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Trust and reasonable expectations in contracts — values that always matter (from the perspective of Polish private law)

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Will a situation where the "competitive contract law" is developing alongside the classical contract law inevitably lead to a clash of these two contractual worlds? It has been suggested that there is a kind of "competition" between modern contract law and the classical one, with the final result seen in terms of a *zero-sum game*. The alternative is to perceive this phenomenon not as a "competitive arena" but a "cooperative one" (with a *win-win* result). By analogy to architecture, it means a peaceful refurbishment, where the foundation is preserved and the rest can be rebuilt in such a way that the whole construction will be solid and serve for decades. Some institutions of traditional contract law, altogether with their traditional functions, create elements that can make the whole construction stable and impervious to unforeseen and atypical situations. This article takes a close look at the three mechanisms present under the provisions of Poland's Civil Code, namely interpretation (Article 65), supplementation (Article 56) and setting out obligations according to due performance (Article 354), which are based on traditional contract criteria, namely trust and reasonable expectations. The perspective of Polish law is presented with some references to Chinese law and culture, as this helps show that certain traditional criteria are recognised and do matter in different legal cultures. These traditional criteria of a contextual nature determine the meaning and content of contracts in almost every legal order and in model law. They can be seen as the elements that strengthen and stabilise the whole construction of contract law. The author raises the question whether nowadays a serious surgical intervention to the extent of contract law is necessary, or whether a delicate face-lifting would be sufficient (if at all). This question refers mainly to trust as a soft but crucial contractual tool at each contracting stage. The article presents the approach whereby trust (in particular), when acting as a unilaterally understood functional instrument, can reconcile the world of traditional contract law with the modern one. In other words, trust is recognised as a vital element connecting not only different legal cultures, but also traditional contract law with the modern one.

Keywords: trust, reasonable expectations, loyalty, fairness, contract law, general clauses.

> Every kind of peaceful cooperation among men is primarily based on mutual trust and only secondarily on institutions such as courts of justice and police.
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> *Albert Einstein*[1]

Introduction

There is no doubt that various tendencies in modern law caused by technology (New-Tech) force us to reconsider the traditional concepts on contracting, no matter whether

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[1] *Einstein A.* Arms Can Bring No Security // Bulletin of the Atomic Scientists. 1950. Vol. 6, No. 3. P. 71.

supranational or national systems are concerned, and various legal cultures are involved[2]. An additional argument for rethinking these concepts is also connected with the current situation caused by COVID-19[3].

In such circumstances, how should the modern face of private law look, and what is the best direction for the changes in the 21st century? This raises the question whether a serious surgical intervention is necessary, or rather a delicate face lifting would be sufficient. It seems that a kind of "competitive contract law" is developing nowadays alongside the traditional, classical, individual-oriented contract law. The clash of these two contractual worlds seems to be inevitable, and nobody knows, who may win. I do not perceive this phenomenon as a kind of conflict of even *war* between the new and the old (contractual) worlds (which can be identified as a *zero-sum* situation). Using the analogy of architecture, I would rather see it as a *peaceful* refurbishment, where the foundation (traditional) is to be preserved to a reasonable extent. One of the most vital points of this construction is trust and reasonable expectations. As long as contracts create the grounds for legal relationships covering the rights and obligations of the parties and forming their legal position, trust does matter (for various reasons). Therefore I would like to believe in a *win-win* attitude, which is connected with a "cooperative arena", rather than a "competitive one". I do believe that, no matter whether one is speaking about modern contract law or traditional one, trust always matters as a fundamental factor of every social relation. It can be said that this is true in various legal cultures that differ from each other like the two contractual worlds mentioned above. My intention is to present the significant role of trust and reasonable expectations in contracts, using the example of Polish law (from the perspective of an internal observer) with some references to Chinese law (as which belongs to a very different legal culture). Meetings between parties rooted in these cultures do not necessarily cause a "clash" on a "competitive arena". I would rather see their relation on a "cooperative arena", with hope for a better chance of creating a *win-win* relation and mutual understanding. In this context, I have tried to rethink whether trust, as a crucial contract tool, can be recognised as a vital link connecting not only different legal cultures, but also traditional contract law with the modern one (with its traditional functions).

Traditionally, the criterion of trust (reliance)[4] and the criterion of reasonable expectations[5] are both strongly connected and intermingle during the existence of a contract[6]. Both represent vital values in contracting from the very beginning of a contract's existence through to its termination[7] (though in some cases they can also be vital after the

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[2] The topic concerning the comparative approach to the values covered by the title was presented by the author during the 4th Sino-Polish Seminar on Comparative Law held under the title: The Theory and Practice of Contract Law organised by Chinese Academy of Social Sciences (Beijing, April 2019); see: *Rott-Pietrzyk E.* The significance of trust and reasonable expectations in commercial contracts (from the perspective of Polish Law with some references to Chinese law and culture) // Sino-Polish perspectives on the theory and practice of contract law / eds P. Grzebyk, E. Rott-Pietrzyk, C. Su. Warsaw: Scholar Publishing House, 2020. P. 127–158.

[3] See the publication that is effect of a collaborative project from over 85 academics and practitioners: Coronavirus and the Law in Europe / eds E. Hondius, M. Santos Silva, A. Nicolussi, P. Salvador Coderch, Ch. Wendehorst, F. Zoll. Cambridge; Antwerp; Chicago: Intersentia, 2021. P. 1151.

[4] The criterion of trust was deeply analysed in Polish doctrine by: *Machnikowski P.* Prawne instrumenty ochrony zaufania przy zawieraniu umowy. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2010.

[5] As to criterion: reasonableness and reasonable expectations see: *Rott-Pietrzyk E.* Klauzula generalna rozsądku w prawie prywatnym. Warszawa: C. H. Beck, 2007. P. 301 et seq.

[6] These criteria are also vital at the pre-contractual stage, though this is not covered here.

[7] The relation between trust and formal contract was analysed by: *Klein Woolthuis R., Hillebrand B., Nooteboom B.* Trust, Contract and Relationship Development // Organization Studies. 2005. Vol. 26 (6). P. 813 et seq.

termination[8]). It could even be said that the criterion of trust is the most decisive element leading the parties to take a decision on whether or not to conclude a contract[9] (when a contract itself is *in statu nascendi* in the parties' minds). It is rather obvious that the development of trust facilitates the initial exchange of information (in any case, this is true not only to the extent of contracting)[10]. As a result, during the early stages of any contractual relationship, personal contact gained can serve as the basis for the design of respective contractual safeguards for either party[11]. Trust may continue to develop between these two parties through frequent communication and knowledge exchange, both formal and informal[12]. When speaking about trust in legal terms, information and knowledge is crucial and it is not really possible to speak about trust that is completely separate from information and knowledge, and based exclusively on belief, feelings and faith[13]. And this applies to the exchange of information and knowledge that are gained by each party independently.

The way in which trust establishes and sustains relationship between people has been widely studied in the fields of the social science, economics, business and management (in particular from the 1980s)[14]. It has been suggested that trust helps to reinforce individuals' positive willingness, confidence, expectations, belief and behaviour, and to overcome risk (uncertainty)[15]. Research in all these disciplines leads to a common conclusion that "mutual trust" has been found to be one of the most important factors underpinning success in maintaining relationships between members of each society, group, organisation etc.[16] There is one general conclusion from these interdisciplinary writings:

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[8] For example, a commercial agent is entitled to indemnity after the termination of commercial agency contract; compare Articles 764^3–764^5 Polish Civil Code (hereinafter PCC) and Articles 17–18 of Commercial Agency Directive (CAD): Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents // Official Journal (hereinafter OJ). L 382. 1986. P. 17–21 (ES, DA, DE, EL, EN, FR, IT, NL, PT). Special edition in Polish: Ch. 06. Vol. 001. P. 177–181.

[9] See: *Eisenberg M. A.* The emergence of dynamic contract law // California Law Review. 2000. Vol. 88. P. 76–77, who concluded that the connection between psychological insights and the law of contract is based not only on the term expectation (as a term from the psychological sphere) but also on scientific ideas regarding how decisions are formed. See also to this extent: *Fukuyama F.* Trust: The Social Virtues and the Creation of Prosperity. New York: Free Press, 1995; one can paraphrase his idea and say: no shared values, no trust; no trust, no business.

[10] *Child J.* Trust — The fundamental bond in global collaboration // Organizational Dynamics. 2001. Vol. 29 (4). P. 274 et seq.

[11] Ibid.

[12] For more detail see: *Kern T., Willcocks L.* Exploring information technology outsourcing relationships: Theory and practice // Journal of Strategic Information Systems. 2000. Vol. 9 (4). P. 321 et seq.

[13] Compare: *Machnikowski P.* Prawne instrumenty ochrony zaufania przy zawieraniu umowy. P. 18.

[14] See for example: *Lewis J. D., Weigert A.* Trust as a social reality // Social Forces. 1985. Vol. 63 (4). P. 967 et seq.; *Gambetta D.* Can we trust trust // Trust, Making and Breaking Cooperative Relations / ed. by D. Gambetta. Oxford: University of Oxford, 1988. P. 213 et seq. Available at: https://www.researchgate.net/publication/255682316_Can_We_Trust_Trust_Diego_Gambetta (accessed: 01.12.2021); *Fukuyama F.* Trust. P. 338 et seq.; *Rousseau D. M., Sitkin S. B., Burt R. S., Camerer C.* Not so different after all: a cross-discipline view of trust // Academy Management Review. 1998. Vol. 23 (3). P. 393 et seq.; *Möllering G.* The Nature of Trust: From Georg Simmel to a Theory of Expectation, Interpretation and Suspension // Sociology. 2001. Vol. 35 (2). P. 403 et seq.

