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**Transformation of
Contract law and civil justice
in new EU member countries
The example of the Baltic States,
Hungary and Poland**

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Table of contents

A. Introduction	4
<i>I. Functions of European contract law as the theoretical starting point</i>	4
<i>II. Enlargement process</i>	5
<i>III. “Relative autonomy” of contract law and civil justice</i>	6
B. Contract law: from socialism to market economy	7
<i>I. Overview</i>	7
<i>II. The “Baltic revolution”</i>	9
<i>III. Hungary and Poland</i>	11
1. Hungary	11
2. Poland	12
<i>IV. The importance of the Europe Agreements</i>	13
C. Autonomy	14
<i>I. The recognition of autonomy in Community law</i>	14
<i>II. Inherent limitations in contract law - good faith and the problem of standard form contracts</i>	16
1. Generalities	16
2. Estonia	17
3. Latvia	18
4. Lithuania	21
5. Hungary	24
6. Poland	25
D. Regulation	27
<i>I. Generalities - the importance of Dir. 99/44 for general contract law</i>	27
<i>II. The importance of Dir. 99/44 on contract law within the enlargement process</i>	29
1. Estonia	29
2. Latvia	30
3. Lithuania	32
4. Hungary	36
5. Poland	37
E. Information	38
<i>I. Generalities - EC law as the starting point</i>	38
1. The information model in Community law	38
2. Secondary law: The transparency principle	39
3. Express information obligations in secondary Community law	41
<i>II. Information requirements in contract legislation of new Member States</i>	43
1. Estonia	43
2. Latvia	44
3. Lithuania	46
4. Hungary	47
5. Poland	48
F. Contract Law “in the books” and “in action”: “New” rules for “old” mechanisms of civil justice?	49
<i>I. A summary of the “new” contract law of “new” Member States</i>	49
<i>II. “Law in action”: Deficits in civil justice?</i>	50
Bibliography (only publications in English or German)	52

A. Introduction

I. Functions of European contract law as the theoretical starting point

Instead of trying to analyse European private law under EU influence as a whole, I limit myself to the transformation of contract law because the discussion is most advanced here, and because it is an area where I can contribute most from my research and teaching. My concept of European contract law is a functional one and has been described elsewhere.¹ I distinguish between three main functions of modern European contract law, namely

- autonomy
- regulation
- information.

I want to use this approach in analysing the transformation process of several, not all new Member countries, namely the Baltic states, Hungary and Poland. Under *autonomy* I understand the fundamental function of any contract law in a market economy like the one enshrined by the EC and EU Treaties, namely to make economic transactions by subjects of private laws (natural persons including consumers, business entities, state acting in its “dominium” function) as secure and efficient as possible, to enforce them effectively under the rule “*pacta sunt servanda*”, once the conditions of a “free meeting of the minds” are met. At the same time I am convinced that even in a liberal economic and legal context, autonomy is not without borders; therefore, its inherent restrictions have to be made a subject matter of reflection, most notably by the principle of “good faith”.

The *regulatory function* of contract law may be subject to doubt by many, notably liberal authors; they may fear a return to “socialism”. I do not share this scepticism but am convinced that this regulatory function has always been present in contract law, sometimes more hidden under general clauses like “good morals”, “public policy”, “ordre public”, later more openly by deliberately protecting the weaker party in labour and consumer transactions. National² and European constitutional law also invades contract law, eg by the theory of “direct horizontal effect” of fundamental freedoms and of the non-discrimination principle³. Regulation may come from “without” contract law, eg restrictions on certain types of gambling contracts or lotteries⁴, but in recent times it has been introduced into contract law itself, eg in consumer law becoming part of contract law.⁵ I will not go into details of

¹ Reich (2004a).

² Canaris (2000)

³ Reich (2003) at 17-18 referring to the case-law of the ECJ.

⁴ As an example, see case C-275/92 HM Customs’s and Excise Services v Schindler [1994] ECR I-1039.

⁵ Rott (2004).

this protracted discussion, but simply take “consumer law” as part of the European *acquis* which therefore has greatly contributed to the transformation of contract. But consumer law may inspire a completely new orientation of traditional civil law principles, as will be demonstrated with some countries here under scrutiny, namely Estonia, Lithuania and to some extent also Hungary.

Information is itself a somewhat vague concept, because it can already be found in traditional rules on fraud and misrepresentation as part of contract formation. These rules have been extensively studied elsewhere and will not be subject to my reflections. I am concerned with more subtle and differentiated rules on information provision of one of the parties of the (future) contract who either is in possession of this information or is required by law to provide this information, and the other party which needs this information for a rational decision making. Again, consumer law is a good example of this new principle which departs from the classical rule of “*caveat emptor*”, but it is not limited to this area. Transaction cost economics may help to define the conditions and limits of this information paradigm in modern contract law.⁶ I am interested not so much in looking at sometimes highly specific and technical rules on information provision, but rather at the emergence of general principles and on rules for its effective enforcement⁷ without endangering the principle “*pacta sunt servanda*”.

II. Enlargement process

The enlargement process is mainly concerned with the new Member countries coming from the “former socialist” block. I deliberately choose the Baltic States, particularly Latvia where I am at present residing and have therefore close access to information even though not speaking myself their complex languages. I also extended my research to Hungary and Poland which had enacted Civil Codes still under the socialist regime in 1959 and 1964, substantially modified but not completely abolished after the demise of socialism, even though new codifications are on the agenda.⁸ I will explain the differences in their contribution to modern contract law, as compared to the Baltic States. Again, I had to rely on secondary sources which however seem to be better elaborated because these countries, in difference to the Baltic republics which lost their independence in 1940 and again in 1944, never had to abandon their academic and professional contacts to the “Western” world even during the most dire times of socialism.

After the 1990ies, all of these countries became been politically and legally linked to the European “*acquis*” by the so-called Europe Agreements (infra at B IV), which exercised a deep influence on the contract law of these countries even before accession. This will be shown by looking at the transformation (not: implementation) of two important, so called “horizontal” European directives, namely 93/13/EEC of 5

⁶ Grundmann (2002); Kerber/Vanberg in Grundmann al (2001) at 49-79.

⁷ Wilhelmson (2002a).

⁸ For Hungary cf. the paper by Vékas (2001).

April 1993 on unfair terms consumer contracts⁹ and 99/44/EC of 25 May 1999 on the sale of consumer goods and associated guarantees.¹⁰

The enlargement process cannot however be understood without at least referring briefly to the prior legal system under socialist principles and their transformation under the rules of market economy. This was an autonomous legal revolution which the countries under scrutiny had undertaken before their membership in the EU was ever discussed. This revolution has a truly constitutional character¹¹ - the abolition of socialist elements of property, of legal personality, and of restrictions of autonomy by a complex (some say: corrupt) licensing system, and its replacement by liberal principles of market economy which cannot be studied here in great detail, but must be remembered as a precondition to the now existing contract law and its tripartite function as described here.

III. “Relative autonomy” of contract law and civil justice

My paper aims at a legal-theoretical analysis of the transformation process of contract law in the jurisdictions studied. Therefore, attention will be paid to the integration of these modern functions of contract law into the relevant legal systems. It may be of surprise to many observers that despite similar political-economic principles, their implementation in the transformation-process has been very different. There is clearly no “European” model of private or even only of contract law, there are indeed several models, traditions, systems, and they vary greatly also among the new Member countries.

Among Marxist authors in the hay days of socialism this was called the “relative autonomy” of law¹² to explain why, despite the social and political revolution which had taken place in the countries studied, the legal system still contained elements of “traditionalism”, particularly under the influence of the continental codification idea.

It can be shown that this ideological paradigm also worked the other way around: even under principles of market economy, the old socialist codes were not immediately replaced by new ones which reflect the imperatives of the transformation process. Sometimes only incremental changes were introduced into prior existing codes, but there is an inherent tendency to reshape legal reality by codification.

Within this systemic transformation process, another question becomes crucial: how to integrate specific protective laws into the more general and to some extent abstract and formal codification principles? This is nothing specific to the contract law of the new Member countries, but has been debated with equal passion in “old” Member countries like Germany, France, and Italy.¹³ Labour law had been

⁹ [1993] OJ L 95/29.

¹⁰ [1999] OJ L 171/12.

¹¹ Fogelklou/Sterzel (2003).

¹² Reich (1972) at 33-37.

¹³ References by Vékás (2004) at 19-24.

completely separated from general contract law and will therefore not be studied here. With regard to consumer law, the debate is still open, and therefore we must study the different legal mechanisms on how to integrate this new, still rather unsystematic area of law, into the more general principles of contract law. This is not a merely theoretical debate. It also has great importance to the understanding and application of contract law itself: how far can “specific private laws” (Sonderprivatrechte) inspire or, for its critics, undermine general contract law? Should an integrationist or a separatist approach be used? The debate has not ended with some countries like Germany choosing an integrationist approach in its *Schuldrechtsmodernisierungsgesetz* (Act on modernising the German law of obligations) of 2001.¹⁴

The solutions found in the countries studied here are particularly relevant for the future of European contract law. Indeed, they form a wide field of legal and systematic experimentation, the results of which are slowly emerging. Can they contribute to answering the central question of a “codification” of European contract law, namely either to systematise the existing *acquis* in consumer law, or to favour an integrationist approach?¹⁵

B. Contract law: from socialism to market economy

I. Overview

The Baltic countries on the one hand, and Poland and Hungary on the other, had been forced into a socialist system of economy which obviously had a decisive influence on their respective contract law systems and principles. Due to substantial political differences in the realisation of this process, the impact on the legal system was quite different and will be mentioned below. The polit-economical specifics are however quite similar, even if their intensity varied over time and place.

The socialist economy, in its conflict with market economy, is based on a completely different concept of property and the legal relations emerging out of it. We will refer to them very briefly without intending to go into details or to repeat the century long debate on their ideological origin and truth.

Since, according to Marxist theory, the system of private property in capitalist economies allows an extortion of the fruits of production by the owner, a socialist system which wants to overcome this process of unjust distribution of economic resources must and will at first radically modify the system of property ownership and power. Instead of a prevalence of private property over land and the means of production, a mechanism of socialist property is introduced. In the Soviet model of socialism, the state becomes the main owner of property which is allocated to

¹⁴ Micklitz (2002).

¹⁵ See the different answers in the contributions to Grundmann/Stuyck (2002). For a codification of European consumer law, cf Rösler (2004) at 250-288.

economic unities (state enterprises etc.) only for management, not for full use and disposal. Alongside with this state property, certain forms of collective, cooperative or communal property are installed, the extent of which has varied greatly over time. There is no autonomous contract regime on the use and transfer of this type of socialist property. It underlies state supervision and disposal. In the interest of socialist economy, a certain transactional autonomy relating to property out of the running production (Umlaufvermögen), not to the stock of property itself, will be guaranteed to socialist entities, and in this context contract law plays a certain yet limited role. There is a rule of “pacta sunt servanda”, but subject to the imperatives of the socialist economy and therefore litigated before a special type of court, the so-called “gosarbitrage”. Contract law is not governed by the principle of autonomy, but by discretionary regulation and a rather restrictive licensing system, depending on the type of economic activity subjected to socialist planning.¹⁶

Whether elements of private property, mainly of small businesses, are allowed parallel to socialist economic entities, has been subject to intense debate and conflict in the socialist economies before their complete abolition itself, and there have been substantial changes in the countries studied to which I will refer later (infra B II/III). Also with regard to foreign investment different rules were imposed, always subject to state control and revocation.

Personal - in striking to difference to “private” - property was allowed in all socialist countries and formed part of the civil law, but was restricted to items of personal and family use. It should not be used to create private property. Contractual relations with the latter objective were regarded to be against the principle of socialist economy and therefore void.

Parallel to this concept of property law, the law of persons systematically distinguished between those subjects who were managing state socialist property, namely in the first hand socialist production and distribution entities, so-called socialist enterprises with a certain margin of discretion concerning the retaining of profits for investment purposes, and other entities like communes, branches of allowed political parties (mostly relating to the governing Communist parties and their auxiliary organisations), labour unions, recreation associations etc. Other entities in the economic and social sphere were subject to a strict licensing system.¹⁷ There was obviously no freedom of association, only a gradual alleviation of existing restrictions subject to the discretion of the ruling party.

In this system of socialist property and legal persons, a rather elaborate but to some extent irrelevant contract law system was existing, playing a very limited role in legal practice. Between “socialised entities” it was not conceptualised as expression of “party autonomy”, but as transmission of the will of the ruling class (the Communist party and its state and societal organs) into the economy. A limited autonomy was granted only in transactions regarding “personal property”. Therefore, many transactions, even though quite common in socialist countries, were regarded

¹⁶ Reich (1972) at 275-303 referring to the Soviet debate.

¹⁷ Kordasiewicz/Wierzbowski (1995) at 184-188.

as illegal and therefore became part of an ever growing black market - a phenomenon that explains to some extent the still existing priority to criminal law over private law in legal practice, and the fundamental problems in the transformation process to civil justice. Contract law operated more in the “shadow of the law”, instead of being central part of the law itself as in market economies.

After the fall of socialism - a truly fundamental revolution - both the system of socialist property and planning, and of licensing of legal entities and specific types of contracts (especially when containing cross-border elements or foreign currency) were abolished. At the same time, a process of privatisation and restoration of formerly nationalised property was initiated. We will not go into details¹⁸ but take a brief look at the re-establishment of liberal contract law in the countries under scrutiny.

II. The “Baltic revolution”

The formerly independent Baltic States came under Soviet dominance in 1940 and then again in 1944 after the retreat of the German occupation forces. For these formerly independent countries, this implied a “double revolution”:

- A *political revolution* since they became part of the Soviet Union as Soviet Republics which implied not only suspension of sovereignty, but also of independent legislative functions. In civil law matters, this led to a separation of the Union competence to lay down “fundamentals” of civil law, and to the republics, to implement them in separate codes.¹⁹
- An *economic and social revolution* which consisted in taking over the above mentioned principles concerning ownership, legal personality, and restricted autonomy.

It is obvious that this double revolution brought to a halt the already quite advanced codification work in the three republics.²⁰

- Latvia had enacted its Civil Code in 1937. It came into force in 1939 and could not survive the Soviet take-over. It was immediately replaced by the RSFSR Code of 1924 in 1940. The Code of 1937 was nearly forgotten till it was revived after the Baltic Revolution in 1991.²¹
- The Estonian codification was nearly finished before the Soviet take-over, but the draft Code of 1939 was never formally enacted. It did not play any role later.²²
- The Lithuanian codification work proved to be particularly difficult and protracted because of the several civil law systems which existed in this country, namely German law in the Klaipeda (Memel) region, Polish law

¹⁸ A typology of privatisation is given by Brunner (1999).

¹⁹ Reich (1972) at 311-326.

²⁰ Loeber (2001)

²¹ Loeber at 949-950

²² Loeber at 948.

(modelled after the Code Napoléon) in Wilna (Vilnius), (pre-revolutionary) Russian law in Kaunas, and Baltic law in Palanga. The merger of these different systems was not successful before the war.²³ A draft Code was prepared in 1940 but lost after Soviet occupation.²⁴

After the Baltic Revolution in 1990/91 which re-established the three formerly independent republics as sovereign states,²⁵ it was obvious that the law stemming from Soviet times had to be abolished and replaced by new civil legislation. However, this process went differently in the three Baltic states which explains the divergence of civil jurisdictions in this region:

Latvia decided to re-enact the Civil Code of 1937 in 1992/93, and to amend it mostly with regard to family and inheritance law. A draft commercial code including the regulation of certain transactions was prepared but never enacted. The existing commercial law is limited to company law and to formal questions on registration and the like. A separate Consumer Rights Act was enacted in 1999. It served to include the relevant EU consumer law directives into Latvian law, and has been amended with the coming of new directives, eg in 2001 to implement the Sales Directive 99/44. This dual system will be analysed more in detail below.²⁶

Estonia decided on a step-by-step codification of its civil law, starting with the most urgent subject matters in property law.²⁷ Finally, in 2002 a comprehensive Code of Obligations was enacted which closely followed the Swiss and Dutch models, thereby including both commercial and consumer transactions. It is based on a “comparative approach”.²⁸ EU consumer directives have been included in the Code. This monist system is important from a legal-theoretical point of view.

