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Transformation of Contract Law and Civil Justice in the New EU Member Countries— The Example of the Baltic States, Hungary and Poland

Prof. Dr. h.c. Norbert Reich*

I. Introduction

A. *Functions of European Contract Law as the Theoretical Starting Point*

Instead of trying to analyze European private law under EU influence as a whole, I plan to limit myself in this paper to the transformation of contract law. The rationale for this decision stems from the fact that this discussion is the most advanced, and because it is an area where I can draw substantially from my research and teaching. My concept of European contract law is a functional one and has been described elsewhere.¹

I first want to distinguish between three main functions of modern European contract law, namely autonomy, regulation, and information.

Under *autonomy*, I understand that the fundamental function of any contract law in a market economy, like the one enshrined by the EC and EU Treaties, is primarily to make economic transactions by the subjects of private law, natural persons, including consumers, business entities, and the state acting in its “dominium” function as secure and efficient as

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1. Norbert Reich, *The Tripartite Function of Modern Contract Law in Europe: Enablement, Regulation, Information*, in LE DROIT PRIVÉ SUISSE FACE AU DROIT COMMUNAUTAIRE EUROPÉEN 145-172 (Franz Werro & Thomas Probst eds., 2004).

possible and to enforce them effectively under the rule of "*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 the subject of reflection, using the principle of "good faith."

The *regulatory function* of contract law may be subject to doubt by many, most notably liberal authors, who may fear a return to socialism. I do not share this skepticism, but I am convinced that this regulatory function has always been present in contract law, sometimes hidden under general clauses such as good morals, public policy, and *ordre public*. Later, the regulatory function was more noticeable when the weaker party in labor and consumer transactions was deliberately protected. National² and European constitutional law also invades contract law, under the theory of direct horizontal effect of fundamental freedoms and the theory of the non-discrimination principle.³ Regulation may come from outside of contract law, such as when there are restrictions on certain types of gambling contracts or lotteries.⁴ However, in recent times it has been introduced into contract law itself, as seen in consumer law becoming part of contract law.⁵ I will not go into the details of this protracted discussion, but simply accept "consumer law as part of the European *acquis* which, therefore, has greatly contributed to the transformation of contract. However, consumer law may inspire a completely new orientation of traditional civil law principles.

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 of information provision where one of the parties to the (future) contract, who either is in possession of this information, or is required by law to provide this information, and the other party, who needs this information for rational decision-making. Again, consumer law is a good example of this new principle which,

2. Claus-Wilhelm Canaris, *Wandlungen des Schuldvertragsrechts—Tendenzen zu seiner Materialisierung*, 200, *Archiv für die civilistische Praxis* 273 (2000); OLIVER REMIEN, *ZWINGENDES VERTRAGSRECHT UND GRUNDFREIHEITEN DES EG-VERTRAGS* 156-174 (2003).

3. NORBERT REICH, *UNDERSTANDING EU LAW—OBJECTIVES, PRINCIPLES, AND METHODS OF COMMUNITY LAW* 17-18 (2003) (referring to the case-law of the ECJ).

4. *See, e.g.*, Case C-275/92, *HM Customs's and Excise Services v Schindler*, 1994 E.C.R. I-1039.

5. P. Rott, *German Sales Law two years after implementation of Dir. 1999/44/EC*, 5 *GERMAN L.J.* 237 (2004).

while it departs from the classical rule of *caveat emptor*, 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 the sometimes the highly specific and technical rules of information provision, but rather at the emergence of general principles and the rules necessary for its effective enforcement⁷ without endangering the *pacta sunt servanda* principle.

B. Enlargement Process

The European Union enlargement process is mainly concerned with the new member countries coming from the former socialist block. Consequently, I deliberately choose the Baltic States, particularly Latvia.⁸ I also extended my research to Hungary and Poland, countries which had enacted Civil Codes in 1959 and 1964 respectively, while still under the socialist regime. These Civil Codes have been substantially modified, but not completely abolished after the demise of socialism, though new codifications are on the agenda.⁹ I will explain the differences in Hungary and Poland's contributions to modern contract law, as compared to the Baltic States.¹⁰

Following the 1990s, all of these countries became politically and legally linked to the European *acquis* by the so-called Europe Agreements,¹¹ which exercised a deep influence on their contract law before accession. This will be shown by looking at the transformation, not the implementation, of two important European directives, the so called horizontal directives, namely 93/13/EEC of April 5, 1993, on unfair terms in consumer contracts¹² and 99/44/EC of May 25, 1999, on

6. Stefan Grundmann, *Information, Party Autonomy and Economic Agents in European Contract Law*, 39 CML REV 269 (2002); Viktor Vanberg and Wolfgang Kerber, *Constitutional Aspects of Party Autonomy and Its Limits—The Perspective of Constitutional Economics*, in PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET, 49-79 (Stefan Grundmann et al. eds., 2001).

7. Thomas Wilhelmsson, *Private Law Remedies Against the Breach of Information Requirements of EC Law*, in INFORMATIONSPLICHTEN UND VERTRAGSSCHLUSS IM ACQUIS COMMUNAUTAIRE, 245-265 (Reiner Schulze et al. eds., 2002).

8. I have resided in Latvia from 2001-2004 and, therefore, had convenient access to information in that country.

9. See Lajos Vékás, *Die Vorbereitungsarbeiten zu einem ungar. Zivilgesetzbuch*, 13 WIRO (2001) (discussing Hungary).

10. Again, I had to rely on secondary sources which, however, seem to be more elaborate because these two countries, in contrast to the Baltic republics, which lost their independence in 1940 and again in 1944, never had to abandon their academic and professional contacts with the Western world, even during the most dire times of socialism.

