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European Initiatives and Reform of Civil Law in Poland

1. The formative period of modern Polish civil law

Poland has a well-established tradition in adopting a comparative law approach to the codification of civil law. This has to a large extent been due to our historical experience.

When Poland lost its independence after it was partitioned by the neighbouring states at the end of the 18th century, Polish law was replaced with the legal systems of those countries. Thus, for over a century, until Poland regained independence in 1918, the Austrian, German, and Russian legal systems applied in various parts of the Polish territory; French law applied on the territory of the former Grand Duchy of Warsaw established by Napoleon Bonaparte. Having regained independence, the reborn Polish state proceeded swiftly to re-establish a uniform Polish system of law.*¹ This task was given to the Codification Commission, composed of the greatest experts in private law — professors and lawyers educated in various foreign legal systems. The comparative law approach toward establishing modern civil law in Poland not only was indispensable for achievement of the best results in that domain but was also quite natural and obvious for members of that commission who were brought in and experienced with various foreign legal systems and legal traditions. It has exercised a great influence on the shape and contents of all legislative acts enacted in various areas of private law.

The most important of these legal codes were the Code of Obligations of 1933 and the Commercial Code of 1934. They created a modern system of law based to a large extent on the achievements of various foreign national legislators. The Code of Obligations, an original modern piece of legislation from the 1930s, was inspired in many respects by the Swiss, French, German, and Austrian civil law codifications, and also the results of the work of the French-Italian commission working on the draft of a new civil code. The Code of Obligations may be recognised as some sort of bridge between various legal traditions. It is worth noting that it has never given rise to a legal nationalism, a trait characteristic of civil law codification in some European countries.

¹ Cf. F. Zoll. The Future of European Contract Law from the Perspective of a Polish Scholar. – European Contract Law, Special issue (ERA Forum — *scripta iuris europaei*) 2006, p. 90 ff.

2. Transition from ‘socialist law’ to civil law

The development of the civil law codification process was stopped by brute force during the Second World War and subsequently by the Communist regime, again imposed by force. The Code of Obligations was repealed. The new Civil Code of the Polish People’s Republic, elaborated by a new Codification Commission, entered into force in 1965. Fortunately, this commission included some professors of law who had participated in the pre-war Codification Commission. It was due to their efforts that the Civil Code, although based on the assumption of ‘socialist’ civil law, could preserve some institutions and provisions of the former Code of Obligations.

Enormous reforms in various areas of civil law were carried out when the Communist regime was gradually dismantled in the 1990s. They were greatly facilitated by the possibility of returning to Poland’s pre-war traditions. The Civil Code of 1964 was gradually changed by several consecutive law reforms. The complex task of preparing reform of the whole system of civil law was given to the Commission for Civil Law Reform as established by the Minister of Justice in 1989. The commission decided that this reform had to be carried out on a step-by-step basis in order to complete the task gradually.

The first phase of the reform started immediately in 1990 and aimed at eliminating ‘socialist’ distortions to the civil law and adjusting it to the emerging market-oriented economy. Fundamental changes were made in property law in order to eliminate the legal regime based on the socialist concept of ownership distinguishing social, personal, and private ownership, each of them being accorded a different level of legal protection. The highest level of legal protection was reserved for ‘socialist state property’, the lowest for private property as a means of production being treated as a remnant of the past capitalist epoch. This differentiation among various types of ownership, with the associated difference in the scope and intensity of their legal protection, had to be abolished, and the traditional unitary concept of ownership reflecting the equality in law of all owners, be they public or private, was reintroduced.

In the area of the law of obligations, specific institutions and special rules concerning economic relations in the socialised, planned economy between the so-called ‘units of socialised economy’ were eliminated. The principle of freedom of contract almost totally absent in a socialised economy was reintroduced, as were some other legal institutions and rules from the pre-war Code of Obligations.

The ‘returning to the roots’ tendency visible during this process of reform was combined with a modernisation approach aimed at establishing a legal framework adjusted to the requirements of a modern market economy.*² Here again, going back to Poland’s pre-war traditions of a comparative law approach to civil law reform was very helpful.

3. Modern law reform: Implementation and impact of EU directives

On 16 December 1991, Poland signed the Europe Agreement, establishing an association between Poland and the European Communities and their Member States. The work of gradual harmonisation of Polish civil law with European rules and standards started in the following year.*³ This work has been intensified and accelerated since 16 April 2003, when Poland signed the Accession Treaty, by which it undertook to accept the entire *acquis communautaire*. Since that time, enormous work has been done to implement it in Polish law.*⁴

Implementation of all EU directives concerning various institutions and rules of private law took place over a relatively short time. This has not always permitted adjusting them perfectly to the system of Polish civil law and undertaking proper research and studies on the potential impact of certain changes on various parts of civil law or even on the system as a whole. Only a few directives have been integrated into the Civil Code. The majority of them were implemented outside the Civil Code either by way of the enactment of specific statutes or through introducing their rules into existing special enactment.