Lithuania decided to first “de-socialise” the existing (socialist) civil law and to prepare at the same time a new comprehensive codification which was enacted on 18 July 2000²⁹. It came into force on 1st of June 2001. Its contract law follows closely the UNIDROIT-principles.³⁰ Its part 6 contains the general principles as well as detailed rules of contract law, including consumer contracts. A separate Consumer Protection Law of 2000 exists aside, but the Code provisions will take priority over special laws, Art. 1.3 para 2. This has led to a parallel regulation of consumer contracts, notably those determined by EC-directives, while conflicts are solved not by the *lex specialis* principle, but by the *lex superior* rule.³¹

It is interesting to note that the three rather small, but historically close jurisdictions of the Baltic states have enacted such different models of contract law, namely

- a dual system (Latvia)

²³ Loeber at 951.

²⁴ Schulze (2001) at 332.

²⁵ Lieven (1994) at 194.

²⁶ Broka (2002)

²⁷ Kaerdi (2003) at 253-255; Paju (2000).

²⁸ Kaerdi at 257.

²⁹ Mikelenas (2000); Schulze (2002) at 339-353.

³⁰ Mikelenas at 252-254.

³¹ Schulze at 340.

- a monist system (Estonia)
- a parallel system (Lithuania).

They enable us to look at contract regulation as an experimental field, and to draw some conclusions for the future European contract law model.

III. Hungary and Poland

The “revolution” which took place under Soviet dominance in these countries is a social and economic, not so much a political one. It meant the take-over of the Soviet system of socialist property and legal persons, but left formal jurisdiction with the constitutional authorities of these countries and gave them at least some margin of “relative autonomy”. The solutions and techniques used in contract law are therefore to some extent different to those used in the Soviet Union and its republics like the Baltic States before their revolution. Both countries enacted their Civil Codes, namely Hungary in 1959 and Poland in 1964, which show some specifics and which are still in force today, even though the underlying economic system has been substantially changed.

1. Hungary

The Hungarian Civil Code of 1959 deviates insofar from the Soviet model as it recognised private property rights, though to a limited extent.³² The Code was elaborated in the reform period which was crushed by Soviet occupation in 1956, it was adopted briefly after the execution of the leader of the reform government, Imre Nagy. It allowed the acquisition of ownership rights in land and anything else that could be taken into possession. Ownership rights could be acquired by transfer, manufacture, separation, accretion, adverse possession, and inheritance. Ownership was defined in the traditional sense, but it did not include using the property in a manner that would needlessly disturb others or jeopardize another’s property rights. Parallel to this limited regime of “private” property, the Code recognised socialist property and provided that it enjoyed “increased legal protection”. It authorised private ownership of land, in difference to the Soviet Union, but did not stop or reverse collectivisation.³³ A full privatisation only happened after 1991.³⁴

The introduction of the “New Economic Mechanism”³⁵ increased the need for consumer protection. The first moderate rules were included in the Civil Code in 1977 by Act IV, allowing to challenge unfair contract terms. In § 209 the concept of general contract terms was however not defined. This was done only in 1997.³⁶

Later reform concentrated on enacting a separate Consumer Protection Act. As a forerunner, in 1984 the Act to Prohibit Unfair Business Practices was enacted. It was substantially amended by Act LXXXVI of 1990 on the prohibition of Unfair Market

³² Spall (2004)

³³ Vékás (2004) at 25.

³⁴ Gobert (1997).

³⁵ Cseres (2004) 2003 at 46

³⁶ Vékás at p. 27.

Practices.³⁷ Finally, in 1997 Act No. CLV on Consumer Protection was adopted and came into force in 1998. It implemented several EC-Directives, including the one on consumer credit.³⁸

Directive 93/13 was transformed as Act CXIX of 1997 and amended §§ 205 (3), (5), (6), 207 (2), 209-209 (d) of the Civil Code (infra C II 5). The Sales Directive 99/44 was introduced into the Civil Code by Act XXXVI of 2002 (infra D II 4).

Hungary therefore can be said to have a *modified uniform system*, but with a clear preference to put consumer protection directives, as far as they relate to contract law, into the Code as general legislation, and not into the special legislation on consumer protection (with the exception of consumer credit) or other separate acts (eg package holidays).

Hungary is working on a new Civil Code which, according to one of its proponents, will be a comprehensive legislation including commercial and consumer contracts.³⁹

2. Poland

Polish civil law was codified by the Civil Code of 25.4.1964 which is still in force today. Naturally, its provisions bear characteristics of the prior political system, the most salient having been the excessively privileged position of so-called “social property”.⁴⁰ On the other hand, its system and rules reminded of traditional Western codes. Socialist economy was ruled by decrees of the Council of Ministers who was empowered to regulate commerce between “the units of the socialised economy” (Art. 2). This was done to a great extent, but stayed completely outside civil law. Economic activities by private persons, including the founding of legal persons, were based on a system of licences.

Surprisingly, the imposition of martial law on Poland in 1981 led to a further liberalisation of the economy and therefore a re-establishment of civil law relations. “The idea began to be advanced that ‘socialism’ did not rule out the adoption of certain elements of a market economy”.⁴¹ State enterprises gained more autonomy, the founding of small businesses was eased, and consumer protection inserted into the Code. By Act of December 23, 1988 the state declared the freedom to engage in economic activity and to replace of the almost universal system of licensing.⁴²

The political changes after the demise of the communist regime introduced traditional elements of property in the emerging (somewhat chaotic) market economy. The Civil Code underwent a first stage of reform on July 28, 1990.⁴³ The concept of property was unified as a legal category. Privatisation was started, but not completely implemented. Privatisation through liquidation was used more

³⁷ Cseres at 51.

³⁸ Cf. the critique of Vékás at 9

³⁹ Vékás (2001).

⁴⁰ Kordasiewicz/Wierzbowski (1995) at 165.

⁴¹ Ibid at 166.

⁴² Gralla (1992).

⁴³ Pazdan (1991).

frequently than commercial privatisation - a sign of the bad state of Polish economy.⁴⁴ Foreign investment was allowed nearly without restriction.

Contractual autonomy was secured by abolishing the rules that pertained to the socialised elements of the economy, eg like the influence of the bureaucracy on engaging in and shaping of contractual relations. Art. 353 para 1 of the Civil Code restored the principle of freedom of contract, with the reservation that what is contracted cannot be contrary to the law or “the principles of social coexistence” (infra C II 6). A clear border-line was drawn between civil law transactions of a unilateral (consumer) and bilateral (professional) character. The first were treated more rigorously against the professional and in favour of the consumer.⁴⁵ A separate consumer law emerged, even though it was limited to some particular rules concerning payment, exclusion clauses, prescription periods, modification of the amount under inflationary conditions, *clausula rebus sic stantibus*. Here, the Council of Ministers could intervene in order to restore, in the interests of consumers, contractual equality of parties - a power used in practice by Regulation of 15.7.1995 even though it reminded too much on the old system of contract regulation.⁴⁶

Later changes in consumer law, in particular those imposed by EU directives were included in the Civil Code. Dir. 99/44 was however put into separate legislation (infra D II 5). Alongside the contractual rules in the Code, a Law on Unfair Competition of 1993 provided for consumer protection by rules on marketing, advertising, and other acts of unfair competition, similar to the German approach protecting the collective, not the individual interest of consumers. Poland can therefore be said to have maintained a *mixed system* of contract law. There has been a debate on drafting a new codification, but no concrete proposals have been publicised.

IV. The importance of the Europe Agreements

When it became clear that the mentioned former socialist governments and (Soviet) republics would become members of the EU, they concluded association agreements (the Europe Agreements) to prepare them for membership and to guarantee the taking over of the so-called “*acquis communautaire*”. The Europe Agreements with Poland and Hungary were concluded in 1993/1994,⁴⁷ with the Baltic States in 1997/1998.⁴⁸ The relevant Art. 70 of the EA with Latvia (the other EA’s contain similar provisions) reads:

“The parties recognise that an important condition for (Latvia’s) economic integration into the Community is the approximation of L.s existing and future legislation to that of the Community. L. shall endeavour to ensure that its legislation will be gradually made compatible to that of the Community.
The approximation of laws shall extend to the following areas in particular:... company law,.. intellectual property, financial services, ... consumer

⁴⁴ Gralla at 182.

⁴⁵ Ibid at 192.

⁴⁶ Jara (1996).

⁴⁷ Poland: [1993] OJ L 348, Hungary [1993] OJ L 347.

⁴⁸ Latvia [1998] OJ L 26, Lithuania [1998] OJ L 51; Estonia [1998] OJ L 68.

protection,.. public procurement... product liability, labour law... Within these areas rapid progress in the approximation of laws should in particular be made in the fields of the internal market, competition, protection of workers, environmental protection and consumer protection.”

Obviously, these provisions are so vaguely drafted that they do not take direct effect, in difference to the non-discrimination rules of the EA⁴⁹, but put an “*obligation de moyen*” on the coming Member States which was supported by the so-called PHARE programmes and monitored by the Commission in its accession progress reports. Most countries under scrutiny indeed tried to make their legislation conform as much as possible with EU law.⁵⁰ This process was terminated with accession on 1st of May 2004.

The following analysis will pay special attention to the integration of consumer contract law into the existing civil legislation of the countries under scrutiny. It will be placed into the general concepts of contract law which had been described as autonomy, regulation, and information. Particular attention will be paid to legal-systematic questions which, even though striving to attain the same objectives, have used surprisingly different legal techniques and means of implementation. We will classify them as

- Monist approach (Estonia)
- Dualist approach (Latvia)
- Parallel approach (Lithuania)
- Modified monist approach (Hungary)
- Mixed approach (Poland).

These classification should not be taken as rigid categorisation of the contract law of these countries, but to help understanding the transformation process which their laws have been undergoing under the impact of the enlargement process.

C. Autonomy

I. The recognition of autonomy in Community law

Primary Community law presupposes the autonomy of economic actors, but does not in itself guarantee it expressly.⁵¹ On the other hand, every liberal legal order has autonomy as its basic philosophy. Open market economy only exists if actors can freely decide what markets to enter - and which not. Vice-versa, on the demand side, the potential clients - whether business or consumer - should be free to choose the products, services, and suppliers they prefer. *Freedom of decision* for active market citizens and *freedom of choice* for consumers and clients is one of its governing principles.

⁴⁹ Reich (2004d).

⁵⁰ Bober/v. Redecker (2002) with regard to Poland, Vékás/Paschke (2004) with regard to Hungary.

⁵¹ Müller-Graff, in: Grundmann *et al* (2001) at 135-150.

These freedoms are supplemented by the *freedom of contract* both in a positive and a negative sense:

- *Positive* insofar as it implies the freedom to choose partners with whom to enter into contractual negotiations, freedom of content such as price and quality of products and services offered and purchased, freedom of conditions that determine performance.
- *Negative* insofar as - in contrast to former socialist economy⁵² - nobody can be forced to enter into any contract, parties may opt out of (non-mandatory) Member State contract law by choice of law and jurisdiction-clauses, and the content of their contract should not be prescribed by the state, courts of law or “arbitrage”, or any other third party.

If a party breaching a contract is forced by law to perform specific performance or to pay compensation, this consequence is not determined by an externally imposed rule, but is the logical result of the free will of the parties. Therefore, *pacta sunt servanda* as a fundamental rule of contract law is the realization of the free will of the parties themselves.

Freedom of contract is complemented by *freedom of association*. Economic actors may decide to co-operate by pooling resources, or entering the market by founding a new entity in order to combine their financial and intellectual resources. Member State law provides for institutions and rules on how this freedom of association can be realized, but will eliminate any general system of licensing which was common under socialism, with the exception of some specific areas like banking and insurance. Since the forms of co-operation by association are more complex and longer lasting than those by contract, legal rules may be more stringent and not allow the same amount of freedom as in contract law. This applies both between the cooperating parties themselves (rules on capital, conditions and terms) and between them and third parties (rules on protection of employees or/and creditors). But again, these limits on the freedom of association do not contradict the liberal model, but only make its realization possible. Law has a supporting function where the free will of the associates is not sufficient to realize the goals upon which they have agreed. The prior socialist system of licensing economic activities is obviously not compatible with EU law.

There has been a debate over whether the principle of freedom of contract can be regarded as a fundamental right in the sense of Art. 6 (2) EU. The ECHR does not expressly mention freedom of contract and therefore has had little impact on contract law theory.⁵³ However, it protects property in its Protocol Nr. 1. In doing so, it implicitly regards a contractual disposition of ownership as the normal legal way to acquire and use property. Property is not merely protected in a static sense, but also in the dynamic form of its acquisition and use by contract. There would be no protection of property if the contractual engagements undertaken in relationship to property were not respected.

⁵² For a discussion in the historical perspective cf. Reich (1972).

⁵³ Reich (2003) at 263-264.

Chapter II of the EU Charter on Fundamental Rights which was integrated into Chapter of the Draft EU Constitution⁵⁴ is concerned with “Freedom” and guarantees freedom of association, Art. II-12, the freedom to choose an occupation and right to engage in work, Art. II-15, the freedom to conduct a business, Art. II-16, and the right to property, Art. II-17. All these freedoms are exercised by contractual engagements. Contracts are the dynamic form of putting to work the freedoms of economic and civil actors, whether they use their right to association, to engage in work, to conduct a business, or to possess and use property.

Particularly interesting in this respect is the broad guarantee of the right to property which gives “everybody ... the right to own, use, dispose of and bequeath his or her lawfully acquired possessions”. This right would be worthless without the dynamic element inherent in the freedom of contract as freedom to acquire goods and immovables, freedom to dispose of them by contract, freedom to enter into contracts and to refuse to contract⁵⁵ with any person at the will of the owner. Expropriation, that is, the taking of property without contract, is strictly regulated and limited by a public-interest test subject to fair compensation.

II. Inherent limitations in contract law - *good faith* and the problem of standard form contracts

1. Generalities

All Civil Codes or Laws of Obligation of the countries investigated contain a guarantee of freedom of contract, the classical one written into Art. 1415 of the Latvian Civil Code of 1937:

“An impermissible or indecent action, the purpose of which is contrary to religion, laws of moral principles, or which is intended to circumvent the law, may not be the subject matter of a lawful transaction; such transaction is void.”

This is a somewhat “old fashioned” recognition of the principle of autonomy. The main problem is of course to define the limits of the law which restricts such freedom; here the fundamental freedoms of EC-law have to be taken into account but will not be discussed in this context.⁵⁵

A more “modern definition” can be found in § 5 of the Estonian Code on Obligations and in Art. 6.158 of the Lithuanian Civil Code:

§ 5 Estonian Code: “Upon agreement between the parties to an obligation or contract, the parties may derogate from the provisions of this Act unless the Act expressly provides or the nature of the provision indicates that the derogation from this Act is not permitted, or unless the derogation is contrary to public order or good morals or violates the fundamental rights of a person.”

⁵⁴ Charter of fundamental rights of the European Union [2000] OJ C 364/1; EU Draft Constitution of 18 July 2003 [2003] C 169 as approved by the heads of State and Governments, Council document CIG 86/04 .

⁵⁵ Reich (2003), at 255-260.

Art. 6.158 (1) Lithuanian Civil Code: “The parties to a contract are entitled to conclude contracts freely and to engage on their own will into mutual rights and obligations, and to conclude contracts which are not foreseen by this law, provided it does not violate the law...”

The Estonian formula is particularly interesting and innovative as it limits the “fundamental freedom of contract” to the equally “fundamental rights of a person.”

The following lines will be concerned with defining inherent limitations to the broad autonomy principles. Under continental legal tradition, they have been spelled out by the good faith principle. This has played a role in the control of so-called standard form and other unilaterally drafted contracts. Art. 3 (1) of the EC Dir. 93/13 on unfair contract terms has for the first time recognised this principle in Community law which thus has become part of *acquis*. It is however subject to a number of limitations, the most important one being its personal application to consumers as “natural persons acting outside his trade, business or profession.” It is also not applicable to individually negotiated clauses and to clauses relating to the subject-matter and the price of the transaction, “provided it is drafted in clear intelligible language..” It will seen whether a more general approach has emerged in the Codes under investigation, which EU-law would allow under the minimum harmonisation principle.