11. See discussion *infra* Part II.D.

12. 1993 O.J. (L 95) 29.

the sale of consumer goods and associated guarantees.¹³

However, the enlargement process cannot be understood without at least referring briefly to the prior legal system under socialist principles and its subsequent transformation under the rules of a market economy. This was an autonomous legal revolution that those countries under scrutiny had undertaken before their membership in the EU was ever discussed. This revolution has a truly constitutional character¹⁴—the abolition of socialist elements of property, legal personality, and restrictions of autonomy by a complex, and some say, corrupt licensing system, and its replacement with liberal principles of market economy. These principles cannot be studied here in great detail, but must be remembered as a precondition to the now existing contract law and its tripartite function described here.

C. *“Relative Autonomy” of Contract Law and Civil Justice*

My paper is a legal-theoretical analysis of the transformation process of contract law in the jurisdictions studied. Therefore, attention will be given 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. While there are indeed several models, traditions, and systems, they vary greatly among the new Member countries. Among Marxist authors, in the heyday of socialism, this was called the “relative autonomy of law.”¹⁵ This model attempted to explain why, despite the social and political revolution that had taken place in the countries studied here, 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 in reverse. Even under principles of market economy, the old socialist codes were not immediately replaced by new ones that 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?

13. 1999 O.J. (L 171) 12.

14. CONSOLIDATING LEGAL REFORM IN CENTRAL AND EASTERN EUROPE: AN ANTHOLOGY (Anders Fogelklou & Fredrik Sterzel eds., 2003).

15. NORBERT REICH, SOZIALISMUS UND ZIVILRECHT 33-37 (1972).

This is not specific to the contract law of the new member countries, but rather it has been debated with equal passion in old member countries, such as Germany, France, and Italy.¹⁶ Labor law had been 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 of 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 for the understanding and application of contract law itself: How much 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 in its Schuldrechtsmodernisierungs-Gesetz (Act on Modernizing the German Law of Obligations) of 2001, choosing an integrationist approach.¹⁷

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 emerging slowly. Can the solutions contribute to answering the central question of “codification of European contract law, namely whether to systematize the existing *acquis* in consumer law, or to favor an integrationist approach?”¹⁸

II. Contract Law: From Socialism to Market Economy

A. Overview

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

16. See Lajos Vékás, *Privatrecht des Verbraucherschutzes in der EU*, in EUROPÄISCHES RECHT IM UNGARISCHEN PRIVAT—UND WIRTSCHAFTSRECHT, 19-24 (Lajos Vékás & Marian Paschke eds., 2004).

17. Hans-W. Micklitz, *The New German Sales Law: Changing Patterns in the Regulation of Product Quality*, 25 J. CONSUMER POL'Y 379 (2002); Rott, *supra* note 5.

18. *But see* AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (Stefan Grundermann & Jules Stuyck eds., 2002) (providing different answers to this question); *see* HANNES RÖSLER, EUROPÄISCHES KONSUMENTENVERTRAGSRECHT 250-288 (2004) (providing a codification of European consumer law).

The socialist economy, in its conflict with market economy, is based on a completely different concept of property and the legal relations emerging from it. We will refer to these concepts 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 that aims 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 economic unities (state enterprises, etc.) only for management, not for full use and disposal. Alongside 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 addressing 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 running production (Umlaufvermögen), not to the stock of property itself, will be guaranteed to socialist entities. In this context, contract law plays a certain, yet limited role. There is a rule of *pacta sunt servanda*, but it is 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.¹⁹

Whether elements of private property, mainly of small businesses, are allowed parallel to socialist economic entities, was the subject to intense debate and conflict in the socialist economies prior to their own complete abolition. I will refer later to the substantial changes in the countries studied.²⁰ Also, with regard to foreign investment, different rules were imposed, always subject to state control and revocation.

In striking contrast to private property, personal property was allowed in all socialist countries and formed part of the civil law, but it was restricted to items of individual and family use. It could not be used to create private property. Contractual relations with the latter objective were regarded to be against the principle of socialist economy and

19. Reich, *supra* note 15, at 275-303 (referring to the Soviet debate); DIETRICH LOEBER, *DER HOHEITLICH GESTALTETE VERTRAG*, 1969.

20. See discussion *infra* Part II.B. and C.

therefore void.

Parallel to this concept of property law, the law of persons systematically distinguished between those subjects who managed state socialist property, namely in the first hand socialist production and distribution entities, the so-called socialist enterprises, with a certain margin of discretion concerning the retention 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 organizations), labor unions, and recreation associations. Other entities in the economic and social sphere were subject to a strict licensing system.²¹ 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 existed, playing a very limited role in legal practice. Between socialized entities this was not conceptualized as an 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. Limited autonomy was granted only in transactions regarding personal property. Therefore, many transactions, even though quite common in socialist countries, were regarded as illegal and, therefore, became part of an ever growing black market. This phenomenon explains to some extent the still existing preference 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 a 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 the system of licensing legal entities and specific types of contracts were abolished. At the same time, a process of privatization and restoration of formerly nationalized property was initiated.²²

B. The Baltic Revolution

The formerly independent Baltic States first came under Soviet dominance in 1940, and again in 1944 after the retreat of the German occupation forces. For these formerly independent countries, this

21. Bogudar Kordasiewicz & M. Wierzbowski, *Polish Civil and Commercial Law*, in LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN 184-188 (Stanislaw Frankowski et al. eds., 1995).

22. Georg Brunner, *Privatisierung in Osteuropa*, 45 OSTEUPARECHT 2 (1999) (giving a typology of privatisation).

implied a double revolution:

It was a *political revolution* since they became part of the Soviet Union as Soviet Republics which implied not only loss of sovereignty, but also the loss of independent legislative functions. In civil law matters, this led to a separation of the Soviet Union's ability to lay down the fundamentals of civil law, and obligation of the republics to implement the fundamentals in separate codes.²³

It was an *economic and social revolution* which consisted of 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 advanced codification work in the three republics.²⁴

Latvia had enacted its Civil Code in 1937. This came into force in 1939, but could not survive the Soviet takeover. It was immediately replaced by the RSFSR Code of 1924 in 1940.

