISIONS REGULATING LIMITATIONS ON THE FREEDOM OF CONTRACT

In the Lithuanian, Estonian and Czech codifications of private law, limitations on the freedom of contract are regulated in the first book (part) of each Code:

- Arts. 1.80 and 1.81 of the Lithuanian Civil Code are located in Chapter IV (Voidability of transactions) of Part II (Transactions) of Book One (General Provisions) of the Code.
- §§ 86 and 87 of the Estonian General Part of the Civil Code Act are systematized in Division 1 (Void Transactions) of Chapter 5 (Invalidity of Transactions) in Part 4 (Transactions) of the General Part[97].
- Section 1 (2) of the Czech Civil Code belongs to the first chapter (Private Law) of Title I (Scope of Regulation and its Basic Principles) of Book One (General Provisions) of the Code.

In the Estonian Civil Code, limitations imposed upon the freedom of contract are additionally regulated in § 5 of Chapter 1 (General Provisions) of Part I (General Part) of the Law of Obligations Act.

As the scope of regulation in the Slovenian and Croatian acts is restricted to the law of obligations, limitations on the freedom of contract are regulated right at the beginning of each act:

- Art. 3 of the Slovenian Obligations Code is regulated in Title I (Basic Principles) of Book 1 (General) of the Code.
- Art. 2 of the Croatian Obligations Act is provided in Title I (Basic Principles) of Part I (General Principles) of the Act.

In these two jurisdictions, the principle of contract — as well as other provisions regulating the law on obligations — applies to other legal transactions as well[98].

[97] Including a provision regulating limitations on the freedom of contract in the General Part of the Civil Code has the objective of allowing a decision on whether a legal transaction is valid based on this part of the codification, P. Varul: *The New Estonian Civil Code* (in:) *Zivilrechtsreform im Baltikum*, H. Heiss (Ed.), Tübingen 2006, p. 53.

[98] Art. 14 (3) of the Croatian Obligations Act: "Any provisions of this Law that relate to contracts shall also apply adequately to other legal transactions". Art. 14 of the Slovenian Obligations Code: "The sense of the provisions of the present Code relating to contracts shall also apply to other legal transactions".

The newest Hungarian Civil Code — as its predecessor from 1959 — does not include a General Part[99]. Thus, provisions regulating limitations on the freedom of contract (sections 6:95 and 6:96) constitute types of defects in the intended legal effects regulated in Chapter XVIII (Nullity and Avoidance) of Title VI (Invalidity) in the second part (General provisions on contracts) of Book Six (Law of obligations)[100]. Even though this solution seems unusual in the context of the other considered codifications, it was adopted in some Western civil codes as well. For instance, the Civil Code of Quebec and the Dutch Civil Code do not contain a General Part. Limitations on the freedom of contract are regulated in art. 1373 of the former and in art. 3:40 of the latter. However, unlike the Hungarian Civil Code and the Civil Code of Quebec — art. 3:40 of the Dutch Civil Code is located in Title 3.2 (Juridical acts) of Book 3 (Property Law in General) and not in a section dedicated to obligations.

For the sake of comparison, it can be mentioned that:

- The UNIDROIT Principles regulate the limitations on the freedom of contract in arts. 1.4. and 1.5., which belong to the general provisions of the Principles.
- The PECL provide the limitations in art. 1:102 (1), which is located in Section 1: Scope of the Principles of Chapter 1: General Provisions of the document.
- The DCFR includes provision II — 1:102 located in Chapter 1: General provisions of Book II: Contracts and other juridical acts.

In the ADCC, limitations on the freedom to conclude a legal transaction are regulated in art. 70, located in Chapter I (General provisions) of Section IV (Contradiction of a legal transaction with the law) of Title III (Declarations and legal transactions) of Book One (General Part). As noted by the drafters, incorporating this provision in the General Part of the Code — a part of the Code that is to apply to all the other regulations included in the Code as well as to private-law legislation located outside of it — prevents the introduction of redundant repetitions and supports a uniform interpretation of all private-law legal provisions[101].

With the exception of the Hungarian Civil Code, in all the most recently discussed civil-law codifications, limitations on the freedom of contract are regulated in the General Part of the Code. The location of the provision regulating such limitations is the most prominent in the Czech Civil Code (section 1(2) of the Civil Code). Historical reasons justify the location of this provision. Namely, the private lives of individuals were harassed by the communist state with the means provided

[99] L. Vékás: *Über das ungarische Zivilgesetzbuch im Spiegel der neueren europäischen Privatrechtsentwicklung*, Zeitschrift für Europäisches Privatrecht 2016, p. 43; H. Küpper: *Ungarns neues BGB — Teil 1…*, *op. cit.*, p. 131.

[100] The current Civil Code — unlike the Hungarian Civil Code of 1959 — includes in the first part of Book Six provisions common to all obligations and in its second part general provisions on contracts. See H. Küpper: *Ungarns neues BGB — Teil 1…*, *op. cit.*, pp. 132–133.

[101] Z. Radwański: *Aktualność posłużenia się częścią ogólną kodeksu cywilnego jako instrumentem regulacji prawa prywatnego*, Transformacje Prawa Prywatnego 2010, No. 4, p. 17.

under Czech private law[102]. Therefore, in the current Code all the provisions are subordinated to the principle of the freedom of contract, and the application and interpretation of limitations are restricted[103].

The provision proposed in the ADCC approximates very closely the solutions provided under the Lithuanian and Estonian Civil Codes (regulating limitations in a section dedicated to the results of defects in the content of a legal transaction), which — in turn — resemble the location of §§ 134 and 138 limiting the freedom of contract in the German BGB[104].

4.3. LEGAL ACTS TO WHICH LIMITATIONS ON THE FREEDOM OF CONTRACT APPLY

The Lithuanian, Estonian and Czech codifications regulate the freedom to conclude any legal transaction and the limitations thereon. Therefore, the freedom of contract and its limitations apply in fact to any legal transaction (any juridical act) that creates an obligation[105]. The term "juridical act" is also used in the Dutch Civil Code and the German BGB.