[15] *Zaghloul R., Hartman F.* Construction contracts: the cost of mistrust // International Journal of Project Management. 2003. Vol. 21 (6). P. 419 et seq.

[16] See: *Black C., Akintoye A., Fitzgerald E.* An analysis of success factors and benefits of partnering in construction // International Journal of Project Management. 2000. Vol. 18 (6). P. 423 et seq.; *Wong S. P., Cheung S. O.:* 1) Trust in construction partnering: the views from parties of the partnering dance // International Journal of Project Management. 2004. Vol. 22 (6). P. 437 et seq.; 2) Structural equation model on trust and partnering success // Journal of Management in Engineering. 2005. Vol. 21 (2). P. 70–80.

relationships do depend on trust (*trust does matter*). The analysis below shows that this remark can be repeated in the context of contracting.

1. General remarks on the Polish normative mechanisms leading to establishing a contract content

The significance of trust and reasonable expectations in contracts is visible under Polish private law from the moment of concluding a contract, through three stages: contract interpretation, contract supplementation and contract performance[17]. There are three articles in the Polish Civil Code that can be seen as offering a general normative expression of both criteria at these stages, namely: Article 65 PCC (interpretation), Article 56 PCC (supplementation) and finally Article 354 PCC (setting out obligations according to due performance)[18].

However, these values (criteria) are not covered by these articles *expressis verbis,* but through the general clause — the principles of social coexistence[19] (*zasady współżycia społecznego*). This means that Articles: 65, 56 and 354 PCC must be the subject of sophisticated legal interpretation in order to analyse how the criteria of trust and reasonable expectations influence the content of a contract during its interpretation, supplementation and due performance[20]. It is worth mentioning here that Chinese contract law also incorporates general clauses (covering the vital contractual values), namely the principles of fairness and good faith, into all the phases of contracting, i. e. pre-contractual negotiations, formation and performance (as well as following the termination of the contract)[21]. These values also cover trust and mutual expectations. To this extent, the two systems can be recognised as very similar at first glance.

Certainly the provisions covered by a general clause have to be read and understand in context, by taking into consideration all the relevant matters (surrounding circumstances, in other words, the contractual external context). This means that contractual context is a vital factor that determines, to a large extent the significance and meaning of the values represented by a general clause in a particular case. As underlined by Stanley Fish in his famous article "There is no textualist position"[22] the method of contextual interpreta-

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[17] In general, and to the extent of European contract law (under Principles of European Contract Law (hereinafter also PECL) which is current under the Draft Common Frame of Reference (hereinafter also DCFR) see: *Storme M. E.* Good faith and contents of contracts in European private law // European Journal of Comparative Law. 2003. No. 7.1. P. 4 et seq.

[18] To some extent, I analysed this problem in: *Rott-Pietrzyk E.* Klauzule generalne a wykonanie zobowiązania (z uwzględnieniem system klauzul generalnych w projekcie KC) // Zaciąganie i wykonywanie zobowiązań / eds E. Gniewek, K. Górska, P. Machnikowski. Warszawa: C. H. Beck, 2010. P. 327 et seq.

[19] The general clause "zasady współżycia społecznego" is also translated in some publications as "the principles of community life", see for example in: *Machnikowski P., Balcarczyk J., Drela M.* Contract Law in Poland. Alphen aan den Rijn: Kluwer Law International, 2017. P. 42; The Civil Code [Kodeks cywilny]. Bilingual Edition / transl. by E. Kucharska. Warszawa: C. H. Beck, 2011; Civil Code. Polish-English / transl. by T. Bil, A. Broniek, A. Cincio, M. Kiełbasa. Warszawa: Wolters Kluwer, 2011.

[20] In order to see it from a comparative perspective in comparison with the functions of general principles in Chinese law, it is worth reading: *Huan S.* General Principles under CCL // Chinese Contract Law. Civil and Common Law Perspectives / eds L. A. DiMatteo, L. Chen. Cambridge: Cambridge University Press, 2017. P. 31–38. The authors underline that Chinese contract law incorporates the principle of fairness and good faith into all phases of contracting: pre-contractual negotiations, formation and performance, and even after contract termination.

[21] *Matheson J. H.* Convergence, culture and contract law in China // Minnesota Journal of International Law. 2006. Vol. 15. P. 348. Available at: http://scholarship.law.umn.edu/faculty_articles/105 (accessed: 01.12.2021); see also the publication in footnote 29.

[22] *Fish S.* There is no textualist position // San Diego Law Review. 2005. Vol. 42. P. 629–650.

tion of a particular contract is a functional tool able to guarantee the criteria of trust and reasonable expectation have a proper role to play during the existence of the contract.

There is no doubt that both criteria are important for the parties — no matter which legal system each party is familiar with and rooted in — and that the parties appreciate mutual trust (and reasonable expectations) as a reflection of a reliable party's behaviour. There is a strong link between trust and expectation, and both are implicit in contractual interactions[23]. However, problems can start to appear when each party represents a different legal culture[24] (or a culture as a whole, with its own way of communicating), and which determines his or her understanding and reading of the trust criterion or reasonable expectations connected with the second party's behaviour[25]. This is all typical for international contracts (e. g. concluded where one party if from China[26] and the second from Poland). The more differences that can be identified as regards the culture itself, or the legal culture in which the parties are rooted, the more difficulties are likely to be seen during the course of contract interpretation (Article 65 PCC), supplementation (Article 56 PCC) and the description of the due performance of the contract (Article 354 PCC), when Polish law is applicable according to the conflict of law rules (PIL[27]). By employing the mechanisms under these three provisions, a contract content covering the parties' rights and obligations is established, and the performance that can be regarded as due is determined.

The article offers an account of these three mechanisms under the provisions of the Polish Civil Code, along with the general clauses of a contextual nature, covering vital criteria (values) during the term of a contract. It shows that the criteria of trust and reasonable expectations should determine the meaning and content of a particular contract. The significance of these criteria is relevant regardless of any specific contractual provision, as

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[23] The concept of trust as the central, social foundation for modern contract law and the link between trust and expectations are discussed by: *Bukspan E.* Trust and the triangle expectation model in twenty-first century contract law // DePaul Business and Commercial Law Journal. 2013. Vol. 11 (3). P. 381 et seq. Available at: https://via.library.depaul.edu/bclj/vol11/iss3/4 (accessed: 01.12.2021).

[24] See two D. Nelken's articles: *Nelken D.:* 1) Using the concept of legal culture // Australian Journal of Legal Philosophy. 2004. Vol. 29. P. 1–26. Available at: http://www.austlii.edu.au/au/journals/AUJLegPhil/2004/11.pdf (accessed: 01.12.2021); 2) Comparative legal research and legal culture: Facts, approaches, and values // Annual Review of Law and Social Science. 2016. No. 12. P. 45 et seq. — See also: *Cotterrell R.* Comparative Law and Legal Culture // The Oxford Handbook of Comparative Law. 2nd ed. / eds M. Reimann, R. Zimmermann. Oxford: Oxford University Press, 2019. P. 710 et seq. — The usefulness of the notion of legal culture was also discussed in the Polish doctrine some years ago by: *Pałecki K.* O użyteczności pojęcia kultura prawna // Państwo i Prawo. 1974. No. 2. P. 73, 74; *Wróblewski J.* Prawo jako zjawisko kultury w amerykańskiej filozofii i teorii prawa, Zeszyty Naukowe Wydziału Prawa i Administracji Uniwersytetu Gdańskiego // Studia Prawnoustrojowe. 1988. No. 1. P. 21 et seq. — See also more recently: *Tokarczyk R.* Współczesne kultury prawne. Warszawa: Wolters Kluwer, 2012. P. 62 et seq.; *Stępień M.* Kultura prawna // Leksykon socjologii prawa / eds A. Kociołek-Pęksa, M. Stępień. Warszawa: C. H. Beck, 2013. P. 120 et seq.

[25] R. Cotterrell concludes that culture "appears fundamental — a kind of lens through which every comparatists must pass as to have any genuine to the meaning of foreign law" (*Cotterrell R.* Comparative Law and Legal Culture. P. 211).

[26] Chinese legal culture has also been analysed by Polish authors, e. g.: *Grzybek J.* Spójność norm moralnych i norm prawnych we współczesnych Chinach // Prawo azjatyckie z perspektywy europejskiej / eds M. Stępień, R. Łukasiewicz. Toruń: Wydawnictwo Adam Marszałek, 2018. P. 13 et seq. — See also: *Dziewięcki M.* Wybrane aspekty prawa kontraktowego Chińskiej Republiki Ludowej w ujęciu komparatystycznym // Ibid. P. 190; *Dębczyńska A.* Cultural differences and Polish-Chinese business relations in practice // Journal of Corporate Responsibility and Leadership. 2017. Vol. 4 (2). P. 7 et seq.

[27] In particular under Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) // OJ. L 177, 04.07.2008. P. 6–16. Available at: http://data.europa.eu/eli/reg/2008/593/oj (accessed: 01.12.2021); to the extent of PIL in relations between parties from Poland and China see: *Zachariasiewicz M.* Conflict of Laws Problems in Contracts Entered Into Between Businesses From Poland And China // Legislative Guide to Investment in Poland / eds W. Meng, E. Rott-Pietrzyk, R. Blicharz. Beijing: China Legal Publishing House, 2019. P. 150 et seq.

the general clauses of Articles 56, 65 and 354 PCC already constitute the legal bases for such values as trust and reasonable expectations.