Thus, for example, the implementation of the Council directive of 25 July 1985 concerning liability for defective products (85/374/EEC) led to the introduction into the Civil Code of a set of provisions, a new Title VI¹ of

² Cf. J. Rajski. Legal Aspects of the Transition from a State Directed Economy to a Market Economy. – Law, Economics and Business in the Melting Pot. Vedback 1997, pp. 183 ff.; J. Rajski. Quelques aspects juridiques du passage de l’économie d’Etat planifié à l’économie de marché en Pologne. – Revue internationale de droit compare 1991/1, p. 119 ff.

³ Cf. J. Rajski. Progressive Harmonization of Polish Civil Law with European Rules: Product Liability. – Liber Amicorum Guy Horsmans. Bruxelles 2004, p. 971 ff.

⁴ Cf. E. Łętowska, A. Wiewiórowska-Domagalska. The Common Frame of Reference — the Perspective of a New Member State. – European Review of Contract Law 2007/3, p. 270 ff.

Book Three (on obligations), located between the titles containing provisions on delictual and on contractual liability, respectively. Implementation of the Self-employed Commercial Agents Directive of 18 December 1986 (86/653/EEC) resulted in profound changes to the legal regime of the agency contract set out in Title XIII of Book Three of the Civil Code. The Council directive of 5 April 1993 on unfair terms in consumer contracts (93/13/EEC) was implemented by way of including new language in Title III of Book Three of the Civil Code on general provisions concerning contractual obligations. Finally, implementation of the directive of 8 June 2000 on electronic commerce (2000/31/EC) led to the introduction of a number of provisions on the declaration of will in an electronic form, electronic offers, electronic contracts, and electronic form of juridical acts into the general provisions of Book One of the Civil Code (on conclusion of contracts).

Implementation of a number of directives led to the enactment of specific legislative acts. Thus, for example, the directive of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC) was implemented through the enactment of a special act of 27 July 2002 on the particular terms of consumer sales⁵, which amended the general regulation of sales in the Civil Code. Implementation of the Council directive of 25 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC) was carried out through the enactment of the Act of 2 March 2000 on the protection of certain consumer rights.⁶ That Act was amended in 2004 by a law⁷ that introduced to it a new Chapter 2a, containing provisions implementing the Directive of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services (2002/65/EC). The Council directive of 22 December 1986 concerning consumer credit (87/102/EEC) was implemented through the enactment of the Act of 20 July 2001 on consumer credit.⁸ Implementation of the directive of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (94/47/EC) was carried through in the enactment of the Act of 13 July 2000 on the protection of purchasers of usage rights to premises or living quarters at a specified time of each year⁹, which amended some provisions of the Civil Code on the right of usufruct of natural persons.

Several directives have been implemented by way of introducing relevant provisions into some special acts. Thus, for example, as part of implementation of the Council directive of 13 June 1990 on package travel, package holidays, and package tours, new provisions (90/314/EEC) were introduced to the Act of 29 August 1997 on tourist services.¹⁰ The directive of the European Parliament and of the Council of 6 October 1997 amending directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (97/55/EC) was implemented in the Act of 16 April 1993 on unfair competition.¹¹ The directive of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (98/27/EC) was implemented in the Act of 15 December 2000 on the protection of competition and consumers.¹²

Through the implementation of the EU directives, Polish civil law has been harmonised with European rules in a way adequate to the nature of those directives, which deal with particular subject matter, create fragmentary regulations prepared in an internally non-harmonised law-making process, and are badly lacking a coherent legal framework. Time pressure has not permitted the elimination of all incoherence and ambiguities in the directives during the process of their implementation. The necessarily hasty implementation of the directives has also not permitted the proper evaluation (i.e., assessment after thorough studies and research) of their impact on the system of Polish civil law.

The dispersion of many of the implemented rules across a number of legislative enactments separated from the Civil Code has made the task of their adjustment to the background and framework of Polish civil law more difficult. This has also had a negative impact on the effectiveness of their application in judicial and contractual practice. In consequence thereof, among other things, the real influence of the EU directives on the development of general civil law in Poland has been rather limited.

⁵ Dz. U. Nr 141, poz. 1176 ze zm. (Journal of Laws No. 141, item 1176, as amended).

⁶ Dz. U. Nr 22, poz. 271 ze zm.

⁷ Dz. U. Nr 116, poz. 1204.

⁸ Dz. U. Nr 100, poz. 1081 ze zm.

⁹ Dz. U. Nr 74, poz. 855 ze zm.

¹⁰ Tekst jednolity: Dz. U. z 2004 r. Nr 223, poz. 2268 ze zm. (Uniform text: Journal of Laws of 2004, No. 223, item 2268, as amended).

¹¹ Tekst jednolity: Dz. U. z 2003 r. Nr 153, poz. 1503 ze zm.

¹² Tekst jednolity Dz. U. z 2005 r. Nr 244, poz. 2080 ze zm.

