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Mixing Legal Systems in Europe; the Role of Common Law Transplants (Polish Law Example)

Beata Gessel-Kalinowska vel Kalisz*

Abstract: At least since the late 1960s, comparatists have been questioning the division of civil law jurisdictions into the German and French families, bearing in mind ongoing processes of amalgamation. Polish law is an example of a mixture, which firstly derives from the unique historical creation of the body of the legal system after First World War, which, in essence, survived until today. Further mixtures, being more typical to all European jurisdictions, were introduced through more or less massive transplants that related to the harmonization demands of the EU. Thirdly, the mixture was effected through the bottom-up process of Anglo-Saxonization of law, especially in its contractual dimension.

Résumé: Au moins depuis la fin des années soixante, les comparatistes se sont interrogés sur la division des systèmes de droit civil en familles allemandes et françaises, tout en gardant à l'esprit les processus d'intégration actuellement en cours. Le droit polonais est un exemple d'un mélange, qui provient tout d'abord de la création historique unique du corps du système juridique après la première guerre mondiale, qui, pour l'essentiel a survécu jusqu'à aujourd'hui. D'autres mélanges, plus typiques de tous les systèmes de droits européens, ont été introduits au travers de transpositions plus ou moins massives dues à une exigence d'harmonisation de l'UE. Troisièmement, le mélange s'est effectué sous la forme du processus, partant du bas vers le haut, de l''anglo-saxonisation' du droit, spécialement en matière contractuelle.

Zusammenfassung: Spätestens seit Ende der 1960er haben Rechtsvergleicher die Aufteilung der civil law-Rechtsordnungen in die deutsche und die französische Familie vor dem Hintergrund einer fortschreitenden Verschmelzung in Frage gestellt. Das polnische Recht ist Beispiel einer Vermischung, die zunächst der einzigartigen historischen Bildung dieses Rechtssystems nach dem ersten Weltkrieg geschuldet ist, welches im Wesentlichen so bist heute besteht. Weitere Vermischungen, die typischer für alle europäischen Rechtsordnungen sind, wurden durch mehr oder weniger schwerwiegende Rechtstransplantate eingeführt, die im Zusammenhang mit den Harmonisierungsbestrebungen der EU stehen. Und schließlich wurde die Vermischung weiter im Rahmen des bottom-up Prozesses der angelsächsischen Beeinflussung des Rechts bewirkt.

1. Three Dimensions of the European Jurisdictional Mixtures

1. It is true what E. Örücü said, that 'what is necessary today is reassessment of individual legal systems according to the old and new overlaps, combinations and

* Adjunct Professor at the Cardinal Stefan Wyszyński University Law Faculty, Senior Partner at GESSEL, Alternate member of the ICC Court of Arbitration. Email: b.gessel@gessel.pl.

blends, and of how the existing constituent elements have mingled and are mingling with new elements entering them'.[1]

2. Any attempt to position Polish law among the great legal families has been fraught with considerable difficulty. Western legal writers have adopted various stands as to how Polish law might fit among the legal systems of the world and usually did so without the benefit of a deeper analysis. Writing in their comparative legal studies classic, K. Zweigert and H. Kötz[2] place Polish law as related to the French, while others, like La Porta et al. regard Polish law as an outgrowth of the German legal system.[3]

3. In particular, as it follows from the Polish law evidence, three factors that challenge the classic taxonomy should be considered. The first is historical relationship, the second the effect of the European law. The third one is the impact of common law on the continental jurisdiction.

The historical perspective is not new in comparative law. As A. Watson said '[i]n the forefront, above all, stands the historical relationship; where one system, or one of its rules, derives from another system, probably with modifications',[4] with such process going back to ancient times.[5] A unique particularity of the Polish system is the deliberate amalgamation of elements devised in various jurisdictions, opted for in lieu of importation of an entire system (as, for example, Swiss civil law was imported into Turkey) or importation of only particular institutions.

European Union law affects the legal systems of its members by mixing in a reciprocal way, characterized by infusing solutions or ideas from various legal jurisdictions into the EU system and then disseminating them back into the national systems via directives, regulations, and soft law-type guidelines, as well as European Court of Justice and European Human Court of Human Rights judgments. The EU law impact will be discussed below only briefly.

4. The most interesting feature, however, which has been present in the last decades and has not been much taken into consideration is the impact of the common law systems on the Continental jurisdictions in the last decades, this on a scale which has not been observed at an earlier stage.

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1 E. Örücü, 'Legal Families and Mixing Systems', in E. Örücü & D. Nelken (eds), *Comparative law. A Handbook* (Oxford and Portland, Oregon 2007), p 172.

2 K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (Oxford 2011), p 154; following L. Constantinescu, *Travaux de la Semaine Internationale de droit 1950. L'influence du Code civil dans le monde* (Paris: Pedone 1954), p 664.

3 R. La Porta, F. Lopez-de-Silanes & A. Sheifer, *NBER Working Paper* 2007 (13608), map marked Figure 1, www.nber.org/papers/w13608.

4 A. Watson, *Legal Transplants. An Approach to Comparative Law* (Edinburgh 1974), p 7.

5 *Ibid.*, p 22 et post.

5. Before discussing those factors in detail, the author would like to offer two caveats. Firstly, the comments set out below are, in principle, limited to the area of private law, as most of the taxonomies in the theory of legal families are,[6] with particular emphasis on the commercial law. Secondly, for the sake of clarity of the argument that deals with European jurisdictions, the impact of international instruments other than purely European ones, e.g. UN Convention on Contracts for the International Sale of Goods (CISG or the Vienna Convention) or the Uncitral works, are not analysed in depth here, although their contribution for the process of mixing legal systems is noted.

2. The Impact of Historical Roots

6. **Incorporation of all great codifications on the territory of Poland.** The historical background of Poland until the 18th century did not play an important role in the creation of its contemporary legal system. The legal system of the First Polish Commonwealth, the sprawling monarchy that reached the peak of its power in the 16th and 17th centuries, was – at least in the realm of private law – a custom-based one, influenced by Roman law to a limited extent and not codified.[7]

7. Successive partitions executed by Poland's neighbours in 1772, 1793, and 1795 left the country divided among Austria, Prussia, and Russia in a state of affairs that, with some minor modifications, persisted until 1918. In 1807, the Napoleonic expansion led to the creation of the Duchy of Warsaw and, in consequence, to introduction of the fourth legal system, namely Napoleonic law. The Duchy of Warsaw lost its sovereignty in 1815 when, following Napoleon's discomfiture, it was transformed into the Kingdom of Poland, associated with Russia by a personal union.[8]

These political vagaries had consequences regarding the impact of the great codifications of the 19th century directly imprinting their mark on development and application of the law within the Polish-speaking realm. The greatest importance in this respect is attached to the Napoleonic Code promulgated in its entirety in 1808. Poles tended to welcome Napoleon's army as liberators from oppression,

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6 K. Zweigert & H. Kötz, *An Introduction...,* p 65.

7 *See* G. Jędrejek, 'Polski kodeks zobowiązań z 1933 roku', XI. *Roczniki Nauk Prawnych* 2001(1), p 50. Certain influences of Roman law were in evidence in the various attempts at legal codification embarked upon before the partitions of Poland; alas, these were never brought to fruition (e.g. the Code of Zamojski from 1778), or came into force only within a limited territory (e.g. the Legal Adjustments from 1532 or the Third Lithuanian Statute from 1588). *See* also M. Safjan, in M. Safjan (ed.), *Prawo cywilne – część ogólna. System Prawa Prywatnego tom 1* (Beck, 2nd edn 2012), pp 1–3.