2. Estonia

a. Good faith-obligation

§§ 6 and 7 of the Estonian Act on obligations recognises the principles of “good faith” and “reasonableness” with the following words:

“Obligors and obliges shall act in good faith in their relations with one another. Nothing arising from law, usage or a transaction shall be applied to an obligation if it is contrary to the principle of good faith.

With regard to an obligation, reasonableness is to be judged by what persons acting in good faith would ordinarily consider to be reasonable in the same condition. In assessing what is reasonable, the nature of the obligation, the purpose of the transaction, the usages and practices in the fields of activity or professions involved and other circumstances shall be taken into account.”

Good faith, supplemented by the new principle of reasonableness (probably borrowed from common law), is regarded as a guiding principle of the law of obligations, including the interpretation of contracts, § 29 (5) No. 4. The relationship between the two principles is however not clear and has to be shaped by judicial interpretation; no precedents seem to exist.

b. Standard terms

Standard terms are regulated in §§ 35-44 of the Act. Their prominent position makes clear that they are an inherent limitation of autonomy. The Estonian legislator thereby implemented Dir. 93/13, but at the same time extended its sphere of application, thus shaping a general law of standard terms, including such traditional rule on the irrelevance of surprising terms for the contents of the contract, § 37 (3),

the priority of individual agreements over standard terms, § 38, the “battle of forms”, § 40, and the “*contra preferentem*”-rule of interpretation, § 39 (1).

Specific consumer protection provisions are included in the so-called black list of § 42 (3) which widened the material sphere of the so-called indicative list of Art. 3 (3) of Art. 93/13; a total of 37 terms (!) have been blacklisted. § 44 provides that there is a presumption of unfairness of the blacklisted clauses have which been entered “into a contract for the purposes of economic or professional activities of the person”. This is to some extent surprising, as the function of the black resp. grey list is completely different in consumer and in business transactions.⁵⁶ § 36 (2) and (3) relate to the international application of the rules on standard terms which is not limited to consumers residing in Estonia. With regard to business entities having “... their economic or professional activities and their places of business related to the contract or the performance thereof ... in Estonia”, the rules of the Act on standard terms apply even if another law is applicable to the contract. Such broad application of Estonian law is contrary to the freedom of choice rules of Art. 3 of the Rome Convention of 1980.⁵⁷ It also goes beyond Dir. 93/13 because it is not limited to the law of a non-member country. With EU membership, Estonia may have to change its Code of obligations.

3. Latvia⁵⁸

a. The good-faith principle

Latvian law has enshrined the good faith principle in Art. 1 which reads laconically:

“Rights shall be exercised and duties performed in good faith”

There is however no express corresponding rule with regard to the interpretation of contracts, Art. 1504-1510.

The place of this norm in the overall structure of the Civil Code is said to be an acknowledgement of its fundamental importance in the implementation of civil law⁵⁹. It is considered to be a principle of high morals⁶⁰, according to which each party to civil law relations ought to carry out their rights and duties fairly (*bona fides*) and taking into account interests of others; it follows that in certain circumstances a party may be barred from fulfilling its rights or duties, if the other party’s lawful interests are to be given priority as more significant⁶¹. Being a fundamental principle of high level of abstraction, the good faith provision is further expounded and implemented through other legal norms. It follows that a court may not use Article 1 Civil Code arbitrarily to modify the legal consequences following

⁵⁶ Vékás (2004) at 38; Reich (2004a)

⁵⁷ Reich (2003) at 270.

⁵⁸ The following section is based on the study by Svjatska (2004).

⁵⁹ Balodis (2003) p.2; Sinaiskis V. Mūsu tiesības un pienākumi jaunajā Civīlīkumā. Prezidenta Ulmaņa Civīlīkums. [Our rights and duties under the new Civil Law. The President Ulmanis’ Civil Law] Rīga, Pagalms, 1938, 167 pp.

⁶⁰ Būmanis A. Vispārējs pārskats par jauno Civīlīkumu. Prezidenta Ulmaņa Civīlīkums [A General Overview of the new Civil Law. The President Ulmanis’ Civil Law] Rīga, Pagalms, 1938, 99.lpp.

⁶¹ Balodis (2003) 2-4.

from a substantive legal norm in order to make them fit some standard of fairness. In other words, the principle of good faith is not seen as an alternative to substantive legal norms, but rather as a tool of systematic interpretation used in exceptional circumstances in order to avoid the application of a particular substantive norm leading to an unfair result⁶². Consequently, the question whether to apply Article 1 Civil Code in a particular case is to a large extent in the discretion of the person applying the law.

In practice Latvian courts have referred to Article 1 Civil Code in a number of judgments. Thus, Article 1 Civil Code is considered to be a legal tool that can be used, *inter alia*, to prevent the exercise of rights in conditions when the entitled person has no protected interests, for instance, when the rights are used to achieve unfair aims⁶³.

Furthermore, the principle of good faith helps to avoid situations when the exercise of particular rights is inadmissible. The court applied Article 1 Civil Code in a case where two heirs of an owner of immovable property had concluded an agreement by which they agreed to divide the property amongst themselves in a particular way, on basis which immovable property was later privatized; later, one of the heirs brought a claim against the other arguing that the privatization was unlawful. The court noted that the privatization was performed according to the will of the parties expressed in the agreement, and the wish to revise it by one party on the expense of the other, without, in addition, offering compensation, was to be considered an exercise of rights in bad faith⁶⁴. The good faith-principle thereby takes up general concerns of “*abus de droit*”, but is limited to a narrow subjective approach.

b. Standard terms

The Latvian Civil Code recognizes the possibility for the parties to a contract to use standard form contracts. This follows from the general civil law provisions allowing the parties to choose freely the form in which to draw up a contract, and not binding them (except for cases when mandatory norms apply⁶⁵) to obeying any formalities or models⁶⁶. Notably, the Latvian Cabinet of Ministers has issued regulations laying down standard form contracts to be used in cases of lease of land⁶⁷; however, such standard contracts terms only bind state institutions entering into this type of agreements, whereas private parties are free to choose themselves a particular form for their contracts⁶⁸.

⁶² Balodis p.5-6.

⁶³ Balodis p.7.

⁶⁴ Decision by the Civil Law Department of the Republic of Latvia Supreme Court, No.SKC-497, Year 1997.

⁶⁵ For example, Articles 1475, 1477, 1483, 1484, 1493 CL.

⁶⁶ Article 1492 CL.

⁶⁷ Regulation of the Cabinet of Ministers, No.292, 03.10.1995.

⁶⁸ Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. [Commentary to the Civil Law of Republic of Latvia: Part Four. The Law of Obligations] Autoru kolektīvs prof.K.Torgāna vispārīgā zinātniskā redakcijā. Rīga, Mans īpašums, 1998, 70.lpp.

The issue of conflicts of standard contract terms (battle of forms) is likewise regulated by the general provisions of CL which state that a contract is deemed to be concluded if a party accepts the offer of the other party containing at least the essential elements⁶⁹ of the contract⁷⁰. If the acceptance of the offer is not unconditional, i.e. if the terms of the contract to be concluded require further negotiations by the parties, then such a response to the offer is considered to be a counter-offer. Thus a contract may only be concluded by virtue of an unconditional acceptance of the offer made⁷¹. Consequently, if a party responds to an offer contained in a standard term form by submitting to the offerer its own standard term form, this must be seen as a counter-offer, and a contract is not concluded at this stage.

In the dualist Latvian system of civil law, the Consumer Rights Act of 1999 has implemented Dir. 93/13, but has also introduced a number of particularities which may be seen as the emergence of new principles of contract law. Art. 5 established the (normative) principle of legal equality between business and consumer, and Art. 6 (1) prohibits the use of terms “as are in contradiction with the principle of legal equality of the contracting parties, this law or other regulatory enactments.”. This broad principle is not limited to standard or pre-formulated terms.⁷² Only Art. 6 para (3) takes up the wording of Art. 3 (1) of Dir. 93/13 and blacklists at the same time 12 clauses from the “indicative list” of the Annex.

The most important one has been the extension of the concept of consumer to business entities acting outside their market activities:

“consumer - a natural or legal person who expresses a wish to purchase, purchase or might purchase goods or utilises a service for a purpose which is not directly related to his or her entrepreneurial activity.”

This has led to Latvian courts applying the consumer protection legislation to the purchase of cleaning material by a business company because this was outside its normal activity.⁷³ It is not known whether this extension of consumer law to business activities has merely happened by accident or a misunderstanding of the relevant EC Directive, or whether it can be seen as a deliberate extension of the good faith principle as in Estonian law.

As a clear violation of EC law, the Act does not provide for an automatic nullity of unfair terms against the consumer, but only allows that the term “shall be declared, upon request of the consumer, null and void, but the contract shall remain effective if it may continue functioning also after exclusion of the unfair provision.”

⁶⁹ Article 1533 CL.

⁷⁰ Article 1536 CL. This, however, is subject to the qualification that parties may want to agree on other provisions of the contract - apart from essential elements - in order to conclude the contract (Article 1534 CL).

⁷¹ Article 1537 CL.

⁷² See the critique of similar formulations in the Hungarian law by Vékás (2004).

⁷³ Decision of the Riga regional court, No. C 33168300/504/02; conceptual critique by Rösler (2004) at 128.

This seems to rule out an *ex officio* disregard of the term by a court of law, as in the *Océano*-judgment of the ECJ.⁷⁴

4. Lithuania⁷⁵

a. The broad good-faith principle in the new Code

Art. 1.5 of the Civil Code entrenches general principles of good faith, reasonableness and justice. The necessity to apply these principles is also highlighted in various Civil Code articles (these principles in one or another context are mentioned more than 100 times). It provides that subjects of the civil law, in exercising their rights and performing obligations, have to act pursuant to requirements of justice, reasonableness and good faith. Courts in interpreting and applying legal norms must follow these principles. The same rules apply to the situation when courts have discretion. Art. 6.38 provides that obligations must be exercised in good faith; Art 6.158 acknowledges that each party must act in accordance with good faith, and the parties may not exclude or limit this duty. Lithuanian courts on repeated occasions confirmed these principles.⁷⁶ Also, it should be noted that these principles are used quite widely: in one of the cases,⁷⁷ the court refused to apply an interest rate (more precisely, the way how and from what date to calculate the interest) which is set by Civil Code⁷⁸. The court stated that in that particular case an adjustment of the interest fixed by Art. 6.210(2) would be contrary to the principles of good faith, reasonableness and justice. In another case the court stated that the litigation costs (of a winning party, which must be paid by a losing party), in that particular case, can be reduced given that a losing party acted in good faith.⁷⁹

Also it should be pointed out that non-compliance with the good faith obligation can amount to the abuse of law (Art. 1.137(3)) or to the fault, which triggers civil liability (Art. 6.248(3)).⁸⁰ If a person acts contrary to the principles of good faith, reasonableness and justice, a court can refuse to protect his right (Art. 1.137 (3)-(5)).⁸¹

b. Standard terms in general

Art 6.185 (1) of the Lithuanian Civil Code provides a definition of standard terms - those contract provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other

⁷⁴ Cases C-240-244/98 [2000] ECR I-4491.

⁷⁵ The following section is based upon the paper by Petrevičius (2004).

⁷⁶ For example see: Lithuanian Supreme Court Case No 3K-3-8/2003 *I.Lemeseva v. G.Lemesevas*; Lithuanian Supreme Court Case No 3K-3-150/2004 *UAB "Skraida" v. UAB "Nabukas"*;

⁷⁷ Lithuanian Supreme Court Case No 3K-3-966/2003 AB „*Ukio bankas*“ v. UAB „*Baltijos Orfejas*“, for the court right to lower excessive interest which are contrary to principles of good faith, reasonableness and justice see: Lithuanian Supreme Court Case No 3K-3-908/2001 *AKB "Nida" v. S.Lideikyte*.

⁷⁸ By Art. 6.210(2) of Civil Code.

⁷⁹ Lithuanian Supreme Court Case No 3K-3-1136/2003 *D.Čeikauskas v. R.Čeikauskiene*.

⁸⁰ Art. 6.162 (2) of Civil Code, see also Mikelėnas V. Lietuvos Respublikos Civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė (I). Justitia, Vilnius, 2003, p.78.

⁸¹ *Ibid*, p.78.

party. This provision basically reiterates Art 2.19 of the UNIDROIT principles⁸². Art. 6.185 (2) entrenches that standard terms of a contract proposed by one party bind the other party only if this party had due possibility of becoming acquainted with these standard terms. Accordingly, standard terms cannot be used against the party if this party did not have a proper possibility to get familiar with the standard terms.⁸³

While this provision is applicable to both consumer and business contracts, the respective information requirements differ.

c. Business contracts

Art 6.185 (3) provides that the requirement to make the other party familiar with standard terms is satisfied if:

- the party which prepared the standard terms provides standard terms to the other party before or during the signing of a contract; or
- the party which prepared the standard terms informs the other party (before the signing of a contract) that the contract will be concluded on the basis of its own standard terms, and instructs how to familiarize with the standard terms; or
- the party which prepared the standard terms proposes to send standard terms to the other party on its request.

The party which prepared the standard terms has a burden to prove that the other party had a real opportunity of becoming acquainted with standard terms in question.⁸⁴

Art 6.186 introduces the definition of “surprising terms”. No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective. A term is not surprising if it has been expressly accepted by that party, when it was duly disclosed. In determining whether a term is of such a character regard shall be had to its content, language and presentation. Again, the provision in question reiterates UNIDROIT principles.⁸⁵ Art 6.186 (3) also provides that, when the contract was concluded on the basis of standard terms, the other party has the right to demand a termination or an alteration of the contract where standard terms, even if they are not against the law, exclude or limit the legal liability of the party which prepared standard terms, or break principles of equality of the parties and balance of their interests, or conflict with the principles of reasonableness, good faith and fairness.

The commentary of the Civil Code suggests that Art 6.186 is applicable in case of commercial contracts, while in case of a consumer contract the provisions on

⁸² For the importance of the Unidroit-principles, see Mikelenas (2000) at 252-54.

⁸³ Lithuanian Supreme Court Case No 3K-3-486/2000 “Pozicija” v. “Lietuvos Draudimas”.

⁸⁴ Lithuanian Supreme Court Case No 3K-3-486/2000 “Pozicija” v. “Lietuvos Draudimas”, also see Lithuanian Supreme Court Case No 3K-3-581/2000 S.Lisovskis v. “Lietuvos Draudimas”. The Commentary of Civil Code suggests just the opposite.

⁸⁵ Art 2.20 of Civil Code.

consumer protection must apply.⁸⁶ However, in practice, this provision was also used in litigation between an individual and an insurance company over an insurance contract.⁸⁷ In that case the Supreme Court affirmed that those standard terms that were not duly disclosed and which are of such a character that the other party could not reasonably have expected them are surprising terms. Such terms are not applicable on the request of the other party.

d. Consumer contracts

The currently effective Law on Consumer Protection and the Civil Code centralized regulation of the consumer protection issues. Those laws have been harmonized with the main EU consumer protection legislation⁸⁸, including Directive 93/13. As regards their wording in respect to consumer protection, both the Law on Consumer Protection and the Civil Code are almost identical. At present courts apply both acts in parallel.⁸⁹

Art. 6.188 of the Civil Code gives a right to the consumer to ask a court to declare unfair terms void. On the other hand, the court can declare contractual terms void *ex officio* when these terms are contrary to the imperative/mandatory rules. The Civil Code does not expressly state whether the consumer protection rules entrenched in Art. 6.188 are mandatory. It is not clear whether the court is able to set aside the application of the relevant term even where the consumer has not raised the fact that it is unfair. Furthermore, unequal possibilities of the parties must be compensated by other means: by a more active role of court in the litigation (for example, in clarifying the rights of the parties); preservation of a balance of interests of the parties; more stringent contractual liability of the stronger party.⁹⁰

The article also contains a non-exhaustive list of the terms which are regarded as unfair.⁹¹ This list is a verbatim translation of the Annex to the Unfair Terms Directive, but makes them into a black-list. However, the unfairness of a contractual term is determined by the court, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. Again, this provision is merely a word-for-word implementation of directive in question.

