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The Influence of Instruments of Harmonisation of Private Law upon the Reform of Civil Law in Lithuania

The declaration of independence of Lithuania in 1990 was a natural consequence of the national movement that had started in 1988. This two-year concentration of change was a time of demonstrations, songs, and national euphoria. Thus it is no accident that this time is called a 'singing revolution'. It was also natural that the driving forces in those two years were feelings and emotions rather than rational thinking about the future after the main task — the declaration of independence — had been achieved. There is no surprise that nobody in those two years seriously discussed the model of the future legal system of Lithuania to be introduced in the aftermath of the declaration of independence. So Lithuanian society reached independence without a clear vision for the system of law, including private law, of the future independent Lithuania. The consequence of such inactivity was the temporary retention of the Soviet legal system.

1. Possible approaches for the creation of the new system of private law

As Lithuania restored its independence on 11 March 1990, a need arose to create a new system of law, including private law. A completely new political, economic, and social situation demanded the complete abolishment of, or at least significant changes to, the laws inherited from the Soviet era. In the area of civil law, the main source has remained the Civil Code of 1964. However, this civil code was a typical example of the Socialist civil law that did not recognise private ownership and private business, freedom of contract, or other main institutes of the Western legal tradition. Thus, the Civil Code of 1964 was not suitable for the new political and economic situation and could not serve as a basis for the new system of civil law. Naturally, the legal society was faced with an existential question similar to that of Hamlet, pondering what to do. There were at least two possible ways of introducing a new system of civil law in Lithuania. The first one was the reintroduction of the pre-war system of private law, which was applied between 1919 and 1940. The idea of restoration of the former pre-war legal system of Lithuania was even supported by some of the politicians who were defending the so-called doctrine of continuity of the state. According to the doctrine of continuity, Lithuania was not a newly established state but simply a continuation of the former Republic of Lithuania of 1918–1940. The idea of continuity of the state was quite strong in the area of constitutional law. For example,

the newly elected parliament restored the validity of the Constitution of 1938. However, on the same day, the parliament suspended the validity of the Constitution of 1938 and adopted a new provisional constitution, which was later replaced by another document, the Constitution of 1992.¹

The reintroduction of the pre-war system of private law was even more complicated. The problem was that a purely Lithuanian system of private law had ceased to exist in 1840 because of the division of the Polish–Lithuanian state among other states. The laws of Prussia, Russia, and other states were introduced in the relevant parts of the territory of Lithuania. For these historical reasons, a reception of four different legal systems of private law took place in 1918 when Lithuania declared its independence. Between 1918 and 1940, the Russian Civil Laws of 1830 were applied in the largest part of Lithuania. In the Klaipeda region, the German *Bürgerliches Gesetzbuch* (BGB) was applied. In the territory on the east side of the river Nemunas, the French Civil Code was applied. In the regions of Palanga and Zarasai, the Third Part of the Digest of the Baltic Local Laws of 1864 was applied.² Such a decentralised system of private law in a small country was not acceptable, and the Commission for the Preparation of the Civil Code of Lithuania was established in 1937. Unfortunately, the activities of this commission were terminated in 1940 and the drafts of several parts of the Civil Code were lost during the war. Thus it was clear that this first option — reintroduction of the pre-war system of private law — was not possible, because of its complexity and the difficulties of adaptation to the present economic, political, and social situation.

The second possibility was to start the preparation of a completely new civil code. This was a more realistic path than a reintroduction of the pre-war system. Nevertheless, this way also presented some difficulties. The main problem was the time factor. Everybody understood that the preparation of a new civil code was a time-consuming job that could take many years. But the state and society needed a new civil code as soon as possible because the application of the Civil Code of 1964 was no longer acceptable from the political, economic, and social points of view. Therefore, the working group established for the preparation of the new Civil Code material had time for neither detailed research nor analyses.³ The second problem was that pertaining to sources — which sources had to be used for the preparation of a new civil code? The working group was charged by the parliament and the Ministry of Justice with a singular task — to prepare a new civil code in the shortest possible time. No other tasks or instructions regarding the model, content, etc. were issued for the working group. Hence, the working group was given free rein to decide upon all questions related to the future new Civil Code of Lithuania. The lack of political instructions meant that on the one hand the working group was free to decide upon the model of the future civil code and the sources to be used for its preparation. On the other hand, such freedom imposed a great responsibility on the working group.