8 T. Cegielski & Ł. Kądziela, *Rozbiory Polski 1772–1793–1795* (Warszawa 1990); G.J.S.L. Eversley, *The Partitions of Poland* (London 1915); H. Kaplan, *The First Partition of Poland* (New York 1962).

so the Napoleonic Code did not engender much opposition, even if some of its specific provisions (concerning, for example, marriage) were too liberal for Polish tastes. After the creation of the Kingdom of Poland (a Russian client state), the Napoleonic Code was elevated to a symbol of the struggle against impending Russification, and its core remained in force until Poland regained her independence in 1918.[9] As, once the partitions stabilized in the early 19th century, Russia ended up controlling some 82% of Poland as it had been in 1772,[10] one may legitimately argue that, in territorial terms, it was the Napoleonic Code which exerted the most far-reaching influence on Polish territory, a trait which may have informed K. Zweigert's and H. Kötz's identification of Poland as a French law jurisdiction.

8. Once Poland was restored as an independent state in 1918, the patchwork of partitions proved to be the cause of confusion, with no less than five distinct legal systems functioning within its new borders: German law, an amalgam of French and Polish law, Russian law, Austrian law, and certain elements of Hungarian law.[11] In this way, Poland had the unquestionable distinction of being the only European country whose legal system now incorporated all three great codifications: the *Allgemeines Bürgerliches Gesetzbuch* (the Austrian civil code from 1811), the *Bürgerliches Gesetzbuch* (its German counterpart from 1896), and the Napoleonic Code.[12] One of the first legislative acts of the new Polish authorities comprised therefore of implementing collision of laws principles, enabling some semblance of the co-existence and cooperation among the legal entities from different parts of the country until a more permanent harmonization of laws could be accomplished.[13]

9. **Creating a modern body of law after WWI.** In 1919, a Codification Commission was convened, bringing together academics, lawyers, and judges who had studied and practiced within the legal systems of all three partitioning powers, were conversant with different legal regimes and were willing to adopt an open, flexible approach to countenancing new legislative solutions.[14]

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9 G. Jędrejek, XI. *Roczniki Nauk Prawnych* 2001, pp 56–57.

10 B. Kerski & A.S. Kowalczyk, 'Realiści z wyobraźnią', in *Kultura 1976–2000: wybór tekstów* (Lublin 2007), p 318.

11 S. Grodziski, 'Prace nad kodyfikacją i unifikacją polskiego prawa prywatnego (1919–1947)', I. *Kwartalnik Prawa Prywatnego* 1992(1–4), pp 9–10.

12 S. Grodziski, 'W osiemdziesięciolecie Komisji Kodyfikacyjnej (Geneza i struktura)', *PiP (Państwo i Prawo*) 2000(4), p 11.

13 In principle, full unification of Polish civil law was achieved soon after World War I, with the new family law, inheritance law, and general provisions of civil law (among other elements) enacted by way of decrees. *See* A. Wolter, *Prawo cywilne. Zarys części ogólnej* (Warsaw 1982), pp 46–47.

14 S. Grodziski, I. *Kwartalnik Prawa Prywatnego* 1992, p 10; *See* here for a full list of the Codification Commission members. This approach, and the care taken to include experts learned

10. As regards the law of obligations, the architects of the new system drew upon the Napoleonic Code and the civil codes of Germany and of Austria. Political considerations were at play here: while the most logical and simple solution would have been to adopt one of these bodies of law in its entirety, a deliberate decision was taken not to do so, for this would be tantamount to endorsing the legal institutions of a (recent) occupier.[15] The Swiss law of obligations from 1911 also exerted some influence in this context, as did the French-Italian legal initiative from 1927 and certain elements of Russian, Japanese, and Soviet law. Roman law ended up influencing the Polish legal system of the 1920s and 1930s much more than it did up until the 18th century. Roman law was resorted to as a species of ligament in instances where legal solutions based on various sources yielded contradictory results, or simply required additional structure so that they may be agglomerated into a workable organism.[16]

11. The outcome was that while Polish law of obligations retained all the elements shared by the Austrian, German, and Russian systems, the Codification Commission formulated new solutions where a common ground in regulations applicable in the partitioned Poland could not be found. The new provisions were generally based – especially in the general law of obligations – on Swiss law, esteemed as an ideal amalgam of the Latin and German legal traditions. Detailed provisions of the obligations code, meanwhile, relied heavily on the German civil code, like for example contract of sale.

12. The Polish code of obligations, adopted in 1933,[17] was much lauded in Europe as a high-quality body of legislation, drawn up in language which, while precise, also lent itself to application to new situations as they arise in actual practice.[18] Commentators noted, among other, its ground-breaking approach to the *rebus sic stantibus* clause, much debated at the time, which sought to reconcile the basic *pacta sunt servanda* rule with fundamental shifts in the underlying reality.

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in the laws of various Continental jurisdictions, might be compared to the beginnings of the legal system in Israel, which involved input from lawyers who had trained and practiced in Continental Europe (mainly in Germany, Austria, and Italy) and then made their way to Palestine in the 1930s, and who retained their attachment to civil law despite having seen it corrupted by Nazism or fascism. see the comments by V.V. Palmer, *Mixed Jurisdictions Worldwide*, *The Third Legal Family* (Cambridge University Press 2012), pp 38–39 and the report by Gidron and Goldstein included there, pp 577 et post.

15 Such nationalistic motivation is nothing uncommon in historical terms. As A. Watson points out, Scotland accepted Roman law because of her resentment against England, *see* A. Watson, *Legal Transplants...*, p 51.

16 G. Jędrejek, XI. *Roczniki Nauk Prawnych* 2001, pp 55-56.

17 The Regulation of the President of the Republic of Poland of 27 October 1933 – The Code of Obligations, Journal of Laws No 82, item 598.

18 S. Płaza, 'Kodyfikacja prawa w Polsce międzywojennej', LVII. *Czasopismo Prawno – Historyczne* 2005(1), p 226.

In a preface to the French edition of the Polish code of obligations, H. Capitant wrote that, while it is closely related to the German code in its substantive aspect, the precision and clarity of its language have more in common with the Swiss code. He noted the high quality of the methodological and formal aspects of the Polish statute. Its technique of subdividing long articles into pithy, readily prehensile paragraphs was assessed as a worthy model to follow. Capitant actually went as far as to compare the labours of the Polish Codification Commission to the framing of the Napoleonic Code, which likewise involved a compromise in codifying the various legal systems hereto applied within a single, coherent set of laws.[19] Other authors debated the viability of adopting the new Polish code as a foundation for unifying the laws of the various Slavic states, arguing that its adroit incorporation of elements from the Latin and German legal traditions would facilitate legal dealings with the polities of Western Europe.[20]

13. Another important statute presented 1934[21] – the new commercial code regulated the incorporation of commercial law entities ('merchants' as the code called them) as well as the transactions in which they engaged. While the code was based on the German commercial code of 1897, it also introduced many original concepts, for example as regards its definition of the 'merchant' and of the 'enterprise'.[22] The fledgling Polish state also enacted laws governing the operation of stock exchanges (1924), warehouses (1924), use of promissory notes and cheques (1924), and, as the first one in Europe, private international law (1936).[23] [24]

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19 Z. Nagórski, 'Codification of Civil Law in Poland', in *Studies in Polish and Comparative Law* (London: The Polish Lawyers Association in the United Kingdom 1945), pp 65–66.

20 *See* G. Jędrejek, XI. *Roczniki Nauk Prawnych* 2001, p 66. Interestingly enough, a broadly similar appeal for unification of the laws of the Slavic states was published by K. Zweigert & H. Kötz, *An Introduction...,* p 155, after the fall of communism in Eastern Europe.

