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The Impact of the Comparative Method on Lithuanian Private Law*

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Abstract: Lithuania, one of the three Baltic states, is among the countries in Europe that are currently facing the challenge of implementing a newly codified private law. Lithuania was the first former Soviet Republic to gain its independence in 1990. Ten years later, the Republic of Lithuania adopted a new civil code. It entered into force in July 2001 and is currently one of the most recent examples of an entirely new private law codification in Europe. This article retraces the role of the comparative legal method in the procedure of drafting the new codification. It further discusses the role of the comparative method when it comes to applying the new Code, focusing on the case law of the Supreme Court of Lithuania. The development in Lithuania shows, on the one hand, the benefits that can be gained when lawmakers use the comparative method in the process of preparing new codifications. On the other hand, the situation in Lithuania illustrates the challenges courts and judges face when it comes to using this method in applying the newly introduced codes and statutes.

Résumé: La Lituanie, un des trois pays baltes, est parmi les pays d'Europe centrale et d'Europe de l'Est faisant actuellement face à la tâche de mettre en œuvre de nouvelles codifications de droit privé. En 1990, la Lituanie était la première des anciennes républiques soviétiques à regagner son indépendance. Dix ans plus tard, la République de Lituanie a adopté un nouveau code civil. Il est entré en vigueur le 1er juillet 2001 et compte aujourd'hui parmi les plus récents exemples d'une toute nouvelle codification de droit privé en Europe. La contribution suivante retrace le rôle de la méthode comparative lors de la préparation du Code civil lituanien. Ensuite, elle analyse le rôle du droit comparé dans la mise en pratique de ce nouveau Code, en mettant l'accent sur la jurisprudence de la Cour Suprême de Lituanie. La situation en Lituanie illustre, d'une part, les bénéfices qui peuvent être tirés de l'emploi de la méthode comparative par le législateur; elle montre, d'autre part, les défis que

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présente l'emploi de cette méthode pour les tribunaux quand il s'agit de mettre en œuvre le nouveau Code civil.

Zusammenfassung: Litauen, einer der drei baltischen Staaten, zählt zu denjenigen mittel- und osteuropäischen Ländern, die gegenwärtig vor der Herausforderung stehen, ein neu kodifiziertes Privatrecht in die Praxis umzusetzen. Litauen erlangte im Jahre 1990 als erste frühere Sowjetrepublik die staatliche Unabhängigkeit. Zehn Jahre später wurde ein neues Zivilgesetzbuch verabschiedet. Es trat im Juli 2001 in Kraft und gehört heute zu den jüngsten komplett neugefassten Zivilrechtskodifikationen Europas. Der folgende Beitrag zeichnet die Rolle nach, welche die rechtsvergleichende Methode bei der Vorbereitung der neuen Kodifikation spielte; des Weiteren analysiert er die Bedeutung, welche die Rechtsvergleichung bei der Umsetzung der neuen Kodifikation spielt, insbes. in der Rechtsprechung des höchsten litauischen Zivilgerichts. Die Situation Litauens macht einerseits die große Bedeutung deutlich, welche der Rechtsvergleichung bei der Gesetzgebung heute zukommen kann. Andererseits zeigt sie, welche Herausforderungen mit der Anwendung dieser Methode für die Gerichte verbunden sind, wenn es gilt, die neue Gesetzgebung in die Praxis umzusetzen.

1. Introduction

Over the last decades, many countries in Central and Eastern Europe were faced with the challenge of transforming their economy from a centrally planned economy to a system based on free market relations and private ownership rights. These changes required fundamental legal reforms. The following contribution analyses the situation of Lithuania, one of the three Baltic states that gained independence during the 1990s. Lithuania was the first former Soviet Republic to become independent in 1990. After ten years of work, the Civil Code of the Republic of Lithuania (CCRL) was adopted on 18 July 2000 and entered into force on 1 July 2001.[1] It is one of the most recent examples of an entirely new private law codification in Europe. Since 2004, Lithuania has been a Member State of the European Union.

This article discusses the role of the comparative legal method in Lithuanian private law in the process of drafting the new codification and in the subsequent court practice. The development in Lithuania shows, on the one hand, the difficulties that arise, and the benefits that can be gained, when lawmakers use the comparative method in the process of preparing new codifications. On the other hand, the situation in Lithuania illustrates the challenges courts and judges face when it comes to using this method in applying the newly introduced codes and statutes.

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1 The Civil Code of the Republic of Lithuania (CCRL), Official Gazette 2000, No. 74-2262. An English translation is available at <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404614&p_query=&p_tr2=2>.