Nevertheless, almost everyone can readily agree that mutual trust and expectations are of huge importance throughout the civilised word, even if they do not always mean exactly the same from the perspectives of various legal cultures. And even if they did mean almost the same, then on the basis of the writings of the legal doctrine[28], they might not necessarily mean the same in practice. From an European perspective, which can be deemed representative, it appears that Chinese Contract Law "only provides the legal framework for understanding how contracts and contract law function in China. The actual implementation and enforcement of the law takes place within a broader context in which the cultural and legal heritage and traditions and the politico-economic environment play an important role"[29]. This can cause problems in international contracts (where, for example, the parties are from China and Poland[30]). The article therefore focuses not only on the legal institutions regulated in Articles: 65, 56 and 354 PCC (or Article 58 PCC, which is of a corrective nature[31]). The background of legal culture (or culture in general[32]) is also taken into consideration as very vital element of contractual context. It seems to be all the more important because these regulations all cover general clauses (*expressis verbis*) along with the criteria of trust, reasonable expectations and loyalty that are hidden under the clause, namely the principles of social coexistence. Taken all together, they are very contextual in nature.

This raises certain questions and reflections on "the war between modern and classic contract law" as far as trust is concerned. It is worth adding that some authors feel that modern contract law, with its new tendencies, creates a "non-trust environment"[33]. Firstly, it should be asked whether the identified problems discredit the methodology of contract interpretation and supplementation based on mutual trust and reasonable expectations; whether it is possible to find the proper meaning of these criteria that can stand as a common denominator no matter what domestic legal system is under consideration, and no matter which legal culture is creating the context (trust as an obstacle because of its problematic contextual meaning). Secondly, we should determine whether, in a modern contractual environment, such values are still applicable and relevant, or whether they have become only typical for the traditional, classic contract law and contractual relations with

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[28] See, for example, the understanding of the general clauses of good faith and fairness in China: *Zhang M.* Chinese Contract Law. Theory and Practice. Leiden; Boston: Brill Nijhoff, 2006. P. 75 et seq.; *Zhao J.* The puzzle of "Freedom of Contract" in China's contract law // ILSA Journal of International & Comparative Law. 2010. Vol. 17. P. 117 et seq. Available at: https://nsuworks.nova.edu/ilsajournal/vol17/iss1/6 (accessed: 01.12.2021); *Liming W., Chuanxi X.* Fundamental Principles of China's Contract Law // Asian Law. 1999. No. 1. No. 13. P. 16 et seq.; *Matheson J. H.* Convergence, culture and contract law in China. P. 344 et seq.; *Kornet N.* Contracting in China: Comparative observations on freedom of contract, contract formation, battle of forms and standard form contracts // Electronic Journal of Comparative Law. 2010. Vol. 14.1. Point 7.3. Available at: http://www.ejcl.org/141/art141-1.pdf (accessed: 01.12.2021). — Polish authors, or in general the authors from other European countries, could say almost the same about the mentioned values and notions on the ground of their domestic legal systems.

[29] See: *Kornet N.* Contracting in China.

[30] For more detail see: *Dębczyńska A.* Cultural differences and Polish-Chinese business relations in practice. P. 17 et seq.

[31] According to Article 58 § 2 PCC, a legal act contrary to the principles of social coexistence is invalid. The first paragraph of this article concerns a legal act which is contrary to the law (the legal effect is the same). The third paragraph covers the situation when only the part of a legal act is affected by invalidity.

[32] Some authors underline that dealing in good faith t is very much connected with Chinese cultural norms; see: *Wang C. L. et al.* Conflict handling styles in international joint ventures: A cross-cultural and cross-national comparison // Management International Review. 2005. No. 45. P. 3.

[33] See: *Eenmaa-Dimitrieva H., Schmidt-Kessen M. J.* Creating markets in no-trust environments: The law and economics of smart contracts // Computer Law & Security Review. 2019. No. 35. P. 69–88.

no discernible use nowadays. In other words, do we still need trust in a "non-trust contractual environment"[34] (trust as an expendable tool)?

2. Cultural differences in contracting (two examples)

It is rather self-evident that, as they enter into an international contract, the respective parties have to be aware of the differences in both culture and legal mentality between them[35] (where, for example, one party is from China and the other is from Poland, or from the West in general). This knowledge is vital at the pre-contractual stage and makes it possible to avoid trouble or misunderstanding at the later stages, assuming that the contract will be concluded. As a rule, the conclusion of a contract is to be seen as the parties' success. However, without some knowledge and awareness of the cultural differences and legal mentality, the conclusion of a contract and its existence may be far from viewed as a success. Instead it can seem more like a hassle or a nightmare[36].

In common law countries, lawyers tend to be involved at a very early stage of negotiations. When a contracting party enters into negotiations with a lawyer, it is to be understood that the party is being professional (and also has the means to hire a lawyer). This way of understanding is in accordance with the legal culture of these countries[37]. Conversely, in the German legal culture (and the same can be regarded as a true for the Netherlands), it is all matter of trust. If a party enters into negotiations from the very beginning with a lawyer, it implies that the party does not trust the other contracting party, which therefore leads to this party not developing any trust in the opposite party. According to this way of thinking, one party tries to be one step behind the other party for some reason (which is understood as not ethical, for example in terms of trying to con or leech off a party). The result is thus completely different to the initial expectations, and that is precisely what is not wanted. So in these legal cultures, the presence of a lawyer at the very early pre-contractual stage can damage trust (reliance). An overemphasis by a lawyer on sanctions, vigilance mechanisms, and possible losses may likewise do much to undermine trust at the early stages of the partnership. It is therefore worth underlining that cultural differences can not only slow the development of mutual understanding, but can also delay the completion of formal agreements or hinder its performance[38].

The second example reveals a different approach (determined by cultural diversities). It concerns the mere fact of concluding a contract and its significance in terms of the mutual relations of the parties. Many Westerners make their biggest mistake when they assume that the communication with a Chinese party is completed once a contract is concluded (signed). In other words, in Europe, the signing of a contract often indicates the actual "conclusion" of a business deal[39]. By contrast, the Chinese generally view the

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[34] Ibid. P. 88; the authors state that, compared to the contract enforcement mechanisms characterised by traditional contract law or relational contracts, smart contracts could offer a superior solution for facilitating trade in no-trust contracting environments. This means that trade relies on trust and, while other enforcement mechanisms support trade through other trust mechanisms, smart contracts offer a new mechanism characterised by a sort of trustless trust.

[35] Compare: *Cotterrell R.* Comparative Law and Legal Culture. P. 712.

[36] Following D. Nelken (*Nelken D.* Using the concept of legal culture) one can say, "Knowing more about differences in legal culture can actually save your life!" or transform it into "knowing more about differences in legal culture can actually save the life of a contract".

[37] This is discussed by: *Storme M. E.* Freedom of Contract: Mandatory and Non-mandatory Rules in European Contract Law // Iuridica International. 2006. No. 11. P. 35–36 and 38.

[38] *Child J.* Trust — The fundamental bond in global collaboration. P. 274 et seq.

[39] Many authors from outside China underline this, for example: *Pattison P., Herron D.* The Mountains are High and the Emperor is Far Away: Sanctity of Contract in China // American Business Law Journal. 2003. Vol. 40. P. 459, 460; *Kornet N.* Contracting in China. P. 5, 6.

signing of the contract as just the beginning of the business relationship[40]. For them a contract is not necessarily a binding document, but may be only an agreement on general principles that expresses the spirit behind the document[41]. It anticipates rather than defines the resulting relationship[42]. As relationships evolve and situations change, the Chinese may want to take the new circumstances[43] into account. A written contract to the Chinese also means the beginning of the relationship, and not the end of negotiations at all[44].

In Europe, signing a contract often indicates the "conclusion" of a business deal, meaning that the parties are required to perform their obligations and, should a dispute arise, the courts are to enforce the terms that have been agreed upon by the parties. From a Chinese perspective, on the other hand, a contract anticipates rather than defines the resulting relationship. Although not meaningless, much less importance is attached to the contractual terms. The Chinese do not recognise the contractual provisions as a single dominant factor. As a result, when determining how the parties should respond to various events and contingencies that arise as the relationship unfolds, the express terms of the contract are not decisive. They are expected to be overridden, or at least modified and informed, by relational and surrounding circumstances. Parties are expected to make mutual adjustments and accommodations in response to the events that occur[45].

Keeping all that in mind, in Poland, the conclusion of a contract is taken to result in obligations between the parties, and should there be any dispute the courts will be called upon to enforce the terms of the contract. In China, in the event of any issues arising from the contract, they expect the express terms of the contract to be overridden or even modified based on the surrounding circumstances as well as the relationships between the parties. The Chinese thus often do not rely solely on the terms and conditions as contained in the written contract, as they place greater emphasis on loyalty and mutual obligations in business relationships between the parties, which are expected to accommodate each other's shortcomings and make mutual adjustments in the contract when necessary. It is therefore clear that, in the event of contractual disputes, the Chinese emphasis will be on upholding the relationship between the parties, rather than on the contractual terms (important as they may be) as would be the case in the West. The Chinese used to consider a written contract as a mere formality. Contracts are "considered unnecessary, sometimes, offensive in some cases, depending on the situation"[46], therefore they ignore a formal contract, in spite of the fact that they have signed and bound themselves to it[47].

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[40] *Faizel J.* Concept and Evolvement of Chinese Contract Law. LLM dissertation. Cape Town: University of Cape Town, 2015. P. 5.

[41] *Kornet N.* Contracting in China. P. 6.

[42] See: *Pattison P., Herron D.* The Mountains are High and the Emperor is Far Away. P. 491; *McConnaughay P. J.* Rethinking the role of law and contracts in East-West commercial relationships // Virginia Journal of International Law. 2001. Vol. 41. P. 446.

[43] I do not mean the extraordinary circumstances that are covered by *clausula rebus sic stantibus* or *hardship*. I am rather thinking on the new circumstances that as a role are to be covered by contractual risk of the parties (see also footnote 100).