It is important that this list is not exhaustive - other contractual terms may be regarded as unfair, provided that they are contrary to the requirements of good faith

⁸⁶ Mikelėnas V. Lietuvos Respublikos Civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė (I). Justitia, Vilnius, 2003, p.235.

⁸⁷ Lithuanian Supreme Court Case No 3K-3-1150/2003 *O.Dubnikova v. „Lietuvos draudimas“*.

⁸⁸ *Doing business in Lithuania*. <http://www.infolex.lt/portal/ml/start.asp?act=dobiz>.

⁸⁹ Lithuanian Supreme Court Case No 3K-7-1/2003 I. *A.Valionienė v. „Karoliniškių būstas“*.

⁹⁰ Lithuanian Supreme Court Case No 3K-3-1150/2003 *O.Dubnikova v. „Lietuvos draudimas“*; Lithuanian Supreme Court Case No3K-3-1137/2002 *SP AB „Vilniaus šilumos tinklai“ v. B.Giedraitienė*.

⁹¹ Art. 6.188 (2) of Civil Code.

and cause inequality of the mutually enjoyable rights and obligations between the seller, service provider and consumer.⁹²

Furthermore, there is a presumption that a term in a consumer contract was not individually negotiated - the burden of proof that the contractual term was individually negotiated lies on the seller or supplier.⁹³ Moreover, the *contra proferentem* rule applies in this context - where there is doubt about the meaning or interpretation of the consumer contract, the interpretation most favourable to the consumer shall prevail.⁹⁴

It should be pointed out that the *contra proferentem* rule applies not only in litigations where one party is a consumer; where there is doubt about the meaning or interpretation of the term of contract, it should be interpreted to the prejudice of the party which tenders it and in favour of the party which accepted it.⁹⁵

Unfair terms are void *ab initio*, i.e. once the contractual term is acknowledged as unfair during legal proceedings, it is null and void from the day of the signing contract.⁹⁶ The fate of the whole contract depends on whether it is capable of continuing in existence without the unfair terms - if yes, the contract continues to bind the parties.⁹⁷ The parties can fill the gap in the contract themselves, or it can be done by the court.⁹⁸

5. Hungary

As mentioned above, Act CXIX of 1997 amended the Civil Code to regulate general contract terms. These broad provisions are not limited to consumer contracts and therefore have a wider application than Dir. 93/13, while others, particular about blacklisted clauses, are limited to consumer contracts. The Hungarian legislator did not go as far as the Estonian law.

§ 209/C contains a definition of standard terms which insists that the user (which, against former law, can also be a private party) determines the contract conditions in advance, unilaterally and for the purpose of repeat contract conclusion without the other party being able to participate. It does, however, not require that the clause has not been individually negotiated.⁹⁹ The burden of proof concerning (non-) participation in the formulation is imposed on the user, a rule to be restricted to consumer contracts.¹⁰⁰ The insistence on “participation” and not on “negotiation” may be due to a misunderstanding of the relevant EC-law provisions which at this time were not officially translated.

The concept of unfairness has been defined in § 209/B (1) by reference to the concept of “good faith” of Dir. 93/13, well known in Hungarian law. In addition to

⁹² Art. 6.188 (3) of Civil Code.

⁹³ Art. 6.188 (4) of Civil Code.

⁹⁴ Art. 6.193 (4) of Civil Code.

⁹⁵ Art. 6.193 (4) of Civil Code.

⁹⁶ Art. 6.188 (6) of Civil Code.

⁹⁷ Art. 1.96 of Civil Code.

⁹⁸ Art. 6.162 (2) of Civil Code, see also Mikelėnas V. *Lietuvos Respublikos Civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė (I)*. Justitia, Vilnius, 2003, p.241.

⁹⁹ Critique Vėkās (2004) at 26 f., 32-33.

¹⁰⁰ Vėkās at 30.

the directive, it tries to give two examples of a one-sided and unjustified imposition of rights and duties, § 209/B (2),

- namely if the clause deviates substantially from central provisions of contract law,
- or if it is incompatible with the subject matter or provisions of the contract.

Vékás criticises that this way the non-mandatory provisions of the Civil Code become mandatory.¹⁰¹

The Government Decree 18/1999 of 15.2.1999 contains a black and a grey list of prohibited clauses in contracts between business and consumers. Blacklisted clauses are automatically void, clauses of the grey list are presumed to be void, but the user can justify them by referring to the entire balance of the contract provisions. Other clauses which are not specifically blacklisted can only be declared void either in individual proceedings upon application of the party against whom the clause is used, or by *actio popularis*, but this action can only be brought if the clause has been used by an “economic organisation” - a limitation in contradiction to Art. 7 of Dir. 93/13.¹⁰²

The main critique against the Hungarian regulation is concerned with the widening of the sphere of application of Dir. 93/13 (resp. its Hungarian implementation) also to B2B contracts.¹⁰³ If on the other hand one starts from the assumption - which is the basis of this paper - that the good faith principle is also rooted in B2B contracts, even though in a somewhat less intensive way, these contracts should not be excluded from the unfairness control of pre-formulated clauses. The yardstick may be a different and less intrusive one, and the mixture of the Hungarian legislator between “normal” and “consumer contracts” may not be a very promising and successful approach. There must indeed be a differentiation between B2B and B2C contracts. EC Dir. 93/13 must however not be misunderstood as a directive limiting the good faith principles in standard form clauses to consumer contracts.

6. Poland

As mentioned above, the re-establishment of market economy in Poland and the abolition of special relations between socialist enterprises led to the recognition of the equality of all civil law subjects, thus rejecting the privileged position of socialist enterprises, and of contractual freedom.¹⁰⁴ According to Art. 353¹ of the Civil Code of 1964 as amended in 1990, “the parties are free to determine their legal relationship according to their free will, provided that its contents and objectives do not contradict the nature of the legal relation, the law and the principles of social coexistence.” The good faith principles is indirectly recognised in Art. 7 Civil Code:

¹⁰¹ Vékás at. 28, 34.

¹⁰² Vékás at 30-31.

¹⁰³ Vékás at 34-40.

¹⁰⁴ Poszobut (1999) at 82.

“if the law determines certain legal consequences by referring to good or bad faith, there is a presumption of good faith.”

Furthermore, later amendments introduced contractual rules having as their objective to privilege the consumer in his relations with the new private or privatised business. At first the law-maker distinguished two types of general contract conditions. The first comprises the those established by a party and authorised by state rules, eg the Polish airline LOT, Post-office, Railway. Such conditions are binding if they are delivered to the other party when the contract was being concluded. All other general conditions are binding only to the extent that a party agrees to their inclusion in the contract. Thus general conditions set forth by a party without special statutory authorisation constitute only an offer addressed to the other party.¹⁰⁵

By Act of 2.3.2000, in force since 1st of July 2000, Art. 384 et seq. of the Civil Code of 1964 were amended to modernise the existing law on standard contract clauses and to introduce specific rules of consumer protection under the impact of EC Dir. 93/13 and the Europe Agreement with Poland.¹⁰⁶ The relevant provisions read as follows:

Art. 384 § 1: A model form of a contract set up by any party, in particular general conditions of contracts, standard forms of contracts and rules shall be binding upon another party if having been delivered to such a party on concluding the contract.

§ 2: Where the use of a standard form is customarily accepted in a given kind of relationships, it shall also be binding upon the other party if such party might have easily learned about the contents. This shall not be valid, however, for contracts concluded with the participation of consumers, except for contracts commonly made in petty current matters of quotidian life....

Art. 385 § 1: In the case of any discrepancies between the contents of a contract and the standard form therefore, the parties shall be bound by the contract.

§2: The standard form of contract must render its contents explicitly and comprehensively. Controversial provisions must be interpreted for the benefit of the consumer.

Art. 385¹ § 1: Provisions of a contract concluded with a consumer, which have not been individually agreed with him, shall not be binding thereupon, if his rights and duties have been stipulated in conflict with public decency and in flagrant violation of his interests (wrongful contractual provisions). This shall not relate to the provisions which specify basic performance of the parties, including price and remuneration if determined explicitly.

§ 2: Where the provision referred to in para 1 is not binding upon the consumer, the parties shall be bound by the remaining provisions of the contract.

§ 3: The provisions not agreed individually shall be such provisions of the contract over which the consumer had no actual influence. It shall concern, in particular, the provisions of the contract taken over from the standard form contract offered to a consumer by a contracting party.

¹⁰⁵ Kordasiewicz/Wierzbowski (1995) at 194

¹⁰⁶ Surdek/Binieda (2003) at 470-473.

§ 4: The burden of evidence to prove that the provision has been agreed individually shall be borne by the party who claims.

Art. 385²: The conformity of a given provision with public decency shall be examined in reference to the state of affairs on the date of conclusion of a contract and taking into account its contents, circumstances its conclusion and other contracts being in connection with the contract which includes the provision being subject to such examination.

Art. 385³ contains a “grey list” of 23 clauses which in cases of doubt are regarded as “wrongful provisions.” The provisions of the Code do however not mention the transparency principle of Art. 4 (2) of the Directive, contrary to ECJ-case law.¹⁰⁷

Art. 385⁴ contains, on the other hand, a rule which is specific to B2B contracts:

§ 1: A contract concluded between entrepreneurs who use different standard forms of contract shall not be valid for the provisions of the standard forms which are mutually contradictory.

§2: A contract shall not be deemed as concluded where, after having received an offer, a party promptly acknowledges that it does not intend to enter into such a contract under conditions referred to in para 2.

The actual practice with regard to the new provisions is not known to me. The structure of the new law is somewhat complicated because general questions of the law of standard contract terms are mixed with specific rules on consumer protection, taking different concepts as starting points. There are no rules concerning “surprising clauses”. The “*contra preferentem*”-rule is only applied to consumer contracts, not as a general principle of the interpretation of standard forms.

D. Regulation

I. Generalities - the importance of Dir. 99/44 for general contract law

The following section will be devoted to analysing the importance of Dir. 99/44 for the contract law of the countries studied here. It is meant to be a consumer protection directive, as clearly stated already in para 1 of its “recitals”. It therefore is limited to consumer sales in a personal and substantive sense:

- Personal insofar as only consumers as “natural persons acting for purposes which are not related to (their) trade, business or profession” come into its ambit of protection.
- Substantive insofar as only consumer goods as “tangible movable goods” are covered with some exceptions, not immovable property, rights and obligations.

¹⁰⁷ Case C-144/99 Commission v Netherlands [2001] ECR I-3541; Reich (2003) at 280; Vékás (2004) at p. 33 with regard to Hungarian law.

With this limitation, the provisions of the directive respectively Member State law implementing it are mandatory and cannot be waived, or, in the words of Art. 7 (1):

“Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller’s attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer...”

But the importance of the directive goes far beyond this narrow regulatory approach in respect to consumer protection.

- First, it extends regulation beyond mere consumer protection because in Art. 4 it provides for a right of redress of the seller against his seller, manufacturer, or importer of the product. It is not clear how far this right is mandatory; there is no similar provision to Art. 7(1) in the Directive, and para 9 of the “recitals” is rather ambiguous on this point: On the one hand, it gives the last seller a right to “pursue remedies against the producer, the previous seller in the same chain of contracts or any other intermediary, unless he has renounced that entitlement”. At the same time, the “principle for freedom of contract” is said to be safeguarded, and it is left to national law to determine “against whom and how the seller may pursue such remedies”, thereby implicitly stating that the seller must be able as such to pursue these remedies, and that they cannot be completely contracted out. This ambiguity must however be solved by national law. This paper will not go into the discussion of this highly controversial point,¹⁰⁸ but will simply take a look at the solutions found by the Member States under scrutiny.
- Second, the concepts used in the directive itself, especially on conformity stemming from the United Nations Sales Convention, have a much broader sphere of application than consumer sales; they may imply a general paradigm change in sales and even more in contract law. It is suggested that dualist systems of contract law will have more problems with implementing the Directive than monist ones, and that countries which decide for a new codification of contract law will be better off than those that have to integrate the imperatives of the Directive into their pre-existing contract law.
- Third, the question of remedies has been intensively debated and solved in a rather detailed though not complete way. This responds to the general principle of Community law of “*ubi res ibi remedium*”.¹⁰⁹ It however does not make reference to compensation but leaves this to Member States under the minimum harmonisation principle.

¹⁰⁸ See Reich/Micklitz (2003) at 660.

¹⁰⁹ V.Gerven (2000); Reich (2003) at 227-231.

II. The importance of Dir. 99/44 on contract law within the enlargement process

1. Estonia

The Estonian Code of Obligations regulates sales law in §§ 208-237. It uses Directive 99/44 to modernise sales law in general, while § 237 (1) provides that in consumer sales the legal remedies provided under the law cannot be contracted out. The same is true if “a contract is entered into as a result of a public tender, advertising or other similar economic activities taking place in Estonia ... with a purchaser residing in Estonia regardless of the country whose law is applied to the contract.” Under § 236 also consumer protection bodies may demand the seller “who is in breach of provisions concerning a (consumer sales).. to terminate such violation and refrain from violating the provisions.”

§ 217 defines conformity in a similar manner as Art. 2 of Dir. 99/44. It is extended to cases of insufficient packaging. The liability of the seller for public statements of the producer is limited to consumer sales and can be avoided under § 217 (3), similar to Art. 2 (4) of the directive. The optional notification obligation has been transposed by § 220 (1), distinguishing neatly between B2C and B2B contracts. An obligation to examine things which is unknown to the directive exists only for B2B contracts.

The remedies of the buyer are written down in §§ 220-225 and are nearly identical for B2B and B2C contracts. § 222 (5) contains a right to self-repair resp. reimbursement of the costs if “the seller fails to repair the thing within reasonable period of time”. Cancellation is only possible when there has been “fundamental breach of contract of sale by the seller”. § 223 (2) stipulates for a consumer sale, that “any unreasonable inconvenience caused to the purchaser by the repair or substitution of a thing is also deemed to be a fundamental breach of contract by the seller.” The Code thereby wants to implement Art. 3 para 6 of Dir. 99/77 whereby “the consumer is not entitled to have the contract rescinded if the lack of conformity is minor”. It is questionable whether the wording is identical; in cases of doubt, Estonian courts will have to apply the theory of “directive conforming interpretation”.¹¹⁰

§ 228 contains a provision on redress of a seller in consumer sales, but only in cases of “a statement by the producer, previous seller or other retailer with respect to particular characteristics of the thing”. This is somewhat narrower than Art. 4, because there redress can be sought “because of a lack of conformity resulting from an act or omission by the producer...” These rules are non-mandatory, but may be caught by the principles of unfair term legislation (supra B II 2).

§ 230 (1) contain detailed rules on warranties. The transparency requirements of the directive are correctly implemented. In addition to Community law, there are certain presumptions concerning the content of the warranty, namely:

¹¹⁰ Reich (2003) at 47-51.

1. the warranty grants the purchaser the right to demand the repair of the thing or delivery of a substitute thing without charge during the warranty period;
2. a new warranty with the same duration as the original warranty will be granted for things replaced during the warranty period;
3. if a thing is repaired during the warranty period, the warranty is automatically extended by the length of the period of repair.
4. a warranty against defects covers all defects of a thing which become apparent during the warranty period, § 230 (3)

This seems to be a particularly promising solution of the dilemma that the guarantee under Art. 1 (3) (f) of the directive is a voluntary “undertaking”, but that its contents may not be clear to the consumer.

2. Latvia¹¹¹

a. The system of the Civil Code

In the dualist system of Latvia, the Civil Code of 1937 does not regulate the remedies for non-conformity in sales contracts as such, but established general rules on liability in so-called “alienation contracts against consideration” (entgeltlicher Veräußerungsvertrag), eg sales, barter, pledge. The alienator has to guarantee that the “property has no hidden defects and possesses all the good qualities which are warranted or presumed”, Art. 1593. Art. 1612 et seq. regulate in detail the duties of the alienator and the remedies of the acquirer which are, as in traditional Roman systems, limited to rescission and reduction of the price; the limitation period for the first is 6 months, for the second one year, Art. 1633, 1634.