2. A Short Overview of the History of Lithuania

In order to understand the legal context of Lithuania, it is helpful to first have a short look at the key events of the country's history. The beginning of Lithuanian statehood lies in the 13th century when the Grand Duchy of Lithuania was established.[2] In the 15th century, it became the largest state in Europe.[3] In 1569, the Grand Duchy of Lithuania signed with the Kingdom of Poland the Union of Lublin under which the Polish-Lithuanian Commonwealth was created. In this commonwealth, both countries maintained their political distinctiveness and had separate governments and laws. In order to integrate Lithuania and Poland more closely, the Constitution of 3 May 1791 was adopted. Since then, a unitary state under one monarch and one parliament was created, but soon after, in 1793 and 1795, it was divided between the Russian Empire, the Kingdom of Prussia, and the Austro-Hungarian Empire. The Grand Duchy of Lithuania as one of the two constituent parts of the Polish-Lithuanian Commonwealth fell under the rule of the Russian Empire for more than one century. On 16 February 1918, the independence of Lithuania was declared. In 1919, the Vilnius region was occupied by Poland and Lithuania's capital was moved to Kaunas until 1939. The Republic of Lithuania remained independent until World War II when it was occupied by the Soviet Union in 1940, followed by a short occupation (1941-1944) by Nazi Germany. In 1944, the Soviet Union re-established the annexation of Lithuania, which lasted for nearly 50 years. On 11 March 1990, Lithuania became the first among the Soviet Socialist Republics to declare its independence.

Thus, the evolution of the statehood of Lithuania can be divided into five periods: (1) the period of the Grand Duchy of Lithuania (from the 13th century until 1795), (2) the first period of occupation (1795-1918), (3) the first period of independence (1918-1940),[4] (4) the Soviet period (1940-1990),[5] (5) the second period of independence (from 1990 onwards).

3. The Influence of the Comparative Method on Lithuanian Law from a Historical Perspective

In Lithuanian law, the use of the comparative legal method has a long tradition going back to the early periods of its history as an independent state. During the second period of independence (i.e., from 1990 onwards), when the CCRL was

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2 V. NEKROŠIUS (ed.), *Civilinė teisė*, Justitia, Vilnius 2009, p. 72.

3 R. BIDELEUX & I. JEFFRIES, *A History of Eastern Europe: Crisis and Change*, Routledge, London 1998, p. 122.

4 Although Lithuania existed as an independent country before, in the legal doctrine the period from 1918 until 1940 is regarded as the first era of Lithuanian independence as a modern country applying the rule of law.

5 With the exception of the years 1941-1944 when Lithuania was occupied by Nazi Germany.

under preparation, previous attempts to codify private law and the experience of applying foreign legal orders during different historical eras of Lithuanian statehood strongly influenced the drafters of the CCRL and other laws who used the comparative legal method as a main tool to codify and modernize national private law.

3.1. The Use of the Comparative Method from the Early Years of Lithuanian Statehood up to the Year 1990

In Lithuania, the first successful attempt to codify private law on the basis of comparison was achieved as early as in the 16th century when the three Statutes of the Grand Duchy of Lithuania were passed.[6] The Statutes were mainly influenced by Roman law and had, for their part, an impact on the law of foreign countries, in particular on Russian and Polish laws.[7] When the Polish-Lithuanian Commonwealth was divided up in the end of the 18th century, the private law of the Russian Empire started to apply gradually in the largest part of the former territory of Lithuania. During the first period of Lithuanian independence (1918-1940), Russian civil laws, of which some were based on the civil codes of Western Europe, continued to be applied. In 1940, when Lithuania was again occupied and annexed by the Soviet Union, the focus laid exclusively on Soviet law, excluding any recourse to comparative law.

The following sub-chapters examine the evolution of the codification of private law and the use of the comparative methodology in Lithuania until the period of preparation of the new Civil Code.

3.1.1. Lithuanian Private Law before 1918

Until the 15th century, Lithuanian private law was based mainly on customs. Two customary law systems - Lithuanian and Slavic - existed in the territory of the country.[8] The first written effort to systemize custom laws dates back to 1468 when the Laws of King Casimir were adopted. A more extensive codification of law was carried out in Lithuania in the 16th century. During that time, Statutes of 1519, 1566, and 1588 were adopted and they were regarded as outstanding monuments of legal thought in Europe.[9]

Since many lawyers from Western Europe were working in the Grand Duchy of Lithuania at that time, the three Statutes were much influenced by Roman law. Furthermore, a very popular theory was widespread among

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6 See further M.A. GLENDON *et al.*, *Vakarų teisės tradicijos*, Pradai, Vilnius 1993, pp. 33-39.