The working group had no intentions to prepare a ‘pure Lithuanian’ civil code (such a task was in 1937 prescribed by the Ministry of Justice for the working group).⁴ On the other hand, for various reasons, the working group also decided not to use as its model the civil code of any particular country. It was clear that the new Lithuanian Civil Code had to be a modern legal act to regulate relationships in the 21st century. Thus, it was natural that the main sources that served as a model for the working group were the results of the new 20th-century national codifications of civil law (the new Civil Code of the Netherlands, the new Civil Code of Quebec, etc.) as well as the outcomes of the international harmonisation and unification of private law.

In 1995, Lithuania signed an agreement establishing an association between Lithuania and the European Communities and their Member States. The political decision of Lithuanian politicians at that time was very clear — integration into the European Union. In order to achieve this task, Lithuania needed to harmonise its laws with European Union law. It was also clear for the working group that the future civil code had to be in full compliance with European Union law. Consequently, the preparation of the new civil code at the same time meant incorporation of European Union laws into the national law. The majority of European Union directives valid until 2000 were incorporated into the Civil Code. Among those directives, the provisions that have become articles of the Civil Code are the following, among others:

- directive 93/13/EEC on unfair contract terms in consumer contracts (article 6.188 of the Civil Code);
- directive 85/557/EEC to protect the consumer in respect of contracts negotiated away from business premises (articles 6.356–6.357 of the Civil Code);
- directive 86/653/EEC on the harmonisation of legislation of the member states concerning independent commercial agents (articles 2.123–2.139 of the Civil Code);

¹ C. Taube. *Constitutionalism in Estonia, Latvia and Lithuania. A Study in Comparative Constitutional Law*. Uppsala: Iustus Förlag 2001, pp. 33–45; D. A. Loeber. *Regaining Independence — Constitutional Aspects: Estonia, Latvia, Lithuania. — Review of Central & East European Law* 1998/1, pp. 1–2.

² V. Mikelenas. *Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience. — Uniform Law Review* 2000/2, pp. 253–261.

³ The Working Group for the preparation of the new Civil Code of Lithuania was established in 1992 and consisted of seven members.

⁴ For a more detailed overview of attempts to unify private law during 1937–1940 in Lithuania, see P. Stravinskis. *Kaip ruošėme Lietuvos Civilinį kodeksą. — Teisininkų žinios* 1958/25–26, pp. 15–16 (in Lithuanian).

- regulations 1983/83 and 1984/83 concerning distributorship (articles 6.782–6.792 of the Civil Code); and
- directive 84/450/EEC concerning civil liability for misleading advertising (articles 6.301–6.304 of the Civil Code).⁵

The working group also decided to incorporate into the Civil Code other instruments of European Law; e.g., the Rome Convention on the Law Applicable to Contractual Obligations of 1980 was incorporated into articles 1.37 and 1.39 of the Civil Code.

Notwithstanding the efforts of the working group to incorporate the relevant provisions of European Union law into the Civil Code, the results of such implementation were not always satisfactory. The main problem was that the responsibility for the implementation of European law during the accession period was distributed among various ministries and departments. For example, the Ministry of Justice was responsible for the preparation of the Civil Code, while, at the same time, the Ministry of Economics was responsible for the modernisation of company law. A dispute between these two ministries arose regarding the content of the Civil Code — the Ministry of Justice insisted that the Civil Code had to establish general provisions on legal persons as well as special rules on specific types of legal persons (stock corporations, co-operatives, foundations, partnerships, etc.). On the other hand, the Ministry of Economics argued that specific types of legal persons had to be regulated by special laws outside the Civil Code. The government supported the position of the Ministry of Economics; thus, the regulation of specific types of legal persons and questions of bankruptcy was excluded from the scope of the Civil Code. Because of this, the majority of the European Union directives on company law were implemented not by means of the Civil Code but through special laws.

The same could be said about other areas of law covered by European Union law. For example, a special section of Book Six of the Civil Code provides for specific contract concerning tourism services. The articles of this section implement the European directive on package travel contracts. At the same time, the Department of Tourism initiated drafting of the Law on Tourism, which also established rules on the contracting of tourism services. A similar situation can be seen in the area of consumer protection. Notwithstanding the fact that the relevant articles of the Civil Code implemented the above-mentioned European Union directives in the area of consumer protection, a special law on consumer protection was adopted, which repeated the same provisions.