The Estonian codification was nearly finished before the Soviet takeover, but the draft Code of 1939 was never formally enacted. It did not play any role later.²⁵

The Lithuanian codification 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 (modeled after the Code Napoléon) in Wilna (Vilnius), (pre-revolutionary) Russian law in Kaunas, and Baltic law in Palanga. A merger of these different systems was not successful before the war.²⁶ A draft Code was prepared in 1940, but was lost after Soviet occupation.²⁷

After the Baltic Revolution in 1990-1991, which re-established the three formerly independent republics as sovereign states²⁸ it was obvious that the law stemming from Soviet times had to be abolished and replaced by new civil legislation. However, this process occurred differently in the

23. Reich, *supra* note 15, at 311-326.

24. Loeber, *Kontinuität im Zivilrecht nach Wiederherstellung staatlicher Unabhängigkeit*, in *AUFBRUCH NACH EUROPA: 75 JAHRE MAX PLANCK INSTITUT FÜR PRIVATRECHT* (Jurgen Basdow, et al. eds, 2001).

25. *Id.* at 948.

26. *Id.* at 951.

27. Ulrich W. Schulze, *Das litauische Zivilrecht—Entwicklung, IPR und Allgemeiner Teil WGO*, 331, 332 (2001).

28. Anatol Lieven, *The Baltic Revolution: Estonia, Latvia, Lithuania, and the Path to Independence 194 (1994)*.

three Baltic States, which explains the divergence of civil jurisdictions in this region:

Latvia decided to re-enact the Civil Code of 1937 in 1992-1993, 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 similar considerations. 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. For example, it was amended in 2001 to implement the Sales Directive 99/44. This dual system will be analyzed in more detail below.²⁹

Estonia decided on a step-by-step codification of its civil law, starting with the most urgent subject matters in property law.²⁹ 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.³⁰ 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 desocialize the existing socialist civil law and to prepare simultaneously a new comprehensive codification which was enacted on July 18, 2000.³¹ This came into force on June 1, 2001. Its contract law closely follows the UNIROIT-principles.³² Part Six contains the general principles, as well as detailed rules of contract law, including consumer contracts. A separate Consumer Protection Law of 2000 exists separately, but the Code provisions will take priority over special laws.³³ 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*

29. B. Broka, *Topical Issues of Protection of Consumer Rights*, in PROBLEMS OF TRANSFORMATION OF LAW IN CONNECTION WITH EUROPEAN INTEGRATION: CURRENT TOPICS IN LATVIAN LAW (U. LATVIA ed. 2002).

30. Martin Kaërdi, *Estonia and the New Civil Law*, in REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE 253-255 (Hector MacQueen et al. eds., 2003); Jaan Paju, *Basic Features of Estonia Property Law*, ZEUP 87 (2000).

31. Kaërdi, *supra* note 30, at 257.

32. Valentinas Mikelenas, *Unification and Harmonisation of Law at the Turn of the Millennium: The Lithuanian Experience*, 5 UNIF. L. REV. 243-261 (2000); Schulze, *supra* note 27, at 339-353.

33. Mikelenas, *supra* note 32, at 252-254.

34. CODE CIVIL [C. CIV.] art. 1.3(2) (Lith.)

principle, but by the *lex superior* rule.³⁴

The different contract law systems in the Baltic States enable us to look at contract regulation as an experimental field, and to draw some conclusions for the future European contract law model.

C. *Hungary and Poland*

The revolution which took place under Soviet dominance in these countries was a social and economic revolution, not so much a political one. It meant the takeover 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 than those used in the Soviet Union and its republics, such as the Baltic States before their revolutions. Both countries enacted their Civil Codes, namely Hungary in 1959 and Poland in 1964, which show some specific characteristics 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 from the Soviet model to the extent that it recognized private property rights, though to a limited extent.³⁵ The Code was elaborated in the reform period which was crushed by Soviet occupation in 1956, and 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 recognized socialist property and provided that it enjoyed increased legal protection. In contrast to the Soviet Union, it authorized private ownership of land, but did not stop or reverse collectivisation.³⁶ Full privatization only occurred after 1991.³⁷

35. Schulze, *supra* note 27, at 340.

36. Hugh Spall, *The Development of Private Property Rights in Communist Hungary and the Theory of Path Dependent Institutional Change*, 1 GLOBAL JURIST TOPICS (2004).

37. Vékás, *supra* note 16, at 25.

38. A. Gobert, *Eigentumsordnung und Privatisierung in Ungarn*, WIRO 361 (1997).

The introduction of the New Economic Mechanism³⁸ increased the need for consumer protection. The first moderate rules were included in the Civil Code in 1977 by Act IV, allowing challenge to unfair contract terms. However, in Section 209, the concept of general contract terms was not defined. This was done only in 1997.³⁹

Later reform concentrated on enacting a separate Consumer Protection Act. As a forerunner, the Act to Prohibit Unfair Business Practices was enacted in 1984. This was substantially amended by Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices.⁴⁰ 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.⁴¹

Directive 93/13 was transformed into Act CXIX of 1997 and Sections 205(3), (5), (6), Section 207(2), and Sections 209-209(d) of the Civil Code were amended.⁴² The Sales Directive 99/44 was introduced into the Civil Code by Act XXXVI of 2002.⁴³

Hungary, therefore, can be said to have a *modified uniform system*. However, Hungary has 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, package holidays for example.

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.⁴⁴

2. Poland

Polish civil law was codified by the Civil Code of April 25, 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.⁴⁵ On the other hand, its system and rules are reminiscent of traditional continental codes. Socialist economy was ruled by decrees of the Council of Ministers who was empowered to regulate commerce between the units of the socialized

39. Katalin Cseres, *The Hungarian Cocktail of Competition Law and Consumer Protection: Should it be Dissolved?* 27 J. CONSUMER POL'Y 43, 46 (2004).