7 M. MAKSIMAITIS, 'Istorinės LDK teisės aidas modernioje Lietuvos teisėje', 19(3). *Jurisprudencija* 2012, p. 848.

8 V. ANDRIULIS *et al.*, *Lietuvos teisės istorija*, Justitia, Vilnius 2002, p. 47.

9 J. VASILIAUSKAS, 'Civilistikos raida Vilniaus universitete ir jos įtaka įstatymams rengti', 26. *Teisė* 1992, p. 113.

Lithuanian nobility, according to which they were of Roman descent. Consequently, Roman law was not considered as foreign law but rather the law of the ancestors.[10] Some legal scholars even encouraged the Lithuanian courts to apply Roman law, which was considered to be an ideal law.[11] Besides Roman law, the Statutes also included provisions taken from Russian or Polish law and from the laws of Magdeburg.[12]

The latest Statute, Third Statute, adopted in 1588, consisted of 14 chapters. Six of them (chapters five to ten) were related to civil law. More than 100 articles of the Statute contained provisions on property law, family law, and the law of succession. It also contained some general provisions on the law of obligations, for example, the formal requirements of contracts, proof of obligations, and so forth and dealt with specific types of contracts, such as the contracts of sale, donation, lease, pledge, and others. This Third Statute was in force for more than two and a half centuries. It continued to be applied even when the Commonwealth of the Grand Duchy of Lithuania and the Kingdom of Poland were divided up in the 1790s. The provisions of the Third Statute that were related to the governance of the state and other aspects of public life were eventually abolished, but in terms of private law this Statute was used until 1840.[13] Only then was the law of the Russian tsar implemented in Lithuania. It was codified in 16 volumes, known as the *Svod Zakonov*. The provisions on private law were to be found in the tenth volume (in Part I). At that time, civil legislation in Russia was drafted on the model of the civil codes of the Western European countries.[14] However, the Third Statute also had an impact on the private law of the Russian Empire.[15]

The law of the Russian Empire was not the only one that had been accepted in the territory of Lithuania during the first period of occupation (1795-1918). In the territory named *Užnemunė*, located on the left side of the river *Nemunas*, the Napoleonic Civil Code of 1804 was applied.[16] Meanwhile, local civil laws were used in the region of *Palanga*, situated on the shore of the

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10 V. ANDRIULIS *et al.* (n. 8), p. 240.

11 *Ibid.*

12 V. MIKELĖNAS, 'Naujasis Lietuvos civilinis kodeksas šiuolaikinės globalizacijos kontekste', in V. Mizaras (ed.), *Šiuolaikinės civilinės teisės raidos tendencijos ir perspektyvos*, Vilnius, Justitia 2007, p. 41.

13 M. MAKSIMAITIS (n. 7), p. 846.

14 F.J.M. FELDBRUCGE (ed.), *The Emancipation of Soviet Law*, Martinus Nijhoff Publishers, Dordrecht 1992, p. 33.

15 The Third Lithuanian Statute was used for drafting the Russian law called Sobor Code of 1679, which later led to the 16 volumes of the Russian Empire law known as *Svod Zakonov*. See further M. MAKSIMAITIS (n. 7), pp. 848-849.

16 A. ŠAPOKA (ed.), *Lietuvos istorija*, Mokslas, Vilnius 1989, p. 449.

Baltic Sea, and in the *Zarasai* area in the country's northeast.[17] In the *Klaipėda* region, which later became part of Lithuania, the German Civil Code of 1900 was in force.[18]

3.1.2. Efforts to Codify Lithuanian Private Law in 1918–1940

At the beginning of the first period of independence following World War I, the idea was put forward not to create a new legal framework but rather to restore the laws of the Lithuanian Grand Duchy, in particular the Statutes of the 16th century.[19] However, this idea quickly proved to be unrealistic because of essential political, social, and economic changes that had occurred in the country. Applying the laws of the former occupants was not an option either.[20] So it was decided to prepare new laws, using foreign sources for inspiration.

The Constitution of 1918 stated that in cases not covered by the statutes in force in Lithuania, the laws that were applied in the territory of Lithuania before World War I were to be applied again, provided that they did not contradict the Constitution.[21] Thus, there was an explicit legal basis to use foreign law in the independent Lithuanian state.