[44] Compare the conclusions of: *Longchamps de Berier F.* Decodification of Contract Law // Theory and Practice of Codification: the Chinese and Polish Perspective / eds C. Su, F. Longchamps de Berier, P. Grzebyk. Beijing: Social Sciences Academic Press (China), 2019. P. 147, 148; according to his general observation "the parties discuss the content of their agreement when executing a contract. They do not simply execute the terms of the contract".

[45] *Kornet N.* Contracting in China. P. 6; *Faizel J.* Concept and Evolvement of Chinese Contract Law. P. 5.

[46] Compare: *Pattison P., Herron D.* The Mountains are High and the Emperor is Far Away. P. 487–488. — The authors underline that contracts in China are "considered unnecessary, sometimes offensive, when rules of loyalty and mutual obligation structure the business environment".

[47] See: *Leonhard Ch.* Beyond the four corners of a written contract: A global challenge to U. S. contract law // Pace International Law Review. 2009. Vol. 21. P. 15.

The reason behind this approach is that trust and honour form the basis of a Chinese contractual relationship, which is connected with Confucianism[48] and the *guanxi* philosophy[49]. Confucianism determines to large extent the Chinese way of thinking overall, and certainly in both negotiations and contracting. Under the tradition of Confucianism, good faith would imply faithfulness, trustworthiness and honesty[50]. Confucius had a strong belief that "people could not live without credibility" (Min Bu Xin Bu Li), (民不信不立), which became a long lasting "gentleman's rule" in Chinese history. The influence of the *guanxi* philosophy played a significant role in the success achieved in the development of business in China. The Chinese are strongly influenced by *Guanxi* in developing their contractual relationships and practice. Nowadays, the broad existence of relational contracts and networks (*guanxi*) in China explains how fast and long-term economic growth can be achieved without formal contract enforcement mechanisms[51]. *Guanxi* can be seen as a specific tool by which to repair "the ineffectiveness of a formal contract enforcement regime". It may play a supplemental role as "a reputational enforcement regime in which reputational costs may force the contracting parties to honour and enforce contractual terms"[52]. However, Westerners often regard *guanxi* as being connected with bribery and corruption, which is a broad misunderstanding of a concept that is in fact focused on trust, honour and shared experiences[53].

3. General clauses, fairness values and contextual interpretation in general

There is no doubt that contract interpretation and supplementation are to be seen as contextual in nature (using *Stanley Fish's* words, "there is no textualist position" to this extent[54]). In the case of Polish regulations that determine the content of the contract (Article 65, 56 and 354 PCC)[55], all employ a general clause that covers the values of fairness as: trust, reasonable (legitimate) expectations and loyalty. Therefore the context connected with legal culture, legal mentality and reasoning may be seen as decisive when it comes

[48] See in more details: *Matheson J. H.* Convergence, culture and contract law in China. P. 371, 372.

[49] In details: *Kornet N.* Contracting in China; *Pattison P., Herron D.* The Mountains are High and the Emperor is Far Away. P. 484; *Matheson J. H.* Convergence, culture and contract law in China. P. 374. — Also see: *Hagedorn A.* Western and Chinese Contract Law. A Comparative Cultural Perspective // Culture, Organization and Management in East Asia. Doing Business in China / eds H. Dahles, H. Wels. New York: Nova Science Publishers, 2002. P. 30. — See also in general: *Fu J.* Modern European and Chinese contract law: A comparative study of party autonomy. Tilburg: Tilburg University School of Law, 2010. P. 19 et seq. Available at: https://pure.uvt.nl/ws/portalfiles/portal/7549119/Fu_modern_20_12_2010.pdf (accessed: 01.12.2021).

[50] The Chinese also pay attention to the principle of good faith and fairness, as well as reasonableness (both in legal and social terms). The general clause of fairness is covered by Article 5, and good faith by Article 6 of Chinese CL; see the comparative approach of: *Twigg-Flesner Ch.* General Principles of Chinese Contract Law. An English Common Law Perspective // Chinese Contract Law. Civil and Common Law Perspective / eds L. A. DiMatteo, Chen Lei. Cambridge: Cambridge University Press, 2017. P. 65–69; *Zhang M.* Chinese Contract Law. Theory and Practice. P. 74 et seq; *Fu J.* Modern European and Chinese contract law. P. 58 et seq.

[51] *Leng J., Wei S.* The Evolution of Contract Law in China: Convergence in Law But Divergence in Enforcement? // Private Law in China and Taiwan — Legal and Economic Analyses / eds S. Chung, W. Chung. Cambridge: Cambridge University Press, 2016. P. 19.

[52] Ibid.

[53] *Pattison P., Herron D.* The Mountains are High, and the Emperor is Far Away. P. 484; *Kornet N.* Contracting in China. P. 5; *Dębczyńska A.* Cultural differences and Polish-Chinese business relations in practice. P. 16, 17.

[54] See footnote 17.

[55] Which can also be said to the extent of the solutions from other national laws and soft law (international model law) as, for example, Draft Common Frame of Reference — DCFR (or earlier Principles of European Contract Law — PECL); UNIDRIOT Principles of International Commercial Contract (hereinafter also UPICC or TRANS-LEX Principles).

to the interpretation and application of the above mentioned provisions. In other words, the contractual context is a vital factor that does much to determine the significance and meaning of the values that are represented by a general clause in a particular case. Therefore, the method of contextual interpretation of a particular contract is to be regarded as a functional tool guaranteeing that the criteria of loyalty, trust, reliance and reasonable expectations will play their proper role during the existence of a contract.

An important aspect of communication is recognising the cultural context behind the actual words that are spoken. In relations with a Chinese partner, it is necessary to take into consideration the fact that Chinese communication is considered to be high context. Chinese partners expect from others an understanding of this context (in particular a cultural one)[56]. The main sources of information can be found in the gestures, tone, social status and background of the speakers[57]. The mutual informal relations and experience with a second party (or a potential party) in the terms of trust does matter. From this perspective, Western societies tend to be more low-context and more legalistically oriented and — as a rule — not as involved in building informal relations with a second party as the Chinese (as this is seen to be significant in China in terms of *guanxi*[58]). In other words, for Chinese partners, the context (surrounding circumstances both when the contract is being concluded and when it is being performed) and mutual relations in a broader sense means more than text (four corners of the contract). This all means that flexibility is necessary in line with the circumstances arising while a contract is being performed. It is worth noting that it is not unusual in the West for legal action to be brought due to a disagreement over a single word taken from a contractual provision[59]. Such an approach may be recognised as incomprehensible for the Chinese.

4. The meaning of the notions of trust, reasonable expectations and loyalty (in general)

Trust (reliance) means that one party can harbour expectations of the other party's future behaviour that a reasonable person[60] having the same information and knowledge could harbour in the same surrounding circumstances (relevant matters)[61]. In other words, the reasonable person is the person who is in the shoes of the contracting party whose trust, reliance and expectations are to be examined, in order to be bound by the legal consequences with them (legal relevance).

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[56] See, in terms of written texts (though the same can also be said also for law, in particular contracts): *Xue L., Meng M.* A Cross-Cultural Characterization of Chinese and English Written Discourse // Intercultural Communication Studies. 2007. Vol. 16. P. 98, who state that a "heavy responsibility is placed on the reader to understand what is said, and a very high degree of shared contextual knowledge is assumed". See also: *Dębczyńska A.* Cultural differences and Polish-Chinese business relations in practice. P. 12, 13.

[57] See the remarks of: *Dębczyńska A.* Cultural differences and Polish-Chinese business relations in practice. P. 14, 15.

[58] Ibid. P. 16, 18.

[59] A very good example is presented in the official comments to the Article II.-8:101: DCFR; the main issue in the case concerns interpretation of "every month in a year" and the question is whether the proper answer is eleven or twelve. See: Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition, prepared by Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) / eds C. von Bar, E. Clive. Vol. 1. Munich: Sellier, 2009.

[60] As to the notion of reasonable person, see: *Rott-Pietrzyk E.:* 1) Klauzula generalna rozsądku w prawie prywatnym. P. 211–215, 261–270; 2) Interpretation of Contracts under CESL // Zeitschrift für Europaisches Privatrecht (ZEuP). 2014. No. 2. P. 385–387.

[61] Compare: *Machnikowski P.* Prawne instrumenty ochrony zaufania przy zawieraniu umowy. P. 59.

The concept of reasonable expectations means the expectations of a contracting party that the second party creates by his or her statement or behaviour in the given circumstances, according to the objective standard of a reasonable person. In other words, the statement and behaviour of the second party leads to legal consequences where there is a need to protect the contracting party's trust (reliance) at the stage of contract formation, interpretation, supplementation and performance. These expectations are protected by law.

Both criteria, as contractual values, are strongly tied and interconnected with each other[62] — two sides of the same coin[63]. Both are vital in contracting from the very outset: at the pre-contractual stage, as well as with the conclusion, interpretation, supplementation and performance of the contract. The principle of loyalty facilitates trust and reasonable (legitimate) expectations[64]. The same is true of the Polish general clause — the principles of social coexistence that are covered by Articles 65, 56, 354 and finally Article 58 PCC[65]. The content of the principle of loyalty is essentially based on reasonable expectations. They are as important as legal terms and they are not to be observed exclusively as social notions.

5. Contract interpretation (Article 65 of the Polish Civil Code)

Article 65 PCC employs the combined interpretation method that covers subjective and objective interpretation directives. A combined method of a normative nature certainly means that both subjective and objective criteria play their role in interpretation and are useful tools in describing the meaning of the contract as a whole, and every contractual provision or single word used in the contract[66]. This article is to be seen as a legal basis for interpretation that leads to establishing both whether the contract exists (in other words, whether it has been concluded or not) and what is its content (in terms of the parties' rights and duties).