Nevertheless, the European Union laws that existed at the time when the Civil Code was being prepared were not the only source used in the drafting process. The working group tried to incorporate into the Civil Code as many international instruments as possible. At the time of the beginning of the preparation of the Civil Code, Lithuania had ratified only a few international conventions in the area of private law. For example, on 19 January 1993, Lithuania ratified the United Nations Vienna Convention on Contracts for the International Sale of Goods of 1980. But many other important instruments on international harmonisation and unification of private law were not ratified. The working group decided to use these international instruments as a source in the drafting of various parts of the Civil Code. For example, the following instruments were incorporated into the Civil Code: provisions of the UNIDROIT Convention on Agency in the International Sale of Goods (articles 2.140–2.146 of the Civil Code), provisions of the UNIDROIT Ottawa Convention on International Financial Leasing (articles 6.562–6.569 of the Civil Code), provisions of the UNIDROIT Ottawa Convention on International Factoring of 1988 (articles 6.883–6.892 of the Civil Code), and provisions of the Convention on the Liability of Hotel-keepers concerning the Property of their Guests of 1962 (article 6.851 of the Civil Code).

In addition, the working group used as a model various documents of the Council of Europe. For example, the regulation of civil contractual liability in the form of civil penalty is based on resolution No. 3(78) of the European Council of Ministers on Penal Clauses in Civil Law, of 20 January 1978 (articles 6.71–6.75 of the Civil Code). Article 6.52, dealing with the place of the performance of monetary obligations, is based on the European Convention on the Place of Payment of Money Liabilities of 1967.

The activity of the working group is a good example of how international instruments could become part of the national law without a long ratification procedure as applicable to international treaties. On the other hand, Lithuanian experience of incorporation of international instruments into the national law by the above-mentioned method illustrates the importance of law professors for the national legislation process and for international harmonisation and unification of law. As was mentioned by J. H. Merryman, the civil law is a law of the professors.⁶ This is particularly true in respect of Lithuania. On the one hand, the Civil Code of Lithuania is a product of the work of law professors, as all of the members of the working group were professors of the Faculty of Law of Vilnius University. On the other hand, thanks to the effort of the members of the working group, many international instruments in the area of private law today are part of Lithuanian private law. If the question of incorporation of those instruments had been left to politicians to be dealt with

⁵ According to the official data of the European Commission, Lithuania has implemented about 98% out of the EU law and in this respect is a leader among the new Member States.

⁶ J. H. Merryman. *The Civil Law Tradition*. 2nd ed. Stanford, California: Stanford University Press 1985, p. 56.

by ratification procedure, probably the majority of those instruments never would have been incorporated into Lithuanian law. In this respect, the Lithuanian experience is a good example of the autonomous and voluntary use of international instruments for the creation and modification of national law.

However, the importance of one particular source of the Lithuanian Civil Code must be given more detailed mention here — the UNIDROIT Principles of International Commercial Contracts (the UNIDROIT Principles).

2. The UNIDROIT Principles — the way to national law

Lithuanian experience of the use of the UNIDROIT Principles in the modification of national contract rules has already been discussed. It has been mentioned in several articles that the contract law provisions of the new Lithuanian Civil Code to a great extent follow the UNIDROIT Principles.⁷ Though this is an accurate assessment, it nevertheless needs some clarification.

The first version of the UNIDROIT Principles was published in 1994. At that time Lithuania was not yet a member of UNIDROIT, and, unfortunately, Lithuanian representatives did not participate in the process of the preparation of the UNIDROIT Principles. Consequently, at that time the Lithuanian role in the process of harmonisation of contract law in Europe was that of a 'bystander'. In 1994, the working group finally finished the first draft of the Civil Code, including the chapter on the general provisions of contract law. However, after the working group had discovered the fact of the publication of the UNIDROIT Principles, it was decided to return to the provisions concerning contract law, once again. Despite the UNIDROIT Principles not constituting a binding instrument, it was clear to the working group that this instrument was some kind of 'better law' that could serve as a model for the contract law of the new millennium. The decision of the working group to consider the provisions of contract law again in this light could be explained by the importance of this part of the Civil Code for the society in transition, the aim of which was to create an effectively functioning market economy and a system of private ownership. On the other hand, contract law in the Civil Code of 1964 was undeveloped and the working group tried to modernise contract law as much as possible.