During the interwar period (1918–1940), five different legal systems coexisted in the (then small) country of Lithuania: Russian, French, Baltic, German, and a mixed Russian-Polish laws. Each of them had their own characteristics, and Lithuanian private law of that time could be described as a mixture of Franco-Latin and Germanic legal concepts.[22]

In the main part of Lithuania, the law of the Russian Empire was preserved. Due to the outdated state of the Russian positive law of the time, case law became one of the main sources of private law in Russia. Lithuanian courts followed this example. Although the lower courts were not formally bound by the decisions of the Supreme Tribunal of Lithuania, its case law was often a very important landmark for solving legal disputes.[23] It is not known if Lithuanian courts used case law of other countries (in particular, that of the countries whose laws were applied in Lithuania), but this is quite unlikely because of the limited accessibility of foreign sources of law at that time. However, Lithuanian legal

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17 M. MAKSIMAITIS & S. VANSEVIČIUS, *Lietuvos valstybės ir teisės istorija*, Justitia, Vilnius 1997, p. 189.

18 V. MIKELĖNAS, 'Reform of Civil Law in Lithuania during the Period of 1990-1994', 28. *Teisė* 1994, p. 51.

19 M. MAKSIMAITIS, 'Rusijos teisės šaltiniai Lietuvoje 1918-1940 m.', 19(2). *Jurisprudencija* 2012, p. 405.

20 *Ibid.*, p. 405.

21 *Ibid.*, p. 406.

22 V. MIKELĖNAS, 'Unification and Harmonization of Law at the Turn of the Millennium: The Lithuanian Experience', 2. *Uniform Law Review* 2000, p. 245.

23 V. ANDRIULIS *et al.* (n. 8), p. 338.

scholars understood the importance of the comparative legal method since articles on foreign law topics were often published in national law journals.[24]

In other parts of Lithuania, more modern laws were applied. In the *Užnemunė* region, the French *Code Napoléon* (of 1804) and the *Code de Commerce* (of 1807) were in force. In the small regions of *Zarasai* and *Palanga*, the 1864 Collection of Civil Laws of the Baltic provinces was applied. Two more legal systems existed in the current capital of Lithuania - Vilnius - and in the *Klaipėda* region, located in Western Lithuania. In the Vilnius region, during the Polish occupation (1919-1939), Russian pre-war laws were used, but they were eventually supplemented by Polish laws. Meanwhile, in the *Klaipėda* region, which was transferred as an autonomous territory to Lithuania in 1923, the German Civil Code (Bürgerliches Gesetzbuch (BGB)) of 1900 was applied.

Despite the fact that during the first period of independence foreign law was often applied, national laws were also enacted, for example, the Law on Cooperative Companies (1919), the Law on Joint Stock Companies (1924), the Law on the Defence of Interest of Creditors against Harmful Transactions (1931), the Law on Mortgage (1936), the Law on Bills of Exchange (1938), and many others.[25] They reduced the importance of foreign laws that were used mainly to fill in the gaps in the national legislation.[26] While national and foreign laws continued to coexist, for practical purposes the need to unify private law became more and more apparent.

In 1937, the State Council formed a special commission for drafting a Lithuanian civil code, the task being to prepare a 'purely Lithuanian' code.[27] This requirement is related to the nationalistic ideology that prevailed in Lithuania under the authoritarian regime that had come to power in 1926. Although politicians tried to prevent the commission from using foreign laws while drafting a national civil code, the members of the working group decided non-officially to take the Swiss Civil Code of 1907 and the Swiss Code of Obligations of 1911 (which were both translated into Lithuanian) as models for the Lithuanian Civil

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24 For example, it could be found articles on the difficulties in codifying marriage law in Poland, the reform in the law on stocks in Italy, the reform in the laws on companies and banks in Germany, and many others. See further J. ROBINZONAS, 'Sunkenybės kodifikuoti Lenkijoje santuokos asmens teisę', 31. *Teisė* 1935; T.B. DIRMEKIS, 'Akcijų teisės reforma Italijoje', 31. *Teisė* 1935; V. FRIDŠTEINAS, 'Akcinių bendrovių ir bankų įstatymų reforma Vokietijoje', 31. *Teisė* 1935.

25 Some of those laws inspired the Parliament of the second period of independence to prepare amendments to the existing Civil Code. See further *Protocol of the 151st Sitting of the Seimas of the Republic of Lithuania,* 1998, No. 51 (151).