40. Vékás, *supra* note 16, at 27.

41. Cseres, *sup. a* note 39, at 51.

42. See the critique of Vékás at 9.

43. See discussion *infra* Part III.B.5.

44. See discussion *infra* Part IV.B.4.

45. Vékás, *supra* note 9.

46. Kordasiewicz et al., *supra* note 21, at 165.

economy.⁴⁶ 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 licenses.

Surprisingly, the imposition of martial law on Poland in 1981 led to a further liberalization 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.⁴⁷ State enterprises gained more autonomy, the ability to found small businesses was made easier, and consumer protection inserted into the Code. In the 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.⁴⁸

The political changes after the demise of the communist regime introduced traditional elements of property in the emerging, and somewhat chaotic, market economy. The Civil Code underwent its first stage of reform on July 28, 1990.⁴⁹ The concept of property was unified as a legal category. Privatization was started, but not completely implemented. Privatization through liquidation was used more frequently than commercial privatization—a sign of the bad state of the Polish economy.⁵⁰ Foreign investment was allowed nearly without restriction.

Contractual autonomy was secured by abolishing the rules that pertained to the socialized elements of the economy, such as the influence of the bureaucracy on engaging in, and shaping, contractual relations, particularly by imposing general contract terms whose legal character as norms or model contracts were in doubt. Article 353, paragraph 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.⁵¹ A clear borderline was drawn between civil law transactions of a unilateral, a consumer, and a bilateral, a professional, character. The consumer transactions were treated more rigorously against the professional and in favor of the consumer.⁵² A separate consumer law emerged, but it was limited to some particular rules concerning payment, exclusion clauses, prescription periods, modification of the amount under inflationary

47. C. Civ. art. 2 (Pol.)

48. Kordasiewicz et al., *supra* note 21, at 166.

49. E. Gralla, *Polen—Gesetz über die Wirtschaftstätigkeit*, WIRO 215 (1992).

50. M. Pazdan, *Zur Änderung des polnischen Zivilrechts*, 37 OSTEUPARECHT 13 (1991).

51. Gralla, *supra* note 49, at 182.

52. See discussion *infra* Part III.B.5.

53. Gralla, *supra* note 49, at 192.

conditions, and *clausula rebus sic stantibus*. Here, the Council of Ministers could intervene in order to restore, in the interests of consumers, contractual equality of the 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.⁵³

Later changes in consumer law, in particular those imposed by EU directives were included in the Civil Code. However, Directive 99/44 was put into separate legislation.⁵⁴ Therefore, Poland can be said to have maintained a *mixed system* of contract law. There has been a debate on drafting a new codification, but, to my knowledge, no concrete proposals have been published.

D. *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 drafted association agreements (the Europe Agreements (EA)) 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 completed in 1993/1994,⁵⁵ and with the Baltic States in 1997/1998.⁵⁶ They contain provisions about taking over the *acquis*, e.g., in the area of financial services, consumer protection, product liability, and labor law. Obviously, these provisions were so vaguely drafted that they do not take direct effect, in contrast to the non-discrimination rules of the EA,⁵⁷ 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.⁵⁸ This process terminated with accession on May 1, 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

54. Z. Jara, *Polen—Verbraucherkauf*, WIRO 258 (1996).

55. See discussion *infra* Part IV.B.5.

56. 1993 O.J. (L 348)(Pol.); 1993 O.J. (L 347)(Hung.).

57. 1998 O.J. (L 26)(Lat.); 1998 O.J. (L 51)(Lith.); 1998 O.J. (L 68)(Est.).

58. Norbert REICH, *FREE MOVEMENT AND CITIZENSHIP IN THE NEW MEMBER COUNTRIES*. (RGSL, Working Paper No. 19).

59. With regard to Poland, see J. Bober and N. Redeker, *Polens Gesetzgebung im Zuge der EG-Rechtsangleichung—Zur polnischen Debatte über Gesetzesfehler und das Gesetzgebungsverfahren*. 48 OSTEUEROPARECHT 83 (2002). With regard to Hungary, see L. Vékás, L. and M. Paschke, *EUROPÄISCHES RECHT IM UNGARISCHEN PRIVAT-UND WIRTSCHAFTSRECHT*, LIT MÜNSTER (Hrsg. 2004).

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 the approaches as Monist approach (Estonia), Dualist approach (Latvia), Parallel approach (Lithuania), Modified monist approach (Hungary), and Mixed approach (Poland).

III. Autonomy

A. *Recognition of Autonomy in Civil Legislation of New Member States*

Primary Community law presupposes the autonomy of economic actors, but does not in itself guarantee it expressly.⁵⁹ We will not go into details.

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.⁶⁰

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

Section 5 of the 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.

Article 6.158 (1) of the 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. . . .

60. Party Autonomy and the Role of Information in the Internal Market 135-150 (Grundmann et al, eds. 2001).

61. Reich, *supra* note 15, at 255-260; Remien, *supra* note 2, at 178-192.

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

B. Good Faith and Pre-formulated Terms in (Consumer) Contracts

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. Article 3 (1) of the EC Directive 93/13 on unfair contract terms has for the first time recognized 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 [their] 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 be seen whether a more general approach has emerged in the Codes under investigation, which EU-law would allow under the minimum harmonization principle.

1. Estonia

Sections 6 and 7 of the *Estonian Act* on obligations recognizes the principles of good faith and reasonableness.

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

Standard terms are regulated in sections 35-44 of the Act. Their prominent position makes it clear that they are an inherent limitation of autonomy. The Estonian legislator thereby implemented Directive 93/13, but at the same time extended its sphere of application, thus shaping a general law of standard terms, including such traditional rules on the irrelevance of surprising terms for the contents of the contract, section 37(3), the priority of individual agreements over standard terms, section 38, the battle of forms, section 40, and the *contra proferentem*—rule of interpretation, section 39(1).

