

# **PERSPECTIVE OF UNIFICATION OF OBLIGATION LAW IN ASPECT OF IMPOSSIBILITY OF PERFORMANCE**

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## **Abstract**

The main aim of this work is to show advantages, disadvantages and perspectives of obligation law unification. The Author shows how private law unification influences the legal systems of particular countries. The institution of impossibility of performance is a very good example for showing these influences, according to the fact, that projects of unified obligation law by UNIDROIT and the Lando Commission are changing traditional point of view for the matter covered.

## **Key words**

Private law unification, obligations, impossibility, performance, Lando Commission, UNIDROIT, international private law, codification, Roman law, pandectists, civil code

The traditional role of the international private law, which is virtually known since the dawn of this province of law, was a delimitation of the functioning of private law systems of different countries in space. This function of the international private law, gained its significance in the period great codification of civil law which developed the “national” private codes. The international private law aimed to point out, which legal systems of particular countries would be the most convenient and proper to a legal assessment of the interplay between private law and international elements, thus, its general principles had properties of collision norms.

However, it would be inaccurate to limit the function of international civil law solely to an arbitration of law and conflicts of law. The discrepancies that occurred between variable legal systems constituted a brake in the development of the international trade, therefore, since the end of the 19th century there has been a tendency to unify legal systems by means of contracts between particular countries. Within international private law, this tendency is called the law unification. The law unification aims to decisively exclude any conflicts of law.

The unification of law has changed the perception of the international private law and to a certain extent increased the role of this domain of the law. It is no longer treated as a group of collision norms, which are derived solely from an internal law. The catalogue of the international private law sources has been extended by means of international agreements, thus, the norms of substantial character constitute an element of the legal system.

There is a number of reasons that make the unification of law an extremely difficult process. It has to be taken into consideration that it may have the scope limited only to a few countries. Exceptionally it embodies certain fields of the law, predominantly the unification of law concerns exclusively civil law privity with an international element. The Geneva Conventions concerning the bill of exchange and cheque law are considered the most successful examples of the unification of law.

Obviously the most ambitious undertaking that appeared during last decades in the area of the law unification, was an attempt to unify the obligation law. The obligation law plays a pivotal role either in the national or international economy. It constitutes a basis of goods and services trade, therefore it allows an unconstrained flow of commodities, services, capital and people which is an indispensable element of globalised world functioning.

Yet, the task of the unification of the obligation law is very difficult, especially by means of its social significance. It has to be mentioned that there is a number of main law traditions in the world which notably differ in their perception of the unification law. It concerns particularly the common law system and the civil law system, derived from the Roman tradition, along with its German, Romanic and mixed law families.

The concept of an unification of the contract law has its origins in the period following the Second World War, however, the first attempts to unify the obligation law were made shortly before the outbreak of war. Especially worth mentioning is the proposal of the obligation law unification in Poland, The Czech and Slovakia Republic, Yugoslavia and Bulgaria submitted by one of the most eminent Polish civilists – R. Longchamps de Berier, during the First Congress of Slavonic Jurists in 1933.

The first issue to be unified were problems concerning the international sale agreement in international trade. The work resulted with the two Hague Conventions – on International Sale of Goods and on Formation of the Contract of Sale of 1st July 1964. These conventions were not widely accepted, therefore, in 1971 the UNCITRAL started a work on preparing a new international convention concerning the sales problems.<sup>7</sup> This work resulted in resolution of United Nations Convention On Contracts For The International Sale Of Goods,

(CISG) in 1980. Over 70 countries which constitute 70% of world trade, ratified the convention and recognised it a successful attempt, to unify a component of the obligation law relevant to the international sales. It was a long step towards the process of the harmonisation and unification of obligation law.

Another significant event for the matter in question, was the creation of UNIDROIT, being a specialised department of UN. Within the frames of its competences the UNIDROIT elaborated and published in 1994, a draft of UNIDROIT Principles of International Commercial Contracts, (UPICC) up dated and supplemented in 2004.

Simultaneously, there was continued a work on the unification of European obligation law, initiated by Danish professor of law Ole Lando, who in 1976 announced a concept of a preparation of European Unified Trade Code or European Law of Contracts, Torts and Private Property. In 1982, by his initiative the Committee of European Contract Law started, which is better known as the Lando Commission. The committee was not a European Union department but was considered a private enterprise. There were three stages of the Lando Commission activities, namely, 1982-1990, 1992-1996 and 1997-2001. The Lando Commission work resulted in publication of the Principles of European Contract Law (PECL) The background for the PECL, constituted the legislation of particular countries being the members of The UE, European Union Law, mentioned above UPICC and the Vienna Convention as regards to international sales. Nowadays, the Lando Commission does not function.

Both projects of the obligation law unification display a far reaching similarities. First of all, they cannot be considered a source of a law in force. They do not have a normative character but they obviously constitute a recapitulation of the current practice in the realm of the international conventional obligations, being at the same time a form of a model legislation for a national legislators.

Most of the institutions which appear in the projects is reflected in current law orders, they were developed as a result of a law-comparative or historical analysis. The sources of some of them are found in Roman law traditions. However, a lion's share of regulations in both projects was readapted in a manner often revolutionary strayed away from their traditional formulation, accepted within many law systems as obligatory.

To the legal institutions which as a result of the unification work gained a brand new shape, belongs mainly the institution of impossibility of performance. Therefore, this institution has to be particularly examined because this specific example may perfectly show the advantages

and disadvantages of the unification of private law process.