26 M. MAKSIMAITIS (n. 19), pp. 415-416.

27 V. MIKELĖNAS (n. 22), p. 246.

Code.[28] The civil laws of other countries were used too: the civil codes of Austria, Brazil, Italy, Latvia, France, Germany; the Polish Code of Obligations; the draft civil codes of Poland, Czechoslovakia, Russia; and the draft of a French-Italian Code of Obligations.[29] Lithuanian lawyers had clearly understood the necessity to modernize national private law on the basis of comparative research. However, due to the Soviet invasion in 1940, the commission did not manage to finish drafting a Lithuanian civil code.[30] Only the general provisions of the law of obligations and family law were completed.[31]

During the years 1918-1940, Lithuania signed more than 100 international treaties related to civil law. It also became a member of several international organizations, notably of the International Institute for the Unification of Private Law (UNIDROIT).

3.1.3. Absence of a Comparative Perspective during the Period of the Lithuanian Soviet Socialist Republic (1940-1990)

After the Soviet invasion in 1940, all legal systems that existed in Lithuania during its first period of independence were replaced by Soviet laws and the USSR Civil Code of 1922 was applied in Lithuania.[32] It was valid in the Lithuanian Soviet Socialist Republic from 1940 until 1964 (with the exception of the years 1941-1945).

The Civil Code of the Lithuanian Soviet Socialist Republic was adopted in 1964 and entered into force in 1965. It was based on the USSR Fundamental Principles of Civil Legislation of 1961.[33] The Principles established compulsory rules on how each Republic of the Soviet Union had to regulate the civil relations of its citizen. Due to those Principles, the civil codes of all the Union Republics were very similar, sometimes even identical.[34] The Lithuanian version of the civil code consisted of eight chapters and 610 articles. It dealt with general provisions of civil law, property law, the law of obligations, copyright law, law of patents, the law of succession, and rules on the conflict of laws. The latter provided the only opportunity to apply foreign legal orders in the context of the Soviet legal tradition. However, foreign laws were not to be applied if they contradicted the

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28 See further V. MIKELĖNAS, 'Privatinės teisės harmonizavimas ir unifikavimas: lietuviškas variantas', *Lietuvos teisės tradicijos*, Justitia, Vilnius 1997, p. 166.

29 V. MIKELĖNAS, 'Naujų kodeksų privatinės teisės srityje svarstymo, priėmimo ir įgyvendinimo problemos', 2. *Teisės problemos* 2000, p. 76.

30 It is interesting to mention that Latvia, a neighbouring country having a historical background similar to Lithuania, finished drafting its Civil Code before the occupation of the Soviet Union. The Civil Code of Latvia was adopted in 1937.

31 M. MAKSIMAITIS (n. 19), p. 413.

32 M. MAKSIMAITIS & S. VANSEVIČIUS (n. 17), p. 267.

33 J. ŽERUOLIS (ed.), *Tarybinė civilinė teisė*, Mintis, Vilnius 1975, pp. 34-35.

34 V. MIKELĖNAS (n. 18), p. 52.

foundations of the Soviet system. Since the laws of Western European countries were *a priori* ideologically contrary to the Soviet legal system, considering foreign laws remained rather theoretical.

During the Soviet period, general principles of law, customs, and case law were not recognized as sources of law. Courts were considered just as formal appliers of laws passed by the state organs. It was impossible to imagine that courts could take into consideration statutes or case law of other countries (in particular, Western European or capitalist countries, as they were called then). Theoretically, it was possible to follow the case law of other Soviet Republics since many laws in the Member States of the Soviet Union were very similar. However, in practice this opportunity was never realized.

For 50 years, the Lithuanian legal community suffered from complete isolation resulting in a very narrow perception of law. Law school curricula did not comprise courses on comparative law or private international law. Lawyers consequently had no knowledge of foreign or comparative law or of the international harmonization of private law.[35] They could hardly imagine that a national legal system may benefit from foreign laws and foreign precedents. Law was understood as purely national, expressed in detailed acts. No clear distinction between private and public laws was made, and the principle that 'everything which is not allowed is forbidden' was applied even with respect to civil relations.