21 The Regulation of the President of the Republic of Poland of 27 June 1934 – The Commercial Code, (Journal of Laws No 57 item 502).

22 S. Płaza, LVII. *Czasopismo Prawno – Historyczne* 2005, p 229.

23 *Ibid.*, pp 227, 229.

24 If we were to delve deeper into the juxtaposition of the new Polish private law of the inter-war period with Israeli law, the following similarities might be noted. Firstly, the successive parts of the law were, as in Poland, drafted and enacted in sequence, e.g. the sales law (1968), the law of transfer of obligations (1969), the contracts law (breaches) (1970), the contracts law (general portion) (1973), the commissions contract law (1974), and the law regarding unjust enrichment (1979). The entirety of Israeli private law was ready for collective codification within an aggregated civil code in 1980, and 2004 witnessed the emergence of the first draft statute; legislative work is still pending. Secondly, this 'codification in parts' (apart from the regulations concerning trusts and unjust enrichment, which were derived from common law) combines French, Italian, and – first and foremost – German influences, so Israeli law can be classified as belonging to the Continental system on a similar basis as the Polish. As a point of difference to material civil law, the Israeli legal procedure derived from common law, to witness only the practice of appointing judges from among legal practitioners – as opposed to the training articles for judges used on the

14. **The impact of socialistic principles after WWII.** The outbreak of World War II brought the work of the Codification Commission to an end. After 1945, its achievements were taken up and elaborated upon by the Legislative Department of the Ministry of Justice and by its Legal Commission, producing – in particular – the new Civil Code of 1964.[25] The new principles enshrined within the new socialist morality, the precedence of public over private property, and the state-controlled market – as referred to in Article 8.1 of the Constitution of the People's Republic of Poland,[26] which stated that 'the laws of the People's Republic of Poland express the interests and the will of the working masses' – were either expressly enacted by way of specific decrees implementing the civil law or were extrapolated from general legal norms inherited from the pre-war legal order.[27] A special interpretative authority was constituted in resolutions of the State Council – an executive body competent to lay down legally binding interpretations of statutory norms.[28]

15. Work on the Civil Code proceeded subject to the overarching rule of unity and cohesion of civil law. As a consequence, the part of the Commercial Code regulating commercial acts (e.g. sale of goods) were subjected to provisions of the Civil Code and the pre-war Commercial Code remained in force only as regards business law entities (various types of private partnerships and incorporated companies). Of course, the economic realities of socialist Poland had little use for institutions such as, say, limited liability companies, so the Commercial Code remained a dead letter until the 1980s, when the authorities first began toying with the idea of companies with mixed Polish and foreign capital in hopes of reinvigorating the moribund economy.[29]

Continent. The latter point is a major difference between the Israeli and Polish systems. *See* the report by Gidron and Goldstein in V.V. Palmer, *Mixed Jurisdictions,* pp 577 et post.; and E. Zamir, *The Civil Codes – Israeli Report* presented at *Thematic Congress of the International Academy of Comparative Law Taiwan*, held in May 2012 in Taiwan, www.researchgate.net/publication/228142349_The_Civil_Codes_-_Israeli_Report.

25 The legislative Act of 23 April 1964 – the Polish Civil Code (Journal of Laws No. 16, item 93).

26 The Civil Code abandoned the principle of a single, absolute concept of ownership and followed the new Constitution of the Polish People's Republic in implementing a varied regime depending on the 'type' of ownership: national property (Art. 12), cooperative property (Arts 15 and 16), and individual property. The latter, meanwhile, was subdivided into small goods property and capitalist property (Art. 17 in reference to Art. 15.1) as well as personal property (Art. 18). *See* A. Wolter, *Prawo cywilne. Zarys...,* p 57.

27 *See* A. Wolter, *Prawo cywilne. Zarys...,* pp 57–62.

28 *See Ibid.,* p 69.

29 J. Frąckowiak, A. Kidyba, K. Kruczalak, W. Opalski, W. Popiołek & W. Pyzioł, in K. Kruczalak (ed.), *Kodeks Spółek Handlowych, Komentarz* (Warsaw 2001), pp 11–15; *See* also: The legislative Act of 6 July 1982 regarding the principles of pursuit within the Polish People's Republic of commercial activity in the scope of small-scale manufacturing by foreign corporate and natural persons (1989 Journal of Laws No. 27, item 148, as amended).

16. Unlike other socialist economies in Eastern Europe after World War II, nationalization in Poland was essentially limited to large land holdings and to means of production – private ownership of small residential and business properties remained in force.[30] Yet the introduction of a centrally planned economy brought a halt to natural development of the broader commercial law, for the simple reason that legal relationships to which this law might apply were basically banished from the official economy. Private companies ceased to operate, and most commercial dealings between private individuals were driven underground, into the grey economy. These unfavourable conditions notwithstanding, the fact that certain legal concepts and institutions from pre-war Poland – such as private ownership (if only in some areas) or the civil law concepts of freedom of intent and of legally protected personal interests[31] – were still allowed to function at least to a limited extent enabled the preservation of some basic institutions of private law (such as land and mortgage registers)[32] and cultivation of legal doctrine. The output kept up by authors such as B. Lewaszkiewicz – Petrykowska, Cz. Żuławska, A. Klein, Z. Radwański, or W. Czachórski made it possible to develop the law and its doctrinal analysis, and books from the period such as Grzybowski's *System prawa cywilnego* (The Civil Law System, 1984) remain a treasured source of knowledge for lawyers to this very day.

The Civil Code managed to keep its basic pre-war rules and quality, albeit sometimes covered by a socialist coat. Its timeless character is best testified to by the fact that, in the wake of the democratic and free market reforms launched in 1989, a quick, clean excision of certain elements added after 1945 sufficed to produce a modern statute perfectly capable of supporting a market economy.

17. **Turn to market economy after 1989.** After the end of socialism in 1989 Polish law was defined by three parallel currents: socialist law, the legal holdovers from the 1920s and 1930s (that included the Commercial Code and the law regulating promissory notes and cheques – statutes which, at the *de jure* level, had remained binding all along, but needed reactivation in practice), and new laws enacted (often at breakneck speed) specifically for the post-1989 market economy. With time, these currents converged into a cohesive, workable system. The

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30 The Decree on Performing the Agrarian Reform of 6 September 1944 (Journal of Laws No. 4, item 17).

31 S. Grzybowski, *System Prawa Cywilnego, tom 1. Część ogólna* (Ossolineum 1984), pp 50 et post, discerns the following basic principles underlying Polish civil law at that time: traditional (associated with the legal orders of societies basing their economies on private ownership of the means of production) – such as autonomous will of the parties, security of dealing, and legally protected personal interests – which retained their basic validity despite a certain curtailment, and socialist – legal differentiation between social, individual, and personal property and unity of national property.

32 The land and mortgage registers law decree of 11 October 1946 (Journal of Laws No. 57, item 320).

Commercial Code was dusted off, and the Civil Code was stripped off certain socialist modifications while leaving in place the elements which, while added under the socialist system, could viably be reinterpreted for the new times. A typical example of the latter is presented in the 'accepted principles of community living' (*zasady współżycia społecznego*) which, at the linguistic level, marked a departure from the pre-war antecedents of 'good custom', 'principles of fairness', or 'principles of fair dealing' but, in day-to-day practice, ended up replicating their substantive meaning.