Nevertheless, the decision of the working group to re-draft the chapters on the general provisions of contract law was not so easy to implement. Various problems emerged before the working group. Here one might mention just a few of them.

First of all, the UNIDROIT Principles are a 'fragmented code' or a miniature contract code. Conversely, the national civil code is a comprehensive, sometimes very general and systemic act that covers not only contract law but also persons, property law, family law, succession law, different kinds of obligations, specific contracts, etc. For example, the draft Civil Code of Lithuania consisted of six books. Book One included general provisions on the notion and types of legal transactions, the form and validity of legal transactions, etc. Book Six provided general provisions on obligations, such as performance of obligations, effects of non-performance, and contractual and tort liability. The structure of the Civil Code was not exactly conducive to a consistent incorporation of the UNIDROIT Principles. It was clear that incorporation of the UNIDROIT Principles into the Civil Code would require adaptation of some provisions of these principles. For example, notwithstanding the fact that the majority of the UNIDROIT Principles are incorporated into Part II, 'Contract Law', of Book Six of the Civil Code, some provisions of the UNIDROIT Principles could be found in relevant chapters of Book One regarding legal transactions and in relevant chapters of Book Six regarding general questions of the law on obligations. On the other hand, the structure and system of the Civil Code did not allow full acceptance of some provisions of the UNIDROIT Principles. For example, article 3.4 of the UNIDROIT Principles, on the definition of mistake, was incorporated into article 1.90 of the Civil Code only partly, i.e., the Civil Code defines a mistake as erroneous assumption relating to facts only, not relating to law. Such partial acceptance of article 3.4 of the UNIDROIT Principles could be explained by article 1.6 of the Civil Code, according to which ignorance of laws or improper understanding thereof does not exempt one from the application of the sanctions established therein and may not justify failure to comply with the requirements of laws, and likewise improper compliance therewith.

⁷ M. J. Bonell. *The UNIDROIT Principles in Practice: The Experience of the First Two Years*. – *Uniform Law Review* 1997/1, p. 37; E. H. Hondius. *Export van Westers recht naar Oost-Europa: het voorbeeld van Litouwen*. – *Import en export van burgerlijk recht*. AW – *Krant Jaarboek* 1997 (13), pp. 113–127; N. Reich. *Transformation of Contract Law and Civil Justice in the New EU Member Countries — The Example of the Baltic States, Hungary and Poland*. – *Penn State International Law Review* 2004–2005 (3) 3, pp. 587–598; T. Zukas. *Reception of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania*. – E. Cashin Ritaine, E. Lein (ed.). *The UNIDROIT Principles 2004. Their Impact on Contractual Practice, Jurisprudence and Codification*. Reports of the ISDC Colloquium (8/9 June, 2006). Zürich: Schulthess 2007, pp. 231–243.

The second difficulty related to the incorporation of the UNIDROIT Principles was that they were conceived for international contracts. The working group understood that some liberal provisions of the UNIDROIT Principles would not be accepted by politicians during the process of adoption of the Civil Code in Parliament. For example, ideas of formalism in contract law were quite strong in Lithuania. Such a conclusion is supported by the fact that Lithuania, when ratifying the Vienna Convention on International Sale of Goods, exercised the right provided by articles 12 and 96 of this convention and made reservations regarding the application of articles 11 and 29 of said convention. According to this reservation, articles 11 and 29, or Part II of the convention, allowing a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form and not just in writing, shall not apply where any party to the contract has his place of business in Lithuania. Because of this and also the fact that the Civil Code regulated contracts regarding acquisition of real property and real rights, special rules on the form of legal transactions were provided by the Civil Code and article 1.2 of the UNIDROIT Principles was not accepted.

The third problem was that the UNIDROIT Principles were basically conceived for commercial contracts. The Civil Code was intended to regulate three different types of contracts — commercial, civil, and consumer. Therefore, it was necessary to provide general rules applicable to all types of contracts and special rules applicable only in respect of commercial or consumer contracts.