3.2. The Use of the Comparative Method during the Preparation of the Lithuanian Civil Code of 2000

With the (re-)establishment of the independence of Lithuania in 1990, a new era in the country's statehood started. For nearly 50 years, Lithuanian private law had been based on the socialist ideology that abolished private ownership and did not recognize individual economic freedom and business initiative. Such regulation of property relations was unacceptable in an independent Lithuania, and it was necessary to start creating a new system of private law. The Parliament of Lithuania made the decision not to restore the uncodified private law of the pre-war period but rather to prepare a new civil code. The process of drafting it was complicated: several working groups were formed, and there were many discussions concerning which areas of private law a new code should cover (in particular, in terms of commercial law). However, the drafters of a new civil code clearly stated that they had no intention to prepare a 'pure Lithuanian' civil code. On the contrary, the CCRL of 2000 was drafted under the influence of several foreign legal orders, international treaties, and soft law instruments and can thus be described as a true product of comparative research.

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35 V. MIKELĖNAS (n. 22), p. 246.

3.2.1. *Drafting Circumstances and Drafters of the Civil Code*

Transition from Soviet law to a Western justice system in 1990 was a hard task for the Lithuanian Parliament, the *Seimas*. For a country as small as Lithuania, it was impossible to create an absolutely new legal framework in a short time. It was decided to extend the validity of Soviet laws with the most necessary amendments for a transition period, provided that they did not conflict with the new Lithuanian Constitution. The Civil Code of 1964 thus remained in force until it was replaced by the new Civil Code on 1 July 2001. However, in order to adapt the civil law to the new political and economic conditions, changes in the Civil Code were made just after the declaration of independence in 1990 and again, and more substantially, in 1994.[36] When the 1994 revision was discussed in Parliament, some politicians proposed to directly apply a modern foreign civil code until the national civil code was prepared.[37] It was understood that drafting a national civil code could take many years, so it was suggested not to wait, using the experience of Western countries instead, just as it had been done before in the *Užnemunė* region where the French Civil Code of 1804 had been applied.[38] Another idea was to restore the laws of the interwar period[39] following the example of Latvia, a neighbouring country of Lithuania, which in 1992-1993 re-enacted its Civil Code of 1937.[40] All these proposals were rejected by the Parliament. It was thought that an independent Lithuania must have its own laws; the restoration of any previous system was considered impossible due to the legal particularities of the interwar period.

The work on drafting a new civil code started on 18 July 1990, when the Presidium of the Supreme Council formed the first working group,[41] followed by a second working group in November 1991, chaired by Valentinas Mikelėnas, associate professor and chair at the Department of Civil and Commercial Law of

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36 V. STASKONIS (ed.), *Civilinė teisė*, Vijusta, Vilnius 1997, p. 36.

37 *Protocol of the 6th Sitting of the Seimas of the Republic of Lithuania,* 1994, No. 6.

38 *Ibid.*

39 *Ibid.*

40 K. TORGANS, 'European Initiatives (PECL, DCFR) and Modernisation of Latvian Civil Law', XIV. *Juridica International* 2008, p. 137.

41 The group was chaired by professor Pranciškus Vitkevičius. Further members were Alfonsas Vileita and Vladas Staskonis (associate professors at the Faculty of Law of Vilnius University), Vytautas Pakalniškis and Pranas Skaisgiris (representatives of the Legal Department of the Supreme Council), Algimantas Dziegoraitis and Mykolas Čapskis (attorneys at law). This group was given the task to prepare a civil code in less than two years, that is, until 1 January 1992. However, only a few meetings were held, and no decisions were made towards the content of a new civil code (for example, the members could not agree whether one - civil - code or two - civil and commercial - codes should be prepared). See V. MIKELĖNAS, 'Europos ir tarptautinių teisės normų ir standartų vaidmuo kuriant naująjį Lietuvos Respublikos civilinį kodeksą ir aiškinant jo normas: kodekso rengimo grupės vizija', <www2.lat.lt/lat_web_test/3_nutartys/senos/nutartis.aspx?id=34065>.

the Law Faculty of Vilnius University (and Dean of this faculty from 1992 on).[42] The members of this working group decided first to prepare necessary amendments to the existing Civil Code and only then to start drafting a new code.[43] The first task was finished in 1992 when the law on the amendment and supplement to the Civil Code of Lithuania was presented. However, it took more than two years for the Parliament to adopt this law.