18. To summarize, come the early 1990s, Polish private law reverted to the state of a unique French-German hybrid; if one were forced to indicate one of these influences as predominant, one would probably point to German antecedents. The German law of obligations served as the basis for Book III (Obligations) of the 1964 Polish Civil Code. As for the remaining parts of the Civil Code, they drew heavily on the work of the pre-war Codification Commission, with the logical corollary that influences of French, German, Austrian and Swiss legal thinking are all in evidence, as are elements of the draft Italian code. The part of the Civil Code regulating various types of contracts as well as the Commercial Code are based primarily on German models, while its general part as well as the concept of tort[33] is derived from French law. Excessive enthusiasm for any clear-cut attributions must be tempered by the fact that some institutions of Polish law present entirely novel solutions achieved by striking a compromise between German and French models.[34] One example is presented in the legal authority of a judge to amend a contractual provision. In accordance with the Napoleonic Code, a contract could have been amended only under exceptional circumstances by way of statutes enacted for an interim period; in the German system, meanwhile, a judge's authority to amend a contract was permanent and could have been exercised whensoever accepted norms of community living so required. The Polish code of obligations adopted the principle that a judge may amend a contract (as in the German system) under specific circumstances (as in the French system).

3. The Impact of European Union Law

19. It is claimed that the European Union has built up hybrid transnational governance arrangements, structured neither in purely private law terms nor in

33 *See* D. Janicka, 'Niektóre problemy stosowania francuskiego prawa zobowiązań w praktyce orzeczniczej Sądu Najwyższego (1918–1939)', LVII. *Czasopismo Prawno-historyczne* 2005(5), p 89 et post.

34 *See* G. Jędrejek, XI. *Roczniki Nauk Prawnych* 2001, p 65.

purely public law terms, neither purely governmental nor non-governmental, leaving traces in private law.[35] The impact of these hybrids on Polish law is similar to that on other Member States and does not require specific elaboration for purposes of this article – apart, perhaps, from two comments.

20. Firstly, on her way to becoming an EU Member State, Poland went through the process of transplanting European laws in a 'wholesale' and turbulent manner. Poland witnessed amendment, on a volume dealing basis, of hundreds of legislative acts, with definition and expounding of the *ratio legis* deferred to a later time.[36] The fact that, during the time interval in question, comparative law studies were very much lagging behind did not help.[37] This entailed incorporation into the Polish legal system of innumerable legal norms, some of which did not sit well with the legal principles already in force and which, in some cases, were little more than exercises in cutting and pasting, with the literal language of EU directives hurriedly shoehorned into legislative acts. In instances where the given directive left certain solutions up to the prerogative of the national legislature, such niceties were ignored.[38] In all fairness, this rough-and-ready legislative style was rendered necessary by the accession schedule, and similar phenomena manifested themselves in the other post-communist countries joining the European Union at the same time as Poland.[39]

21. Within the framework of private law and especially business to business relations, the impact of the European unification process is not essential. The various measures taken by the Commission in this respect are based on superior

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35 Ch. Joerges, 'On the Legitimacy of Europeanising Private Law: Considerations on Justice-making law for the EU Multi-level System', 7. *Electronic Journal of Comparative Law* 2003, p 3, www.ejcl.org/73/art73-3.html.

36 Poland was first tied to the EU by way of the Association Treaty, sometimes referred to simply as the European Treaty, executed on 16 December 1991. The commercial part of this Treaty came into force on 1 March 1992, and its entirety (subsequent to the requisite ratifications) – on 1 February 1994. The Association Treaty provided the normative basis for reception of Communities law into the Polish legal system.

37 *See* Z. Kühn, 'Development of Comparative Law in Central and Eastern Europe', in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford 2007), p 228. The author does well to point out that comparative legal studies were something of an underdeveloped academic discipline in the post-communist countries, impeding the understanding of new legal institutions (some of which contravened the legal order into which they were transplanted) and delaying their effective reception. The fact that the University of Warsaw and the Central European University of Budapest went to the trouble to open schools of foreign law is cited as two praiseworthy exceptions from this general tendency. Since then, the situation has changed a lot.

38 As concerning consumer law, *see*: E. Łętowska, M. Jagielska, K. Lis. P. Miklaszewicz & A. Wiewiórowska-Domagalska, 'Implementation of Consumer Law in Poland', 6. *ERPL (European Review of Private Law)* 2007, p (873) at 881–884; also W. Czapliński, 'Harmonization of Laws in the European Community and Approximation of Polish Legislation to Community Law', *PYIL (Polish Yearbook of International Law)* 2001, p 54.

39 *See* Z. Kühn, in *The Oxford Handbook of Comparative Law*, p 228.

considerations of general community policies such as consumer protection, protection of employees, or socially weak parties, implementation of the four fundamental freedoms of the EC Treaty, or on such fields as banking or insurance supervision law and creation of a 'level playing field'.[40] The impact on the contractual laws of Member States tends to be exerted in a soft way, to witness the Principles of European Contract Law or the Draft Common Frame of Reference.[41]

22. Secondly, as a consequence of accessing the EU, Poland became indirectly subject to the influence of various legal systems: either French-, German-, or English-oriented. Polish law became one of the legal systems subsumed under the law of the European Union – which is a species of fusion of various national systems. In other words, transplantation into Polish soil of certain legal solutions devised in various Western European countries was achieved in a roundabout way, via EU law. A few examples will follow.

23. In the area of company law, a strong influence of German law is visible.[42] Yet, company law directives did not revolutionize Polish law, as the German solutions were reflected already in the pre-war legislation. The subsequent directives, including the Takeovers Directive (2004/25/EC), the Shareholders Rights Directive (2007/36/EC), and the Directive 2005/56/EC on cross-border mergers of limited liability companies (Tenth Company Law Directive), changed Polish company regulations substantially.[43]

24. The French law impact seems to be limited. The concept of timesharing was introduced into Polish law through transposition of Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of

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40 K.P. Berger, *The Creeping Codification of the New Lex Mercatoria* (Netherlands: Kluwer International 2010), p 234.

41 However, the question is frequently asked whether European consumer law can be a forerunner of statutory amendments of contract law in general. If the domestic law perceives consumer law as an integral part of the civil law, and if the legislature wants to maintain coherence of the system, this means that consumer law is going to affect the general rules intensely (as happened in Poland); *see* E. Łętowska & A. Wiewiórowska-Domagalska, 'The Common Frame of Reference, the Perspective of a New Member State', 3. *ERCL (European Review of Contract Law)* 2007, p (277) at 292.

42 As an example, one might cite the German practice of recognizing certain material effects of some announcements made by a company, as adopted in the First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, *see* Hykawa 2002: 97, or adoption of the German mechanism for establishment of single-person companies adopted in Council Directive XII, *see* Modrzejewski 1996: 172–175.

43 K. Oplustil & A. Radwan, 'Company Law in Poland: Between Autonomous Development and Legal Transplants', in Ch. Jessel-Holst, R. Kulms & A. Trunk (eds), *Private Law in Eastern Europe* (Tübingen 2010), pp 464–465.

purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.[44]

25. Common law influences are visible mostly in the strong position of the European Court of Justice (ECJ) and its quasi-law making prerogatives[45] as well as in specific solutions such as Article 23 of the Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent 77/91/EEC, which was strongly inspired by the regulations of the English Companies Act.[46]

4. The Direct Impact of Common Law at the Statutory Level

26. The process of adapting Polish law to market economy drew not only upon Continental models, but also with an increasing frequency upon common law ones. As explained above, the common law influences European states indirectly, through legislation adopted at the EU level. Its impact is also observed in the area of direct links, both at the statutory level and in the sphere of contractual practice.