The first of these (subjective) is covered by Article 65 § 2 PCC, according to which the common intention of the parties and the aim of the contract should be examined in contracts, rather than its literal meaning. The second one (objective) is derived from Article 65 § 1 PCC. According to the wording of this article, a declaration of intent should be interpreted in view of the circumstances in which it is made, as required by the principles of social coexistence[67]. This general clause covers objective criteria such as: reasonableness, good faith and reasonable person in particular. Those criteria are also recognised at the interpretation stage in most national legal systems, as well as in international model

[62] See the approach of both values presented in broader ("triangle") perspective by *Bukspan E.* Trust and the triangle expectation model in twenty-first century contract law // DePaul Business and Commercial Law Journal. 2013. No 11 (3). P. 381 et seq. Available at: https://via.library.depaul.edu/bclj/vol11/iss3/4 (accessed: 01.12.2021).

[63] Both criteria are also vital in Polish public law; for more detail see: *De Ambrosis Vigna A., Kijowski D. R.* The Principle of Legitimate Expectations and the Protection of Trust in the Polish Administrative Law // Białostockie Studia Prawnicze. 2018. Vol. 23, No. 2. P. 39 et seq.

[64] Reasonable expectations can be seen as synonym for legitimate expectations in private law.

[65] *Machnikowski P., Balcarczyk J., Drela M.* Contract Law in Poland. P. 42.

[66] The vital Polish Supreme Court judgment (passed by 7 judges) explaining a combined method of interpretation and the subjective and objective directives is the judgment from 29.06.1995, III CZP 66/95, Orzecznictwo Sądu Najwyższego, Izba Cywilna (OSNC). 1995. No. 12. Item 168, and recently the Supreme Court judgment from 16.11.2017, V CSK 79/17, SN, OSNC-ZD2018/4/59, LEX No. 2447354 and from 17.04.2018, I PK 28/17, LEX No. 2542286.

[67] There are many various commentaries to Article 65 PCC explaining the mechanism covered by the general clause; see for example: Kodeks cywilny Komentarz / eds E. Gniewek, P. Machnikowski. Warszawa: C. H. Beck, 2017. P. 151 et seq.

law (in particular PECL[68], DCFR[69], UPICC[70] and the Trans-Lex Principles[71])[72]. At the level of a normative regulation (in both national legal systems[73] — for example Polish law, as well as model law), interpretation in accordance with the common intention of the parties constitutes a principle, and the meaning assumed following the standard of a reasonable person is an exception. However, in practice this relation is very often reversed. Notably, in practice, the interpretation based on the reasonableness criterion that is expressed in the standard of a reasonable person is a principle, and the reading of the contractual meaning in line with the common intention of the parties is an exception[74]. This means that trust and reasonable expectations in the surrounding circumstances are absolutely vital when interpreting contracts (as regards both the existence of the contract and its content). However, a court using the standard of a reasonable person and criterion as trust, should not "create the contract for the parties", by giving it a meaning that the parties did not intend to give it[75].

Subjective and objective interpretations do not represent alternatives in Polish law (or in international model law solutions). This means that a subjective approach is adopted as a (very important) starting point as the actual intention of the author(s) of a contract is read, and interpretation commences. It is then when it does not prove possible to discern a shared, common understanding in accordance with the parties' intentions that the interpretation strategy shifts from a subjective to an objective approach, applying objective standards (such as a reasonable person, having in mind trust and reasonable expectations)[76].

It is worth mentioning that the commentaries to Article II.-8:101 DCFR (as with the comments to the PECL[77] earlier) explain that "the interpreter should not try to discover the intentions of the parties at any price and end up deciding what they were in an arbitrary way"[78]. As far as the interpretation of juridical acts and contracts is concerned, the DCFR

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[68] Article 5:101–107.

[69] Article II.-8:101–202.

[70] Article 4.1–4.8. It is worth mentioning that in the CCL, this can be observed in many provisions which were clearly influenced by international instruments such as the CISG and the UNIDROIT Principles of International Commercial Contracts (UPICC); more details in: *Kornet N.* Contracting in China. P. 5 et seq.

[71] Section 5: Interpretation, No. IV 5.1–5.6.

[72] To the details see: *Rott-Pietrzyk E.* Interpretation of Contracts under CESL. P. 376–379.

[73] See: *Zweigert K., Kötz H.* An introduction to Comparative Law. Oxford: Oxford University Press, 1998. P. 400 et seq., who compare the *civil law* approach and *common law* approach to the contractual interpretation methods.

[74] The reversal of the discussed principle is, in practice, strongly emphasised in: Commentary on the UNIDTOIT Principles of International Commercial Contracts (PICC) / eds S. Vogenauer, J. Kleinheisterkamp. Oxford: Oxford University Press, 2009. P. 502. — Similar views are also expressed by: *Herbots J. H.* Interpretation of Contracts // Elgar Encyclopedia of Comparative law / ed. by J. M. Smith. Cheltencham; Northampton: Edward Elgar Publ., 2012. P. 329. — For more detail see also: *Rott-Pietrzyk E.* Interpretation of Contracts under CESL. P. 383, 384.

[75] See the Supreme Court's judgments: from 24.04.1997, II CKN 118/97, Orzecznictwo Sądów Polskich (OSP). 1998. No. 1, item 3 with the A. Szpunar's gloss; from 09.04.1999, I CKN 1135/97, OSNC 1999, No. 9, item 165 and recently from 17.04.2018, I PK 28/17, LEX No. 2542286.

[76] As I argue in the Introduction ("Interpretation" in private law) in: Interpretation in Polish, German and European Private Law / eds B. Heiderhoff, G. Żmij. Berlin; New York: Sellier, 2011. P. 6. — This approach is to be observed in Polish courts judgments and their justifications; to this extent see for example: of the Court of Appeal in Białystok from 19.10.2018, I AGa 114/18, LEX No. 2627841, the Court of Appeal in Szczecin from 29.11.2017, I ACa 551/17, LEX No. 2490091.

[77] See Article 5: 101 PECL. See also S. Vogenauer's comments to this article in: Commentary on the UNIDTOIT Principles of International Commercial Contracts (PICC) / eds S. Vogenauer, J. Kleinheisterkamp. P. 501, 502.

[78] Principles, Definitions and Model Rules of European Private Law / eds Ch. Von Bar, E. Clive. Vol. 1. P. 556. — See also: *Kötz H.* Comparative contract law // The Oxford Handbook of Comparative Law / eds

reflects the most common ideas of interpretation widely recognised in national and international regulations[79]. And there is a question whether the national courts could follow the ideas covered by DCFR and to what extent. In this context, it is worth noting that the first recognised judgment to have used its model rules as a gap-filler on the grounds of the domestic private law system is the judgement of the Swedish Supreme Court (*Hoögsta domstolen*)[80]. In order to fill the encountered gap, it made recourse to Article IV.E.-2:302(3) DCFR, specifying the factors determining the reasonable length of the withdrawal period. Furthermore, adopting the standpoint that the lack of any termination period would be inequitable for legal and economic reasons, the Court made a direct reference to the criteria of determining its length proposed in the DCFR[81]. This way of reasoning seems to be controversial, though it cannot be excluded. This judgement was commented as "a ground-breaking decision for the application of DCFR in judicial practice", and that "in the European legal culture, it remains quite a perilous legal tightrope"[82].

According to the DCFR comments, the interpreter has to decide when it is justified to move to an objective interpretation model. It is always the subjective interpretation that is the starting point, where the interpreter looks for a meaning that complies with the common intention of the parties. Only where it is not possible to arrive at the interpretation result this way does the interpreter shift to objective directives, which are subsidiary[83]. After coming to the conclusion that it is not possible to discern the meaning of the contractual provisions based on the common intention of the parties (on the grounds of the "competitive area", when each party "fights" for an understanding that is in accordance with his or her interests), the interpreter faces a choice between two solutions. The first comes down to the consideration that the contract did not exist, due to the lack of any common intention, and the second to the assumption that the intention of the parties was to enter into a contract, but the interpretation of certain contractual provisions requires taking into consideration the standard of a reasonable person, given that it is not possible to establish the actual common intentions of the parties on the basis of the available evidence[84]. From the moment the decision is made to apply the objective directive, the interpreter is no longer searching for meaning that is in line with the common intention of the parties, but instead attaches such meaning to the contractual provisions that are subject to the assessment that would be given by a reasonable person (in the surrounding circumstances).

M. Reimann, R. Zimmermann. Oxford: Oxford University Press, 2019. P. 913, 914.

[79] It is worth mentioning that the DCFR — given the way that the restatements of this kind are worded — states that the best solutions are those that tend to follow modern trends in private law concepts.

[80] The judgment of the Swedish Supreme Court (*Hoögsta domstolen*) of 3 November 2009, Case T 3-08. Taking into consideration this judgment, special attention must be paid to the potential use of non-binding DCFR regulations as an interpretative pattern, chosen solely *imperio rationis* by the European judiciary. This point of reference may be important both for the already existing domestic private law and for EU legislation. For more detail see: *Grochowski M.* The practical potential of the DCFR Judgment of the Swedish Supreme Court (*Hoögsta domstolen*) of 3 November 2009 Case T 3-08 // European Review of Contract Law. 2013. No. 9 (1). P. 96 et seq.; *Niglia L.* The Struggle for European Private Law. A Critique of Codification. Oxford: Oxford University Press, 2015. P. 96; *Wrbka S.* European Consumer Access to Justice Revisited. Cambridge: Cambridge University Press, 2015. P. 330.