In March 1993, this group was replaced by a third working group for the preparation of a civil code.[44] All members of this group were professional lawyers and lecturers at the Faculty of Law of Vilnius University.[45] The average age of its members was about 40 years (some of the members being even younger than 30). However, they had all graduated in the Soviet period. As mentioned above, comparative law had not been taught at the Law Faculty of Vilnius University. The Lithuanian legal community consequently did not know much about foreign and international laws and of the opportunities to use them for the purposes of comparison and for the achievements of legal unification. Moreover, for lawyers educated in the Soviet system, adopting Western ideas and perceptions was, from an ideological standpoint, far from obvious.[46]

During the Soviet period, a great number of the best educated lawyers had left Lithuania and they did not come back after the restoration of independence in 1990. It might have been possible to ask them or other lawyers of Lithuanian origin who were educated abroad to participate in the activities of the working group, but such an idea was not realized. On the other hand, the members of the working group tried to acquire higher qualification and new skills during their work through professional internships at various universities, institutes, and research centres abroad. As the head of the group remembers, the idea for the structure of the CCRL was born during an internship at the University of Lund in

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42 Four members of the previous group continued working in the second group: Pranciškus Vitkevičius, Pranas Skaisgiris, Alfonsas Vileita, and Vladas Staskonis; two new members were appointed: Stasys Gudynas (judge of the Supreme Court) and Stasys Vėlyvis (a representative of the Department of Privatization of the Government).

43 V. MIKELĖNAS (n. 18), pp. 52-53.

44 This group was formed not by an act of the Parliament but in accordance with the decision of the Minister of Justice. This decision was passed on 27 Mar. 1993. Four members of the previous group left (Pranciškus Vitkevičius, Stasys Vėlyvis, Pranas Skaisgiris, and Stasys Gudynas), and four new members joined the group instead: Gintautas Bartkus (lawyer in a law firm), Algirdas Taminskas (Seimas Ombudsman), Viktoras Tiažkijus (deputy advisor to the President and Vice-Dean of the Faculty of Law of Vilnius University), and Rimvydas Kūgis (representative of the State Property Fund), all of them also lecturing at university; see V. MIKELĖNAS, 'Susipažinkime: naujojo Lietuvos Respublikos civilinio kodekso projektas', 4(4). *Justitia* 1996, p. 16.

45 V. MIKELĖNAS, 'The Influence of Instruments of Harmonization of Private Law upon the Reform of Civil Law in Lithuania', XIV. *Juridica International* 2008, p. 145.

46 V. MIKELĖNAS (n. 12), p. 42.

Sweden in 1993.[47] In order to provide further foreign input, the draft version of the new Civil Code was submitted to the expertise of professors and other professionals of law from foreign countries, in particular to J. Bonell (Italy), P. Schlechtriem (Germany), F. Feldbrugge (the Netherlands), J. van Erp (the Netherlands), D. Philipe (Belgium), and M. Prinz (Germany).[48]

The working conditions of the group were difficult. The period fixed for preparing the new Civil Code was short, and since all members of the working group had their main jobs, many of the activities of the group took place in the evenings, during weekends, and on public holidays.[49] The members complained that instead of working on their principal task, they had to dedicate their time to many auxiliary tasks: searching for the sources of information, making copies, translating from foreign languages to Lithuanian, and so on.[50] As there was no legal doctrine on modern private law in Lithuanian language, it soon proved necessary to use foreign sources instead. Their accessibility was one of the serious problems of that time. Another problem was that the members of the working group could face difficulties in understanding the content of foreign laws and foreign legal doctrine. As mentioned before, lawyers in Lithuania were not trained in working with foreign jurisdictions. Moreover, they lacked sufficient knowledge of foreign languages since the Russian language had been predominant during the Soviet times and much less attention was paid to learning other languages. However, the working group had considerable freedom in drafting the new Civil Code in terms of its structure and content. No constraints were made by the Parliament, the *Seimas*, or other institutions that all put great confidence in the members of the working group.[51]

Despite all the difficulties, the working group managed to prepare the first draft of the Civil Code in 1996, that is, after three years of intensive work. It consisted of six books: Book I - 'General Provisions', Book II - 'Persons', Book III - 'Property Law', Book IV - 'Law of Succession', Book V - 'Law of Obligations', and Book VI - 'Intellectual Property Law'.[52] The drafters suggested including family law and commercial law in the new Civil Code, but the *Seimas*

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47 V. MIKELĖNAS (n. 41).

48 *Explanatory Note on the Civil Code of the Republic of Lithuania,* 1999, No. P7-1877.

49 D. SAULIŪNAS, 'Lietuva turi naują Civilinį kodeksą', 4-5. *Justitia* 2000, p. 3.

50 V. MIKELĖNAS (n. 41).

51 In fact, the members of the Parliament very often asked the opinion of the working group on laws in the field of civil law. If the particular opinion was negative, the drafts often did not become laws. See *Protocol of the 42nd Sitting of the Seimas of the Republic of Lithuania*, 1996, No. 314; *Protocol of the 3rd Sitting of the Seimas of the Republic of Lithuania,* 1996, No. 338; *Protocol of the 11th Sitting of the Seimas of the Republic of Lithuania,* 1996, No. 342; *Protocol of the 30th Sitting of the Seimas of the Republic of Lithuania*, 1999, No. 210.