Only in the Hungarian Civil Code do the relevant provisions refer to contracts (and not legal transactions). It was a conscious decision of the drafters of the Code to treat "contract" as the elementary category for the regulation of the law of obligations. The same choice was made during preparatory work on the Hungarian Civil Code of 1959. It was argued that: "The notion of juridical act, its types, creation, amendment, fulfilment and termination is in the closest relationship with the rules of contract; the juridical act as such is nothing else than a common denominator of artificially abstracted elements of contract and the exceptional cases of unilateral declarations"[106]. Nevertheless, the application of common provisions to obligations and the application of general provisions to contracts extends to obligations arising from unilateral acts (section 6:2 (2)), and general provisions on contracts concerning the effect, nullity and invalidity apply to legal statements[107] (section 6:9).

[102] P. Bohata: *Neugestaltung des tschechischen Zivilrechts — Teil 2 — Sachen und Rechtsgeschäfte*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2012, p. 11.

[103] P. Bohata: *Grundsatzentwurf des neuen tschechischen Zivilrechts*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2001, p. 295.

[104] See D. Steinke: *Die Zivilrechtsordnungen…*, *op. cit.*, p. 220.

[105] These — of course — include contracts, see V. Mikelenas: *The Main Features of the New Lithuanian Contract Law System Based on the Civil Code of 2000*, Juridica International 2005, p. 43; P. Bohata: *Neugestaltung des tschechischen Zivilrechts — Teil 1…*, *op. cit.*, p. 354; P. Bohata: *Neugestaltung des tschechischen Zivilrechts — Teil 2 — Sachen und Rechtsgeschäfte*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2012, p. 10.

[106] Official Explanation prepared by the Minister of Justice, *Kozgazdasagi es Jogi Konyvkiado*, Budapest 1963, p. 26 according to P. Gardos: *Recodification of the Hungarian Civil Law*, European Review of Private Law 2007, No. 5, p. 718.

[107] A legal statement is defined in section 6:4 (1) as "a unilateral act intended to have legal effect".

The fact that the Slovenian Obligations Code and the Croatian Obligations Act use the terms "obligation" or "contract" is based on the limited scope of application of these acts — they only regulate the law on obligations. However, as already mentioned, art. 14 of the Slovenian Code and art. 14 (3) of the Croatian Act extend the application (of the sense) of provisions regulating contracts to other juridical acts[108].

Due to the scope of application of these documents, which is primarily contract law, the UNIDROIT Principles, PECL and DCFR use the term "contract".

Article 70 of the proposed General Part restricts the freedom to conclude any juridical act. The same term is used in art. 58 of the currently applicable Polish Civil Code. The use of the term harmonizes with placing the provision in the General Part of the Code, which is to apply to all legal transactions.

4.4. INTERPRETATION OF THE LIMITATIONS ON THE FREEDOM OF CONTRACT

4.4.1. MANDATORY LEGAL PROVISIONS

Although the freedom of contract is limited by mandatory legal provisions in all the discussed legal acts, the interpretation and application of the limitations differ in each considered jurisdiction.

Czech law provides for the most restrictive interpretation. The freedom to conclude any juridical act is limited by all statutory provisions, but not by all legal norms that can be deduced from such provisions[109]. Conversely, the prohibition against making a particular contractual stipulation must be explicitly regulated in a statute[110]. Particular terms: prohibiting, ordering the invalidity of or imparting no legal consequences to a particular contractual stipulation must be used in a legal provision in order for it to limit contractual freedom[111]. Adopting this legislative technique prevents an expansive interpretation of legislative provisions that could be seen as unjustified (as happened when the previous civil code was in force)[112], and it curbs the tendency to order the invalidity of every juridical act regardless of the extent to which its content contradicts a statutory provision[113]. Special attention is dedicated to "the law

[108] S. Nikšic: *Contract Law…*, *op. cit.*, p. 136.

[109] P. Bohata: *Neugestaltung des tschechischen Zivilrechts — Teil 1…*, *op. cit.*, p. 355.

[110] *Ibidem*, p. 356.

[111] *Ibidem*.

[112] *Ibidem.* David Elischer commented on the direction of the regulations of the Czech Civil Code by stating that "Philosophically said, the draft of [the] Czech Civil Code seeks to achieve the ideals of Europeanism and humanism. The major axis of [the] whole draft is a human being and his interests which are predominantly individual in [the] private law sphere. It is the end of preferring any kind of collectivism and higher protection of collective interests" (D. Elischer: *The New Czech Civil Code…*, *op. cit.*, p. 438).

[113] M. Hulmak (in:) *Einführung in das tschechische Recht*, H.-B. Wabnitz and P. Holländer (Eds.), München 2009, p. 68, para 4:5.

concerning the status of persons, including the right to protection of personality rights". This law must be considered together with the statutory legal provisions stipulating it, and it restricts the parties' freedom only if the questioned provision of a juridical act violates statutory laws or good morals[114]. Even though this law does not constitute a separate ground for finding invalidity, violating it may be considered as an argument for finding a contractual provision contrary to a legal provision and therefore invalid[115]. In contrast, invalidity is a legal consequence of violating public order only if a statutory provision explicitly articulates the rule of public order that was violated[116].

Mandatory statutory provisions also seem to be interpreted very narrowly under Slovenian law. They include only legal provisions imposing prohibitions or a mandatory course of conducting certain actions[117]. However, as stated in art. 2 of the Code, the content as well as the meaning of provisions restrict the freedom of contract. Art. 3, in addition to compulsory regulations, also lists the Constitution of the Republic of Slovenia as a limiting factor. The Constitution provides, however, only a few general rules applicable to the law of obligations. Therefore, it is not probable that a contractual stipulation could be found invalid based solely on it contradicting the Constitution. Moreover, "the human rights regulated by the Constitution are directly applicable against the state (vertical relationships) [and are principally inapplicable] in contracts between private persons (horizontal relationships)"[118]. Likewise, the Constitution of the Republic of Croatia, which is listed as potentially limiting the freedom of contract in the Croatian Obligations Act, contains no provisions that could be directly applied to any contracts. Thus, as Croatian practitioners point out, the Constitution could not serve as an exclusive ground for finding a contractual stipulation invalid.