[81] M. Grochowski states that, "A significant spur for recourse to the DCFR is undoubtedly the high repute of this document […]. This is a useful guide for the interpretation of EU private law regulations, in compliance with the requirement of an autonomous interpretation and the principle of *effet utile*" (*Grochowski M.* The practical potential of the DCFR Judgment… P. 96).

[82] Ibid.

[83] For more detail, see: *Rott-Pietrzyk E.* Wykładnia oświadczenia woli (stadium prawnoporównawcze) // Studia Prawa Prywatnego. 2007. No. 3–4. P. 5–6.

[84] Also: *Roca E.* The interpretation of contract in accordance with the Principles of European Contract Law // Kierunki europeizacji prawa prywatnego. Księga pamiątkowa dedykowana Profesorowi Jerzemu rajskiemu / eds A. Brzozowski, W. Kocot, K. Michałowska. Warszawa: C. H. Beck, 2007. P. 180.

It is obvious that the meaning of a reasonable person is established in a manner that is individual with respect to the entity in a specific context. As a result, outside of the situational context, with respect to the subject criterion, it has to be considered, in particular, whether the parties are professionals, whether they are professionally engaged in the activities that the contract applies to, as well as the professional experience and the industry in which the parties operate[85]. Next, the standard of a reasonable person with the attributes of a party acting in the same circumstances has to be constructed, and the reasoning process has to be conducted in order to determine how such a person would understand a particular contractual provision. As meaning is assigned to contractual provisions based on the reasonable-person standard, the judge takes into account the circumstances occurring *in concreto* (in which the contract was concluded), as well as the nature of the parties that set them apart[86]. However, a judge using objective criteria should not thwart the sense and objective of the contract under a pretext of interpretation, and should not give a meaning to contractual provisions that is contrary to the intentions of the parties[87].

This reasoning is also held by Polish courts. For example, in January 2010 the Court of Appeal in Katowice stated that the legal system should protect the addressee's trust as to the meaning of the second party's statement, which is the result of his or her careful interpretation[88]. This means that a protection of the addressee's understanding based on trust prevails over the understanding of the second party according to objective criteria (in particular the reasonable person standard in particular circumstances)[89].

There is also no doubt that, under Article 65 PCC, interpretation should be contextual. In interpreting a contract, particular attention may be paid to: the circumstances in which a contract was concluded, including the preliminary negotiations; the conduct of the parties, even subsequent to the conclusion of the contract; the interpretation that has already been given by the parties to expressions that are identical to or similar to those used in the contract; usages that would be considered generally applicable by parties in the same situation; practices that the parties have established between themselves; the meaning commonly given to expressions in the branch of activity concerned; the nature and purpose of the contract; and good faith and fair dealing[90]. These circum-

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[85] See, for example, the catalogue of criteria that individualise the parties, proposed by S. Vogenauer's in: Commentary on the UNIDTOIT Principles of International Commercial Contracts (PICC) / eds S. Vogenauer, J. Kleinheisterkamp. P. 499; the same way of reasoning has been employed by the Court of Appeal in Białystok from 19.10.2018, I AGa 114/18, LEX No. 2627841.

[86] When using the reasonable person criterion, a definition of *reasonableness* from Article 5 (1) CESL may be helpful or the definition of reasonableness in Annex I to the DCFR and in Article I.-1:104 DCFR. For more details see: *Schulte-Nölke H.* Common European Sales Law (CESL) // Common European Sales Law (CESL). A commentary / ed. by R. Schulze. Baden-Baden: Nomos, 2012. P. 98 et seq.

[87] Like: Principles, Definitions and Model Rules of European Private Law / eds Ch. Von Bar, E. Clive. Vol. 1. P. 556.

[88] This argument is to be seen most recently in the judgment of Court of Appeal in Katowice, from 11.01.2019, V AGa 630/18, SA Katowice, LEX No. 2627393; see also the justifications of judgments held by different courts of appeal in Poland from the last decade that follow this way of reasoning, for example: Court of Appeal in Warsaw from 23.01.2019, V ACa 37/18, LEX No. 2631087; Court of Appeal in Katowice from 11.01.2019, V AGa 630/18, LEX No. 2627393; the Court of Appeal in Białystok from 19.10.2018, I AGa 114/18, LEX No. 2627841. The significance of trust element is visible not only to the extent of contracts but also in case of unilateral acts as authorisation to act in the name of principal (power of attorney, see Article 96 PCC), see the judgment of the Court of Appeal in Krakow from 14.11.2017, I ACa 808/17, LEX No. 2460100.

[89] The factor of trust is recently strongly underlined by the Court of Appeal in Białystok from 19.10.2018, I AGa 114/18, LEX No. 2627841 and the Court of Appeal in Szczecin from 2017.11.29, I ACa 551/17, LEX No. 2490091 judgment.

[90] Compare Article 5:102 PECL, Article II.-8:102 (1) DCFR, No. IV.5.1. Trans-Lex Principles, Article 4.3 UPICC, and also compare Article 59 CESL concerning interpretation in which these circumstances (relevant matters) are inserted *expressis verbis*.

stances are taken into account by the Polish courts (although they are not mentioned in Article 65 PCC *expressis verbis*). According to the view of the Polish Supreme Court, one of the circumstances that should be taken into consideration is the parties' conduct after the contract has been concluded and the way of performing the contract[91]. The *ratio legis* of taking into account the subsequent conduct of the parties in the course of performing the contract comes down to the fact that, as a rule, the parties know very well what they have agreed to, and act according to their stipulations[92]. This factor would therefore seem to be very important while interpreting a contract and one of the most decisive at the interpretation stage. Polish courts also take into consideration the purpose of the contract, bearing in mind the previous experience of the parties, their status and the negotiation process[93].

In general, this leads to the conclusion that meaning of an expression used in a contract should be the meaning that would reasonably be given to it in the context. The surrounding circumstances must be taken into account, along with the nature and purpose of the contract in which the expression is contained, as far as could be objectively ascertained.

6. Contract supplementation (Article 56 of the Polish Civil Code)

Contract supplementation is particularly vital in long-term contracts requiring flexibility, for example in the approach to the *pacta sunt servanda* principle[94]. Flexibility is especially needed in long-term contracts like: cooperative agreements, franchise agreements,[95] commercial agency agreements, construction agreements[96] or outsourcing[97] agreements, which should work over time and very often adapt to changing circumstances[98].

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[91] See the judgment of the Polish Supreme Court 18.11.2016, I CSK 802/15, LEX No. 2182269 and the justification of judgment of Court of Appeal in Katowice from 11.01.2019, V AGa 630/18, LEX No. 2627393 and the Court of Appeal in Białystok from 19.10.2018, I AGa 114/18, LEX No. 2627841.

[92] This way of reasoning is presented by: *Wendehorst Ch.* Common European Sales Law (CESL) // Common European Sales Law (CESL). A commentary / ed. by R. Schulze. P. 310. — Compare S. Vogenauer, in: Commentary on the UNIDTOIT Principles of International Commercial Contracts (PICC) / eds S. Vogenauer, J. Kleinheisterkamp. P. 513.

[93] See the justification of the Supreme Court judgment from 03.09.1998, I CKN 815/97, Orzecznictwo Sądu Najwyższego (Izba Cywilna). 1999. No. 2. Item 38; repeated by the Supreme Court in another cases, e. g. the Supreme Court judgment from 16.11.2017, V CSK 79/17, OSNC-ZD2018/4/59, LEX No. 2447354 and by other courts, for example the Court of Appeal in Białystok from 19.10.2018, I AGa 114/18, LEX No. 2627841.

[94] See Article 8 (1) CCL. As regards the *pacta sunt servanda* principle in Chinese law see: Chinese Contract Law / ed. by Z. Xiaoyang. Hong Kong: Open University of Hong Kong Press 2013 (reprint). P. 21, 22; *Fu J.* Modern European and Chinese contract law. P. 98 et seq.; *Kornet N.* Contracting in China. P. 9, 10.

[95] See: *Bertrandias L., Fréchet M., Lumineau F.* The Contract-Trust Debate From A Framing-Based Perspective: Findings From Franchise Contract Experiment. Available at: https://www.strategie-aims.com/events/conferences/2-xixeme-conference-de-l-aims/communications/17-revisiting-the-contract-trust-debate-from-a-framing-based-perspective-findings-from-franchise-contract-experiment/download (accessed: 01.12.2021).

[96] The importance of trust in construction contracts as long-term contracts is underlined by: *Cheung S. O., Wing Yiu T., Pang H. Y., Wong W. K.* A framework for trust in construction contracting // International Journal of Project Management. 2008. Vol. 26. P. 821 et seq.

[97] Trust in the context of outsourcing is analysed by: *Babin R., Bates K., Sohal S.* The role of trust in outsourcing: More important than the contract? // Journal of Strategic Contracting and Negotiation. 2017. Vol. 3 (1). P. 38 et seq.

[98] The need for some provisions to be implied in long-term contracts is argued by: *Harrison D.* Is a Long-term business relationship an implied contract? Two views of a relationship "Disengagement" // Journal of Management Studies. 2004. Vol. 41 (1). P. 107 et seq. Available at: https://www.impgroup.org/uploads/papers/62.pdf (accessed: 01.12.2021).

In those situations, trust (reliance) plays an important role in connection with other important contractual values, such as loyalty[99].

In line with contractual fairness, parties must have due regard for each other's interests while the contract is being negotiated, while it is being performed, and once full effect has been given. The principle of loyalty may, for example, oblige a party to deliver particular information to the second party if it is relevant for performing the contract, or requires the renegotiation thereof due to changing circumstances (not only in the case of extraordinary circumstances[100], but also in cases of changing circumstances covered by contractual risk). It is worth mentioning in this context that in some situations, there is no distinction between circumstances that are to be covered by a contractual risk and the circumstances that create a basis for the application of hardship or force majeure principles are not so obvious[101].