Under existing Latvian law, Dir. 99/44 could not be simply implanted into the Civil Code because it starts from a completely different concept. Therefore, an amendment of the Consumer Right’s Protection Act of 1999 (CRP Act) was adopted on 22 Nov. 2001. It reinforced the dualist system of Latvia law.

b. Transposition into the CRP Act

The Sales Directive 99/44 is deemed to be fully transposed into the CRP Act. The technical and procedural details of submitting a claim of non-conformity, possible verification of non-conformity and settlement arrangements are further regulated by Regulations of the Cabinet of Ministers. Some basic points on implementation and possible misconceptions are outlined below.

The CRP Act lists all criteria of goods non-conforming with the contract by reiterating in the negative the criteria of goods presumed to be in conformity with the contract mentioned in the Sales Directive¹¹², adding several other grounds, such as counterfeit goods, inappropriate packaging, etc.

The CPR Act restates the four means of redress available to the consumer precisely as defined in the Sales Directive¹¹³. In addition, a consumer is entitled to

¹¹¹ The following section is based on the study by Petkeviča (2004).

¹¹² CRP Act, Article 14 (1) transposing Article 2 (2) of the Sales Directive.

¹¹³ CRP Act, Article 28 transposing Recital 10 of the Sales Directive

damages as available under general Civil Law rules. Interestingly, the CRP Act does not specify the defences mentioned in Article 2 para. 4 of the Sales Directive that are available to the seller in situations when he is not bound by public statements. Apparently, it is possible to put these defences under Latvian general civil law, as according to the Sales Directive the burden of proof is on the seller anyway.

The peculiarity of Latvian implementation is that when non-conformity is claimed within a period of 6 month after delivery, the consumer has the free choice of the four remedies as provided for by the Sales Directive - a questionable implementation not taking into account the detailed two-step procedure of enforcing claims which the directive has introduced after long debates in Parliament and Council, suggesting a complete harmonisation of the hierarchy of remedies (with the exception of compensation).¹¹⁴

Six months after delivery, the priority is given to repair or replacement. If these means are not possible or cause considerable inconvenience to the consumer, the contract can be rescinded, but the payment made to the consumer should take into consideration natural depreciation of goods. There are no such provisions in the Sales Directive. It seems justified to take the interests of the sellers into consideration here, as Latvian law does.

Another interesting point is that under Latvian law a guarantee is an undertaking of a seller going beyond (that is, granting more than) the protection of the CRP Act¹¹⁵. If the guarantee does not specify something more, it cannot be called 'guarantee'. The Sales Directive does not define the term guarantee and does not require such an extended definition. Latvian law thus gives more protection to the consumers in this respect.

c. **Mandatory character - subrogation**

Though required by the Sales Directive, there is no provision in the CRP Act stating exactly that any term waiving or restricting the rights of consumer is not binding on the consumer¹¹⁶. A waiver of consumer rights in a contract is a breach of the principle of equality of the contracting parties which is guaranteed by the CPR Act. The consequence is that a consumer is entitled to claim that such a term is invalid. Despite this, the mandatory character is rather obvious from the spirit of the CRP Act and is presumed in legal writings¹¹⁷. The aim of the law is to grant consumers the necessary protection; thus the requirements provided in the CRP Act are clearly only minimum guarantees to be complied with by a seller. Administrative and criminal penalties are imposed for violations of the CRP Act¹¹⁸. The general rule of Civil Law, providing that a contract contrary to the law is void,¹¹⁹ is applicable here.

¹¹⁴ Rott (2003) at 1129; Reich (2004b).

¹¹⁵ *ibid*, Article 16.

¹¹⁶ Sales Directive, Article 7 para. 1

¹¹⁷ E.g., Kalniņš E. „Līgums nav spēkā, kamēr nav ievērota likumā noteiktā forma” (Contract Is Not in Force Until the Form Required by Law Is Satisfied) in *Latvijas Vēstnesis* 09.10.2001; Sporne I. „Atteikuma tiesības patērētāju līgumos” (Right of Withdrawal in Consumer Contracts) in *Latvijas Vēstnesis* 20.11.2001.

¹¹⁸ CRP Act, Article 33.

¹¹⁹ Civil Law, Article 1415.

According to Art. 33 of the CRP Act, the seller is entitled to pursue remedies against the person liable in the contractual chain. It seems that no private arrangement can divert the liability of the final seller. This right of subrogation has been included in the CPR to make enforcement of consumer claims effective, and it therefore cannot be contracted out. The Latvian legislator has not changed the provisions of the Civil Code even though they may be based on a different theory of liability and have shorter prescription periods.

Also, Latvian law does not explicitly provide that consumers cannot waive the protection by opting for the law of non-member state where the contract has a close connection with the territory of Member States¹²⁰. The Civil Law states that the foreign law can not be applied in conflict with the social or moral ideals of Latvia as well as mandatory rules of Latvian law - a rather general rule which must be put in line with the Rome Convention and with Dir. 99/44 itself.

d. Influence on general civil law

The Latvian implementation, though not formally integrated into the old Civil Code of 1937, will impose changes on general civil law beyond consumer protection in three directions:

- The broad consumer concept (supra C II 3b) means that also transactions between businesses will be caught by the CPR Act and will take priority over the rules of the Civil Code.
- Questions of redress of the seller against his suppliers will be solved by subrogation, eg by applying the norms of the CPA without allowing the defences under general civil law.
- The rules on conformity have been extended also to cover services, per Art. 29 CPR Act.

The CPR Act therefore may be starting point for a substantial change of the existing Latvian contract law as such. It is not known how this emergence of a new contract law will be handled by the Latvian legislator and Latvian courts.

3. Lithuania¹²¹

All questions of contract law are dealt in the sixth book of the Code, which first deals with the law of obligations, then there is a chapter on the law of contracts, the next deals with obligations arising on the basis of other grounds, and then the Code contains provisions concerning particular contracts. Sales contracts are dealt with in the first place. Consumer sales contracts are regulated also by the Law on Consumer Protection¹²² (CPL), which is only applicable in cases mentioned above.

The 23rd section of the 4th part of the sixth book of the Code contains provisions about sales contracts. It also contains a special paragraph (no 4) providing

¹²⁰ Sales Directive, Article 7 para.3.

¹²¹ The following section is based on the study by Samuelevičius.

¹²² The Law on Consumer Protection of the Republic of Lithuania, new wording from 2000.10.11, Official gazette No. 85-2581, 2000.10.11, <http://www3.lrs.lt/c-bin/eng/preps2?Condition1=114309&Condition2>.

special norms on consumer sales contracts. General requirements for the quality of the goods are established in Art. 6.333 of the Code. Part 5 of this article implements the requirements of Art. 2(2)(a) of the Sales Directive, by providing that „in case the contract was entered into by sample, model or description, the seller is obliged to provide the buyer with goods which are in conformity with that sample, model or description, except for cases specified in the agreement.” Art. 6.363 (3)(1) of the Code, which is part of consumer sales law and therefore a special norm to be applied in the first place, provides that „goods must be in conformity with the requirements set out in the normative documents as supplied by the producer.“ The concept of the producer is provided in Art. 2(4) of the CPL and is the same as in the Sales Directive - it is the manufacturer of the goods who places his name, trade mark or any other distinctive sign on it; also who acts as a representative of the producer and upon request of the producer supplies the product marked by its name, to the market, or if the producer is not established in Lithuania, imports the product; also who stores and (or) packages the product and identifies himself as manufacturer of this product.

The requirements of Art. 2(2)(b) and (c) of the Sales Directive are met in the Art. 6.333(4) of the Code, which is a general norm on sales contracts. There is one discrepancy in the wording, however - the Sales Directive provides that if the consumer requires the goods to conform to the specific purpose, made known to the seller at the time of the conclusion of the contract, the acceptance of the seller of those requirements is needed. The Code does not provide for the need of the sellers acceptance to such statements of the buyer, but this might be derived from the purpose and aim of that norm, and also from the principle of freedom of contract and general principles of the contract conclusion.

Art. 2(2)(d) of the Sales Directive is implemented in Art. 6.363(3)(3) of the Code, which is a special norm on consumer sales contracts. However, the requirements set out in Art. 2(4) of the Sales Directive, concerning the cases when the seller will not be bound by its public statements are neither implemented in the Code nor in the CPL. As concerns Art. 2(5) of the Directive, it can be regarded as implemented into the Code at least to some extent. Art. 6.645(4) of the Code, which governs the contracts on installing equipment, provides that if the nature and value of works being performed is not large in comparison with value of the thing being produced, bought or altered (processed), then the contract is a sales contract. The Supreme Court has confirmed such a position with regard to an agreement concluded between two companies for the sale of petrol pumps. Installation works were agreed separately and their value was only 734 LTL in comparison with the value of the contract which was 35 000 LTL. The Court held that agreement for the works is also a sale-purchase agreement, therefore all the requirements for the quality of goods are applicable¹²³. However, it should be remembered that this is conditional upon the relation between the value of the works performed and the value of the object of works.

¹²³ Supreme Court of Lithuania, case No. 3K-3-887/2003, UAB “Saurida” v. UAB “Jutoma”;

Art. 3 of the Sales Directive contains provisions about the rights of the consumer in case he acquired non-conforming goods. All those rights are also established in Art. 6.363(4) of the Code (which is a special norm for consumer contracts), namely the right to have the goods brought in conformity free of charge by replacement (Art. 6.363(4)(1) of the Code) or repair (Art. 6.363(4)(3) of the Code), also the right to have an appropriate reduction made in price (Art. 6.363(4)(2) of the Code) and the right to rescind the contract (Art. 6.363(8) of the Code). What is different from the Directive is the way of application of those rights - the Directive provides in the Art. 3(5), that a consumer is entitled to a reduction of the price or to have the contract rescinded, if he is not entitled to other rights, mentioned above, or in case of other conditions, specified in the Sales Directive. The Code, however, provides in Art. 6.363(4) that the consumer has a discretion to choose one of those rights - a problematic provision similar to the one under Latvian law (supra D II 2b).

Moreover, according to Art. 6.363(4), the provisions of the Code granting those rights to the consumer are only applicable in case the good is not a food item, whereas the Directive does not contain any differentiation on that basis.¹²⁴ However, Art. 7(8) of the CPL provides that in case the consumer acquired goods which are food items, he has the right to have the goods replaced or rescind the contract. The consumer can exercise those rights only within the use period of the goods, except where he already acquired the goods with the expired date of use. This is provided both in CPL Art. 7(9) and in the general provisions of the Code on sales contracts Art. 6.338(4).

In addition to that, the general provisions of the Code on the sales contracts, namely Art. 6.334, provide that the buyer has the right to rescind the contract only if the non-conformity of the good constitutes a fundamental breach of the contract. Fundamental breach is also stipulated in Art. 6.217(1) of the Code, concerning the general grounds for the termination of contracts. The Commentary on this article provides that if one party terminates the contract on the ground of fundamental breach, the burden of proving that the breach is not fundamental rests on the other party¹²⁵. It is questionable whether this is in conformity with the Art. 3(6) of the Sales Directive, which provides the possibility of rescinding the contract only in case the lack of conformity is minor. Interestingly, Art. 7(3)(4) of the CPL contains the identical wording of the Directive in this part, but according to the above mentioned collision rules the Code would take priority. However, it is not clear whether those provisions of the CPL can be seen as contradicting the provisions of the Code, but rather supplementing the Code.

Art. 3(3) of the Directive provides the criteria according to which the proportionality of the remedy (repair or replacement) sought by consumer against

¹²⁴ It is questionable that these provisions are in conformity with EU law, even though „repair“ of food stuff seems to be a somewhat unrealistic remedy. With regard to fresh food, only replacement or rescission of the contract seem to be adequate remedies. With regard to processed food, a price reduction may also be envisaged.

¹²⁵ The Commentary of the Civil Code of the Republic of Lithuania, 1st part of the 6th book, Justitia, Vilnius 2003, p. 292;

the seller of the non-conforming goods is determined. It also provides that such remedies shall be carried out within a reasonable time period. This is also provided in the Code - Art. 6.363(4)(3) being a special norm for consumer sales contracts, however, only for goods which are not food items, and 6.334(1)(3) being a general norm for sales contracts. The criteria for determining whether the remedy sought is proportional are not specified in that part of the Code. However, Art. 1.5 of the Code provides that the court must follow the principles of equity, prudence and good faith when interpreting the law and applying it (supra C II 4a). The content of those principles depends on the type of obligation - the requirements are higher for all obligations arising out of the consumer contracts¹²⁶.

Art. 4 of Directive 99/44 provides for a right of redress. This right is indirectly enshrined in the Art. 6.280 of the Code. This part of the Code deals with questions of the law of torts, which is part of the chapter about obligations arising on the basis of other grounds than contracts. Art. 6.280(1) provides that in case the person has reimbursed the damage caused to another person, he has the right of redress equal to reimbursement, if the law does not provide for the different amount. According to the Commentary, the Code itself and other laws may provide for cases when the person who has reimbursed for damage caused by the other person will not have the right of redress¹²⁷. The Lithuanian rules on subrogation seem to be similar to the ones of Latvian law (D II 2c) and make redress mandatory.

Art. 5(1) of the Directive lays down time limits within which the consumer can claim the non-conformity of the goods. The general term is 2 years from the delivery of the goods and it is also established in the Art. 6.338(2) and (5) of the Code. Art. 7(7) of the CPL provides that consumer must inform the seller about non-conformity within two months from the day he detected it - this is an identical wording to that of Art. 5(2) of the Directive. This provision is applicable to goods which are not food items. Art. 6.348(1) of the Code, a general norm applicable to all sales contracts, establishes the obligation for the buyer to inform the seller about non-conformity within a period of time specified in laws or in the agreement. In case such period is not specified, the buyer must inform the seller within a reasonable period of time after he detected or should have detected the non-conformity, having regard to the nature and purpose of the goods. This is an example when the Code gives preference to other laws.

The presumption contained in Art. 5(3) of the Directive, namely that any lack of conformity which becomes apparent within six months of delivery is presumed to have existed at the time of delivery unless proven otherwise by the seller, is not implemented neither in the Code, nor in CPL. This omission must be settled by directive conforming interpretation of Lithuanian law.

Art. 6 of the Sales Directive provides some important requirements for the content of the guarantee. Special provisions on consumer sales contracts of the

¹²⁶ The Commentary of the Civil Code of the Republic of Lithuania, 1st part of the 6th book, Justitia, Vilnius 2003, p. 22;

¹²⁷ The Commentary of the Civil Code of the Republic of Lithuania, 1st part of the 6th book, Justitia, Vilnius 2003, p. 389;

Code, namely Art. 6.353(1) establish the seller's obligation to provide the necessary information about goods to the consumer, including terms of the guarantee. The Code regulates the term of the guarantee in Art. 6.335 - it states that the term of the guarantee begins to count from the moment of handover of goods, unless the parties agree otherwise. It also covers other matters, non of which relate to the contents of the guarantee itself.

The requirements set out in Art. 7(2) of the Directive are implemented in Art. 1.37(3) of the Code, which provides that in case of opting for the law of another state as the one applicable to the contract, the mandatory norms of Lithuania or other states will still be applicable. The commentary goes on by elaborating that this provision establishes limits to the principle of party autonomy, because parties cannot by their agreement circumvent the application of the mandatory norms of the state with which the contract has a connection. The term „other states“ in this article is to be understood as the states with which the contract is more closely connected than with the country the law of which the parties have chosen¹²⁸. Art. 1.37 mostly reiterates the provisions of the Art. 3 and 4 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations. Moreover, Art. 1.39 of the Code is a special norm addressed to the protection of consumers in relation to Art. 1.37, because it implements (identical wording) the provisions of the Art. 5 of the Rome Convention, namely that the consumer shall not be deprived of the protection granted to him by the mandatory norms of his domicile, if the contract satisfies certain requirements, specified in that article and the Rome Convention.

