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harmonisation of private law In the  
integration of the european union:  
addition or opposition?**

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# THE BILATERAL GERMAN-POLISH HARMONISATION OF PRIVATE LAW IN THE INTEGRATION OF THE EUROPEAN UNION. ADDITION OR OPPOSITION?

Since April 2014, research workers at the Faculty of Law and Administration of the University of Silesia in Katowice have been carrying out a research-academic project under the name “*The Bilateral German-Polish Harmonisation of Private Law in the Integration of the European Union. Addition or Opposition?*” The research group of the University of Silesia, under the leadership of prof. UŚ dr hab. Ewa Rott-Pietrzyk, which consists of research workers and doctoral students from the Chair of Civil and Private International Law of the Faculty of Law and Administration of University of Silesia in Katowice: dr hab. Monika Jagielska, dr hab. Grzegorz Żmij, mgr Małgorzata Lubelska-Sazanów, mgr Bartłomiej Panfil, mgr Małgorzata Pohl and mgr Anita Strzebińczyk, established a cooperation with a research group from the Faculty of Law of the University of Osnabrück – the Chair of European and Polish Private and Comparative Law (Lehrstuhl für Europäisches und Polnisches Privatrecht sowie Rechtsvergleichung) under the leadership of prof. dr hab. Fryderyk Zoll.

The aim of the research project is to analyse a number of problems, both theoretical and practical. The problems that are being analysed are connected with balancing the functions of two main directions of the Europeanisation of Law: a direction determined by projects unifying contract law regulations in all countries of the European Union and, on the other hand – consideration of legal harmonisation at a bilateral level. This is done at the level of a bilateral and comparative analysis, the subject of research is the Polish and German legal systems. In the area of sales law, both legal systems will be compared with the draft of the Common European Sales Law (CESL)<sup>1</sup>.

On 5th of December 2014 at the Faculty of Law and Administration of the University of Silesia, there was a conference within the framework of a project financed by the Polish-German Foundation for Science<sup>2</sup> “*The Bilateral German-Polish Harmonisation of Private Law in the Integration of the European Union. Addition or Opposition?*”, which was combined with a workshop. The participants at the conference were members of the research group of the Faculty of Law and Administration of the University of Silesia: prof. UŚ dr hab. Ewa Rott-Pietrzyk, dr hab. Monika Jagielska, dr hab. Grzegorz

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<sup>1</sup> Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law from 11.10.2011, COM (2011) 635 final; 2011/0284 (COD); Also at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>

<sup>2</sup> <http://www.pnfn.pl/pl/>

Żmij, mgr Małgorzata Lubelska-Sazanów, mgr Bartłomiej Panfil, mgr Małgorzata Pohl and mgr Anita Strzebińczyk. Dr hab. Wojciech Klyta also participated in the conference as a guest. The research group from the Faculty of Law of the University of Osnabrück was represented by prof. dr hab. Fryderyk Zoll and mgr Monika Kubela. Prof. dr hab. Hans Schulte-Nölke was not able to visit Katowice because of his professional duties at the University of Osnabrück. However, modern technology enabled the researchers participating in the conference to connect with Professor using videoconference facilities.

The conference began with a short introduction by project coordinators: prof. UŚ dr hab. Ewa Rott-Pietrzyk and prof. dr hab. Fryderyk Zoll. They underlined the significance of the German-Polish Harmonisation of Private Law in the Integration of the European Union. This research task entails research work on the legislation process of the Europeanisation of Private Law in the field of Contract Law, which has intensified in connection with the legislative activity of the European Union, which presented a draft European regulation concerning the sales law (the CESL). Before that, the European legislator mainly recognised the importance of soft-law instruments (instruments that are not binding acts of law). As a result of this, the harmonisation process of European Contract Law has been supported with many interesting projects, such as: the Principles of European Contract Law (PECL)<sup>3</sup> presented by the Lando Group, the Acquis Principles<sup>4</sup> as an effect of the work of the European Research Group on the Existing EC Private Law<sup>5</sup> and the Draft Common Frame of Reference (DCFR) from the years 2008<sup>6</sup> and 2009<sup>7</sup>.

The aim of the research task in a broader perspective is also to analyse European Uniform Law (soft law and the CESL, as well as legal acts with a global scope of application, i.e. the United Nations Convention on Contracts for the International Sale of Goods signed in Vienna in 1980 – CISG<sup>8</sup>) and to set out its scope of application on Polish (especially in the context of works on the new codification of civil law) and German Law. Within the framework of the project, the research group is also trying to qualify the impact of the harmonisation of European law on transnational contracts, especially those involving consumers and entrepreneurs but also those in B2B and C2C relations. Furthermore, the question to be answered is which legal system would be the

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<sup>3</sup> First part issued in English in 1995, and harmonised parts I and II turned out together with O. Lando and H. Beale commentary in: O. Lando, H. Beale, *Principles of European Contract Law, Part I and II, Combined & Revised*, Hague–London–Boston 2000.