4. Modern law reform: Harmonisation with uniform rules and standards

In the process of recent reforms of some areas of Polish civil law, great attention has continually been paid to the solutions adopted in the Principles of European Contract Law (PECL) and the UNIDROIT Principles of International Commercial Contracts, as well as those accepted in international conventions establishing uniform rules — in particular, the UN Convention on Contracts for the International Sale of Goods (Vienna Convention of 11 April 1980).

This approach has been adopted in order to achieve a proper level of harmonisation of certain rules of civil law with international and in particular European rules and standards.

A number of new rules introduced to the Civil Code have been inspired by solutions adopted in European (PECL) and UNIDROIT (UPICC) principles of contract law.

The Act of 2 March 2000 amending some provisions of the Civil Code¹³ introduced a provision concerning the conflicting general conditions, which was inspired by article 2:209 of the PECL and article 2:22 of the UPICC. The new article 385⁴ of the Civil Code provides that a contract between entrepreneurs using different standard terms does not embrace conflicting provisions of those terms (§ 1). However, the contract is not concluded if a party, after having received the offer, informs the other party without delay that he does not intend to conclude the contract on such terms (§ 2). The 2003 reform that amended a number of provisions of the Civil Code introduced important changes to its general provisions concerning conclusion of contracts, which were inspired by the PECL, the UPICC, and the Vienna Convention of 1980.

Important modifications have been made in respect of provisions concerning an offer and its acceptance. A concept of revocation of the offer inspired in particular by article 2:202 of the PECL has been introduced but restricted to business-to-business relations (article 66² of the Civil Code). A concept of modified acceptance of the offer was modelled on article 19, p. 2 of the Vienna Convention; article 2.1.11, p. 2 of the UPICC; and article 2:208 of the PECL. The scope of application of this rule has also been restricted to business-to-business relations (see article 68¹ of the Civil Code).

New important rules have been introduced concerning negotiations of contracts. A new article 72, § 2 of the code modelled on article 2:301 of the PECL imposes liability on a party who, when negotiating a contract, acts contrary to good faith and thereby causes damage to the other party. According to this provision, a party having entered into or carried on negotiations in breach of good faith — in particular, with no intention to enter into a contract — is obliged to provide compensation for damage suffered by the other party as a result of expectation of conclusion of the contract. A new article 72¹ of the Civil Code introduced a rule on breach of confidentiality accepted in the law of EU member states and modelled on article 2:302 of the PECL. According to this provision, if confidential information is supplied by a party in the course of negotiations, the other party has a duty not to disclose that information and transmit it to other persons or to use it for its own purposes, unless the parties to the contract agreed otherwise. In a case of non-performance or improper performance of the above duties, the aggrieved party may demand from the other party compensation for damages or restitution of the benefit received by the other party. Adoption of the institution of ‘professional’s written confirmation’, previously unknown to Polish law, has also been inspired by the provisions of the PECL and UPICC (articles 2:210 and 2:12, respectively). According to article 77¹ of the Civil Code, if confirmation of a contract concluded between entrepreneurs without satisfying a written form is given to the other party without delay in writing that does not materially alter its contents, the parties are bound by the contract as specified in the written confirmation, unless the other party does not object to the content in writing without delay.

It may be concluded that the PECL and UPICC have exercised an important influence on the modernisation of Polish civil law.

5. Conclusions

Profound changes of civil law in Poland introduced by a number of legislative enactments, many of which have not been integrated into the Civil Code, have led to a certain degree of disintegration of the codified system of law. The problem of its reintegration promoted by the legal doctrine is under consideration by the Codification Commission, whose composition is regularly changed according to its four-year term of office. At the end of its term, the form of the Codification Commission established in 2002 published a Green Book

¹³ The Civil Code was enacted in 1964, it entered into force in 1965 and has been amended a number of times; only some of the amendments are discussed in this article.

on the optimal vision of a civil code in Poland indicating the general direction of civil law reforms and opening discussion on the paths of their implementation.

The fundamental dilemma facing the Polish legislator is whether to proceed with further profound amendments to the existing civil code or to elaborate a new one. Different opinions in that respect have been expressed in public discussion and legal writings. The Codification Commission appointed in 2006 has been given as its principal tasks to prepare the assumptions and general directions of changes in civil, family, and private law, taking into consideration the need for harmonisation of Polish law with European rules. Although a formal decision has not yet been taken in that respect, the commission has undertaken preparatory research and work aimed at elaborating a new civil code, reinforcing the legislative unity and integrity of civil law by integrating into the code the provisions concerning both business-to-consumer and business-to-business relations. The whole body of civil law should be further modernised in order to be better adjusted to contemporary economic and social needs. It should be fully harmonised with European rules and standards. In that respect, it is worth noting that the preparatory research and work undertaken recently by the Codification Commission has taken into consideration the academic Common Frame of Reference (CFR) and those parts of the Principles of European Patrimonial Private Law that have been published. The CFR and the above principles will certainly have an important impact on the final shape of Polish civil law.