Neither the listing of particular legislative acts (i.e. the Constitution) in the Slovenian and Croatian acts nor the specification of a set of laws ("law concerning the status of persons, including the right to protection of personality rights" and "the fundamental rights of a person") in the Czech Civil Code and in the Estonian Law of Obligations Act established an autonomous limitation on the freedom of contract. Rather, these additions had a symbolic dimension and aimed at emphasizing the importance of the named act or set of laws and providing a directive for interpretation of other legislative provisions.

Even though under Lithuanian law "mandatory statutory provisions" are understood as "imperative norms of legal act", the application of this limitation is significantly restricted[119]. As established in the case law of Lithuanian courts, a legal

[114] J. Petrov: *Občanský…*, *op. cit.*, art. 1 paras 57–58.

[115] P. Bohata: *Neugestaltung des tschechischen Zivilrechts — Teil 2…*, *op. cit.*, p. 12.

[116] *Ibidem*, art. 1 para 49.

[117] D. Možina, A. Vlahek: *Contract Law in Slovenia*, The Netherlands 2019, para 176.

[118] *Ibidem*, para 175.

[119] J. Gumbis: *The Impact of the ABGB on the Lithuanian Civil Law* (in:) *200 Jahre ABGB — Ausstrahlungen. Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen*, M. Geistlinger and others (Eds.), Wien 2011, p. 206.

transaction contradicting a mandatory statutory provision can be adjudicated as invalid *only* if it violates a "fundamental public interest, which requires universally outlawing disputed transactions"[120]. In a particular case, the lack of mandatory administrative authorization necessary for conducting a regulated legal activity may lead to the invalidity of a contract. The applicable sanction seems to depend on the area of law regulating the questioned contract[121].

In Hungary, the freedom of contract is limited by mandatory rules articulated in the statutory law. They must be complied with and cannot be violated by the parties' agreements[122].

A much wider interpretation of mandatory statutory provisions appears to apply under Estonian law. A provision has mandatory character when it expressly states as much (for instance, by establishing a prohibition) or when the nature of a provision indicates it. Therefore, deviation from a statutory provision is generally allowed unless it is explicitly prohibited or the provision's nature does not allow it[123]. Examples of prohibitions deduced from the nature of a provision can be found in case law[124]. Despite explicitly identifying "the fundamental rights of a person" as a limitation of the freedom of contract in § 5 of the Law of Obligations Act, the fundamental rights do not have an autonomous character[125]. As mentioned earlier, listing the rights in the provision emphasizes their importance for the interpretation of law.

The UNIDROIT Principles, PECL and DCFR subject the freedom to determine the content of a contract to applicable mandatory rules (e.g. art. 1.4 of the UNIDROIT Principles, art. 1:102 (1) of the PECL and II — art. 1:102 (1) of the DCFR). The prohibition against violating mandatory statutory provisions is also a standard limitation in Western civil codes (see e.g. § 138 of the German BGB, art. 3:40 (2) of the Dutch Civil Code and art. 1373 of the Quebec Civil Code).

Under the proposed art. 70 of the General Part of the ADCC, any imperative norms regulating the parties' rights and obligations limit the freedom of contract. The comments published in the explanatory memorandum further clarify that the term "statute", which is used in the provision, "encompasses both norms that are directly named in a statute and norms that are their necessary consequence"[126]. Unlike the laws of most of the other considered central and southeast European

[120] Rulings of the Lithuanian Supreme Court of 4 May 2005 in civil case No 3K-3-263/2005 and of 21 September 2005 in case No 3K-3-416/2005 according to L. Didžiulis: *Contract…*, *op. cit.*, p. 128, para 282.

[121] See L. Didžiulis: *Contract…*, *op. cit.*, pp. 128–129, para 283.

[122] A. Menyhárd: *Contracts* (in:) *Introduction to Hungarian Law*, A. Harmathy (Ed.), 2019, p. 155.

[123] V. Kõve: *Applicable…*, *op. cit.*, p. 35; P. Varul: *Creation…*, *op. cit.*, pp. 361–362.

[124] I. Kull: *Principle…*, *op. cit.*, pp. 232–233.

[125] Nevertheless, Reich finds this provision "particularly interesting and innovative" (N. Reich: *Transformation of Contract Law and Civil Justice in the New EU Member Countries —The Example of the Baltic States, Hungary and Poland* (in:) *The Institutional Framework of European Private Law*, F. Cafaggi (Ed.), Oxford 2006, p. 283).

[126] *Kodeks cywilny. Księga I. Część ogólna. Projekt z objaśnieniami*, https://www.projektkc.uj.edu.pl/index.php/projekty accessed 22 January 2020.

countries, the provision does not contain any "safety valves" or interpretive directives limiting the courts' discretion.

4.4.2. MORALS

The understanding of morals (or good morals or decency) seems to be similar in all the considered jurisdictions. It encompasses moral or ethical norms commonly recognized and adhered to in a society.

§ 86 (2) of the General Part of the Estonian Civil Code lists exemplary situations in which good morals are violated: "*inter alia*, if a party knows or must know at the time of entry into the transaction that the other party enters into the transaction arising from his or her exceptional need, relationship of dependency, inexperience or other similar circumstances, and if: 1) the transaction has been entered into under conditions which are extremely unfavourable for the other party or 2) the value of mutual obligations arising for the parties is [disproportionately] contrary to good morals"[127]. Legal literature and case law provide further clarification. Kull describes good morals as "canons of ethical and moral conduct" generally acknowledged by the majority of society as grounded in the "normal sensitivity towards politeness and decency" that change with time. Under the current situation "the protection of individuals' interests, not of the whole society's interests, has become the main objective of legal practice when it comes to voiding a contract on grounds of good morals"[128]. Good morals compel courts to "proceed from their sense of propriety, and from the sense of propriety applied upon resolving analogous cases in the past"[129]. The Supreme Court of Estonia, for example, has found it contrary to good morals where a company entered into a contract when aware of its upcoming bankruptcy[130] or where a lease for a period of 99 years was signed without the right to early termination[131].

Only in Estonia is the meaning of good morals clarified directly in the text of the code. In all the other jurisdictions, its interpretation comes from case law and legal literature.