The time factor and the issue of human resources must be mentioned also. As has been mentioned above, the working group was asked to prepare a new civil code within the shortest possible time. As a result, the group did not have enough time to study all relevant materials related to the UNIDROIT Principles and methods and the consequences of their incorporation into the Civil Code. On the other hand, as was also mentioned, the working group consisted of only seven members and the possibility to employ consultants and advisers was limited also. Nevertheless, the working group applied its initiative and sought advice from foreign specialists involved in the process of the preparation of the UNIDROIT Principles — namely, Professors J. Bonell, P. Schlechtriem, and U. Drobnig. We are most grateful to all of them for their useful advice.

Finally, the last but not the least reason for not all provisions of the UNIDROIT Principles being incorporated into the Civil Code was the critical attitude of the members of the working group to some of the provisions of the UNIDROIT Principles. It is almost a universal rule that uniform international documents are largely the result of compromise. This approach means that other solutions to a given problem are also possible and that a solution reached by way of compromise is not always the best solution. Even uniform international documents have weak parts and are sometimes subject to criticism, often justifiably.⁸ Thus it was natural that some provisions of the UNIDROIT Principles were not compatible with the ideas supported by the members of the working group. For example, the working group insisted on strict application of the principle of *pacta sunt servanda*. The elements of this principle are clearly established by the relevant provisions of the Civil Code. For example, Part 1 of article 6.189 of the Civil Code provides that a contract formed in accordance with the provisions of the law and that is valid shall have the force of law between its parties. Obviously, it is not possible for a party either to unilaterally avoid a contract or to unilaterally refuse to perform an obligation that arises out of a contract (under article 6.59 of the Civil Code). For these reasons, the working group decided not to accept the institute of avoidance of a contract, as provided by articles 3.14–3.17 of the UNIDROIT Principles, because unilateral avoidance of a contract could lead to instability of civil relationships. As a result, the Civil Code provides that in the event of mistake, fraud, or threat, the interested party must start court proceedings for the annulment of a contract.

On the other hand, it was necessary to enshrine in the Civil Code the contract law provisions that were widely accepted though, as a consequence of their general recognition, not made explicit in the UNIDROIT Principles, among them the principle of the freedom of contract and types of contracts. The necessity of the inclusion of such generally recognised provisions is explained by the lack of such provisions in previous legislation. For example, the Civil Code of 1964 did not provide the principle of the freedom of contract, as this principle was not recognised under Soviet legal doctrine.

The adoption of a new version of the UNIDROIT Principles has raised a number of new questions about the relationship between the new chapters of the UNIDROIT Principles and the Civil Code. At the moment, there is no intention to make a revision of the Civil Code and to incorporate these new chapters of the principles into the Civil Code. Nevertheless, the new chapter of the UNIDROIT Principles of 2004 will be used in the interpretation process of the relevant provisions of the Civil Code. We even have some examples of such interpretation. For instance, in one arbitration case, article 6.101 of the Civil Code, which allows non-assignment clauses, was interpreted in the light of article 9.1.9 of the UNIDROIT Principles of 2004, which provide that the non-assignment clause shall not be valid in respect of the monetary claims of the creditor. Such examples allow one to make optimistic assumptions that, in the future, all contract law provisions of the Lithuanian Civil Code will be interpreted in the light of the UNIDROIT Principles of 2004.

⁸ U. Mattei. The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments. — Hastings International and Comparative Law Review 1998 (21), pp. 898–901; P. Linzer. Validity under Chapter 3 of UNIDROIT Principles of International Commercial Contracts. Available at www.bibliojuridica.org/libris (19.02.2008).

3. Experience of seven years of application of the Civil Code: A case study approach

The new Civil Code of Lithuania entered into force on 1 July 2001. Thus, we have approximately seven years of practical experience of the application and interpretation of the rules of this 'private law constitution' and it is possible to draw some conclusions.