An issue of importance is the behaviour that can be expected of each party, in other words what the parties can expect from each other. The principle of loyalty facilitates trust and reasonable expectations, making it easier for parties to enter into more flexible contracts that are to be supplemented by the parties (according to their intention and as a reaction to changing circumstances, or if there is a need for contractual regulation where the contract is silent) or by the court (if there is no agreement on the extent to which it is necessary to resolve an issue). The principle of loyalty and the values of trust and reasonable expectations will be given weight in the interpretation of the contract (including through their drafting technique), its supplementation, performance and after its termination. In many legal systems, trust and reasonable expectations are derived from the general clause of loyalty (or other general clauses under the principle of social coexistence[102], such as good faith, reasonableness and equity).

Therefore, the general assumption can be made that the principle of loyalty, along with trust and reasonable expectations, enables a proper contract supplementation (by implied terms) and promotes the due performance by directing behaviour so that the other party's reasonable expectations will be met. Since cooperation, in particular within long-term contracts, normally cannot work without trust, it is clear that trust is a rational element of contracts. This is the line where the *ratio legis* of Article 56 PCC meets the *ratio legis* of Article 354 PCC[103].

The values of mutual trust of the parties, reasonable expectations, loyalty and the balance of the contract do not exist *expressis verbis* in the wording of Article 56 PCC, but the surrounding circumstances (the context) can be derived from this regulation. This article

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[99] *Cheung S. O., Wing Yiu T., Pang H. Y., Wong W. K.* A framework for trust in construction contracting. P. 821 et seq.

[100] I mean the circumstances that are the requirements of *rebus sic stantibus rule* (or hardship), e. g. which is regulated in Article 357[1] PCC, and as far as model law (*soft law*) is concerned see for example: Article 6:111 PECL, Article III.-1:110 DCFR, Articles 6.2.1–6.2.3 UPICC, Principle No. VIII. 1 of TRANS-LEX Principles.

[101] Compare J. Fu, who states that "it is very difficult to distinguish the boundary between hardship and normal commercial risks. On the one hand, free market offers lots of good chances for the investors, but on the other hand, there also exist many risks that the investors cannot expect when concluding the contract. Since the boundary between those two concepts is so difficult to distinguish, it is possible for some commercial risks to be considered as hardship, which may be harmful to the development of a market economy and detrimental to the justice of law" (*Fu J.* Modern European and Chinese contract law. P. 99 et seq.).

[102] For example, in Article 56 PCC.

[103] The interpenetration of Articles 56 and 354 PCC is very visible in some judgments; see, for example, the Supreme Court judgment from 17.01.2007 II CSK 350/06, LEX No. 567660 and the judgment of the Court of Appeal in Krakow, I ACa 1092/14, LEX No. 1648959. Polish courts assumed that Article 56 PCC should be taken into consideration during assessment of a due performance of contractual obligations according to the content of a contract under Article 354 PCC.

states that a juridical act produces not only the consequences expressed in it, but also those that result from the statutes, the principles of social coexistence and established customs. In other words, sources supplementary to the contract are to be derived from: statutes, the general clause, namely the principles of social coexistence (covering various values that are important for contracting) and the established customs.

The interpretation of this provision, as regards a general clause, means that the content of the contractual relationship can be supplemented in line with the context. In this way, trust (reliance) and reasonable expectations could be protected in connection with the principle of loyalty; for example, values covered by the general clause can oblige one party to inform the other about any issues that are relevant to a party's performance under the contract, even if such an obligation is not inserted in the contract (in the contractual provisions) or in the legal provisions that are to be applied to the given contract[104].

While interpreting Article 56 PCC, the Polish courts state that, when the contractual provisions are not sufficient to denote all contractual obligations, then it is necessary to refer to additional criteria such as the principles of social coexistence or customs[105]. In one of case involving a construction contract, the court found it necessary to supplement that contract by the obligation to deliver the construction permit[106]. Consequently, even if the immediate application for the construction permit does not arise from the sources covered by Article 56 PCC, the party is obliged to do so under Article 354 PCC (which is connected with a general clause of economic purpose[107] covered by this article). A due performance requirement is understood as a party's desirable behaviour that is in accordance with the contract not only in a formal way, but a behaviour that finally enables the goal of the contract to be achieved, which also means the fulfilment of the creditor's interest. While applying Article 354 PCC, the court invokes the function and goal of the contractual obligation[108] at hand and takes into consideration the parties' expectations typical for a contract of a given type, a type of business and the professional character of the parties (their status)[109].

This case shows that the mechanisms of both Article 56 and Article 354 PCC are strictly connected, and that the delimitation of a demarcation line between them is a tough task. However, as far as describing the content of a contract and due performance is concerned, it seems that this difficulty does not create a real problem with the application of the law in Poland. A short view on judicatory output justifies the conclusion that there is no need to draw a strict demarcation line between both articles. This way of interpreting and applying the law forms a complementary system that is coherent and effective.

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[104] See the judgment of the Court of Appeal in Białystok from 23.08.2013, I ACa 336/13, LEX No. 1372243; the court in this judgment applies Article 354 PPC and supplements the contract with an obligation to inform and describe what kind of information one party is obliged to deliver to the second party. See also another judgment the Court of Appeal in Białystok, namely from 04.01.2017, I ACa 623/16, LEX No. 2229138; in its justification the court also take into consideration the additional obligations of one party (Bank) to inform the second party (client).

[105] See for example the judgments mentioned in footnote 87.

[106] The judgment of the Court of Appeal in Krakow from 13.11.2014, I ACa 1092/14, LEX No. 1648959.

[107] In Polish "*cel społeczno-gospodarczy*".

[108] The Court of Appeal in Krakow from 16.03.2015, I ACa 47/15, LEX No. 1711718, in the light of Article 354 PCC underlined the function and goal of the contract and loyalty that can be expected by one party from another.

[109] See the justification of judgment of the Court of Appeal in Krakow from 13.11.2014, I ACa 1092/14, LEX No. 1648959; the Supreme Court in this case ruled that, even if the contract at hand does not state *expressis verbis* that the party is obliged to apply for a construction permit in particular period, the party is obliged to do this without delay.

7. The content of a contract (due performance) according to Article 354 of the Polish Civil Code

As far as the content of a contract is concerned, the previous steps demanded by Articles 65 and 56 PCC are to be taken into account. The *ratio legis* of Article 354 PCC and its application has been explained above, together with Article 56 PCC to some extent. Article 354 § 1 PCC states that the debtor will perform an obligation according to its content and in a manner corresponding to its social and economic purpose and to the principles of social coexistence. Where there are customs in that regard — also in a manner corresponding to these customs. According to § 2 of the article, the creditor must cooperate in the performance of an obligation in the same manner. Its general clauses covered similar values as those in Articles 65 and 56 PCC. Describing what due performance should mean, and what obligations of the parties the contract should cover *in concreto* is also connected with the principle of loyalty, trust and reasonable expectations.

One Polish court, when applying Article 354 PCC, stated that, in the event of complicated long-term contracts (such as construction contracts, for example) that impose many obligations on the investor, setting out too short a time to deliver documentation that could be used by the contractor as an instrument for the contract termination, and enabled pressure to be exerted on the second party with a view to reaching goals that are not covered by the contract. Given the far-reaching effects of termination and the duty of loyalty[110] and cooperation while performing the contract (in accordance with the principles of social coexistence and the values that are covered under these principles), withdrawal from the contract should be seen as an extreme solution. Therefore the instrument of withdrawal can be used only if the difficulties that arise while the contract is being performed cannot be resolved in another way. In this specific case, the court dismissed the argument of contract termination and stated that the obligation to deliver the documentation can be assumed in this case as having been performed in due time (the time of delivery was not described in the contract)[111]. In another case, when interpreting general clauses covered by Article 354 PCC, the court also took into consideration the trust and reasonable expectations of one party who is less experienced (e. g. a farmer) and deals with a professional party[112].

This normative triad (comprising Articles 65, 56 and 354 PCC) is very important when deciding both the content of a contractual obligation and the due performance of that obligation. Article 65 PCC represents the first step and determines: the existence, meaning and extent of a contract. Article 56 PCC supplements the content of a contract according to additional sources (beyond what the parties agreed). And finally, Article 354 PCC describes the criteria of due performance accordingly. All these can be seen as three separate stages, though the difficulties in describing a demarcation line between them, in particular between Articles 56 and 354 PCC, should not be regarded as an obstacle[113].

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[110] The principle of loyalty under Article 354 PCC is also underlined by the Supreme Court judgment from 26.09.2012, II CSK 66/12, LEX No. 1619143 and the Court of Appeal in Katowice from 07.05.2014, I ACa 77/14, LEX No. 1477083; the Court of Appeal in Białystok from 23.08.2013, I ACa 336/13, LEX No. 1372243.

[111] See the judgment of the Court of Appeal in Szczecin from 13.10.2016, I ACa 628/16, LEX No. 2171153.

[112] The Court of Appeal in Warsaw in the judgment from 21.05.2013, VI ACa 1550/12, LEX No. 1339416, stated that the less experienced party (a defendant who is a farmer) can have trust in the second party and expect from her the preparation of all the necessary documents in a clear, professional way, and also professional support in reaching the goal of the contract. See also the judgment of the Court of Appeal in Warsaw from 02.12.2015, VI ACa 1612/14, LEX No. 1994432, in which the court — in light of Article 354 PCC — referred to values such as: loyalty, trust and expectations.