Specific consumer protection provisions are included in the so-called black list of section 42(3) which widened the material sphere of the indicative list of Article 3(3) of Article 93/13; a total of thirty-seven

terms have been blacklisted. Section 44 provides that there is a presumption of unfairness of blacklisted clauses which have 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 respectively grey list is completely different in consumer and in business transactions.⁶¹ Section 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 Article 3 of the Rome Convention of 1980.⁶² It also goes beyond Directive 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.

2. Latvia

Latvian law has enshrined the good faith principle in Article 1 which reads laconically: Rights shall be exercised and duties performed in good faith.

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 law. In court practice, however, a narrow, subjective approach is preferred. The typical cases concern *abus de droit*. Thus, Article 1 of the Civil Code is considered 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 aims.⁶³

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 apply)⁶⁴ to obeying any formalities or models.⁶⁵

In the dualist Latvian system of civil law, the Consumer Rights Protection Act of 1999 has implemented Directive 93/13, but has also

62. L. Vékás, *supra* note 16 at 38; N. Reich, *supra* note 1 at 145-172 (Werro et al. 2004).

63. Reich, *supra* note 3, at 270.

64. K. BALODIS, THE PRINCIPLE OF GOOD FAITH IN LATVIAN CIVIL LAW. LIKUMS UNĀ TIESĪBAS—LAW AND JUSTICE 7 (Riga, English edition) (2003).

65. See, e.g., C. CIV. arts. 1475, 1477, 1483, 1484, 1493 (Lat.).

66. C. CIV. art. 1492 (Lat.).

introduced a number of particularities which may be seen as the emergence of new principles of contract law. Article 5 established the (normative) principle of legal equality between business and consumer, while Article 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.⁶⁶ Only Article 6(3) takes up the wording of Article 3(1) of Directive 93/13 and blacklists at the same time twelve clauses from the indicative list of the Annex.

The most important 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 utilizes a service for a purpose which is not directly related to his or her entrepreneurial activity.

This has led Latvian courts to apply the consumer protection legislation to the purchase of cleaning material by a business company because this was outside its normal activity, quite contrary to the relevant case-law of the ECJ in *Idealservice*.⁶⁷ This leads to particular problems in the field of consumer credit where Section 8(3) of the CRP Act allows the consumer to perform repayment before the period specified in the contract, without a compensation of the bank for lost profits even in case of mortgage loans. 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. In this author's opinion, the Latvian CRP Act must be interpreted restrictively so as to exclude genuine business entities not needing protection by law from falling under the concept of consumer

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. 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.⁶⁸

67. See the critique of similar formulations in the Hungarian law by Vékás, *supra* note 62.

68. Decision of the Riga regional court, No. C 33168300/504/02 against ECJ, Case C-541/99, ECR I-9049 (2000).

69. Cases C-240-244/98, ECR I-4491 (2000).

3. Lithuania

Article 1.5 of the Civil Code entrenches general principles of good faith, reasonableness and justice. Courts in interpreting and applying legal norms must follow these principles. The same rules apply to the situation when courts have discretion. Article 6.38 provides that obligations must be exercised in good faith; Article 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 have on repeated occasions confirmed these principles.

Article 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 party. This provision basically reiterates Article 2.19 of the UNIDROIT principles.⁶⁹ Article 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.

Article 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 should be had to its content, language and presentation. Again, the provision in question reiterates UNIDROIT principles.⁷⁰ Article 6.186(3) also provides that, when a 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 violates principles of equality of the parties and balance of their interests, or conflict with the principles of reasonableness, good faith and fairness.

The currently effective Law on Consumer Protection and the Civil Code implemented the regulation of the consumer protection issues. Those laws have been harmonized with the main EU consumer protection legislation,⁷¹ including Directive 93/13. As regards their

70. For the importance of the Unidroit-principles, see V. Mikelenas, *Unification and Harmonization of Law at the Turn of the Millenium: the Lithuanian Experience*, 5 UNIFORM LAW REVIEW 252-254 (2000).

71. C. CIV art 2.20 (Lith.).

72. See *Doing business in Lithuania*, at <http://www.infolex.lt/portal/ml/>

wording in respect to consumer protection, the Law on Consumer Protection and the Civil Code are almost identical. At present courts applies both acts in parallel.

Article 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 Article 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.

The article also contains a non-exhaustive list of the terms which are regarded as unfair.⁷² 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 to recognize 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 and cause inequality of the mutually enjoyable rights and obligations between the seller, service provider and consumer.⁷³

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 favor of the party which accepted it.⁷⁴

4. Hungary

As mentioned above, Act CXIXL 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 Directive 93/13, while others, particular about blacklisted clauses, are limited to consumer contracts. The Hungarian legislator did not go as far

start.asp?act=dobiz (last visited Mar. 15, 2005).

73. C. Civ. art. 6.188(2) (Lith.)

74. C. Civ. art. Art. 6.188(3) (Lith.).

75. C. Civ. art. 6.193(4) (Lith.).

as the Estonian law.

Section 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.⁷⁵ The burden of proof concerning (non-) participation in the formulation is imposed on the user, a rule to be restricted to consumer contracts.⁷⁶ The insistence on participation and not on negotiation may be due to a misunderstanding of the relevant EC-law provisions which at that time were not officially translated.

The concept of unfairness has been defined in Section 209/B(1) by reference to the concept of good faith under Directive 93/13, well known in Hungarian law. In addition to the directive, it tries to give two examples of a one-sided and unjustified imposition of rights and duties, section 209/B(2), namely if the clause deviates substantially from central provisions of contract law and if it is incompatible with the subject matter or provisions of the contract. Vékás criticizes that this way the non-mandatory provisions of the Civil Code become mandatory.⁷⁷

The main critique against the Hungarian regulation is concerned with the widening of the sphere of application of Directive 93/13 (respectively its Hungarian implementation) also to B2B contracts.⁷⁸ 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.

5. 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.⁷⁹ According to Article 353¹ of the civil Code of

76. Vékás, *supra* note 16, at 26, n. 32-33.

77. *Id.* at 30.