27. **Company law.** On a legislative level, Polish Commercial Companies and Partnerships Code that came into force on 1 January 2001[47] provides a good example. While the most significant changes concerned the rules regulating merger, demerger, and transformation of commercial law companies, the introduction of new varieties of private partnerships, and new regulations governing joint stock companies, in the end all sections of the old Commercial Code were amended at least to some extent.[48] The new code aimed at modernizing the statute and harmonizing it with EU law. Therefore, the legislator not only pored over the European Union laws, but also considered relevant solutions of individual

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44 The Law on protection of purchasers of the right to use buildings and apartments on a time-share basis and on amendment of the Civil Code, the Misdemeanours Code, and the Land and Mortgage Registers Law of 13 July 2000 (Journal of Laws No. 74, item 885). *See* P. Puch, '"Timesharing" – sposób korzystania z nieruchomości', 5. *Nieruchomości* 2003, p 6.

45 *See* M. Cesarz, 'Porządek prawny Unii Europejskiej', in A. Pacześniak & M. Klimowicz (eds), *Procesy integracyjne i dezintegracyjne w Europie* (Wrocław 2014), p 180.

46 M. Cejmer, *Europejskie prawo spółek. Tom I. Instytucje prawne dyrektywy kapitałowej*, in M. Cejmer, J. Napierała & T. Sójka (eds), (2004, access: Lex Delta).

47 The Commercial Companies and Partnerships Code of 15 September 2000 (Journal of Laws No. 94, item 1037, as amended).

48 Reasoning for the draft statute – the Commercial Companies and Partnerships Code, Druk Sejmu Rzeczpospolitej Polskiej no. 1687 of 4 February 2000, p 2.

Member States. Given the German pedigree of the Polish Commercial Code, German law was an especially popular point of reference, even if this time the Polish codifiers were more wont to interpret the provisions of German law rather than adopting them verbatim. Other sources of inspiration included – in addition to French, Italian, Austrian, Dutch, and Swiss law[49] – also American law (as regards private partnerships). English law was often resorted to for purposes of analysis.[50] The statutory provisions concerning compulsory buy-back of shares in publicly listed companies (Art. 418 of the Commercial Companies and Partnerships Code) may have been based on Dutch, French, and Belgian law,[51] but there is no question that the origins of this legal institution hark back to the English Companies Act 1929.[52] Reference was also made to new laws regulating the relevant questions in Hungary, Slovenia, and Croatia.[53]

28. **Securities law.** Another good example of beneficial fusion of Continental law, common law, and EU law is presented in regulation of the securities markets. Laws governing the public securities trade account for an area in which the influence of European law on the individual Member States has been very strong, striving towards an integrated European financial market.[54]

It should be noted, however, that many of the legal institutions of modern securities law have a common law heritage. The tender to purchase shares, for example, first arose as a uniformly regulated legal institution in the United States

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49 In their reasoning, the authors of the draft point out that the model of the partnership limited by shares (*spółka komandytowo akcyjna*) has more to do with 'partnership limited', as in German and French law, than with 'shares', as in Swiss or Italian law (p 33); compulsory buying up of shares, meanwhile, refers to Dutch, French, and Belgian models (p 48).

50 For example, 'as in German law, English law, and the laws of most of the American states, the statutory responsibilities of the supervisory board shall include appointment and removal of management board members, which ought to bolster the position of the supervisory body vis a vis the directors', p 46; 'the special position of the president of the board is now a solution which predominated in most leading legislative systems (e.g. in the United States, Great Britain, and France)' (p 47).

51 Reasoning for the draft statute – the Commercial Companies and Partnerships Code, Druk Sejmowy no. 1666 of 5 June 2013, www.orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/1666/$file/1666.pdf.

52 *See* A. Radwan, 'Polska regulacja przymusowego wykupu akcji w spółkach publicznych na tle prawa unijnego', 1. *PPH (Przegląd Prawa Handlowego)* 2003, p 41.

53 Reasoning for the draft statute – the Commercial Companies and Partnerships Code, Druk Sejmowy no. 1666 of 5 June 2013, pp 22–23, www.orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/1666/$file/1666.pdf.

54 The Polish foundations for this process were laid down with the coming into force of the legislative Act on public offering, conditions governing the introduction of financial instruments to organized trading, and public companies (2013 Journal of Laws No. 1382, as amended) and of the Act on financial market supervision (2005 Journal of Laws No. 183, item 1537, as amended); M. Michalski, in M. Michalski (ed.), *Ustawa o ofercie publicznej, Komentarz* (Warsaw 2014), pp 37.

in 1934 by way of the Securities Exchange Act – a concerted effort by the federal authorities to introduce more order to the workings of the stock exchange with a view to protecting shareholder interests as regards the timeframes and execution of such tenders and access to information. The American solutions were taken as a model for similar ones enacted in English law, and subsequently in France and in other Continental jurisdictions.[55] The hostile takeover as a means of acquiring control over a listed company was developed in England in the 1950, from whence it was adopted in the United States and in other countries, gaining in popularity along the way.[56] American practice, meanwhile, has devised and tested the catalogue of defences against hostile takeovers now established as a global standard.[57]

29. **Registered pledge.** Another example relates to the registered pledge regulations inspired by the concept of the common law floating charge,[58] an interesting point if we bear in mind that rights *in rem* were generally associated with local, and in any case Continental, principles.

30. **Civil proceedings.** The story of Polish legal procedure has been one of curious evolution. The civil procedure and criminal procedure codes[59] alike have been remodelled so as to compensate for socialist times, when the conflation of official and investigative powers made for a certain repressiveness of the system. The new emphasis is on adversarial process and on autonomy of the parties – on every party concerned presenting its own narrative rather than on a single overriding truth. Such an approach, of course, is closer to common law than to Continental procedure. As a matter of fact, mainland Europe has been tilting in the opposite direction as of late; French procedure, for example, has recently been reformed so as to limit the autonomous will of the parties and to rely more on investigative findings, all in the interests of streamlining the process.[60] While the changes to Polish civil procedure were formulated as a rejection of a certain model inherited from socialist times, with the result that Polish law was positioned in the neighbourhood of common law, the introduction of class action lawsuits was an unabashed, straightforward legislative borrowing from Anglo-Saxon law. Class

55 C. Podsiadlik, *Wrogie przejęcie spółki* (LexisNexis: Warszawa 2003), p 22 at fn. 2.

56 J. Armour, J.J.B. Jacobs & C.J. Milhaupt, 'The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets, An Analytical Framework', 52. *Harvard ILJ* (*Harvard International Law Journal)* 2011(1), p 239 et post.

57 C. Podsiadlik, *Wrogie...,* p 58.

58 U. Ernst, *Zabezpieczenia na rzeczach ruchomych w Polsce i w Niemczech. Przewłaszczenie na zabezpieczenie – zastaw rejestrowy – prawo kolizyjne* (Warszawa 2011), p 396.

59 See the reasoning for the draft of the Act amending the Code of Criminal Procedure dated 8 November 2012, draft No. 870.

60 A. Stawarska-Rippel, 'Kontradyktoryjność i inkwizycyjność w europejskiej procedurze cywilnej XIX I XX wieku', LXV. *Czasopismo prawno-historyczne* 2013(2), pp 132–133, 142.

action suits were introduced to the Polish legal order by way of the legislative act[61] framed in reference to regulations in force in mainly in Sweden, but also Denmark, Spain, Holland, Germany, Greece, and England. It must be mentioned, however, that class action suits, or bills of peace, were first developed in England in medieval times, their special feature being that the verdicts were binding not only vis a vis the actual members of the group, but also other potential members[62] – an admirably logical solution in a system based on judicial precedents.