[113] It is easier to differentiate the extent of application between Article 65 PCC on the one hand and Articles 56 and 354 on the other hand; see the justification of the judgment of the Court of Appeal in Warsaw

The provisions intertwine with each other and lead to one final result as they establish the content of contractual obligation and determine whether the parties are performing their obligation(s) in the proper manner[114].

Conclusions

There is no doubt that values such as trust, reasonable expectations, loyalty and fairness are commonly recognised in national legal systems on all continents, as well as in international law (both binding[115] and non-binding[116]) directly or indirectly by general clauses.

There is no doubt that various legal systems protect these values and connect with them legal consequences (for example Articles 65, 56 and 354 PCC). They seem to almost always be functional in domestic cases, though they may be problematic in connection with foreign elements (when various legal cultures have to be confronted). This is regardless of whether the relationship at hand is intra-union by nature (for instance, between entities from Poland and from Germany) or transactions implemented between entities from the EU and from outside the EU (for instance, between an entity from Poland and an entity from China). However, the foreign element may cause more problems in the second case due to the differences in legal culture in a wider sense.

It is true that, in a broader transnational context, it is not easy to speak about the idea of uniformity (taking into consideration both potential interpretation and the application of law) as regards general clauses (that stand as general principles of contract law), or in other words the legal norms that covered these clauses (such as good faith, loyalty, fairness or the different faces of reasonableness, e. g. reasonable expectations, reasonable person etc.)[117].

There is no doubt that problems can appear when each contracting party represents various legal cultures determining his or her understanding of what designates the trust criterion or reasonable expectations connected with the second party's behaviour. The more differences that can be identified concerning the culture or legal culture in which the parties are rooted, the more difficulties might occur on legal grounds (finally, the interpretation and application of the law by a court or arbitral tribunal, if the parties are not able to find a satisfactory solution by themselves).

Considering the question of whether there is any alternative to a traditional methodology based on mutual trust and reasonable expectations, it seems that the final answer is not unambiguous. On the other hand, it seems that there is no good alternative for this

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from 07.02.2018, VI ACa 1557/16, LEX No. 2581119, stated that interpretation directives covered by Article 65 PCC concerns only the interpretation stage and it is not possible to employ them for the purpose of changing or implementing a contract.

[114] An example of coherent interpretation and application of Articles 65, 56 and 354 PCC is the Supreme Court's judgment from 20.06.2017, II PK 65/16, LEX No. 2383251, where the court took into consideration all these regulations without strict division between the three stages represented by these articles as separate stages. See also the justification of judgment of the Court of Appeal in Warsaw from 19.10.2016, VI ACa 1856/15, LEX No. 2256905.

[115] For example: CISG.

[116] For example: DCFR or UPICC.

[117] M. E. Storme raised a proper and vital question: "How uniform should contract law be? But it is also a question of technique" and paid attention to the vital point: "Diversity should be allowed, but a contained and predictable diversity. It must be sufficiently predictable to what extent the uniform rules will be uniformly applied and to what extent their application involves different practices. <…> If correctly used, good faith and reasonableness are therefore instruments which allow us to take into account national and regional differences in an appropriate way" (*Storme M. E.* Good faith and contents of contracts in European private law. P. 4 et seq.). Despite of the passage of time, both the question and the answer are still relevant today.

method. As far as its positive features are concerned, the following might be identified[118]: firstly, the method is flexible and it is contextual, which allows solutions to be adapted to the surrounding circumstances. Secondly, it employs the objective standard of a reasonable person or reasonable expectations in atypical situations, which is adjusted to the individual situation of the contracting parties; this objective standard guarantees legal certainty (when applied in a proper manner). Thirdly, the method can deliver a satisfactory result in contractual relations in the case of a high contractual risk (in changing circumstances that are not necessarily covered by *clausula rebus sic stantibus* or *force majeure*). Fourthly, standards and values covered with this method are recognised throughout the civilised world. And finally, it seems to be possible to reconcile the diversities in various approaches to the basic values.

This method has also its negative side, of course. First of all, the concepts of trust, expectations and loyalty are often understood differently by parties rooted in different legal cultures (with everyone agreeing to the existence of these values, but seeing their content differently). One consequence of this is a matter of dispute as to whether it is possible to find a general meaning (that is to be specified *in concreto*) of these criteria that can stand as a common denominator no matter what legal culture and legal mentality is concerned. It would be a rather disheartening conclusion that the only common denominator is that a contract without trust (regardless of which legal system, legal culture and mentality is being discussed) is inconceivable. However, even if approaches to the crucial contractual values that are determined by contexts instantly connected with various legal cultures are far from uniform and are difficult to reconcile, that does not mean that they should be abandoned. And further, it does not mean that new phenomenon and tendencies in contract law, whether influenced by new technologies or COVID-19, necessarily lead to a devaluation of the traditional "contractual world".

The statement that law is in permanent progress is rather banal. However, this progress has a chance not to be chaotic if the general shape of areas such as contract law covers certain fundamental axioms that every party to the contract must hold equally important. I believe that new tendencies in law, connected with NewTech or COVID, should not change the significance of vital values in contracting. In particular, trust does matter. It seems that nowadays trust must be promoted, supported and protected even more than in the past — in the era of traditional contract law. At that time, trust was imprinted into social and legal relations in the real world in more natural way. Nowadays, its existence as a vital contractual element, bearing in mind its functions (presented mainly under the example of Polish law), have to be seen on a "cooperative arena" together with a *win-win* attitude. As I mentioned in the introduction above, there is one general conclusion from the writings concerning various fields of science: every relationship (legal or social) does depend on trust. In the case of trust, the idea of "two contractual worlds" does not apply. This value does not divide contract law into two worlds. It rather unites the old, traditional institutions with new tendencies, phenomena and institutions.

Therefore, contract law imbued with the traditional functions of trust (as well as reasonable expectations, loyalty and fairness) do not need even face-lifting or a kind of new understanding. What could improve its use and functionality is a uniform understanding (to as wide extent, as only that might be achievable), which connects rather than divides the actors of the contractual world. Thanks to trust, contract law can be developed with a durable fundament on the "cooperative arena", by using legal tools that protect the mentioned values and guarantee their effectiveness. Trust is an immanent and fundamental element of contract law (whether "modern contract law" or old one, if one wishes to see it in terms of a division of this kind). Trust as a legal and social criterion still has a major role

[118] However, some of these features might be viewed in a negative way.

to play, and that role is all the more justified in the NewTech era and the time of COVID-19[119] in the 21st century[120]. Despite all its drawbacks, trust is able to reconcile the world of traditional contract law with the modern one. In other words, trust should be recognised as a vital link able to connect the different legal cultures as well as connecting traditional contract law with the modern one. The contractual environment (old or modern) does not really exist without trust. Finally, trust, along with reasonableness, should be always demanded, now perhaps more than ever before.

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[119] According to the Edelman Trust Barometer 2021 explanation: “Global Pandemic Puts Trust to the Test”. Available at: https://www.edelman.com/trust/2021-trust-barometer (accessed: 01.12.2021).

[120] See the Edelman Trust Barometer 2021. Available at: https://www.edelman.com/trust/2021-trust-barometer; https://www.edelman.com/sites/g/files/aatuss191/files/2021-03/2021%20Edelman%20Trust%20Barometer.pdf (accessed: 01.12.2021), which states that: “Trust remains the most important currency in lasting relationships between the four institutions studied and their various stakeholders. Particularly in times of turbulence and volatility, trust is what holds society together and where growth rebuilds and rebounds”.

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Доверие и разумные ожидания в контрактах — ценности, которые всегда имеют значение (с точки зрения польского частного права)

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Приведет ли ситуация, когда «конкурентное договорное право» развивается наряду с классическим договорным правом, к неизбежному столкновению этих двух договорных миров? Высказывалось предположение, что существует своего рода «конкуренция» между современным договорным правом и классическим, причем конечный результат рас-

сматривается в терминах игры с нулевой суммой. Альтернативой является восприятие этого феномена не как «конкурентной арены», а как «кооперативной» (с беспроигрышным результатом). Если проводить аналогию с архитектурой, то это означает мирную реконструкцию, где фундамент сохраняется, а остальное можно перестроить таким образом, чтобы вся конструкция была прочной и служила десятилетиями. Некоторые институты традиционного договорного права в совокупности с их традиционными функциями создают элементы, способные сделать всю конструкцию стабильной и невосприимчивой к непредвиденным и нетипичным ситуациям. В статье подробно рассматриваются три механизма, предусмотренные положениями Гражданского кодекса Польши: толкование (ст. 65), дополнение (ст. 56) и установление обязательств в соответствии с надлежащим исполнением (ст. 354), — которые основаны на традиционных договорных критериях, а именно на доверии и разумных ожиданиях. Перспектива польского права представлена со ссылками на китайское право и культуру, поскольку это помогает показать, что определенные традиционные критерии признаются и имеют значение в различных правовых культурах. Эти традиционные критерии контекстуального характера определяют смысл и содержание договоров практически в каждом правовом порядке и в модельных правилах. Их можно рассматривать как элементы, укрепляющие и стабилизирующие всю конструкцию договорного права. Автор ставит вопрос о том, необходимо ли в настоящее время серьезное хирургическое вмешательство в рамках договорного права, или достаточно деликатной «подтяжки лица». Этот вопрос касается главным образом доверия как мягкого, но важного договорного инструмента на каждом этапе заключения контракта. В статье представлен подход, согласно которому доверие, выступая в качестве односторонне понимаемого функционального инструмента, может примирить мир традиционного договорного права с современным. Другими словами, доверие признается жизненно важным элементом, соединяющим не только различные правовые культуры, но и традиционное договорное право с современным.

Ключевые слова: доверие, разумные ожидания, лояльность, честность, договорное право, общие оговорки.

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