78. *Id.* at 28, 34.

79. *Id.* at 34-40.

80. J. Poczobut, *Zur Reform des polnischen Zivilrechts (mit einigen rechtsvergleichenden Bemerkungen)*, 7 ZEUP 82 (1999).

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 principle is indirectly recognized in Article 7 of the Civil Code: if the law determines certain legal consequences by referring to good or bad faith, there is a presumption of good faith.

By Act of 2.3.2000, in force since July 1, 2000, Article 384 *et seq.* of the Civil Code of 1964 were amended to modernize the existing law on standard contract clauses and to introduce specific rules of consumer protection under the impact of EC Directive 93/13 and the Europe Agreement with Poland. At the same time they wanted to eliminate the old concept of (qualified) contract terms which had a quasi-normative power and were imposed by state authorities upon business entities, whether privatized or not.⁸⁰

Article 385³ contains a grey list of twenty-three clauses which in cases of doubt are regarded as wrongful provisions. Article 385 § 2 of the Code as amended mentions the transparency principle of Article 4(2) of the Directive, thus respecting to ECJ-case law.⁸¹

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 proferentem*-rule is only applied to consumer contracts, not as a general principle of the interpretation of standard forms.

IV. Regulation

A. Generalities—The Importance of Directive 99/44 for General Contract Law

The following section will be devoted to analyzing the importance of Directive 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 paragraph 1 of its recitals. It therefore is limited to consumer sales in a personal and substantive sense:

81. Surdek/Binieda (2003) at 470-473; STEPHAN HEIDENHAIN, DAS VERBRAUCHERSCHUTZRECHT IN POLEN UND DER EUROPÄISCHEN UNION 78, 250 (2001).

82. Case C-144/99, Commission v. Netherlands ECR I-3541 (2001). See also Reich, *supra* note 3 at 280; L. Vékás, *supra* note 62, at 33 (with regard to Hungarian Law).

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.

With this limitation, the provisions of the Directive respectively Member State law implementing it are mandatory and cannot be waived, Article 7(1).

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 Article 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 Article 7(1) in the Directive, and paragraph 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 of. This ambiguity must however be resolved by national law. This paper will not go into the discussion of such a highly controversial point,⁸² 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 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 intensely debated and resolved in a rather detailed though not complete way. This responds to

83. See NORBERT REICH AND H.W. MICKLITZ, *EUROPÄISCHES VERBRAUCHERRECHT* (4. A.2003).

the general principle of Community law of *ubi ius ibi remedium*.⁸³ It, however, does not make reference to compensation but leaves this to Member States under the minimum harmonization principle.

B. The Importance of Directive 99/44 on Contract Law within the Enlargement Process

1. Estonia

The Estonian Code of Obligations regulates sales law in sections 208-237. It uses Directive 99/44 to modernize sales law in general, while section 237(1) provides that in consumer sales the legal remedies provided under the law cannot be escaped. 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.

The remedies of the buyer are codified in sections 220-225 and are nearly identical for B2B and B2C contracts. Section 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 Article 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.⁸⁴

Section 230(1) contains 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.

2. Latvia

In the dualist system of Latvia, the Civil Code of 1937 did 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*), e.g., 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."⁸⁵ Article 1612 et seq. regulate in detail the duties of the

84. Walter Van Gerven, *Of Rights, Remedies, and Procedures*, 37 COMM. MKT. L. REV. 501 (2000). See also Reich, *supra* note 3, at 227-231.

85. See discussion *infra* Part II.B.1.

86. C. Civ. art. 1593 (Lat.).

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 six months, for the second one year.⁸⁶

Under existing Latvian law, Directive 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 Rights Protection Act of 1999 (CRP Act) was adopted on Nov 22, 2001. This enactment reinforced the dualist system of Latvia law.

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 Directive,⁸⁷ 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 Directive.⁸⁸ The peculiarity of Latvian implementation is that when non-conformity is claimed within a period of six months 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 harmonization of the hierarchy of remedies (with the exception of compensation).⁸⁹

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 Act.⁹⁰ 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

87. C. Civ art. 1633, 1634 (Lat.).

88. Consumer Rights Protection Act (CRP Act), 14(1) (2001) (transposing Article 2 (2) of the Sales Directive.).

89. CRP Act, § 28(1) (2001) (Lat.) (transposing Recital 10 of the Sales Directive.).

90. Peter Rott, *Minimum Harmonization for the Completion of the Internal Market? The Example of Consumer Sales Law*, 40 COMM. MKT. L. REV. 1107, 1129 (2003). Norbert Reich, *Stichtag 1. Mai 2004: Eine erweiterte Union—auch ein erweitertes europäisches Zivilrecht? Zur Rolle der baltischen Privatrechtssysteme in der EU*. 12 ZEuP 2004 at 499.

91. CRP Act, § 16 (2001) (Lat.).

definition.

According to Article 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.

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* III.B.2) means that also certain B2B transactions 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, e.g., by applying the norms of the CPA without allowing the defences under general civil law.

Most surprisingly, the rules on conformity have been extended also to cover services, per Article 29 of the 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. Lithuania

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 Protection⁹¹ (CPL), which is only applicable in the cases mentioned above.

The twenty-third section of the fourth part of the sixth book of the Code contains provisions about sales contracts. Paragraph 4 contains

92. The Law on Consumer Protection of the Republic of Lithuania, No. I-657 (Amended Sept. 19, 2000), at <http://www3.lrs.lt/c-bin/eng/preps2?Condition1=114309&Condition2=> (last visited Feb. 17, 2005).

special norms on consumer sales contracts.