The first conclusion that follows from the experience of these seven years is the confirmation of the well-known division between the 'law on the books' and 'law in action'. Yes, Lithuania transferred into its statutory law — i.e., into the Civil Code — many harmonised and uniform rules of private law, including provisions of European Union law, provisions of several international conventions, the Council of Europe documents, and the absolute majority of the provisions of the UNIDROIT Principles of 1994, among other materials. In this respect, the codification process in Lithuania between 1990 and 2000 could be described in the words of Professor A. Watson as a process of 'transplantation'.⁹ Nevertheless, the transplantation of uniform international instruments into national statutory law is only the first step. The second, a more important and more complicated step, is the practical application and interpretation of these uniform provisions. The process of transplantation of international and foreign instruments into national law could be implemented by a few lawyers, as happened in Lithuania during the preparation of the Civil Code. However, the whole of the legal community must be involved in the process of application and interpretation of transplanted provisions. In this respect, the results of legal reform depend to a great extent on the qualification, knowledge, openness, and willingness of all members of the legal community. Unfortunately, the legal community in Lithuania still possesses many features of the former Soviet legal system. Over the last decade, the legal thinking and legal practice in post-Soviet states have been submitted to extensive critical assessment. For example, former Justice of the European Court of Justice David A. O. Edward highlighted the 'legal deficit' in post-Soviet states — the lack of rich law libraries and good textbooks, as well as lack of publication of court judgments.¹⁰ Other critics mentioned the weakness of the judiciary in these states.¹¹ These critical comments are, of course, valid. Despite the efforts of legal harmonisation and unification, there is no single, common legal community in Europe, and legal thinking and legal methodology are still divided at the European level. It will take many years to eliminate the legacy of the Soviet legal mind and to improve the knowledge of lawyers who were educated during Soviet times. Only when new generations of lawyers, educated in Western universities, replace the old generation of jurists can we speak of a more real common European legal thinking.

The outlook for this aspect of private law reform looks more doubtful and even pessimistic. For example, since the entry into force of the civil code, the courts of Lithuania have heard a thousand civil cases in which they have applied the contract rules of the new code. Several hundred of these cases reached the Supreme Court of Lithuania. Unfortunately, only in 11 contract law dispute cases did the lawyers of the parties base their arguments on the UNIDROIT Principles and only in four cases did the Supreme Court itself mention the UNIDROIT Principles. Even in these four cases, the application of the UNIDROIT Principles in fact entailed only a reference to the relevant article of the UNIDROIT Principles rather than proper extensive argumentation based on the doctrine, court practice of other states, or arbitral awards applying the same provision of the UNIDROIT Principles.

The best way to show the difficulties in applying and interpreting the provisions of the UNIDROIT Principles that are 'transplanted' into the Lithuanian Civil Code might be an analysis of one civil case. The case in question concerns the application of articles 1.7 and 2.15 (2) of the UNIDROIT Principles, regarding good faith in pre-contractual relationships. The provisions of the above-mentioned articles of the UNIDROIT Principles are incorporated into several articles of the Civil Code. Article 1.5 of the Civil Code provides that, in exercise of their rights and performance of their duties, the subjects of civil relationships shall act according to the principles of justice, reasonableness and good faith. The same article provides that, in interpreting and applying laws, the courts shall be guided by the principles of justice, reasonableness, and good faith. Article 6.4 of the Civil Code provides that the debtor must conduct himself in good faith, reasonably and justifiably both at the time the obligation has been created and is existing and at the time it is under performance or extinguishment. According to article 6.158 of the Civil Code, each party to a contract shall be obliged to act in accordance with good faith in handling of contractual relationships. A special article (article 6.163) of the Civil Code establishes obligations of the parties in pre-contractual relationships. According to this article, in the course of pre-contractual relationships, the parties shall conduct themselves in accordance with good faith.

⁹ A. Watson. *Legal Transplants. An Approach to Comparative Law*. Edinburgh: Scottish Academic Press 1974, pp. 4–5.

¹⁰ D. A. O. Edward. *What Kind of Law Does Europe Need? The Role of Law, Lawyers and Judges in Contemporary European Integration*. — *The Columbia Journal of European Law* 1998/5, pp. 1–14.

¹¹ Z. Kühn. *European Law in the Empires of Mechanical Jurisprudence: the Judicial Application of European Law in Central European Candidate Countries*. — *Croatian Yearbook of European Law and Policy* 2005 (1), pp. 55–73; F. Emmert. *Administrative and Court Reform in Central and Eastern Europe*. — *European Law Journal* 2003 (9) 3, pp. 288–315; Z. Kühn. *The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts*. — *Croatian Yearbook of European Law and Policy* 2006/2, pp. 19–26.

The same article provides that the parties shall be free to begin negotiations and negotiate and that they shall not be liable for failure to reach an agreement. However, a party who begins negotiations or negotiates in bad faith shall be liable for the damages caused to the other party. It shall be considered bad faith for a party to enter into negotiations or continue them without intending to reach an agreement with the other party, or to conduct any other actions that do not conform to the criteria of good faith. One can see that the requirement of good faith in pre-contractual relationships is clearly established by the Civil Code. However, as evidenced by the analysis of the applications of these provisions, the reality is much different from what is set out in the rules of the statutory law.