The Supreme Court of Lithuania finds the norms of good morals to be multifaceted and to refer to actions as well as to their consequences, especially their impact "on society, the State and private individuals"[132]. As good morals refer to

[127] For information on the manner in which the provision has been applied, see I. Kull: *European and Estonian Law…*, *op. cit.*, pp. 36–37.

[128] *Ibidem*.

[129] I. Kull: *Principle…*, *op. cit.*, pp. 232–233.

[130] CCSCd 3-2-1-102-02. — RT III 2002, 27, 301 according to I. Kull: *European and Estonian Law…*, *op. cit.*, pp. 36–37.

[131] CCSCd 3-2-1-29-02. — RT III 2002, 14, 164; CCSCd 3-2-1-76-01. — RT III 2001, 19, 204 according to I. Kull: *European and Estonian Law…*, *op. cit.*, pp. 36–37.

[132] Ruling of the Lithuanian Supreme Court of 16 January 2006 in civil case No 3K-3-30/2006 according to L. Didžiulis: *Contract…*, *op. cit.*, p. 129, para 284.

norms provided in the Decalogue, they are violated, for instance, by transactions involving "prostitution [as well as] trade in human body parts and tissues"[133]. Moreover, the Supreme Court identified the violation of good morals, for instance, when a bailiff sold seized property for a very low price[134] or when a transaction aimed at maintaining an unequal division of assets between spouses[135].

The application of Slovenian law shows that contractual stipulations contrary to the principle of good faith or the principle of good commercial practices are identified as violating moral principles. However, only on rare occasions is a contractual stipulation found invalid entirely due to the violation of one these principles[136].

Czech courts characterize good morals as "a summary of social, cultural and moral norms that, in a historical context, confirm some immutability, reflecting important historical trends, are common to critical parts of society and are of basic nature"[137]. Czech scholars identify them as basic moral values commonly shared in a society; their violation brings a strong sense of injustice[138]. A violation of good morals does not take place in cases of inconvenience or departure from ordinary practice[139].

The interpretation of good morals under Hungarian law does not significantly deviate from the understanding given to it under the laws of the other jurisdictions. They can be characterized as "values generally accepted in the society"[140]. However, section 6:96 of the Code requires that the morals are "manifestly" contradicted[141]. In particular, good morals are violated if a contract is incompatible with public policy: "Contracts that are oppressive, restrict personal freedom excessively, were concluded with the intent to cause harm to others, are detrimental to the public interest, are incompatible with basic professional and commercial standards, family values or other basic social and economic values are null and void. The primary source of such basic values is the Fundamental Law"[142].

The prohibition of violations of morality is also included in art. 3:40 (1) of the Dutch Civil Code and in section 138 of the German BGB[143]. There is, however, no equivalent limitation in the Quebec Civil Code.

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[133] L. Didžiulis: *Contract…*, *op. cit.*, pp. 130–131, para 286.

[134] Ruling of the Lithuanian Supreme Court of 30 December 2008 in civil case No 3K-3-617/2008 according to L. Didžiulis: *Contract…*, *op. cit.*, pp. 129–130, para 286.

[135] Ruling of the Lithuanian Supreme Court of 19 June 2008 in civil case No 3K-3-293/2008 according to L. Didžiulis: *Contract…*, *op. cit.*, pp. 129–130, para 286.

[136] D. Možina, A. Vlahek: *Contract…*, *op. cit.*, para 177.

[137] J. Petrov: *Občanský…*, *op. cit.*, art. 1 para 47.

[138] *Ibidem*, art. 1 para 46.

[139] *Ibidem*.

[140] A. Menyhárd: *Contracts…*, *op. cit.*, p. 155.

[141] Section 200 (2) of the earlier Civil Code of 1959 included a similar condition.

[142] A. Menyhárd: *Contracts…*, *op. cit.*, p. 155.

[143] However, according to the translation provided on the Website of the *Bundesministerium der Justiz und für Verbraucherschutz*, "Sitten" are translated as "public policy".

Article 70 as proposed in the ADCC also includes decency as a limitation on the freedom of contract. In the explanatory memorandum it is suggested that it be understood as moral norms that are binding in the Polish society[144]. The proposed interpretation corresponds to the understanding of "the principles of community life", which currently limit the freedom of contract. Replacement of the current clause is supported with the argument that the meaning of "decency" is better understood in Poland and abroad. The final interpretation of that clause is to be left to courts and academics.

4.4.3. PUBLIC ORDER (PUBLIC POLICY)

Only the Lithuanian, Estonian and Czech Civil Codes explicitly include public order (public policy, in French *ordre publique*) as a limitation of the freedom of contract.

The Supreme Court of Lithuania considers "public policy" with regard to legal actions and their consequences[145]. Public policy includes the "main principles [that] are the basis for the State legal system and functioning of State and society". It "consists of imperative norms of constitutional, administrative and other branches of Lithuanian law"[146]. Actions contrary to public policy are, for instance: "contracts with criminal content, transactions which hide evidence of a crime, [contracts which create] illicit privileges, trades in chairs within the civil service, [contracts which focus] on the evasion of taxes, [contracts which facilitate] hostile activities against the Republic of Lithuania or its allies, [the making of] donations solely in order to get State accolades"[147]. Additionally, according to case law of the Supreme Court, a juridical act circumventing a mandatory bailiff's order made during the enforcement procedure violates public policy[148].

Under Czech law, public order is understood as basic public policy principles that must be closely followed[149]. Nevertheless, violating public policy leads to the invalidity of a contractual stipulation only if it also contradicts a mandatory statutory legal provision explicitly articulating the rule of public order that was violated[150].

Under Croatian law, the protection of public order is the main reason for limiting the freedom of contract[151]. Public order is, however, not explicitly set out in

[144] *Kodeks cywilny. Księga I. Część ogólna. Projekt z objaśnieniami*, https://www.projektkc.uj.edu.pl/index.php/projekty, accessed 22 January 2020.

[145] Ruling of the Lithuanian Supreme Court of 16 January 2006 in civil case No 3K-3-30/2006 according to L. Didžiulis: *Contract…*, *op. cit.*, para 284.