The rights of the consumer in case he acquired non-conforming goods contained in Article 3 of the Sales Directive are transposed in Article 6.363(4) of the Code, namely the right to have the goods brought in conformity free of charge by replacement (Article 6.363(4)(1) of the Code) or repair (Article 6.363(4)(3) of the Code), also the right to have an appropriate reduction in the price (Article 6.363(4)(2) of the Code) and the right to rescind the contract (Article 6.363(8) of the Code). What is different from the Directive is the way of application of those rights—the Directive provides in Article 3(5), that consumer is entitled to 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 Article 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.⁹²

Article 4 of Directive 99/44 provides for a right of redress. This right is indirectly enshrined in the Article 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 grounds other than contracts. According to Article 6.280(1), the person who has reimbursed the damage caused to another person has the right of redress equal to reimbursement, if the law does not provide for a different amount. The Lithuanian rules on subrogation seem to be similar to those of Latvian law⁹³ and make redress mandatory.

Article 6 of the Sales Directive provides some important requirements for the content of the guarantee. Special provisions of the Code on consumer sales contracts, namely Article 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 Article 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. The Code also covers other matters, none of which relate to the contents of the guarantee itself.

4. Hungary

If we follow the detailed account of Vékás⁹⁴ concerning implementation of Directive 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

93. See discussion *supra* Part IV.B.2.

94. *Id.*

95. L. Vékás, *supra* note 16.

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 Article 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 Article 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 section 305/A(2) of the Civil Code.

The remedies of Article 3 of the Directive were transposed into Hungarian law and extended by making use of the former case law of the Hungarian Supreme Court, e.g., 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 respectively to the reimbursement of such costs, if the seller does not finalize the repair within an adequate time in section 306(3).⁹⁵ Similar to prior law, the consumer must inform the seller of lack of conformity within two months, according to Article 5(2) of Directive 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, according to section 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 sixty days after fulfilling the consumer's claims, in total not more than five years. This right of redress can be waived in part or completely⁹⁶—a somewhat problematic solution.

The Hungarian legislator also made clear that the contractual guarantee does not modify the rights of the consumer under law in section 248 of the 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 make the guarantee unenforceable.

Vékás⁹⁷ summarizes the Hungarian transposition of Directive 99/44 as follows:

96. *Id.* at 65.

97. *Id.* at 67, referring to the freedom of contract principles which, however, is applicable here only to a limited extent.

98. *Id.* at 68

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 Directive 99/44 not in amending its Civil Code of 1964, but by special Act of July 27, 2002, effective as from January 1, 2003. At the same time it tried to create a comprehensive consumer sales legislation, going beyond Directive 99/44.⁹⁸

Article 1 defines the sphere of application similar to the Directive. Article 4-7 contain the transposition of Article 2 of the directive. The provision of Article 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.

Article 8 of the Polish Act transposes Article 3 of Directive 99/44 regarding the rights of the consumer. The definition "free of charge in Article 3(4) is extended to also cover costs borne by the buyer, "particularly costs of disassembly, delivery, labor, 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 fourteen days; in not doing so, the demand shall be deemed justified.

Article 10 is concerned with time limits and prescription within the margins allowed by the directive. Article 9 imposes a two-month notification period. Article 11 makes the rights of the consumer mandatory and tries to avoid 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.

Article 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

99. See discussion *infra* Part V.B.5 for a discussion of the information requirements of the Act.

Article 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 legislation⁹⁹ is available in this context.

V. Information

A. Generalities—EC Law as the Starting Point

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. In the meantime, information requirements vis-à-vis citizens have become part of primary Community law itself, especially in Article 153(1) of the EC. This contains the consumer's right to information, which of course also includes (pre-)contractual information, even though it must be made concrete by specific directives. The objective of Community law, as a recent study by Rösler stated, is a timely, specific and complete disclosure of relevant information to the consumer as the structurally weaker party to a contract.¹⁰⁰ I will not go into details of the information paradigm in Community law which can be found on three levels:

The interdiction of deceptive and misleading information—a rule particularly applicable to marketing practices;

100. See discussion *supra* Part III.B.5.

101. H. RÖSLER, *EUROPÄISCHES KONSUMENTENVERTRAGSRECHT*, 148, 168 (2004).

The transparency principle in pre-contractual negotiations;¹⁰¹

Specific information obligations in consumer directives.¹⁰²

B. Information Requirements in Contract Legislation of New Member States

1. Estonia

The Estonian Code of Obligations contains a general information rule in case of pre-contractual negotiations. Section 15(2) reads:

Persons who engage in pre-contractual 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, these broad obligations must be made concrete 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 application there.

2. Latvia

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. 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 relations.¹⁰³

The transparency principle of pre-formulated terms regarding the price or the subject matter of a contract (Article 4 paragraph 2 of Directive 93/13) seems to be omitted and not transposed into the CRP

102. Case C-144/99, *Commission v. Netherlands*, E.C.R. I-3541 (2001).

103. See Reich, *supra* note 3, at 278-286.

104. K. Balodis, *supra* note 64, at 2-9.

Act at all. On the hand, the rules on the transparency of a guarantee in sales contracts have been introduced into the Latvian CPR Act.¹⁰⁴

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, Section 9 reads:

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 Section 2(2).

3. Lithuania

The Lithuanian Civil Code expressly obliges parties to reveal to each other information essential to conclude a contract.¹⁰⁵ 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.¹⁰⁶ A party which breaks this obligation is liable for the losses caused to the other party.¹⁰⁷ Article 6.164(2) provides that minimum losses in such situations are equal to the benefit received by the other party.

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,

105. See discussion *supra* Part IV.B.2.

106. C. Civ. art. 6.163(4) (Lith.).

107. C. Civ. art. 6.164(1) (Lith.).

108. C. Civ. art. 6.164(1) (Lith.).

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.¹⁰⁸

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 the contract was concluded.¹⁰⁹ Moreover, if the seller fails to provide necessary information, he is responsible for the defects of the goods, which occurred after the goods were delivered to the consumer, when the consumer proves that the defect occurred because of the lack of information.¹¹⁰

4. Hungary

The Hungarian Civil Code contains a general information obligation in section 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 the 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 Consumer Protection Act of 1997 gives the consumer two important information rights:

information with regard to the product or service purchased

information about remedies—certainly an innovative provision.