The facts of the case are as follows. The plaintiff — closed stock corporation Vilnius Vingis Cinema (the Plaintiff) — on 12 March 2002 announced a closed tender for the construction of a cinema building in Vilnius. The tender documents, including the standard conditions for the construction contract, were sent to several construction companies. Participating in this closed tender, defendant closed stock construction corporation Eika (the Defendant), on 2 April 2002 sent to the Plaintiff two proposals and confirmed its participation in the tender and its obligation to start construction work immediately after receiving the relevant instructions of the Plaintiff. These proposals also provided that the proposals (i.e., the offer) were to be irrevocable for a period of two months. After receiving these proposals, the Plaintiff on 15 April 2002 sent to the Defendant an explanatory letter aimed at the clarification of the price of the future construction work. On 17 and 18 April 2002, new irrevocable proposals of the Defendant were sent to the Plaintiff regarding the price of the future construction work. During the negotiations of the representatives of both parties on 18 April, the Defendant confirmed that he found all of the tender documents to be clear and the parties agreed that the Defendant would send the final offer by 2:30 pm on 19 April 2002. The minutes of the meeting also indicated that the Defendant had to inform the Plaintiff about the date of the start of the construction work, and the Defendant also asked the Plaintiff for advance payment. The next meeting between the parties took place on 19 April 2002. According to the minutes of this meeting, the parties finally agreed that the final price of the construction work would be 8,475,000 litas. The parties also agreed that the Defendant on the same day would send the final proposal containing that price and the Plaintiff would send to the Defendant the letter of intent. The parties also agreed that the contract would be signed on 22 April 2002. On 19 April, the Plaintiff sent to the Defendant the letter of intent confirming that the Defendant had been selected as a contractor for the construction of the cinema building and that the contractor would be able to start the construction work immediately. The letter of intent also stated that the construction contract had to be signed on 22 April 2002 and that until that date the letter of intent together with the proposal of the Defendant comprised a contract of obligatory force. Nevertheless, the Defendant did not respond to that letter of intent and on 22 April 2002 informed the Plaintiff of his refusal to sign the contract. After some time, the Plaintiff entered into a new construction contract, with another construction company, though the price of the construction work under the latter contract was higher by 1.9 million litas.

The Plaintiff sued the Defendant for damages, claiming 1.9 million litas as the difference between the price agreed for the construction work with the Defendant and the actual price paid to the other construction company, plus expenses incurred during the negotiations with the Defendant. However, the courts of first and second instance dismissed the Plaintiff's claim, arguing that no contract had been formed. The Supreme Court reversed the judgment of the Court of Appeal and remanded the case to be reheard. The main arguments of the Supreme Court related not only to the procedure of the formation of a contract but also to the correspondence of the activity of the parties to the requirements of the principle of good faith. In its judgment, the Supreme Court presented a comparative analysis of the procedure of the formation of contract and cited foreign comparative contract law sources.^{*12} The Supreme Court mentioned that sometimes it is difficult to distinguish between offer and acceptance. According to the Supreme Court, a contract is very often a result of consensus reached during a lengthy process of negotiation during which the parties exchange numerous proposals and counter-proposals. In the case under discussion, the Supreme Court pointed out that the parties had entered into negotiations. According to the general principle of good faith, parties are free to begin negotiations and negotiate without being held liable for failure to reach an agreement. Nevertheless, the above-mentioned principle requires the negotiation to be carried out in good faith. The Supreme Court, when interpreting the notion of good faith in negotiations, turned to the practice of the Dutch Supreme Court, which in its judgment of 18 June 1982 in the *Plas v. Valburg* case formulated the doctrine of three stages of negotiations. According to the Supreme Court, termination of negotiations during the last stage of negotiation without serious reasons is contrary to the principle of good faith. The Supreme Court also cited the 'Commentary' section of the UNIDROIT Principles.^{*13} According to the Supreme Court, articles 6.4, 6.158, and 6.163 of the Civil Code of Lithuania had been prepared on the basis of articles 1.7 and 2.15 of the UNIDROIT Principles and therefore had to be interpreted in the light of these principles. The Supreme Court ruled that, according to the facts of the case, the negotiation process between the parties had reached the final stage. The actions of the Defendant (asking for advance payment, the clarification of the day of the beginning of construction work,

¹² For example, the Supreme Court made references to the well-known book H. Beale et al. (eds.), *Contract Law: Cases, Materials and Text*. Oxford: Hart Publishing 2002.