[146] L. Didžiulis: *Contract…*, *op. cit.*, para 285.

[147] *Ibidem*.

[148] *Ibidem*.

[149] J. Petrov: *Občanský…*, *op. cit.*, art. 1 para 49.

[150] P. Bohata: *Neugestaltung des tschechischen Zivilrechts — Teil 2…*, *op. cit.*, footnote 29.

[151] See e.g. Z. Slakoper, V. Gorenc: *Obvezno pravo — Opći dio*, Zagreb 2009, p. 47.

the text in art. 2 of the Croatian Obligations Act as a limitation on the freedom of contract.

Public order limits the freedom to conclude juridical acts also under art. 3:40 (1) of the Dutch Civil Code. Moreover, art. 1373 of the Quebec Civil Code prohibits any obligation whose content is contrary to public order. In Quebec's Civil Code, it is the only limitation mentioned in the provisions apart from the need to adhere to "the law".

As the limitation of public order does not constitute an autonomous limitation of the freedom of contract in the discussed central and southeast European countries and as its application relies on the interpretation and application of statutory law or notions of decency, listing it as a separate limitation can be questioned. This is particularly true as there is no obvious reason supporting the introduction of this clause in any of the discussed legal acts. For the same reason, the drafters of art. 70 ADCC found including this limitation unnecessary. This limitation is not explicitly provided in the provisions currently limiting the freedom of contract.

4.4.4. CIRCUMVENTION OF THE LAW

The prohibition against circumventing the law is expressly articulated only in the Hungarian Civil Code. There seems to be no other explanation for including it in section 6:95 of the current code apart from the fact that this prohibition was found in section 200 (2) of the Hungarian Civil Code of 1959, as well as in uncodified Hungarian law. However, as Hungarian academics clarify, this limitation is rarely (if ever) applied in practice.

The prohibition against concluding a contract with impermissible motives (intentions) fulfils similar functions to the prohibition of circumvention of the law[152]. Art. 40 (2) of the Slovenian Obligations Code and art. 273 (2) of the Croatian Obligations Act declare a contract invalid if "an impermissible motive had a significant effect on the decision by one of the contracting parties to conclude the contract and the other contracting party knew or should have known" about it[153]. Knowledge of the other party is not required in cases of gratuitous contract (art. 40 (3) of the Slovenian Obligations Code and art. 273 (3) of the Croatian Obligations Act). As in most legal systems, exceptions cannot be interpreted broadly (*exceptiones non sunt extendendae*) and mandatory provisions cannot be applied to legal transactions so as to exploit gaps in the law. In these situations, the prohibition against concluding

[152] A contract was ineffective due to the parties' prohibited motives also under the Yugoslav Obligations Act of 1978. See art. 53 of the Act.

[153] Article 273 (2) of the Croatian Obligations Act uses the terms "materially influenced" instead of "significant effect". For details on the provision found in Croatian law, see V. Gorenc and others: *Komentar zakona o obveznim odnosima*, Zagreb 2014, art. 273.

a legal transaction circumventing the law or with impermissible motives supplements the prohibition against concluding a legal transaction contrary to mandatory statutory rules. Thereby, both prohibitions achieve the same result.

The broad interpretation of the term "statute" as "encompass[ing] both norms that are directly named in a statute and the norms that are their necessary consequence" brought the drafters of the proposed new Polish civil code to the conclusion that explicit articulation of the prohibition of circumvention of law is redundant[154]. According to the Polish scholars, the prohibition against circumvention of the law was included in art. 58 of PCC to stop a judicial practice present before 1965, whereby transactions circumventing the law were (incorrectly) classified as violating the principles of community life[155]. In spite of the prevalent opinion that transactions circumventing the law are in fact contrary to the law, court practice confirms that there are legal transactions circumventing the law that cannot be classified as contradicting the law[156]. Moreover, even if deleting the prohibition on circumventing the law (and also the prohibition against contradicting the nature of a contractual relationship) was based on the argument that it has little practical significance, it can be treated as a directive of interpretation. Namely, it explicitly deters attempts to exploit legal gaps.

5. CONCLUSIONS

Solutions applying to limitations on the freedom of contract as adopted in other Central and Southeast European countries reinforce most of the proposals made regarding the regulation — and limitation — of the freedom of contract in the proposed new Polish Civil Code. Firstly, apart from Croatia and Slovenia, in which the Yugoslav model of legislative technique was adopted, in all the other considered states the law of obligations is regulated as part of a civil code. Secondly, in most of the considered new civil codes (except for the Hungarian Civil Code) the provision(s) imposing limitations on the freedom of contract is (are) included in the General Part of a civil code. Finally, the limitations apply to all legal transactions rather than exclusively to contracts (again, excepting Hungarian law).

The adopted solutions vary regarding the number of provisions dedicated to regulating the freedom of contract and imposing limitations. However, that seems to be a purely technical matter that depends on the adopted legislative technique.

Also, the question whether to explicitly regulate the meaning of the principle of the freedom of contract was answered in different ways by drafters of the con-

[154] *Kodeks cywilny. Księga I. Część ogólna. Projekt z objaśnieniami*, https://www.projektkc.uj.edu.pl/index.php/projekty, accessed 22 January 2020.

[155] Z. Radwański: *Prawo cywilne…*, *op. cit.*, rozdział V § 23 para 19.

[156] D. Miler: *Czynności…*, *op. cit.*, pp. 118–119.

sidered acts. As discussed earlier, it might be disputed whether regulating the content of the principle in a separate provision of the future Polish Civil Code is necessary and useful.

A closer comparison of the limitations on the freedom of contract as adopted in the most recent civil codifications in Central and Southeast Europe — which have been considered in this article — leads to the conclusion that there is clearly no single set of limitations uniformly imposed in all the examined jurisdictions. The list of limitations adopted in each country was influenced by foreign laws and each jurisdiction's own historical experiences. However, it could be argued that the interpretation of the adopted limitations, rather than the terms used to name them, is decisive for the final outcome of the application of the law. Therefore, the differences are only superficial and boil down to different terminology being used to achieve similar results. That is to say, it can be assumed that in every democratic country a court would arrive at the same conclusion under similar case circumstances, regardless of what exact "tools" it is provided with. This seems to be the ground for including only prohibitions against violation of a statute and decency as limitations on the freedom of contract in the Draft of a new Polish Civil Code. An expansive interpretation of the meaning and scope of application of these two terms may in practice fulfil the functions performed by all the other limitations listed in the codes currently applicable in the considered jurisdictions.