31. **Arbitration law.** Brief mention of the development of Polish arbitration law should be apposite in this context. The amendments to the Polish Civil Process Code from 2005[63] were drawn up with an eye to the Uncitral Model Law 1985[64] that represents a hybrid of Continental and common law solutions. Polish arbitration practice – both at the soft law level (the rules of arbitration tribunals, the adoption of International Bar Association (IBA) rules and guidelines) as well as how the actual proceedings are handled – has implemented a number of important institutions typical of Anglo-Saxon legal systems, such as depositions by witnesses, case management meetings, or the way in which hearings are prepared.[65]

32. The statutory area of regulation also includes international instruments that were incorporated into the body of the law. The best example of a common law transplant in this respect is the Vienna Convention which was incorporated into Polish law in 1990.[66] The uniform concept of breach of contract by the seller defined by Article 45 of CISG as including all kinds of non-compliance such as non-delivery, late delivery, delivery of goods of a wrong description, lack of conformity of the goods, etc. was rooted in the common law jurisdiction and, by the same token, was contrary to the traditional concepts of Polish civil law where different liability principles were applied to delay in delivery, defects of the thing sold, etc.[67] Indirectly, through the operation of the Directive 2011/83/EU of 25 October 2011 on consumer rights, which was adopted by the Act of 30 May 2014

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61 Act of 17 December 2009 on pursuit of claims in group proceedings (2010 Journal of Laws No. 7, item 44).

62 *See* M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym, Komentarz* (2nd edn 2015, access: LEX).

63 Amendment introduced by the Act of 28 July 2005 amending the Code of Civil Procedure (Journal of Laws No. 172, item 1438).

64 UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985.

65 *See* for example M. Kocur, 'Witness Statements in International Commercial Arbitration', in B. Gessel-Kalinowska vel Kalisz (ed.), *The Challenges and the Future of Commercial and Investment Arbitration* (Warsaw 2015), pp 167–181; B. Gessel-Kalinowska vel Kalisz, 'Evolution of interim measures in international arbitration', in B. Gessel-Kalinowska vel Kalisz (ed.), *The Challenges and the Future of Commercial and Investment Arbitration* (Warsaw 2015), pp 153–166.

66 Presidential Act dated 27 April 1990 (Journal of Laws No. 74, item 439).

67 J. Basedow, 'Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG', 25. *IRLE (International Review of Law and Economics)* 2005, p 490.

on Consumer Rights which in turn amended certain provisions of the civil code, the concept of uniform breach was brought into the regulation of contract of sales.[68]

5. The Direct Impact of Common Law at the Contractual Practise Level; Contract Standardization as a Key Concept in Private Law

33. The impact of the common law on Polish statutory law can be assessed as being of secondary importance; it is the civil law influences that rises to the foreground. There is a dramatic shift, however, when it comes to the practical solutions applied in the area of commercial law.

34. Contracts drawn up and relied upon in the realm of commercial law are marked by a pronounced tendency towards a spontaneous standardization.[69] The vast majority of standard contracts observed in Polish commercial relations, both formed by legal practise or generated by industry organizations, are adapted from Anglo-Saxon models, with admixture of Polish accents and accretions enabled by the freedom of contract principle. It must be emphasized that, in the beginning, adoption of these standards hardly generated universal applause. They were criticized for their incompatibility with the existing legal infrastructure and, sometimes, were even denied legal effect.[70] The initial lack of understanding in this respect was similar to that concerning perception of the new European laws introduced to Poland in the run-up to EU accession. Over the course of time, however, most of the new concepts evolved, progressed, and settled into the system, coming into their own as quite successful transplants.

35. **M&A practise.** As good example of contractual standards developed in the practice of law firms are share purchase agreements. The basic framework of the typical M&A contract encountered in corporate finance in Poland, and likewise in some other countries of the region, is very much a creature of the common law

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68 The amendments of the civil code introduced by the Act of 30 May 2014 on Consumer Rights (Journal of Laws, item 827). See B. Gessel-Kalinowska vel Kalisz, 'Wpływ nowej regulacji rękojmi przy sprzedaży (Art. 5561 k.c.) na definicję wady fizycznej prawa udziałowego – uwagi w świetle zmian kodeksu cywilnego wprowadzonych ustawą z 30.05.2014 r. o prawach konsumenta', 12. *PPH* 2015, p 6–11.

69 The standardization processes are also becoming popular in EU, in particular with regards to consumer service standards aimed at enhancement of terminological and systematic coherence. allowing export of best practises even beyond Europe. This type of standardization is done by EU institutions, however with the participation of various stakeholders. See Ch. Busch, Towards a 'New Approach' in European Consumer Law: Standardization and Co-Regulation in the Digital Single Market, Journal of European Consumer and Market Law, Vol.5/2016, pp 197–198.

70 M. Bednarek, writing in an article under the portentous title 'Cudze chwalicie, swego nie znacie' (loosely: 'You praise foreigners without measure but neglect your own treasure'), criticized the importance attaching to representations and warranties in the typical M&A contract: *see* M. Bednarek, 'Cudze chwalicie', 1. *MoP (Monitor Prawniczy)* 2005, p 33 et post.

which, by various means, became domesticated in new jurisdictions. In the specific case of Poland, the establishment of this basic model was commenced by the first British and American law firms, which took the plunge into the country immediately after its adoption of a market economy. Since then the basic model has undergone certain adjustments to better fit with the Polish legal standards, like adjustment of the liability clauses considering proper application of statutory guarantee, or accommodation of put and call options into the existing framework of pre-emptive rights, and construction of an offer and obligation to contract in the civil code.

36. The M&A experience is also a good example, how such Anglo-Saxon transplants influence also the perception of the existing regulations. The concept of representations and warranties, granted with respect not only to the status of the sold shares but also of the business of the company in which shares were sold, gave rise to the redefinition of the concept of the legal and physical defect of the right sold and more functional then dogmatic interpretations.[71]

37. Another example is presented in contracts regulating management buy-outs and leveraged buy-outs. The entire idea of leveraging funds from a financing institution to buy a company that will then, hopefully, provide the proceeds to repay this financing – not to mention the SPVs (Special Purpose Vehicle), multiple jurisdictions, and other elements which soon come into play when this basic idea is implemented – was something of a novelty in Poland, even if, at the theoretical level, the institutions of Polish business law and civil law were perfectly capable of accommodating it.[72] Once again, Anglo-Saxon law was looked to as a source of general inspiration and of specific ideas.

38. **Project finance.** The same basic mechanism of transplanting Anglo-Saxon models onto Polish soil manifested itself in the fields of project finance, when it comes to defining the complex network of principals, contractors, and subcontractors, the concept of limited-recourse and non-recourse financing, and the reduced role of traditional collateral in favour of anticipated future proceeds from the project.[73]

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71 B. Gessel-Kalinowska vel Kalisz, 'A Defect of the Enterprise as a Defect of a Share – One of the Dilemmas of M&A Transactions (Polish law perspective)', in Ch. Cascante, A. Spahlinger & S. Wilske (eds), *Global Wisdom on Business Transactions, International Law and Dispute Resolution* (CH Beck 2015), pp 213–216.

72 The first attempt of a leveraged buy-out in Poland of which I am aware concerned the publicly listed company Stomil Sanok in the mid-1990s. It was not approved by the Securities Commission or by the crediting banks, which discerned too many various risks for the shareholders, and indeed for the creditors. Since then, Polish banks have embraced LBOs as a standard transaction model.

73 *See* M. Piątek, 'Project finance w prawie polskim i angielskim, part I', 16. *MoP* 2001 (access: Legalis); T. Jewartowski, 'Project finance jako metoda finansowania inwestycji infrastrukturalnych', LXIV. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2002(1), p 187.