¹³ UNIDROIT Principles of International Commercial Contracts with Commentary. Rome 1994.

etc.) created reasonable reliance on the part of the Plaintiff that the intentions of the Defendant were serious. According to the Supreme Court, Part 3 of article 6.163 of the Civil Code imposed civil liability for breaking off negotiation in bad faith. In the opinion of the Supreme Court, which is based on the Commentary of the UNIDROIT Principles, the Plaintiff was entitled both to recover the expenses incurred during the negotiations and to claim for the lost opportunity to conclude another contract with a third party on the same conditions (reliance or negative interest). The Supreme Court also pointed out that the lower courts had failed to investigate the facts of the case and the activities of the parties in view of the principle of good faith. According to the Supreme Court, even if the conclusion that the parties had not entered into a contract were valid, the lower courts' duty was to evaluate the activities of the parties during the negotiation process in the light of the requirements of good faith. The Supreme Court pointed out that the facts of the case made it obvious that, by his refusal without due reasons to sign the contract in the final stage of negotiations, the Defendant acted in bad faith; therefore, it held that he was to be held liable for the violation of the duty to act in good faith during the pre-contractual relationships. As the facts of the case were not investigated in terms of articles 6.4, 6.158, and 6.163 of the Civil Code, the Supreme Court quashed the judgment of the Court of Appeal and remanded the case to the Court of Appeal for a new hearing.^{*14}

Unfortunately, the outcome of the case before the Court of Appeals remained the same — the Court of Appeal dismissed the claim. When evaluating the behaviour of the Defendant, the Court of Appeal devoted just one sentence to indicating that the Defendant had acted in good faith.^{*15} No reference to the UNIDROIT Principles or other comparative law sources cited by the Supreme Court was made.

Analysis of the practice of Lithuanian courts shows that the courts are not ready to implement new provisions of the Civil Code that are based on the UNIDROIT Principles and other uniform international documents. There are many reasons for such a situation, but, in any case, it does not seem likely that this state of affairs might change in the nearest future.

Nevertheless, quite a different situation manifests itself in the area of arbitration. The parties and the arbitrators are more willing to apply the UNIDROIT Principles and other uniform international documents in deciding contractual disputes. Unfortunately, arbitration is not popular in Lithuania (only 10–15 cases per year are administrated in Lithuania by the Vilnius Court of Commercial Arbitration).

4. Conclusions

The creation of the national private law system in a post-Soviet state like Lithuania is a long-term process that requires many intellectual, political, and economic efforts and capabilities. The final task of this process is not just to prepare a civil code. Preparation and adoption of any code is only the first step, however important it may be, of this process. The final task of a reform is to make the private law system more modern, more predictable, more understandable, more just, and more efficient. In its material sense, the preparation and adoption of a civil code is a creative process. In order to ensure that this creative process is efficient and to achieve the final tasks of the reform, some prerequisites must be met. The success of private law reform and the transformation or transplantation of uniform international instruments into the form of national law need a relevant legal and cultural atmosphere, well-developed doctrine of law, qualified and active judiciary, good knowledge of comparative law on the part of the entire legal community, etc. We must also keep in mind that the law is absolutely not an autonomous subject. The statutory law, legal thinking, and legal practice depend on many cultural, political, economic, and other factors. Today Lithuania is part of the European Union. However, cultural, economic, legal, and other features in the East and West, in the North and South of the European Union are quite different. It is obviously because of these differences that the same rule of the UNIDROIT Principles could be interpreted and applied in different ways in various Member States. Consequently, it is not possible to achieve a more harmonised and uniform legal system without reducing the economic and cultural differences among the Member States.

¹⁴ Supreme Court, judgment of 19 January 2005, case No. 3K-3-38-2005. – Lietuvos Aukščiausiojo Teismo biuletenis Teismų praktika (Bulletin of the Supreme Court of Lithuania) 2005 (23), pp. 145–155 (in Lithuanian).

¹⁵ Court of Appeals, judgment of 5 April 2005, case No. 2A-161/2005. Unpublished.