Accepting this approach, however, deprives the different legal terminology and general clauses of their independent meaning, and it blurs the distinctions existing between them. Further, as an expansive interpretation is not always permissible, the contravention of statutory law cannot always be found in situations where a violation of the prohibition against circumvention of law or against contradicting the nature of a relationship might have been found. Moreover, additional limitations — even if they do not serve as independent limitations on the freedom of contract and even if their application depends on identifying a violation of mandatory statutory provisions — may fulfill other important functions. For instance, they may serve as directives for the interpretation of statutory norms or they may guarantee respect for certain rights or laws.

These considerations call into question the minimalistic approach of the drafters of the Polish Civil Code. In all the other considered countries with a similar historical, social, economic and political background, adherence to mandatory statutory provisions and notions of decency is safeguarded by other limitations guaranteeing the preservation of democratic values and emphasising the importance of rights of individuals. The provision proposed in the ADCC provides courts with wide discretion to broadly interpret the proposed limitations, and it expresses the drafters' significant trust in the judicial power without imposing any "safety valves" or interpretive directives. The correctness of this position can be debated, espe-

cially if the independence of courts in Poland were ever to be endangered. However, regardless of the represented view, it is interesting to observe that the proposal made by the Polish scholars is unique and strongly contrasts with the solutions adopted in the analyzed Central and Southeast European countries. Even if the legislative aims supporting the solutions adopted in the Baltic states or in the post-Yugoslav countries were disregarded as outdated due to the time that has elapsed since their introduction, such a contention would not apply to the arguments supporting the regulations adopted in the Czech Civil Code. In Czech legal literature it is openly stated that the memory of private law's misuse by communist state organs — and a fear of its repetition — strongly influenced the shape of provisions expressing and limiting the freedom of contract as adopted in the current Czech codification. The question remains: should the provisions adopted as a result of these concerns inspire Polish academics to revise their Draft?

BIBLIOGRAPHY

Bączyk K.: *Zasada swobody umów w prawie polskim* (in:) *Studia Iuridca Toruniensia*, *Przemiany polskiego prawa*, vol. 2, E. Kustry (Ed.), Toruń 2002.

Bejcek J.: *Das ABGB und das tschechische Zivil- und Handelsrecht* (in:) *200 Jahre ABGB — Ausstrahlungen. Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen*, M. Geistlinger and others (Eds.), Wien 2011.

Bohata P.: *Grundsatzentwurf des neuen tschechischen Zivilrechts*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2001, pp. 295–296.

Bohata P.: *Neugestaltung des tschechischen Zivilrechts — Teil 1 — Allgemeiner Teil des zukünftigen BGB*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2011, pp. 353–360.

Bohata P.: *Neugestaltung des tschechischen Zivilrechts — Teil 2 — Sachen und Rechtsgeschäfte*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2012, pp. 7–13.

Csach K., Laclavikova M.: *Das ABGB und das slowakische Zivilrecht* (in:) *200 Jahre ABGB — Ausstrahlungen. Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen*, M. Geistlinger and others (Eds.), Wien 2011.

Didžiulis L.: *Contract Law in Lithuania*, 2019.

Elischer D.: *The New Czech Civil Code. Principles, Perspectives and Objectives of Actual Czech Civil Law Recodification: On the Way to Monistic Conception of Obligation Law?*, Dereito 2010, No. 19, pp. 431–448.

Gardos P.: *Recodification of the Hungarian Civil Law*, European Review of Private Law 2007, No. 5, pp. 707–723.

Gorenc V. and others: *Komentar zakona o obveznim odnosima*, Zagreb 2014.

Gumbis J.: *The Impact of the ABGB on the Lithuanian Civil Law* (in:) *200 Jahre ABGB — Ausstrahlungen. Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen*, M. Geistlinger and others (Eds.), Wien 2011.

Guść J.: *O właściwości (naturze) stosunku prawnego*, Państwo i Prawo 1997, No. 4, pp. 16–25.

Gutowski M.: *Nieważność czynności prawnej*, Warszawa 2006.

Hamza G.: *Geschichte der Kodifikation des Zivilrechts in Ungarn*, AFDUDC 2008, No. 12, pp. 533–544.

Justyński T.: *Nadużycie prawa w polskim prawie cywilnym*, Kraków 2000.

Käerdi M.: *Estonia and the new civil law* (in:) *Regional Private Laws and Codification in Europe*, H.L. MacQueen and others (Eds.), Cambridge 2003.

Karwat P.: *Obejście prawa podatkowego*, Warszawa 2002.

Kisfaludi A.: *The Influence of Harmonisation of Private Law on the Development of the Civil Law in Hungary*, Juridica International 2008, pp. 130–136.

Kodeks cywilny. Księga I. Część ogólna. Projekt z objaśnieniami, https://www.projektkc.uj.edu.pl/index.php/projekty, accessed 22 February 2020.

Kõve V.: *Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act*, Juridica International 2001, pp. 30–37.

Kull I.: *Effect of Harmonisation of European Civil Law on Development of Estonian Law of Obligations*, Juridica International 1998, pp. 98–102.

Kull I.: *Principle of Freedom of Contract in European Civil Law and Reform of Law of Obligations in Estonia* (in:) *Tiesību transformācijas problēmas sakarā ar integrāciju Eiropas Savienībā: starptautiskās konferences materiāli: Problems of Transformation of Law in Connection with European Integration*, J. Lazdiņš (Ed.), Riga 2002.

Kull I.: *European and Estonian Law of Obligations — Transposition of Law or Mutual Influence?*, Juridica International 2004, pp. 32–44.

Kull I.: *Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law*, Juridica International 2008, pp. 122–129.

Küpper H.: *Ungarns neues BGB — Teil 1: Entstehung und Inhalt*, Zeitschrift zur Rechts- und Wirtschaftsentwicklung in den Staaten Mittel- und Osteuropas 2014, pp. 129–135.