4. Hungary

If we follow the detailed account of Vékás¹²⁹ concerning the implementation of Dir. 99/44 into Hungarian private law, there was agreement to amend the respective provisions of the Civil Code of 1959, and not to create a special law on consumer sales as in Latvia and Poland. One of the reasons had been the already modern concept of liability of the seller (and similar contracts) based on the agreement; the concept used was „defective performance“ which is identical with „lack of conformity“ in the sense of Art. 2 of the Directive. Some provisions of the implementing legislation became less “consumer-friendly”. In the old Hungarian Civil Code, only positive knowledge of non-conformity excluded liability of the seller, while the directive in Art. 2 (3) extends it to the case that the “consumer could not reasonably be unaware of the lack of conformity” which was taken over by § 305/A (2) of the Civil Code.

The remedies of Art. 3 of the directive were transposed into Hungarian law and extended by making use of the former case law of the Hungarian Supreme Court, eg on giving the consumer a right of retention of the purchase price in case of non-conformity. There is also a right to self-repair resp. to the reimbursement of such

¹²⁸ The Commentary of the Civil Code of the Republic of Lithuania, 1st book, Justitia, Vilnius 2001, p. 131;

¹²⁹ Vékás (2004) at 41-68.

costs, if the seller does not finalise the repair within an adequate time, § 306 (3).¹³⁰ Similar to prior law, the consumer must inform the seller of lack of conformity within two months, according to Art. 5 (2) Dir. 99/44. This period may be extended. Non-information does not lead to a loss of remedies, but only to an obligation to pay to the seller the additional costs caused by the delay, § 307 Civil Code. The general time limit for liability of the seller has been extended to two years, but only for consumer sales.

The seller has a right of redress against his prior seller for the costs of fulfilling the claims of the consumer, provided that the latter informed the seller about the lack of conformity. The time limit for redress is 60 days after fulfilling the consumer's claims, in total not more than 5 years. This right of redress can be waived in part or completely¹³¹ - a somewhat problematic solution.

The Hungarian legislator also made clear that the contractual guarantee does not modify the rights of the consumer under law, § 248 Civil Code. The guarantee is not a mandatory instrument. The rights under the guarantee have to be exercised similar to the remedies for non-conformity. The transparency and form-requirements of the guarantee have been transposed into law, but their lack does not void the claim.

Vékás¹³² summarises the Hungarian transposition of Dir. 99/44 as follows:

“The transposition must be said to be a success. It is practically in full conformity with the directive, except for some minor errors. It must be particularly welcomed that the new rules have been organically integrated into the existing provisions of the Civil Code even where they go beyond the directive, and that the few special rules on consumer sales have been separated. In my opinion, the maintenance of non-mandatory rules including the right of redress must be clearly supported.”

5. Poland

Poland has implemented Dir. 99/44 not in amending its Civil Code of 1964, but by special Act of 27 July 2002, effective as from 1st of January 2003. At the same time it tried to create a comprehensive consumer sales legislation, going beyond Dir. 99/44. The information requirements of the Act are treated under E II 5.

Art. 1 defines the sphere of application similar to the directive. Art. 4-7 contain the transposition of Art. 2 of the directive. The provision of Art. 2 (4), concerning the cases where a seller is not bound by statements of the producer or his representative, has been taken over into Polish law, with the exception of the alternative that “at the time of conclusion of the contract the statement had been corrected.”

Art. 8 of the Polish Act transposes Art. 3 of Dir. 99/44 regarding the rights of the consumer. The definition “free of charge” in Art. 3 (4) is extended to also cover costs borne by the buyer, “particularly costs of disassembly, delivery, labour,

¹³⁰ Vékás at 65.

¹³¹ Defended by Vékás at 67 referring to the freedom of contract principles which however is applicable here only to a limited extent.

¹³² Vékás at p. 68

materials, as well as costs of another installation by other means.” The Act therefore confirmed the existence of a far-reaching right to self-help of the consumer, similar to Hungarian law. The limits of such self-help are not defined. The seller must react to a demand of repair or replacement within 14 days; in not doing so, the demand “shall be deemed justified”.

Art. 10 is concerned with time limits and prescription within the margins allowed by the directive. Art. 9 imposes a two-months notification period. Art. 11 makes the rights of the consumer mandatory and tries to avoid a circumvention by a buyer’s statement “that he had the knowledge of the inconsistency of the consumer good with the agreement, or by opting to apply a foreign law”.

Art. 13 contains detailed rules on the warranty with regard to its contents, transparency, address of the warrantor “or his representative in Poland”. It must be formulated in Polish. A violation of these requirements does not affect the validity of the warranty, as provided in Art. 6 (5) of the directive.

The Act does not contain any rule with regard to the right of redress. This is left to the general provisions of the Polish Civil Code which mean that they can be contracted out according to the general rules of civil law. It is not sure how far protection under standard term legislation (supra C 6) is available in this context.

At the same time, the Act has abolished the amendments of 1996 with regard to warranties and guarantees in consumer sales.¹³³

E. Information

I. Generalities - EC law as the starting point

1. The information model in Community law

Autonomy requires actors who are informed about their rights and duties. In traditional legal concepts, it is usually left to the actors themselves to acquire the necessary information that makes their freedom of action possible and effective. *Caveat emptor* as the general rule of autonomous transactions in contract law includes responsibility to inform oneself. Autonomy is thus reduced to a formal concept based on the fiction that actors either have or can get the information needed to make decisions. Eventually they will have to “buy” and pay for it if they do not want to rely on information conveyed through advertising. A market exists for information supplementing the market for goods and services.

Community law as a basically liberal order also started from this principle. However, it has increasingly recognized that autonomy in a substantive sense must be supplemented by adequate information provisions. The first impact of this new insight has paradoxically come from the case law developing the proportionality principle as a test for justifying or rejecting Member State restrictions on free

¹³³ Mewly (1998) at p. 26; Poczout (1999) at 85.

movement.¹³⁴ But these cases are restricted to product regulations of content, safety, quality, size and the like, not to contract terms.

In a later case the Court stated that:

under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements.¹³⁵

The philosophy behind this concept is simply that actors, when making their choices about products and services, should rely on (truthful, not misleading) information and need not be over-protected by more restrictive rules limiting market access as such. Information is not a supplement of regulation but an instrument of contract law on its own, thus respecting the autonomy principle. It has been said that the information rule, even “if mandatory ... is an instrument fostering party autonomy.”¹³⁶ It may support in protecting legitimate expectations of citizens, workers, and consumers.

In the meantime, information requirements vis-à-vis citizens have become part of primary Community law itself, especially in Art. 153 (1) EC. It contains the consumer’s right to information, which of course also includes contractual information, even though it must be concretised by specific directives. The objective of Community law, as a recent study by Rösler has stated, is a timely, specific and complete disclosure of relevant information to the consumer as the structurally weaker party to a contract.¹³⁷ Art. 137 (1) (e) EC on Social Provisions is concerned with “information and consultation of workers”, but labour law will not be discussed here

The following analysis will therefore concentrate on contract law where the information paradigm is gaining recognition. After analysing its Community law basis, mostly in consumer law, its implementation will be taken up in the civil jurisdictions under scrutiny. The main question will not so much be whether the different EC directives have been correctly implemented, but whether a *more general principle of contract* law concerning the provision of information to the weaker or/and uninformed party to a contract is emerging.

2. Secondary law: The transparency principle

a. The Unfair terms directive

The already mentioned transparency principle has found its express inclusion in Art. 4 and 5 of the Unfair Terms Directive 93/13:

- Terms on the price/quality ratio are only excluded from control when being “in plain intelligible language”.
- Written terms proposed to the consumer (one should add: terms in electronic form) must always be drafted “in plain intelligible language.”

¹³⁴ For details Reich (2003) at 278.

¹³⁵ Case C-362/88 GB-INNO-BM v Confédération du commerce luxembourgeois [1990] I-667.

¹³⁶ Grundmann/Kerber/Weatherill in: Grundmann *et al* (2001) at 7.

¹³⁷ Rösler at p. 148, 168.

The importance of the transparency principle has been stressed by the Court in the litigation against the Netherlands¹³⁸ for incorrect implementation of the Directive. Since Arts. 3, 4 and 5 are intended to grant rights to the consumer, it is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before national courts.

... even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirement of a directive, this cannot achieve the clarity and precision needed to meet the requirement of legal certainty... (para 21)

The transparency principle in contract law needs to be implemented by the legislator himself, and not just be mere court practice. Transparency requires a two-layer approach to implementation: the first layer is concerned with contract law as such, the second with implementing state regulations.¹³⁹

b. Specific directives

Several consumer protection directives contain express and detailed transparency requirements. As an example followed in this paper, directive 1999/44/EC on consumer goods and guarantees does not impose a duty on the seller or producer of consumer goods to give a guarantee to the consumer with regard to the durability or quality of the product sold. Art. 6 as a minimum requirement provides that, should such a guarantee be given, it must:

- state that the consumer has legal rights under applicable national legislation, and make clear that those rights are not affected by the guarantee;
- set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

Transparency is not just a principle of consumer law, but of contracting and marketing practices rules in general. Art. 10 (1) of the E-Commerce Directive 2000/31 provides that information requirements should be given by the provider “clearly, comprehensively and unambiguously”. This transparency rule is not limited to consumers, but is a general principle which is particularly important in e-commerce. A similar broad rule can be found in Annex III of the Life Assurance Directive 2002/83/EC.¹⁴⁰

¹³⁸ Case C-144/99 Commission v Netherlands [2001] ECR I-3541.

¹³⁹ As to the limits cf. case C-478/99 Commission v Sweden [2002] I- 4147.

¹⁴⁰ Directive 2002/83/EC of the EP and the Council of 5 November 2002 concerning life assurance, [2002] OJ L 345/1.

3. Express information obligations in secondary Community law

a. The case 'for' information

Secondary Community law contains a wide plethora of information rights, of which it is impossible to give a detailed account here. With increased commitment of the Community in the area of trade practices, contract, tort and environmental law, these information obligations on the part of traders or governments have been increased and deepened. The philosophy behind these is always autonomous decision making. This is most obvious in contract law, where to some extent it supplements mandatory protection rules. In other areas it helps to describe the main subject matter of a contract - notably in financial services.¹⁴¹

A new example of these information obligations can be found in the new Directive 2002/65/EC of the EC and the Council of 23.9.2002 on the distance marketing of financial services¹⁴². Arts. 3-6 contain detailed pre-contractual information obligations of the consumer concerning such factors as

- the supplier;
- the financial service;
- the distance contract;
- redress;
- special rules on information obligations in case of telephone communications;
- communication of the contractual terms;
- right of withdrawal.

The Directive on electronic commerce 2000/31 has extended information requirements to protect every potential client, whether consumer or not, with regard to name, geographic address, and details of the service provider. This is necessary to identify the contractual partner, which should not be left uncertain in electronic commerce.

b. Consequences of non-respect

Usually, Community law does not regulate the consequences of failure to respect its provisions. It leaves it to Member States to find effective and non-discriminatory instruments in case of breach, unless otherwise specified in secondary Community law. They have to include both individual protection and collective remedies. The remedies stand at the interface between contract law *strictu sensu*, and trade practices law in general. They aim at both prevention and reparation. While the type of remedy is prescribed by Community law as an "obligation de moyens", the concrete procedural instruments must be determined by national law.

¹⁴¹ Grundmann (2002) at 273.

¹⁴² Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L 271/16.

Art. 5 of the Unfair Terms Directive is an exception insofar as it expressly prescribes the *contra-proferentem* rule in case of non-respect of the transparency principle. It is an open question whether a violation of the transparency principle also involves consequences under Art. 6 of the directive, namely that intransparent terms should not be binding upon the consumer. This would be the case if an intransparent term could be qualified as an unfair term in the sense of Art. 3 (2). Good argument exists for such an interrelation between the transparency and the fairness principles, in that an intransparent term which cannot be understood by the consumer should be regarded as unfair in a formal sense. If the supplier can show that the term does not indeed violate the principles of good faith within the meaning of Art. 3 (2), then the consequence of Art. 6 (1) whereby an unfair term is not binding on the consumer, would not be justified. A presumption of unfairness exists in case of intransparent terms.¹⁴³

Another case concerned a doorstep contract where the provider failed to inform the consumer about its right of withdrawal according to Dir. 85/577/EEC of 20.12.1985¹⁴⁴. The ECJ, in its *Heininger* judgment of 13.12.2001, flatly stated that in this case the right to withdraw does not lapse. The consumer has a Community right to be informed of the contractual right to information; any violation entitles the consumer to renounce the contract indefinitely and without time limits, even if national legislation provides for a time limit.¹⁴⁵

c. Information requirements: realization of autonomy or excuse for non-regulation?

The to some extent parallel development of autonomy and information requirements in Community law should not make forget the fundamental question behind it: Does it start from an ideal-type model of autonomy which is not corroborated by practical experiences, or is it a normative principle rooted in the liberal philosophy of law itself?

Wilhelmsson, in his analysis of Community contract law, criticizes the “radical transparency principle...” introduced through Community law, particularly in contractual relations. He fears that it may be and has been used “in a negative manner, to prevent or slow down the creation of content-oriented rules”.¹⁴⁶ This may not be the only direction, but the economic rational choice model seems to be inherent in Community (contract) law - a model, in his opinion, which is not sufficient to fulfil the needs of a social contract law and which does not conform to the contract model of his own jurisdiction (the so-called Nordic model). However, “social” contract law is rare in European private law, and even regulation as mentioned above is more intended for achieve a fair balance between the parties

¹⁴³ Reich (1997) at 169.

¹⁴⁴ [1985] OJ L 372/31.

¹⁴⁵ Case C-481/99 Georg und Helga Heininger v Bayr. Hypo- und Vereinsbank [2001] ECR I-9945, note Reich/Rörig, [2002] EuZW 87.

¹⁴⁶ Wilhelmsson (1995) at 145 f.

despite their different economic position, and not to reach certain social objectives by imposing them on one of the contract-partners.

On the other hand, this direction is expressly welcomed in a recent contribution by Grundmann, Kerber and Weatherill:¹⁴⁷:

...even in European re-regulation, there are strong mechanisms against unduly heavy restrictions on party autonomy. This is even a general characteristic of European contract law....there is an important difference between mandatory information rules and mandatory substantive rules. The latter reduce variety - to one possibility only or to a smaller range of possibilities... Reducing variety means reducing offers which match individual preferences. Individual preferences, however, are nowadays the basic point of reference for economic theory building (normative individualism). Substantive mandatory rules can be justified only if an information rule cannot remedy the market failure. This is so because information rules may be mandatory by construction - the duty to disclose is not subject to party autonomy -, but they are always aimed at enabling the parties to take an autonomous decisions in substance.

The opinion suggested in this context has to be a differentiated one and will be the starting point for the analysis of the contract law of the jurisdictions under scrutiny. There are certain cases where an information type remedy as suggested by Grundmann may be sufficient to achieve the envisaged objectives, particularly in financial services. But there may also be cases where mere information is not enough, as has been well debated in unfair terms legislation: even drastic warning clauses in large print will not eliminate unfair exemption clauses which, therefore, have to be controlled by substantive law rules, as in Art. 7 of the Consumer Sales Directive 1999/44. This is also an economically efficient solution because it saves transaction costs, negotiations about individual contract terms, and the like.

Against Grundmann, a mere information type remedy cannot achieve this result. As a result of this discussion it can be said that information is a necessary, but not as such sufficient, prerequisite to achieve autonomy.

II. Information requirements in contract legislation of new Member States

1. Estonia

The Estonian Code of Obligations contains a general information rule in case of precontractual negotiations. § 15 (2) reads:

Persons who engage in precontractual negotiations or other preparations for entering into a contract shall inform the other party of all circumstances with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest. There is no obligation to inform the other party of such circumstances of which the other party could not reasonably be expected to be informed.”