The institution of impossibility of performance has a very long tradition. It occurred firstly in Roman Law. The rule “*impossibilium nulla obligatio est*” was first created by Celsus, Roman lawyer living in the second century. It states, that no one shall be obligated to perform something impossible from the beginning. Till the middle of XIXth century, this institution was understood in a very narrow way. A breakthrough in perception of the impossibility of performance came from German Pandectists, especially by F. Mommsen works. It is F. Mommsen, who divided impossibility of performance into initial and subsequent. He also created an idea of results of these kinds of impossibility. The result of initial impossibility of performance is that contract is null and void. The subsequent impossibility touches the matters, which occurred after the formation of contract. The result of subsequent impossibility may be twofold. When the debtor is responsible for this kind of impossibility and when the debtor is not responsible for occurring impossibility.

A model proposed by F. Mommsen was realised in the primary text of the German Civil Code (Bürgerliches Gesetzbuch) called BGB. The ideas of Mommsen has influenced not only the German legal system. It was an example for many European civil law codifications for example for 1932 Polish Obligations Code , 1965 Polish Civil Code and also 1964 Czechoslovak Civil Code.

The project of unified obligation law proposed by UNIDROIT and the Lando Commission is totally opposite to a model proposed by the Roman Law and German Pandecists. According to article 4:102 PECL “A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates.” It means, that the initial impossibility has no influence on contract validity. As a result a traditional division into initial and subsequent impossibility does not longer exist in those projects. In case of initial impossibility a contract stays valid and it may be a debtors civil liability.

The projects of UNIDROIT and The Lando Commission have influenced mostly German civil law. It is significant due to famous durability of German Civil Code and its provisions. It seemed that the provisions stipulating impossibility of performance, which inspired many legal systems were going to stay undone. But entering into power of the Obligation Law Modernization Act of 26th November 2001 (BGBl. I S. 3158) has revolutionized the matter of impossibility of performance in German legal system. The provision of § 306 BGB providing, that the contract whereas the main performance was impossible is null and void. It has been

replaced by § 311a, which main aim is that this kind of contract stays valid. According to § 275 BGB the debtor has a possibility to avoid fulfilling the performance and the creditor has the right to get compensation and the right to reimburse the primary input. It shows, that the present solutions proposed in BGB were inspired by projects of UNIDROIT and the Lando Commission.

As doctrine says, the provision of projects of UNIDROIT and the Lando Commission related to the impossibility of performance are concentrated on solving practical problems and more flexible than solution proposed by Mommsen in the XIXth century.

However it is worth to notice, that the influence of the projects by UNIDROIT and the Lando Commission on legislation of different countries is limited. In the matter of fact only Germany decided to take over those regulations. Other countries rather prefer the traditional point of view to the matter covered and are reluctant to change their legal systems.

It means, that the process of unification of obligation law is still *in statu nascendi* and nothing seems it soon to be changed. For example the project of the new Civil Code of the Czech Republic has not been inspired neither by PECL nor UPICC. The impossibility of performance in those project is still divided into initial, which makes contract null and void and subsequent, which may lead into a civil liability of the debtor. Even the countries, which decided to restate their civil law systems are very cautious in introducing such a revolutionary ideas as changes in the institution of impossibility of performance.

As it is written above the process of unification of the obligation law is extraordinarily complicated. It does not change the fact, that this process is inevitable, but on the other hand we should not expect the forthcoming finalization of this process. Certainly, the states would rather preserve their original legal ideas, which were under the influence of the tradition, history and the civil law development level. That is why unification has to be done conservatively with a respect to the legal order of every state. The author claims, that unification should be subsidiary, which means it should be conducted only in those areas of law, where it is truly necessary to provide efficiency of international economic affairs.

We should also consider if the existing particularism of legal systems is an advantage. The good example to this claim are the United States, where 50 different legal systems co-exist. This does not lead to the expected chaos because of existence of developed rules of conflicts of law. Due to the collision norms, the parties may choose law, which is the most advantageous for them, what would be impossible if the private law was unified. The pluralism of private law allows the countries to compete with each other in enforcing of

solutions good for entrepreneurs, what is expected by them. But the pluralism of laws will be advantageous only when there will be clear rules of choice of law for the parties.

So what is the future of the unification of private law, especially the law of contracts? In this case we need to take a look at the Polish experience from the XXth century. After Poland gained its independence, there were five legal systems in different parts of the country i.e. Austrian, French, German, Hungarian and Russian. Polish legislator decided to unify the conflicts of law rules firstly, what was done in 1926 by enforcing the International and Inter-Province Private Law Act. The unification of obligation law was done later, in 1932.

The unification of private law in the European Union seems to be done in a very similar way. The countries of European Community decided to unify the principles of the choose law applicable to contractual obligations. The Convention of Rome introduced a clear system of indication of law, which is applicable to law of contracts. Paralelly the works on a draft of the European Civil Code were lead. But as it seems those works stuck in a dead point.

To sum up, the unification, which take place in the area of obligation law is certainly one of the most interesting process in the field of modern private law. Thus this process is very complicated, due to the fact of diversity of legal systems. Enforcing of the institutions which are totally unknown to the internal legal systems and sometimes which are incompatible to internal legal systems seems to be a step in bad direction. That is why, the best way of unification of private law is to unify provisions of international private law. This would connect advantages of unification with positive sides of existing legal pluralism.

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