Leszczyński L.: *Funkcje klauzul odsyłających a model ich tworzenia w systemie prawa*, Państwo i Prawo 2000, No. 7, pp. 3–17.

Łętowska E. (Ed.): *Prawo zobowiązań — część ogólna, System prawa prywatnego*, vol. 5, 2nd edn, Warszawa 2013.

Łętowska E. and Wiewiórowska-Domagalska A.: *The Common Frame of Reference — The Perspective of a new Member State*, ERCL 2007, No. 3, pp. 277–294.

Luts M.: *Textbook of Pandects or New Style of Legislation in Estonia?*, Juridica International 2001, pp. 152–158.

Machnikowski P.: *Zasada swobody umów jako problem kodyfikacyjny* (in:) *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, M. Sawczuk (Ed.), Kraków 2006.

Mączyński A.: *Die Entwicklung und die Reformpläne des polnischen Privatrechts* (in:) *Privatrechtsentwicklung in Zentral- und Osteuropa*, R. Welser (Ed.), Wien 2008.

Menyhárd A.: *Contracts* (in:) *Introduction to Hungarian Law*, A. Harmathy (Ed.), 2nd edn, 2019.

Mikelenas V.: *Unification and Harmonisation of Law at the Turn of the Millennium: The Lithuanian Experience*, Uniform Law Review 2000, No. 2, pp. 243–260.

Mikelenas V.: *The Influence of Instruments of Harmonisation of Private Law upon the Reform of Civil Law in Lithuania*, Juridica International 2008, pp. 143–150.

Mikelenas V.: *The Main Features of the New Lithuanian Contract Law System Based on the Civil Code of 2000*, Juridica International 2005, pp. 42–50.

Mikk H.: *Zur Reform des Zivilrechts in Estland*, Jahrbuch für Ostrecht 2001, No. 42, pp. 31–52.

Miler D.: *Czynności mające na celu obejście ustawy na tle orzecznictwa sądów polskich*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2019, No. 4, pp. 109–124.

Mizaras N.: *Das neue Zivil- und Zivilprozessrecht in Litauen*, Zeitschrift für Europäisches Privatrecht 2002, pp. 466–488.

Možina M.: *Harmonisation of Private Law in Europe and the Development of Private Law in Slovenia*, Juridica International 2008, pp. 173–180.

Možina M. and Vlahek A.: *Contract Law in Slovenia*, The Netherlands 2019.

Nikšic S.: *Contract Law* (in:) *Introduction to the Law of Croatia*, T. Josipović (Ed.), *Introduction to the Law of Croatia*, The Netherlands 2014.

Osajda K. (Ed.): *Kodeks cywilny. Komentarz*, vol. II, Warszawa 2013.

Petrov J.: *Občanský zákoník: komentář*, Praha 2017.

Pilich M.: *Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej*, Studia Prawnicze 2006, No. 4, pp. 37–57.

Pisuliński J.: *Struktura części ogólnej prawa zobowiązań (wprowadzenie do dyskusji)*, Transformacje Prawa Prywatnego 2017, No. 2, pp. 37–51.

Poczobut J.: *Geschichtlicher Hintergrund, heutiger Stand und Perspektiven des polnischen Privatrechts* (in:) *Privatrechtsentwicklung in Zentral- und Osteuropa*, R. Welser (Ed.), Wien 2008.

Polajnar-Pavcik A.: *Neukodifikationen des Privatrechts in Slowenien* (in:) *Kodifikácia, europeizácia a harmonizácia súkromného práva*, P. Blaho and J. Švidroň (Eds.), Bratislava 2005.

Radwański Z.: *Kodifikationsprobleme des Zivilrechts in Polen* (in:) *Kodifikácia, europeizácia a harmonizácia súkromného práva*, P. Blaho and J. Švidroň (Eds.), Bratislava 2005.

Radwański Z.: *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, 2006.

Radwański Z.: *Zielona Księga. Optymalna wizja kodeksu cywilnego Rzeczypospolitej Polskiej*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2007, No. 1, pp. 5–16.

Radwański Z.: *Prawo cywilne — część ogólna*, *System prawa prywatnego*, vol. 2, 2nd edn, Warszawa 2008.

Radwański Z.: *Aktualność posłużenia się częścią ogólną kodeksu cywilnego jako instrumentem regulacji prawa prywatnego*, Transformacje Prawa Prywatnego 2010, No. 4, pp. 13–20.

Redakcja: *Projekt Kodeksu cywilnego. Księga pierwsza. Sprawozdanie z dyskusji przeprowadzonej w Izbie Cywilnej Sądu Najwyższego*, Przegląd Sądowy 2010, No. 2, pp. 104–123.

Reich N.: *Transformation of Contract Law and Civil Justice in the New EU Member Countries — The Example of the Baltic States, Hungary and Poland* (in:) *The Institutional Framework of European Private Law*, F. Cafaggi (Ed.), Oxford 2006.

Rudolf C.: *Slowenien: Neues Schuldgesetzbuch in Kraft*, WGO — Monatshefte für Osteuropäisches Recht 2002, pp. 7–8.

Safjan M.: *Klauzule generalne w prawie cywilnym (przyczynek do dyskusji)*, Państwo i Prawo 1990, No. 11, pp. 48–59.

Safjan M.: *Zasada swobody umów (uwagi wstępne na tle wykładni art. 353[1] k.c.)*, Państwo i Prawo 1993, No. 4, pp. 12–19.

Schulze U.: *Das litauische Zivilrecht — Entwicklung, IPR und Allgemeiner Teil*, WGO — Monatshefte für Osteuropäisches Recht 2001, pp. 331–356.

Slakoper Y.: *Allgemeines Bürgerliches Gesetzbuch (ABGB) und kroatisches bürgerliches Recht* (in:) *200 Jahre ABGB — Ausstrahlungen. Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen*, M. Geistlinger and others (Eds.), Wien 2011.

Slakoper Z. and Gorenc V.: *Obvezno pravo — Opći dio*, Zagreb 2009.

Sawczuk M. (Ed.): *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, Kraków 2006.