<sup>4</sup> *Principles of the Existing EC Contract Law (Acquis Principles), Contract I, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, prepared by Research Group on the Existing EC Private Law (Acquis Group), Munich 2007 and *Principles of the Existing EC Contract Law (Acquis Principles), Contract II, General Provisions, Delivery of Goods, Package Travel and Payment Services*, prepared by the Research Group on the Existing EC Private Law (Acquis Group), Munich 2009.

<sup>5</sup> Also at: <http://www.acquis-group.jura.uni-osnabrueck.de/>

<sup>6</sup> Ch. von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, P. Schlechtriem, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Interim Outline Edition*, Munich 2008.

<sup>7</sup> Ch. von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Outline Edition*, Munich 2009.

<sup>8</sup> United Nations Convention on Contracts for the International Sale of Goods from 11 April 1980 [CISG], Available at: <http://www.cisg.law.pace.edu/cisg/text/treaty.html>. In Polish, officially published in: J.L. from 1997, No 45, item 286.

best choice (from the buyer's perspective) in transnational transactions involving German and Polish parties: German law, Polish law or the CESL?

The presentations given by the participants dealt with the issue of liability for defects in sales law transactions. The speakers analysed the Polish and German legal systems in a comparative perspective and took into account the amendment introduced by the Polish legislator with the introduction of the Act on Consumer Rights from 30 May 2014<sup>9</sup>, which came into force on 25 December 2014. The speeches were supported by multimedia presentations and provided an introduction to the discussion, which enriched the conference with an analysis of numerous judgements.

**Dr hab. Monika Jagielska** presented issues connected with liability based on a guarantee duty of the Seller in her presentation "Beschaffensvereinbarungen" in German law and quality arrangements in Polish law. Her speech was focused on the qualification when the lack of a specified characteristic of an object of a sales agreement may be qualified as a defect. Dr hab. Monika Jagielska presented a short evolution of the Polish law connected with the seller's liability based on a guarantee, which resulted in a discussion on possible amendments in the European and German legal system. Afterwards, the speaker presented six judgements of German courts and pointed out the problematic issues. She was also trying to find a similar judgement of a Polish court in order to illustrate a certain legal question.

Then the researchers initiated a videoconference with Prof. dr hab. Hans Schulte-Nölke from the Law Faculty of the University of Osnabrück. The discussion took place in English. During the videoconference, **mgr Małgorzata Pohl** presented a speech in English under the name "Beschaffensabweichungen im Kaufvertrag" in German law and the departure from the quality arrangements between the parties in Polish law. The speaker presented issues of the departure from quality arrangements between the parties under Polish law, against the background of German judgements. Mgr Małgorzata Pohl focused mainly on the term "defect" and on the term "*aliud*" (*aliud pro alio*, which means delivery of a different object to what was agreed between the parties before). She based her qualification of these issues on the Regulation on special conditions of a sales agreement with a consumer and on amending the Polish Civil Code from 27 of February 2002<sup>10</sup>, with a background of Polish judgements and the Regulation on consumer rights from 30 May 2014. The next issue presented in her speech concerned a doctrinal dispute concerning *aliud*, which could be rephrased as a question whether a seller delivering an *aliud* fulfilled his duty to deliver the goods (if the good is incompatible with the contractual arrangements) or whether it is an example of non-performance. This issue was fundamental for the discussion between the participants, which also concerned the future legislative amendments (in European and German law). The speaker presented two judgements of a German court and expressed doubts concerning its interpretation by the court. She tried to find a similar judgement of a Polish court that would illustrate the same legal issue.

The issue of "Rechtsmaengel" in German law and defects of the goods in Polish law" was presented by **mgr Anita Strzebińczyk**. The speaker presented the issue of legal defects, also based on selected judgements of the German court. The judgements involved

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<sup>9</sup> Act on Consumer Rights from 30 May 2014 (J.L. 2014 item 827).

<sup>10</sup> Regulation on special conditions of a sales agreement with a consumer and on amending the Polish Civil Code from 27 of February 2002 (J.L. 2002, No 141, item 1176, with amendments).

the problem of legal defects resulting from a sales agreement of badges with a picture of a famous tennis player which were being sewn on T-shirts. The defect was based on the lack of the claimant's permission to use his image. The existence of a legal defect was also considered in a different case, based on a situation whereby engine oil was mixed with heating oil. The problem was connected with an analysis as to whether the facts of these cases also result in a legal defect. Mgr Anita Strzebińczyk presented the differences between a factual and a legal defect. She presented the possible claims in a situation when such a defect occurs, which led to a discussion on the sense of differentiation of defects into legal and factual ones. The discussion took into account the amendments of European law, the amendments of German law from 2002, and the amendments of Polish law from 2014. The speaker also presented numerous judgements of Polish courts which considered similar problems as the presented judgements of the German courts.

At the end of a conference, the participants analysed various theoretical and practical issues connected with balancing the functions of the two main directions of the Europeanisation of Law. The analysis was made from the perspective of German law and from the perspective of Polish law, considering the similarities and the differences existing between them.

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