5. Poland

Specific information requirements are included in the new Act of

109. C. Civ. art. 6.353 (Lith.). *See also* The Law on Consumer Protection of the Republic of Lithuania, No. I-657 (amended Sept. 19, 2000), available at <http://www3.lrs.lt/c-bin/eng/rep2?Condition1=114309&Condition2=> (last visited Feb. 17, 2005).

110. C. Civ. art. 6.353(9) (Lith.).

111. C. Civ. art. 6.353(10) (Lith.).

July 27, 2002 on consumer sales.¹¹¹ Article 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 should "issue a written"¹¹² 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. Article 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"¹¹³ is, however, not without problems in a context of party autonomy and free movement of products and services.

VI. Contract Law In the Books and In Action: New Rules for Old Mechanisms of Civil Justice?

A. *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 now members 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 (Lithuania), 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 a competition of better rules, e.g., on general information requirements written into some modern contract legislation (Estonia, Lithuania, to some extent also Hungary and Poland),

112. See discussion *infra* Part IV.B.5.

113. It is not clear whether this confirmation can also be in an electronic form, which seems to be required by Art. 9 of Dir. 2000/31/EC of June 8, 2000 of the EP and the Council on Electronic Commerce 2000 O.J. (L. 178) 1.

114. K. Kłapa, *Die Auswirkungen des Gesetzes über die polnische Sprache auf die Vertragpraxis*, WIRO 233, 2000; Surdeck and Binieda in Z. BRODECKI, POLISH BUSINESS LAW 479 (Kluwer: The Hague, 2003).

on redress of the seller in consumer sales contracts (Latvia, Lithuania), on transparency of guarantees (Estonia, Latvia, Hungary, to some extent also Poland), in improving remedies under EU law (Lithuania, Hungary), in prescribing spill-over effects to general contract law which had not yet been reformed (Latvia). On the other hand, 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 in 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 implementation of directives, e.g., hierarchy of consumer remedies in sales contracts (Latvia, Lithuania), 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 be an instrument of transformation and modernization 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. Three seemingly contradictory trends should however be mentioned:

All new Member states analyzed 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 Article 249(3) of the EC, once being member of the EU.

On the other hand, there is a certain tendency of overreach of consumer protective provisions into areas which are not covered by consumer law, e.g., 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).

Finally, the ambiguities of EU Directives itself create transposition

problems particularly in new Member countries, e.g., the concept of unfair terms (Latvia, Hungary), redress of the seller (different solutions in Latvia/Lithuania on the one hand, Hungary on the other, non-solution in Poland which creates problems with cross-border transactions), consequences of individual non-respect of directives.

B. *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, and 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 fulfill his obligations in accordance with the contract.¹¹⁴ The quality of judicial decisions in Hungary has been repeatedly criticised,¹¹⁵ a theory of judicial precedent is only emerging.¹¹⁶ With regard to Poland, Letowska¹¹⁷ criticized 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, criticizes the excessive dogmatism or formalism of Latvian court practice,¹¹⁸ which makes a flexible adaptation to modern market conditions difficult. The Open Society Institute,¹¹⁹ in a study done for the EC-Commission, voiced concerns over judicial independence in some of the countries under scrutiny. Unfortunately,

115. A. Harmathy, *Hungarian Civil Law Since 1990*, 43 ACTA JURIDICA HUNGARICA 1-22, 17 (2002).

116. H. Küper, *Zivilrechtsprechung in Ungarn: die Metro-Urteile und die ungarische Vertragsrechtsdogmatik* WIRO 366 (1999).

117. B. Pokol, *Statutory Interpretation and Precedent in Hungary*, 46 OSTEUROPARECHT 262, 274-288 (2000).

118. E. Letowska, *Between Knowledge and Skill: Obstacles to Efficient Implementation of the Community Consumer Law in Poland*, in M. KEPINSKI, THE EVALUATION OF THE NEW POLISH LEGISLATION IN THE MATTER OF CONSUMER PROTECTION FROM THE EUROPEAN PERSPECTIVE. Conference Proceedings, Zakrzewo, June 21-23, 2001.

119. K. Torgans, *Contract Law: Latvia and the EU*, in University of Latvia, Problems of Transformation of Law in Connection with European Integration. Current Topics in Latvian Law, Riga, 2002-2003 ed., at 31.

120. Open Society Inst., *Judicial Independence-Monitoring the EU Access in Process*, Central European U. Press, 16-69 (2001). Detailed recommendations for improvement not analyzed here.

there exists no follow-up for today's situation.

A more general and highly critical discussion can be found in a substantial paper by Emmert.¹²⁰ Talking from 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 rules in practice.¹²¹ 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.¹²² There is no professional legal argument, nor a thorough discussion of existing case-law. Citizens have no confidence in the working of civil justice.¹²³ Legal education has to be reformed more rapidly to reflect not only the changes in legislation but also the (necessary) changes in legal culture.¹²⁴ 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 as 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 of Emmert's study 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 (present) full membership. To conclude, 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. The Latvian judge at the ECJ, Egils Levits is probably right in observing:

(Mastering interpretation methods regarding general clauses) has been a serious problem in Eastern European countries where

121. Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, 9 EUR. L.J. 288-315 (July 2003).

122. *Id.* at 289.

123. *Id.* at 295.

124. St. Holmes, *Citizen and Law After Communism*, 7. E. EUR. CONT. REV. 1 (1998).

125. Emmert, *supra* note 121, at 302.

these . . . methods were neither recognized nor used in the inherited socialist traditions of law. In the course of time the situation improved when the content of legal education slowly approached European (continental) education. In recent years, too, in Latvia it can be observed that civil servants' and judges' knowledge of interpretation methods is becoming better.¹²⁵

126. E. Levits, *General Clauses and Discretionary Power of Administrative Institutions and Courts*, *Law and Justice* 2, at 9, para. 37 (2004).