39. **Credit facilities.** Moving on to standard contracts drawn up by organizations, an example is provided by the standard credit agreements propagated by the Loan Market Association (LMA). The best practices and contracts produced by the LMA with a view to fostering the development of credit markets around the world are rooted in English law, but are applied in many jurisdictions. In Poland, their utility has been acclaimed to the point where the LMA standard contracts are used in their English-language originals as well as in Polish translations. That said, some of the terms used in LMA standard contracts as a kind of legal shorthand – such as calling back a loan with immediate effect, breach of representations and warranties, or the material adverse change clause (MAC) – required some fine-tuning for optimum application in Polish practice, leading the Polish Bank Association to prepare versions specifically for the Polish market.[74]

40. **Other spheres.** Factoring, securitization, private equity/venture capital funds formation, management options, introduction of the concept of a merger clause as a standard of many types of contracts,[75] contracts used in the real estate market (such as leasing, tenancy, insurance of title to the real estate regardless of the existing system of Land and Mortgage Registers). There are myriad examples of English or American legal concepts and mechanism being successfully applied in Polish business law.

41. **Drafting style.** This process of contractual standardization imported from the Anglo-Saxon tradition is also visible in the style of drafting contracts in Poland, which is more casuistic than a Continental lawyer might expect. Also, the legal jargon used in purely Polish-language discussions or in the contracts is, in many instances, English rather than German or French, to mention only MAC , IPO (Initial Public Offering), put and call options, or earn-out clauses. When these technical terms are graced with Polish proper declination forms, a humorous effect sometimes results.

6. Reception of Common Law Contractual Standards in Polish Law

42. In what is not only a Polish phenomenon, commercial contracts are based on common law standards, both in international and in domestic dealings.[76] Whether the commercial contracts are drafted in English or in the local language, they adopt

74 R. Zakrzewski, 'LMA documentation in Poland', *LMA News H1* 2016, p 24 et post.

75 Introduction of a merger clause raised some doubts as to its conformity with Art. 65 of the Polish Civil Code, which provides for examination of the intention of the parties which might fall beyond the pure text of the contract, while the written form is not obligatory. Nevertheless, arguments allowing its validity based on the contractual freedom principle prevailed.

76 G. Cordero Moss, 'International Contracts between Common Law and Civil Law: Is Non-State Law to be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith', 7. *Global Jurist* 2007, p 3.

common law legal terminology, legal institutions, and structures. There are two important questions to be asked in this respect. Firstly, why does this happen? There is a number of reasons, both of an intrinsic and an extrinsic character, which are valid for Poland but may also apply for other jurisdictions. And the other question: do those standards fit the Polish legal culture in such a way that they change it significantly, considering the overall picture mirrored in comparative law taxonomies?

43. **Extrinsic factors.** Beginning with the extrinsic factors, most of the internationally published collections of model contracts are based on common law standards, not on civil law ones. Standardization has traditionally been associated with the common law culture. Standardization is cited as an example of pragmatism of the common law manifested in this kind of encapsulation of accumulated experience.[77] Purely Continental models are scarce in this respect, and as already pointed out, the situation where a civil law contract would be governed by the common law system, would be much more complicated.[78] Common law model agreements are self-governing, leaving precious little to the decision of the courts. There might be certain tensions stemming from contrary statutory law provisions but, in majority of cases, the umbrella of the contractual freedom principle works effectively. In the case of a Continental law model agreement, which is less casuistic and thus more accommodating of the codified rules, inclusion of rights and duties of the parties through the definition of *contractus nominativus* (to which English law is intended to apply) opens problematic gaps and, really, is impossible without the context of the underlying applicable law.

44. Secondly, those standards were used by international players including law firms, financial institutions, and corporations which began investing funds and efforts in Poland since the beginning of its market reforms and which helped to shape the country's contemporary legal scene as it developed. The first privatization agreements signed by the Polish government were drawn up with input, on both sides, by Anglo-American style business advisors and law firms and triggered a whole range of innovations in the Polish legal-economic perception. Institutions such as the European Bank of Reconstruction and Development[79] or the Polish American Enterprise Fund did a lot to build up the legal infrastructure, and their efforts were based, again, on the common law features.[80]

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77 N. HD. Foster, 'Comparative Commercial Law: Rules or context?', in E. Örücü & D. Nelken (eds), *Comparative Law, A Handbook* (Oxford 2007), p 271.

78 G. Dannemann, in G. Cordero Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge 2011), p 64.

79 G. Cordero Moss, 7. *Global Jurist* 2007, p 2.

80 In Germany, for example, the standard M&A common law style contract was introduced after World War II in connection with the considerable level of activity by American and English investors buying up German companies; mention has also been made of the significant

45. Thirdly, there is the continuing process of standardization of contracts playing out on a global scale, caused in turn by globalization of general political and economic processes. As J. Basedow put it, '*[t]he greater the number of economic actors who take part in the international trade, the less convincing will be the justification of the national particularities of contract law*'.[81] And this process is driven by traditionally civil law countries that gradually come around to certain elements of the common law.[82] Such thinking is supported by the EU approach to private law, which allows (save for some areas where protection of weaker players, like Small and Medium Enterprise (SMEs) or consumers, is deemed desirable) for natural convergence of legal instruments within the framework of soft law initiatives like the European Principles of Contract Law or the Common Frame of Reference.

46. **Intrinsic factors.** That said, it is difficult to claim that common law standards were somehow foisted onto the Polish legal culture by foreign investors. There were a number of intrinsic factors that allowed reception of seemingly alien institutions into Polish law.

Firstly, there was the urgent need for know-how. On the one hand, there was basically nothing on the domestic scene in the way of modern commercial law solutions, while on the other readymade standards could simply be plucked from the shelf. As already said, this notional shelf was packed with common law standards. Flexibility of the statutory civil law, expressed by the principle of contractual freedom,[83] was put to the test.

47. From the internal perspective, the benefits connected with usage of boilerplate in legal documentation is visible at least in two dimensions. As discussed by Kahan and Klausner using the example of corporate finance documentation, the potential 'learning benefits' include drafting efficiency, reduced uncertainty over

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contribution by German lawyers, many of whom had studied in the United States. *See* Droste, 'Mergers and Acquisitions in Germany', *CCH Europe* 1995, p 40. In other post-communist countries, the origin of the typical M&A agreement was basically the same as in Poland.

81 J. Basedow, 25. *IRLE* 2005, p 489.

82 *Ibid.*, p 492, as mentioned earlier, formulated this thesis based on the CISG where, *inter al.*, Art. 45 CISG regulates the concept of homogenous breach reflecting a long tradition of common law while it introduces the new category of non-conformity into civil law jurisdictions.

83 This principle is set forth in Art. 353.1 of the Civil Code, which reads as follows 'The parties to a contract may arrange the legal relationship as they deem proper on the condition that the contents or the purpose of that contract are not contrary to the nature of the relationship, with statutory law, and with the principles of community life.' Before insertion of this article, the principle was derived from the general provisions of the Civil Code, namely Art. 65, which provided that all legal actions contrary to the law and social life principles are invalid, though *a contrario* other actions are valid. The introduction of a new test centred on 'the nature of the contract' caused certain problems in court interpretations, which led to narrowing of the freedom. Recently, a more relaxed approach to this principle may be observed.

the meaning and validity of a term due to prior judicial rulings, and familiarity with the term among the lawyers, other professionals, and the investment community. These benefits clearly result in reduction of costs at the contract drafting stage. The 'network benefits' are parallel to the learning benefits, but they stem from contemporaneous use of readymade solutions. This kind of advantage will result in, among other gains, reduction of the cost of evaluating a given instrument.[84] Both kinds of benefits can be extrapolated onto the entire realm of commercial law and, hence, amount to a good reason for broad adoption of the boilerplate solutions. Both benefits were manifest in the post-communist countries of Eastern Europe. Constructing new documentation from scratch would be like breaking down an already open door. Adjusting standards to the own needs of particular jurisdiction was simply much more efficient and less costly than inventing new ones.