Stawecki T.: *Obejście prawa. Szkic na temat granic prawa i zasad jego wykładni* (in:) *Nadużycie prawa*, H. Izdebski and A. Stępkowski (Eds.), Warszawa 2003.

Steinke D.: *Die Zivilrechtsordnungen des Baltikums unter dem Einfluss ausländischer, insbesondere deutscher Rechtsquellen*, Osnabrück 2009.

Tichý L.: *Processes of Modernisation of Private Law Compared, and the CFR's Influence*, Juridica International 2008, pp. 35–42.

Tichý L.: *Stand und Entwicklung des Privatrechts und der Tschechischen Republik* (in:) *Privatrechtsentwicklung in Zentral- und Osteuropa*, R. Welser (Ed.), Wien 2008.
Tracz G., Zoll F.: *Przewłaszczenie na zabezpieczenie*, Kraków 1996.
Trstenjak V.: *Zivilrecht in Slowenien: Entwicklung und Stand der Dinge heute*, Zeitschrift für Europäisches Privatrecht 2000, pp. 77–89.
Trstenjak V.: *Das neue slowenische Obligationenrecht*, WGO — Monatshefte für Osteuropäisches Recht 2002, pp. 90–110.
Trstenjak V.: *Das ABGB in Slowenien* (in:) *Festschrift 200 Jahre ABGB*, C. Fischer-Czermak and others (Eds.), vol. 1, Wien 2011.
Varul P.: *Creation of New Private Law in Estonia*, Rechtstheorie 2000, nos. 3–4, pp. 349–370.
Varul P.: *Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia*, Juridica International 2000, pp. 104–118.
Varul P.: *Estonian Private Law and the European Union* (in:) *Tiesību transformācijas problēmas sakarā ar integrāciju Eiropas Savienībā: starptautiskās konferences materiāli: Problems of Transformation of Law in Connection with European Integration*, J. Lazdiņš (Ed.), Riga 2002.
Varul P.: *The New Estonian Civil Code* (in:) *Zivilrechtsreform im Baltikum*, H. Heiss (Ed.), Tübingen 2006.
Varul P.: *The Creation of New Estonian Private Law*, European Review of Private Law 2008, No. 1, pp. 95–109.
Varul P.: *The Impact of Harmonisation of Private Law on the Reform of Civil Law in the New Member States* (in:) *The Foundations of European Private Law*, R. Brownsword and others (Eds.), Oxford, Portland 2011.
Vékás L.: *Über die Expertenvorlage eines neuen Zivilgesetzbuches für Ungarn*, Zeitschrift für Europäisches Privatrecht 2009, pp. 536–563.
Vékás L.: *Über das ungarische Zivilgesetzbuch im Spiegel der neueren europäischen Privatrechtsentwicklung*, Zeitschrift für Europäisches Privatrecht 2016, pp. 37–52.
Wąsowicz W.: *Obejście prawa jako przyczyna nieważności czynności prawnej*, Kwartalnik Prawa Prywatnego 1999, No. 1, pp. 69–95.
Wabnitz H.-B., Holländer P. (Eds.): *Einführung in das tschechische Recht*, München 2009.
Zieliński T.: *Klauzule generalne w nowym porządku konstytucyjnym*, Państwo i Prawo 1997, nos. 11–12, pp. 134–147.
Zimmermann R.: *The civil law in European codes* (in:) *Regional Private Laws and Codification in Europe*, H.L. MacQueen and others (Eds.), Cambridge 2003.
Zukas T.: *Reception of the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania* (in:) *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and*

Codification. Reports of the ISDC Colloquium (8/9 June 2006), E. Cashin-Ritaine and E. Lein (Eds.), Zürich 2007.

Zukas T.: *Einfluss der «Unidroit Principles of International Commercial Contracts» und der «Principles of European Contract Law» auf die Transformation des Vertragsrechts in Litauen*, Bern 2011.

Żuławska C.: *Wokół zasady wolności umów (art. 353[1] k.c. i wykładnia zwyczaju)*, Acta Universitatis Wratislaviensis, No. 1690, Prawo CCXXXVIII, Wrocław 1994, pp. 173–186.

Tytuł w języku polskim: Kodyfikacje prawa zobowiązań w Europie Środkowej i Południowo-Wschodniej w kontekście proponowanej regulacji swobody umów w nowym polskim kodeksie cywilnym

Słowa kluczowe: swoboda umów, ograniczenia swobody umów, prawo zobowiązań w Europie Środkowej i Południowo-Wschodniej, nowy polski kodeks cywilny.

DOROTA MILER

CODIFICATIONS OF THE LAW OF OBLIGATIONS IN CENTRAL AND SOUTHEAST EUROPE IN THE CONTEXT OF THE PROPOSED REGULATION OF THE FREEDOM OF CONTRACT IN A NEW POLISH CIVIL CODE

Summary

A group of Polish scholars is preparing an Academic Draft of a New Civil Code (ADCC) that is supposed to replace the current Polish Civil Code. The scholars are continuing the work started by the Polish Codification Commission of the Civil Law (an advisory body of the Minister of Justice) after the members of the Commission were relieved of their duties in December 2015.

One of the questions that the drafters of the new civil code must answer is how to limit the freedom of contract in the new codification. The drafters must determine whether to explicitly articulate the principle of the freedom of contract in the new codification and how to limit it. Further, they must decide where to locate the provision prescribing the limitations, what acts they should apply to, what limitations should be provided and how to interpret them.

Since 1990, the law in post-communist countries has been recodified to adjust to new economic, social and political conditions. The author presents the limitations of the freedom

of contract adopted in the most recent codifications in Central and Southeast Europe in the context of proposals made in the (academic) draft of a new Polish Civil Code. In particular, civil codes from Lithuania, Estonia, the Czech Republic and Hungary, as well as acts regulating the law of obligations which entered into force in Slovenia and Croatia are considered. In addition, for purposes of comparison, the text briefly presents legal provisions adopted in selected instruments proposing the harmonization of European private law, as well as in the BGB, the Dutch Civil Code and the Civil Code of Quebec.

Keywords: freedom of contract, limitations on freedom of contract, law of obligation in Central and Southeast Europe, new Polish Civil Code.