Obviously, this broad obligation must be concretised by case-law which to our knowledge does not yet exist. It is worth mentioning that the information obligation is not limited to consumer contracts, even though it will have its main field of

¹⁴⁷ Grundmann *et al.* (2001), at 7.

application there. Specific information obligations are therefore contained in certain consumer contracts, eg in § 232 concerning “services provided in event of consumer sale.” The seller must inform the consumer that he is not servicing the good, if the consumer “may reasonably expect that services related to the use, maintenance or repair of the thing will be provided”.

2. Latvia

a. Pre-contractual duties under general Civil law

The limited application of a general duty to act in good faith underpins also the legal regulation of pre-contractual duties on information in Latvian civil legislation. The Civil Code of 1937 regulates pre-contractual duties only in general terms, by providing that fictitious expressions of intent (i.e. expressions in fact lacking intent, made only for the appearance) have no legal consequences, except in cases of intentional deceit against the other party¹⁴⁸. It follows that if a party negotiating a contract has acted in bad faith and has wilfully mislead the other contracting party as to his/her real intentions, it can be held liable for losses according to the general duty to reimburse for losses caused by one’s unlawful conduct¹⁴⁹. Under the Civil Code, such actions are considered as intentional wrong¹⁵⁰, which does not require the intention of the infringing party to cause particular detrimental consequences but rather the intention to cause harm as such¹⁵¹. According to the Civil Code, intentional wrong gives grounds for full reimbursement for losses¹⁵². However, if in case of failure to conclude a contract none of the parties has acted in bad faith, the Civil Code does not foresee the possibility of reimbursement by any of them for any losses incurred¹⁵³.

There is however one exception contained in the Civil Code when a party has a right to rely on expectations that a contract with it will be concluded, and that is the case of an announcement containing a public offer of a reward for the performance of a certain activity¹⁵⁴. The law provides that such an offer, once made, can only be revoked by an analogous announcement, provided that the announced activity has not yet been accomplished. Yet, if a person has made preparations for carrying out the particular activity, the offerer remains bound by his/her offer, and

¹⁴⁸ Article 1438 CL.

¹⁴⁹ Articles 1635, 1779 CL.

¹⁵⁰ Article 1641 CL.

¹⁵¹ Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. [Commentary to the Civil Law of Republic of Latvia: Part Four. The Law of Obligations] Autoru kolektīvs prof.K.Torgāna vispārīgā zinātniskā redakcijā. Rīga, Mans īpašums, 1998, 148.lpp.

¹⁵² Article 1784 CL.

¹⁵³ Kārklīņš J. Latvijas līgumtiesību modernizācijas virzieni vienotas Eiropas līgumtiesību izpratnes veidošanā. [The directions of modernization of Latvian contract law in the creation of a unified understanding of European contract law]. Likums un Tiesības, 2004, nr.3 (55), 75.lpp.

¹⁵⁴ Article 1540 CL.

consequently, must either make the offered payment or reimburse for any losses incurred in connection with the preparation¹⁵⁵.

Thus, the scope of *culpa in contrahendo* provision as a basis for pre-contractual information in the Latvian Civil Code is quite narrow, generally covering only intentional misconduct, and not negligence. In the light of this, it has been suggested in Latvian legal literature that amendments need to be made in the law, requiring the pre-contractual negotiations to be conducted in good faith, with an intention to enter into contractual relations¹⁵⁶.

b. Transparency and information obligations in consumer contracts

The transparency principle of pre-formulated terms regarding the price or the subject matter of a contract (Article 4 para.2 of Directive 93/13) seems to be omitted and not transposed into the CRP Act at all. On the other hand, the rules on the transparency of a guarantee in sales contracts have been introduced into the Latvian CPR Act (supra D II 2b)

Furthermore, there are extensive information obligations with respect to consumer goods and services provided in the CRP Act. The seller or supplier of services has a general obligation to inform a consumer about the quality, safety, price, guarantees and other things relating to goods or services sold¹⁵⁷. A consumer may request any additional information to be submitted by the seller orally. Certain information on the seller himself such as a name and address and on the origin of goods must be given to the consumer¹⁵⁸. Separate rules are applicable to technically complicated goods and related instructions, as well as to the labelling of possibly dangerous goods¹⁵⁹.

Non-providing the information required by law means that a good/service is non-conforming with the contract. No additional regulation similar to *culpa in contrahendo* except what is found in Latvian Civil Law can be cited.

c. Language requirements in the “Official Language Law”

Latvia has specific legislation concerning the use of the Latvian language as the official state language (against Russian which used to be the second or even first language during Soviet times). It is mostly concerned with state activities, but there are some spill-over effects to private law relations which are justified, according to Section 2, by concerns of public security, public health, consumer protection and the like. Therefore, Sec. 9 reads:

¹⁵⁵ Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. [Commentary to the Civil Law of Republic of Latvia: Part Four. The Law of Obligations] Autoru kolektīvs prof.K.Torgāna vispārīgā zinātniskā redakcijā. Rīga, Mans īpašums, 1998, 95.-96.lpp.

¹⁵⁶ Kārklīšs J. Latvijas līgumtiesību modernizācijas virzieni vienotas Eiropas līgumtiesību izpratnes veidošanā. [The directions of modernization of Latvian contract law in the creation of a unified understanding of European contract law]. Likums un Tiesības, 2004, nr.4 (56), 114.lpp.

¹⁵⁷ CRP Act, Article 17.

¹⁵⁸ CRP Act, Article 18.

¹⁵⁹ CRP Act, Articles 19-21.

Contracts of natural and legal persons regarding provision of medical treatment, health care, public safety and other public services in the territory of Latvia shall be entered into the official language. If a contract is in a foreign language, a translation into the official language shall be attached thereto.

It is somewhat surprising to justify this strict rule by concerns of consumer protection, because the consumer to be protected may not know Latvian at all. It also contains a general exception to rules on the use of language in private international law - this would be either the law applicable to the contract, or the language in which the parties negotiated. It is also not clear what the consequences of disregard are: will it void the entire contract if drafted in a foreign language without a translation attached to it? This seems to be out of line with the principle of proportionality which the law itself mentions in Sec. 2 (2).

3. Lithuania

a. General information requirements

The Lithuanian Civil Code expressly obliges parties to reveal to each other information which is essential for the conclusion of the contract.¹⁶⁰ Furthermore, where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded.¹⁶¹ A party which breaks this obligation is liable for the losses caused to the other party.¹⁶² Art. 6.164(2) provides that minimum losses in such situations are equal to the benefit received by the other party. According to the leading commentary to the Code, this is only one of the possible ways to estimate the amount of damages¹⁶³, since the parties, for example, may enter into a special agreement for the non-disclosure of the information.

b. Information obligation in consumer contracts

Under both the Law on Consumer Protection and the Civil Code, consumers are entitled to receive in the Lithuanian language (except when the use of the goods and services is traditionally known) correct, complete and transparent information concerning the terms under which goods and services are purchased, their quality, directions for use, a description of warranties and exchange period, procedures for termination of contracts for goods or services, and other relevant information which is significant to consumers.¹⁶⁴

If the consumer was not provided with relevant information he has the right to claim damages, or to unilaterally terminate the contract, reclaim sums paid by him, and claim other damages if contract was concluded.¹⁶⁵ Moreover, if the seller

¹⁶⁰ Art. 6.163(4) of Civil Code.

¹⁶¹ Art. 6.164(1) of Civil Code.

¹⁶² Ibid.

¹⁶³ Art. 6.162 (2) of Civil Code, see also Mikelėnas V. *Lietuvos Respublikos Civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė (I)*. Justitia, Vilnius, 2003, p.209.

¹⁶⁴ Art. 6.353 of Civil Code and Art. 5 of Law on Consumer protection.

¹⁶⁵ Art. 6.353 (9) of Civil Code.

fails to provide necessary information, he is responsible for the defects of the goods, which occurred after goods were delivered to the consumer, when consumer proves that defects occurs because of the lack of information.¹⁶⁶

The ECJ in its *Heininger* judgment (E I 3b) held that the doorstep-selling directive 85/577/EEC precludes the national legislature from imposing a time-limit of one year from the conclusion of the contract within which the right of cancellation provided for in Article 5 of that directive may be exercised, where the consumer has not received the information specified in Article 4. However, both the Lithuanian Civil Code and the Law on Consumer Protection provide that if such notice is not given to the consumer, the consumer shall have the right to cancel the contract for a period of three months from the signing of the contract. Furthermore, the consumer cannot use the right of cancellation, when contract was in relation to a provision of services, the supplier starts the provision of the services with the consent of consumer.

As to the question what are the consequences of the *Heininger* judgment to Lithuanian civil law, it should be noticed that Commentary of the Civil Code suggests that courts in interpreting and applying Art. 6.188 should invoke practice of the ECJ and the courts of EU Member States.¹⁶⁷ Therefore, it looks that the theory of directive conforming interpretation can be applicable in such case.

4. Hungary

The Hungarian Civil Code contains a general information obligation in § 205 (4) which reads:

The parties have to cooperate when concluding a contract and take care of the justified interests of the other side. Before concluding the contract they have to inform each other about the relevant essential circumstances concerning the contract to be concluded.

This rule has been extensively used by Hungarian courts to impose information requirements, particularly in asymmetrical information relations. It is supplemented by specific information obligations which are derived from transposing EC directives, namely on unfair contract terms and on consumer sales.

The Act LVII of 1996 on the prohibition of Unfair and Restrictive Market Practices which replaced the Competition Act of 1990 is also concerned with information.¹⁶⁸ The rules on consumer deception were extended. A new provision was added under Art. 10, which was to protect the freedom of consumer choice against unfair trade practices. This provision was intended to solve the problems consumers faced as a result of the mass appearance of new, aggressive business practices. The list of typical cases of consumer deception was altered. It was prohibited to create a false impression of an especially advantageous purchase or withhold the relevant information which is capable of manipulating the consumer's decision. The Act is

¹⁶⁶ Art. 6.353 (10) of Civil Code.

¹⁶⁷ Art. 6.162 (2) Of Civil Code, see also Mikelėnas V. *Lietuvos Respublikos Civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė (I)*. Justitia, Vilnius, 2003, p.239.

¹⁶⁸ Cseres (2004) at p. 61.

enforced by the “Office of Economic Competition” (OEC) and usually will not give the consumers contractual rights.

The Consumer Protection Act of 1997 give the consumer two important information rights:

- information with regard to the product or service purchased
- information about remedies - certainly an innovative provision.

5. Poland

Art. 385³ (2) of the Civil Code contains the transparency obligation for model contracts, and the *contra preferentem* rule in favour of consumers.

Specific information requirements are included in the new Act of 27 July 2002 on consumer sales (supra D II 5.) Art. 2 contains a general information prescription as to price, unit price, and conditions of a hire-purchase and similar agreement. At the buyer’s request the seller shall “issue a written confirmation of the conclusion of the agreement, including the seller’s mark bearing his address, date of sale and specification of the consumer good together with its amount and price.” Art. 3 contains a requirement for sales in Poland “to provide clear, understandable, not misleading information in Polish, necessary for proper and full use of the consumer good.” There are detailed rules with regard to the placement of the information, instructions for use, maintenance manuals, all in Polish. “At the buyer’s request the seller shall explain the meaning of each provision of the agreement”. The Polish language requirement written into the Act on language which contains this requirement for “legal transactions performed within the territory of Poland”¹⁶⁹ is however not without problems in a context of party autonomy and free movement of products and services (F I).

The Act on Unfair Competition of 1993 as amended only contains the negative duty not to disseminate misleading advertisements and information,¹⁷⁰ but not a positive duty to provide the consumer or other economic subjects with the information needed for rational decision making.

¹⁶⁹ Klapsa (2000); Surdeck/Binieda, in: Brodecki (2003) at 479.

¹⁷⁰ Mewly (1998) at p. 31.

F. Contract Law “in the books” and “in action”: “New” rules for “old” mechanisms of civil justice?

I. A summary of the “new” contract law of “new” Member States

The investigation presented above has shown that the principles of autonomy, regulation and information as basic requirements of a market conforming contract law, integrating consumer protection requirements, have been taken over by all former socialist countries becoming now a member of the EU, but that the methods and instruments chosen differ widely. We have distinguished between a “monist approach” (Estonia), a “dualist approach” (Latvia), a “parallel approach” (Lithuanian), a “modified uniform approach” (Hungary) and a “mixed approach” (Poland). This shows the richness of European legal cultures after the enlargement process which will certainly give impulses to the ongoing emergence of a “uniform” European contract law. European contract law is truly a field of experiment and maybe even for “competition of better rules”, eg on general information requirements written into some modern contract legislation (Estonia, Lithuania, to some extent also Hungary and Poland), in improving remedies under EU law (Hungary), in prescribing spill-over effects to general contract law which had not yet been reformed (Latvia). At the same time, it imposes a warning against too much uniformity, and may discourage those who are optimistically promoting a “European Civil Code”.

At the same time, European law, both its general principles and its specific directives, has had an enormous impact on the contract law of the new Member countries here under scrutiny. It is even more remarkable that this process has been accomplished before and not after membership. There may be certain deficits with regard to the implementation of directives, notably on consumer protection, but they cannot be said to be such as to endanger the European legal integration model - quite to the contrary. They have strongly reinforced general contract law principles like good faith, control over standard contract terms. They have allowed specific contract law, most notably on consumer protection, to “spill over” into general contract law. They have encouraged integrationist models of contract law which have clearly shown the deficits of a dualist model like in Latvia. *EU law has therefore been an instrument of transformation and modernisation of contract law* - similar to the situation in “old” Member countries like Germany.

This paper is not concerned with the implementation of EC law as such and with possible violations of the obligations of new Member states. Two seemingly contradictory trends should however be mentioned:

- all new Member states analysed here have taken great efforts to bring their contract law in line with basic EC directives, even though via different methods to which they are entitled under Art. 249 (3) EC

- on the other hand, there is a certain tendency of overreach of consumer protective provisions into areas which are not covered by consumer law, eg rules on the territorial application of consumer law (Estonia, Poland), widening of the concept of consumer to certain B2B transactions (Latvia), applying the rules on pre-formulated contracts also to individually negotiated clauses (Hungary), mandatory language rules beyond the accepted limits of party autonomy and free movement (Lithuania, Poland, to some extent also Latvia). This can to some extent be justified by the minimum harmonisation clause in the relevant directives, but still should be reconsidered after membership where the rules on the internal market take prevalence over nationally limited protective provisions.

II. “Law in action”: Deficits in civil justice?

What is much less known is the working of the “reconstruction of contract law” in the countries under scrutiny. This is to some extent due to the relative “youth” of the legislation under examination. Little case law has emerged, even less is known to the foreign observer. We simply don’t know yet how the new “law in the books” really works, and where the fault-lines of new countries come up.

This leads to a more fundamental problem: the weakness of the institutions of civil justice after the fall of socialism. Harmathy has said with regard to Hungary that “the element of insecurity in contractual relationships may also be found in the form that the party crediting his contractual counterpart is unable to know whether the debtor will fulfil his obligations in accordance with the contract.”¹⁷¹ The quality of judicial decisions in Hungary has been repeatedly criticised;¹⁷² a theory of judicial precedent is only emerging.¹⁷³ With regard to Poland, Letowska¹⁷⁴ criticised the lack of focus on implementation of new laws; this is “left to its own resources” (which are scarce). Torgans, the leading Latvian scholar of civil law, criticises the „excessive dogmatism or formalism“ of Latvian courts,¹⁷⁵ which makes a flexible adaptation to modern market conditions difficult. The Open Society Institute,¹⁷⁶ in a study done for the EC-Commission, voiced concerns over judicial independence in some of the countries under scrutiny. Unfortunately, there exists no follow-up for the situation of today.

A more general and critical discussion can be found in a substantial paper by Emmert¹⁷⁷. Talking from his own experience, he sees problems in law application in new member countries not so much in the legislative framework but in the missing “suitable structure... to ensure the application and enforcement of the new legal

¹⁷¹ Hrmathy (2002) at 17.

¹⁷² Küper (1999).

¹⁷³ Pokol (2000) at 274-288.

¹⁷⁴ Letowska (2001) at 11.

¹⁷⁵ Torgans (2002) at 31.

¹⁷⁶ OSI (2001) at 16-69 with detailed recommendations for improvement which will not be taken up here.