48. Kahan and Klausner did not, however, consider the disadvantages brought by the tensions which begin to appear once a common law standard is applied in civil law jurisdictions. Their model was tested on common law standards with common law as the law applicable. It did not analyse the potential unpredictability caused by transplanting common law agreements to a civil law ecosystem. The big advantage of using common law model agreements is comprised in their self-governing character, putting together the terms negotiated by the parties. This gives the transaction participants a certain level of assurance that their bargain shall be implemented. On the other hand, statutory provisions of the Continental jurisdiction might jeopardize such assumed predictability in various ways by exerting an unexpected impact on the terms of the contract, for instance by bringing to bear the abstract rules of good faith and fair dealing,[85] raising questions as to how far the statutory law may intervene in the substance of the parties' agreement or in interpretation of terms and institutions which are typical in common law but not defined in the given system of Continental law (should such terms be interpreted in the way as they are interpreted in the law of their origin, or as they would be interpreted under the applicable law of the given contract?). Such tensions are not new in the Polish legal reality.[86] They have already appeared on many other occasions, as discussed earlier: jettisoning of socialist law, adoption of own new economic regulations, adoption of new European law, or resuscitation of old pre-war rules not yet tested by the then-current generation of practitioners. In early 1990s Poland, adding common law standards was just one of the several elements of law and order which needed urgent alignment. Now that almost 30 years have

84 M. Kahan & M. Klausner, 'Standardisation and Innovation in Corporate Contracting (or the Economics of the Boilerplate)', 83. *Va. L. Rev (Virginia Law Review)* 1997(4), pp 719, 725.

85 G. Cordero Moss, 7. *Global Jurist* 2007, p 21.

86 The same effect was observed by K. Oplustil & A. Radwan, in *Private Law in Eastern Europe*, p 467; in the area of company law, where it is claimed that no formal transplantation methodology has ever been developed in Polish jurisprudence, making the system uncertain and inefficient.

passed since their first introduction, common law transplants came to be an integral part of the Polish economic and legal order, creating new and valuable qualities, albeit not without a struggle. The concept of representations and warranties in share purchase agreements may serve as an example.[87] It is not questioned now, that this institution may well serve in the framework of statutory warranty for legal and physical defects, what raised strong objection at the earlier stage or can be construed as *contractus innominativus* of a guarantee type. Both solutions might lead to the similar effects as representations and warranties under English law.

49. The reception of Anglo-Saxon influences into the Polish legal order and their successful implementation present a promising subject for further comparative analysis. By way of a conclusion, we may defer to M.C. Vettese, who said that '[i]n any case, the technique used in common law system clearly prevailed in day-to-day business use even in the civil law countries, so that it is almost impossible to even draft contracts without having in mind the common law system structure'.[88]

50. The phenomenon of Anglo-Saxonization conforms with the paradigm of the New Lex Mercatoria, as claimed by K. P. Berger. 'Law making no longer appears "in the splendid garment" of the statute. Instead, it occurs "bottom up" in a number of informal methods which create pragmatic, practise-made rules.'[89]

7. Polish Law as European Jurisdiction with Mixed Pedigree

51. Polish law lacks a clear DNA sequence that might tie it either to French or German law. A more helpful solution to classify it lies in the concept of a genealogical chart of the law, as posited by Örücü. Such a family tree of Polish law would feature, as the thickest of all, a prominent German trunk, with French and Swiss branches as well as a considerable number of thinner branches accounting for, *inter alia*, English, and American law. We would have English leaves sprouting forth from Continental branches, and vice versa. If nothing else, such a complex family tree of the law justifies recourse to legal writings from a variety of national systems and enables falling back on comparative law in search of a better understanding of specific legal institutions and their genesis. Such a mixture is to some extent confirmed by the legal doctrine. Analysis of 200 articles published in Poland's most popular commercial law journal, 'Przegląd Prawa Handlowego', over the years 2013–2015 reveals that their authors cited 262 German, 212 common law,

87 B. Gessel-Kalinowska vel Kalisz, in *Global Wisdom on Business Transactions, International Law and Dispute Resolution*, p 207–216.

88 M.C. Vettese, in G. Cordero Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge 2011), p 24.

89 K.P. Berger, *The Creeping*..., p 43.

and 134 French sources.[90] These statistics confirm the German influences in Polish law, but also attest to the sturdiness of the Anglo-American branch of our legal family tree. It is difficult to opine, based just on these figures, how important was simply the level of language command. Undoubtfully, French is not the most popular foreign language in Poland.

52. It is difficult yet to analyse the Polish courts' activity. The novelty of standards used in broad range of contracts was not frequently tested in courts by the parties due to uncertainty how the judges would react. This situation is now changing, and in the meantime a substantial number of cases was resolved in arbitration, which is confidential by definition.

53. If we stretch this dendrologic analogy to the question of Polish accession to the European Union, the Polish tree is now growing in an EU park, where it is subject to the ministrations of an EU garden.

54. The above conclusions are being confirmed also by the exercise of matrix taxonomy posited by M. Siems[91] It is clear from that projection that the distance between Polish law and, respectively, German law and French law is similarly short, with the Polish-to-German distance being a little shorter (which is compatible with the conclusions set out above). The distance of Polish law to English law on the Siems map is quite long, but the two countries are still in the same cluster, namely European Legal Culture, which encompasses civil, common, and Nordic origin countries. It was helpful, in this respect, that membership in the EU was one of the variables. This distance would be much closer if such variables like Anglo-Saxonization of contracts, as described above, were considered.

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90 In my analysis, the number of sources was counted independently for each article. Each of the foreign sources (a book or article) was always counted as one source, even if quoted more than once within the given article. If, meanwhile, the same source was quoted in more than one article, it was counted separately for each article.

91 M. Siems, 'Varieties of Legal Systems: Towards the New Global Taxonomy', 12. *Journal of Institutional Economics* 2016(3), p 583 et post and p 590, Fig. 2, prepared a map of 156 legal systems based on 15 variables. Those variables included not only private law (existence of a civil code, notary public institution), but also public law indicators (death penalty, democracy index, constitutional court, abortion) which were prevailing on the list. Juxtaposing the Siems variables with the three differentiating factors described above, we find that only one of them is considered among the Siems variables, namely adoption of the European Union laws. The two others: Anglo-Saxonization of the contractual legal culture and historical roots, were not considered as a separate variable, although indicators such as codification of civil law or Latin notarial institutions indirectly testify to the historical background. Analysing similarities and dissimilarities (a matrix of proximities), M. Siems localized all local legal systems on the map, with distance between the given points representing specific systems of law showing how close, or how distant, they are from each other.

8. Summary

55. Summing up, Polish law cannot be clearly classified to the French or German family. If we are to consider the dichotomy of civil and common law systems, Poland's place among Continental law jurisdictions descended from the Roman system is indubitable. The common law transplants changed however the internal DNA to some extent, not only by introduction of new elements but also changing perception of the existing institutions .This change does not alter basic state of affairs – Polish law is based on legislation rather than judicial precedent, and Polish legal scholarship and practice are defined by this underlying principle. As Polish system evolved comparatively within short period of time, it serves as an excellent laboratory, where mixing of various norms and whole systems can be observed and tested.