¹⁷⁷ Emmert (2003).

rules in practice.”¹⁷⁸ Emmert also identifies methodological weaknesses which are part of the communist heritage. Judges are trained to apply written law only in a rather formal manner. “They have no training to overcome lacunae in the law, for example by recourse to general principles of law... The judges have no experience with the concept of justice in contrast to the concept of law.”¹⁷⁹ There is no professional legal argument, nor a thorough discussion of existing case-law. Citizens have no confidence in the working of civil justice.¹⁸⁰ “Legal education has to be reformed more rapidly to reflect not only the changes in legislation but also the (necessary) changes in legal culture.”¹⁸¹ Critical academic discussion of case law and regulatory action should be encouraged. The system of hierarchical court administration should be changed to more self-administration.

Emmert points to structural problems of civil justice which are more or less present in all countries studied here. On the other hand, with the improved quality of legislation, especially the adoption of new civil codes like in Estonia and in Lithuania, administration of justice will improve. Complicated problems of multi-level application of legislation from completely different traditions like in Latvia and to some extent Poland should be avoided in the interest of a more transparent and responsible administration of civil justice.

Some arguments in the study of Emmert may seem anecdotal and exaggerated today. They need to be tested against the development of the countries studied here under the impact of preparation to (now existing) full membership. Finally, the enormous changes in substantive and procedural law, the role of the judiciary, training of legal personnel, and finally the take-over of the excessively complex *acquis* may necessitate a rethinking of these hypotheses.

¹⁷⁸ Emmert at 289.

¹⁷⁹ Emmert at 295.

¹⁸⁰ Holmes (1998).

¹⁸¹ Emmert at 302.

Bibliography

(only publications in English or German)

Baginska, E. (2003): The Development of Polish State Liability Law, in: Comparative Law Review 77-90: Torun.

Balodis, K. (2002): The Regulation of Impossibility to Fulfil Contractual Obligations in the Law of Latvia and EU Member States, in: University of Latvia 279-296.

Balodis, K. (2003): The principle of good faith in Latvian Civil Law. Likums und Tiesibas - Law and Justice (English edition) 2-9: Riga.

Basedow, J. (1995): A Common Contract Law for the Common Market. 34 Common Market Law Review (CMLRev) 1169.

Basedow, J. et al. (1998): Festschrift Drobniig. Mohr Siebeck: Tübingen.

Basedow, J. et al. (Hrsg. 2001): Aufbruch nach Europa - 75 Jahre Max Planck Institut für Privatrecht. Mohr Siebeck: Tübingen.

Beale, H. & Lando, O. (eds. 2000): Principles of European Contract Law.

Bober, J./Redeker, N. v. (2002): Polens Gesetzgebung im Zuge der EG-Rechtsangleichung - Zur polnischen Debatte über Gesetzesfehler und das Gesetzgebungsverfahren. 48 Osteuroparecht 83.

Bourgoignie, Th. (2001): The evaluation of the new Polish legislation on the matter of consumer protection from the European perspective. The case of unfair terms in consumer contracts. In: Kepinski (2001), 33-40.

Brodecki, Z. (ed. 2003): Polish Business Law. Kluwer: The Hague.

Broka, B. (2002): Topical Issues of Protection of Consumer Rights, in: University of Latvia 345-355.

Brunner, G. (1999): Privatisierung in Osteuropa. 45 Osteuroparecht 2.

Callies, G.-P. (2003): Nach der Schuldrechtsreform: Perspektiven des deutschen, europäischen und internationalen Verbrauchervertragsrechts. 203 Archiv für die civilistische Praxis 575.

Callies, G.-P. (2004): Transnationales Verbrauchervertragsrecht. 68 RabelsZ 244.

Canaris, C.-W. (2000): Wandlungen des Schuldvertragsrechts - Tendenzen zu seiner Materialisierung. 200 Archiv für die civilistische Praxis 1.

Commission of the EC (2003): A More Coherent European Contract Law. OJ C 63, 1-18.

Cseres, K. (2004): The Hungarian Cocktail of Competition Law and Consumer Protection: Should it be Dissolved? 27 Journal of Consumer Policy 43-74.

Emmert, F. (2003): Administrative and Court Reform in Central and Eastern Europe. 9 European Law Journal (ELJ) 288-315.

Fogelklou, A. & Sterzel, F. (eds. 2003): Consolidating Legal Reform in Central and Eastern Europe - An Anthology. Rättsfondens Skriftserie 37: Stockholm.

Frankowski, A. & Stephan, BP (1995): Legal Reform in Post-Communist Europe. Kluwer: Dordrecht.

Gerven, W. v. (2000): Of Rights, Remedies and Procedures. CMLRev 501-536.

- Gerven, W. v.** (2002): Codifying European Private Law - Yes, if... *European Law Review* 156-176.
- Gerven, W. v.** (2004): A Common Framework of Reference *and* Teaching. *European Journal of Legal Education* 1-16.
- Gobert, A.** (1997): Eigentumsordnung und Privatisierung in Ungarn. *WIRP* 361.
- Gralla, E.** (1992): Polen - Gesetz über die Wirtschaftstätigkeit. *WIRO* 215.
- Gray, C., Hanson, R. & Heller, M.** (1999): Hungarian Legal Reform for the Private Sector. *George Washington Journal of International Law and Economics*, 294.
- Grundmann, St.** (2002): Information, party autonomy and economic agents in European Contract Law. *CMLRev* 269.
- Grundmann, St. & Stuyck, J.** (eds. 2002): *An Academic Green Paper on European Contract Law*. Kluwer: Leiden
- Grundmann, St./Kerber, W. & Weatherill, St.** (eds. 2001): *Party Autonomy and the Role of Information in the Internal Market*. Kluwer: Leiden.
- Harmathy, A.** (2002): Hungarian Civil Law since 1990. *43 Acta Juridica Hungarica* 1-22.
- Hartkamp, A.** et al. (eds. 2001): *Towards a European Civil Code*. 2nd ed.
- Heidenhein, St.** (2001): *Das Verbraucherschutzrecht in Polen und der EU*. Berlin: Lang.
- Heinitz, M.** (1996): Die Republik Litauen auf dem Weg in die EU. *WIRO* 241.
- Heiss, H.** (2001): Vom EU- zum gesamteuropäischen Privatrecht, in: Basedow (2001), 123-140.
- Holmes, St.** (1998): Citizen and Law after Communism. *7 East European Const. Review* 1
- Jara, Z.** (1996): Polen - Verbraucherkauf. *WIRO* 258.
- Kaërdi, M.** (2003): Estonia and the new civil law, in: McQueen/Vaquer/Espiau (eds.), *Regional private laws and codification in Europe*, Cambridge 2003, 250-259.
- Karklins, J.** (2003): Perspectives of Contract Law Modernisation in Latvia within the Context of European Contract Law, in: University of Latvia (2003), 64-95.
- Kenny, M.** (2003): The 2003 Action Plan on European Contract Law: Is the Commission Running Wild? *European Law Review* 538-552.
- Kepinski, M.** (ed. 2001): *The Evaluation of the New Polish Legislation in the Matter of Consumer Protection from the European Perspective*. Conference proceedings, Zakrzewo, 21st to 23rd June 2001.
- Kepinski, M.** (2001a): Report on contracts concluded away from business premises. In: *Kepinski (2001)* 179-186.
- Klapa, K.** (2000): Die Auswirkungen des Gesetzes über die polnische Sprache auf die Vertragpraxis. *WIRO* 233.
- Kordasiewicz, B. & Wierzbowski, M.** (1995): Polish Civil and Commercial law, in: Frankowski/Stephan, 163.
- Küper, H.** (1999): Zivilrechtsprechung in Ungarn: die Metro-Ureile und die ungarische Vertragsrechtsdogmatik. *WiRO* 366.

- Lavigne, M.** (1999): *The economics of transition - From socialist Economy to Market Economy*. 2nd ed. London.
- Letowska, E.** (2001): *Between knowledge and skill: Obstacles to efficient implementation of the Community consumer law in Poland*, in: Kepinski (2001), 19-32.
- Lieven, A.** (1994). *The Baltic Revolution*. Yale Univ. Press.
- Liuhio, K.** (2001 ed.): *Ten Years of Economic transformation. Vol. I: The Economics in transition and the EU enlargement*. Lappeerante.
- Loeber, D.** (2001): *Kontinuität im Zivilrecht nach Wiederherstellung staatlicher Unabhängigkeit*, in: Basedow (2001) 943-954.
- Lošmanis, A.** (2002): *The New Commercial Code of Latvia*, in: University of Latvia 307-317.
- Lurger, B.** (2002): *Grundfragen einer Vereinheitlichung des Privatrechts in der EU*. Springer: Wien.
- Madl, F.** (1998): *Restoration of Property in Central and Eastern European Countries*, in: FS Drobnič 593-608.
- Magnus, U.** (2002): *Rechtsfolgen in Acquis communautaire*, in: Schulze et al. (2002) 2919.
- Meuwly, D.** (1998): *Consumer Policy in Poland: Institutional and Legal Features*. 24 *Review of Central and East European Law* 9-41.
- Micklitz, H.-W.** (1996): *Rechtseinheit oder Rechtsvielfalt in Europa? Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten*. Nomos: Baden-Baden.
- Micklitz, H.-W.** (1998): *Perspektiven eines europäischen Privatrechts*. 6 *ZEuP* 253-276.
- Micklitz, H.-W.** (2002): *The New German Sales Law: Changing Patterns in the Regulation of Product Quality*. 25 *Journal of Consumer Policy* 379.
- Mikelenas, V.** (2000): *Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience*. 5 *Uniform Law Review (ULRev)* 243-261.
- Mizaras, V. & Nekrošius, V.** (2002): *Das neue Zivil- und Zivilprozessrecht in Litauen*. 10 *Zeitschrift für Europäisches Privatrecht (ZeuP)* 466-476.
- Neelken, D. & Feest, J.** (2001): *Adapting Legal Cultures*. Oxford Univ. Press.
- Nesterowicz, M.** (2003): *Compensation for Non-pecuniary Damage Caused by Loss of Enjoyment of Holidays*, in: *Comparative Law Rev.*, 5-12: Torun.
- Open Society Institute** (ed) 2001: *Judicial Independence - Monitoring the EU Accession Process*. Central European University Press.
- Paju, M.** (2000): *Basic Features of Estonia Property law*. 8 *ZEuP* 87.
- Pazdan, M.** (1991): *Zur Änderung des polnischen Zivilrechts*. 37 *Osteuroparecht* 13.
- Petkeviča, J.** (2004): *Consumer Protection Law in Latvia*. Unpubl. Paper at file with the author.
- Petkevicius, M.** (2004): *Lithuanian contract law*. Unpub. paper at file with the author.
- Pfaff, D.** (1993): *Wirtschaftsrecht und Privatisierung in Osteuropa*. *WIRO* 73.

- Pritchard, J.-P.** (ed. 2000): Consumer Protection in Estonia, Hungary, Latvia, Lithuania, Poland. (with contributions by different authors in the framework of the PHARE-project) Université Catholique de Louvain.
- Poczobut, J.** (1999): Zur Reform des polnischen Zivilrechts (mit einigen rechtsvergleichenden Bemerkungen). 7 ZEuP 75-90.
- Pokol, B.** (2000): Statutory Interpretation and Precedent in Hungary. 46 Osteuroparecht 262.
- Reich, N.** (1972): Sozialismus und Zivilrecht. Athenäum: Frankfurt/M.
- Reich, N.** (1997): The German Implementation of Dir. 93/13. European Review of Private Law 167,
- Reich, N.** (2003): Understanding EU Law - Objectives, Principles and Methods of Community Law. Intersentia: Antwerp and London.
- Reich, N.** (2004a): The tripartite function of modern contract law in Europe: Enablement, regulation, information, in: Werro/Probst (2004) at 145-172.
- Reich, N.** (2004b): Stichtag 1. Mai 2004: Eine erweiterte Union - auch ein erweitertes europäisches Zivilrecht? Zur Rolle der baltischen Privatrechtssysteme in der EU. ZEuP 2004/3, 449-453.
- Reich, N.** (2004c): Das lettische Zivilrecht nach dem EU-Beitritt, ERA-Nachrichten 2004 to be published.
- Reich, N.** (2004d): Free movement and Citizenship in the new Member countries. RGSL working paper No. 19.
- Reich, N., & Micklitz, H.-W.:** (2003). Europäisches Verbraucherrecht. 4. A. Nomos: Baden-Baden.
- Riesenhuber K.** (2003), Europäisches Vertragsrecht. De Gruyter:Berlin.
- Rösler, H.** (2004): Europäisches Konsumentenvertragsrecht. Beck: München.
- Rott, P.**(2003): Minimum harmonisation for the completion of the internal market? The Example of Consumer Sales Law. CMLRev 1107.
- Rott, P.** (2004): German Sales Law Two years after Implementation of Dir. 1999/44/EC, in: 5 German Law Journal 237.
- Samulevicius, T.** (2004): Implementation of the Sales Dir. in Lithuania. Unpub. Paper at file with the author.
- Schulze, U. W.** (2002): Das litauische Zivilrecht - Entwicklung, IPR und Allgemeiner Teil. WGO 332.
- Schulze, R.;** Ebers, M. & Grigoleit, H. Chr. (Hrsg. 2002): Informationspflichten und Vertragsschluss im Acquis communautaire. Mohr Siebeck: Tübingen.
- Smits, J.** (2002): The Making of European Private Law. Intersentia: Antwerp and Oxford.
- Spall, H** (2004): The Development of Private Property Rights in Communist Hungary and the Theory of Path Dependent Institutional Change. Global Jurist Topics 1.
- Staudenmayer, D.** (2003): The Commission Action Plan on European Contract Law. European Review of Private Law 113
- Steindorff, E.** (1996): EG-Vertrag und Privatrecht. Nomos: Baden-Baden.
- Svjatska, A.** (2004): Latvian Civil Law: General Overview. Unpub. Paper.

- Torgans, K.** (2001): Comparing and Contrasting Obligation related Laws in Latvia and the Member States of the EU. Univ. of Latvia - 5 (31) Humanities and Social Sciences 5
- Torgans, K.** (2002): Contract Law: Latvia an the EU, in: University of Latvia 24-39.
- Torgans, K.** (2003): The Concept of Fault in Latvian Contract Law Requiries Adjustment, in: University of Latvia 96-109.
- Török, Gabor** (1998): Die Entwicklung des ungarischen Zivilrechts nach dem Systemwechsel. 6 ZEuP 309-323.
- University of Latvia** (ed. 2002): Problems of Transformation of Law in Connection with European integration. Riga.
- University of Latvia** (ed. 2003): Current Topics in Latvian Law 3(40): Riga.
- Vékás, L.** (1998): Über die Neugestaltung des ungarischen Zivilrechts, in: Basedow (1998), 713-724.
- Vékás, L.** (2000): Guiding Principles of the Comprehensive Reform of Hungarian Civil Law, European Journal of Law Reform 277-287.
- Vékás, L.** (2001): Die Vorbereitungsarbeiten zu einem ungarischen Zivilgesetzbuch. WIRO 13.
- Vékás, L.** (2004): Privatrecht des Verbraucherschutzes in der EU, in: Vékás/Paschke (2004), 11-84.
- Vékás, L./Paschke, M.** (Hrsg. 2004): Europäisches Recht im ungarischen Privat- und Wirtschaftsrecht, LIT Münster.
- Werro, F./Probst, Th.** (eds. 2004): Le droit privé suisse face au droit communautaire européen. Stämpfli Editions Berne.
- Wilhelmsson, Th.** (1995): European Contract Law And Social Values. Dartmouth:Aldershot.
- Wilhelmsson, Th.** (2002a): Private Law Remedies against the Breach of Information Requirements of EC Law, in: Schulze et al. (2002), 245-265.
- Wilhelmsson, Th.** (2002b): Private Law in the EU: Harmonised or Fragmented Europeanisation? European Review of Private Law 77-94.
- Zedler, F.** (2001): Procedural issues relating to unfair contractual terms. In: Kepinski (2001) 41-50.