52 The members of the group were responsible for different parts of the CCRL. Book I was prepared by the Chair, V. Mikelėnas; Book II by V. Mikelėnas (the first part), V. Tiažkijus and G. Bartkus

decided that three different codes were to be prepared: a civil code, a commercial code, and a code on family law[53] (consequently, two more working groups were formed[54]). The *Seimas* positively assessed the draft Civil Code but decided to extend the work of the commission. Since the Civil Code was perceived as the most important law after the Constitution,[55] it was agreed that there was a necessity to prepare a code that could be effectively applied for many years.

The drafters eventually abandoned the idea of preparing separate commercial and family codes and incorporated the provisions on family and commercial law into the new version of the draft CCRL. The final version of the new Civil Code was presented to the Parliament and the government in 1999. It also consisted of six books but had a structure that differed from the previous draft: Book I - 'General Provisions', Book II - 'Persons', Book III - 'Family Law', Book IV - 'Property Law', Book V - 'Law of Succession', Book VI - 'Law of Obligations'. The provisions on intellectual property were not included in the CCRL but left for separate statutes on the different objects of intellectual property.[56]

3.2.2. *Foreign Jurisdictions Taken into Account for Comparison*

Since the drafters of the Civil Code had much freedom when preparing the new Code, they were also free to decide whether, and to what extent, they wanted to use foreign jurisdictions for the purpose of comparison. The drafters decided that not only the experience of other countries in codifying private law was to be taken into account but also some provisions of foreign laws could be used as models for

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(the second part); Book III by A. Taminskas; Book IV by A. Vileita; Book V by V. Mikelėnas (the first part) and V. Staskonis (the second part); Book VI by R. Kūgis.

53 At the beginning, it was considered to include transport law in the Civil Code. It was eventually decided to prepare separate codes for different areas of transport.

54 V. MIKELĖNAS (n. 44), p. 16.

55 D. SAULIŪNAS (n. 49), p. 2.

56 Before the CCRL entered into force in 2001, some other important laws were passed, for example, Law on Companies of 1990, Law on Partnerships of 1990, Law on the Register of Companies of 1990, Law on Agricultural Companies of 1991, Law on the Initial Privatization of State Property of 1991 (replaced by Law on the Privatization of State-Owned and Municipal Property of 1997), Law on Mortgage of 1992 (revised version in 1997), Law on Competition of 1992, Law on Cooperative Companies of 1993, Law on Consumer Protection of 1994, Law on Joint Stock Companies of 1994, Law on State and Municipal Enterprises of 1994, Law on the Pledge of Movable Property of 1997, Law on the Management, Use and Disposal of State and Municipal Property of 1998. Such a variety of laws lead to the situation that separate laws contradicted each other and the Civil Code of 1964; see V. MIKELĖNAS (n. 18), p. 51. This happened because different state institutions were responsible for the preparation of new laws. Since a new civil code was still under preparation, it was necessary to adopt them as soon as possible for the practical needs of business. Later, some provisions of the above-mentioned laws were incorporated in the CCRL or amendments and supplements were made in order to remove contradictions.

the preparation of the Code. However, the members of the working group agreed not to use any particular foreign civil code as a model for the CCRL.[57] Some foreign legal experts suggested not to waste time and to select a well-proven civil code of another jurisdiction, to translate it, and to put it into force in Lithuania.[58] The idea to select one civil code (e.g., the French *Code civil* or the Civil Code and the Code of Obligations of Switzerland) as a model was also proposed by members of the Parliament.[59] However, as the head of the working group remembered, its members were too ambitious to follow this advice and decided instead to benefit as much as possible from international experiences and draft a modern civil code, suitable for the 21st century.

Which foreign jurisdictions were taken into consideration when drafting the new Code? In the first article that analyzed the reform of the civil law in Lithuania, published in 1994, it was highlighted that the attention of the working group was focused mainly on the civil codes of Italy, the Netherlands and the Canadian province of Québec.[60] In 1996, when V. Mikelėnas presented the first version of the Civil Code to the legal community, he explained that it was drafted under the influence of the civil codes of France, Germany, Italy, Switzerland, the Netherlands, Latvia, Japan and Québec, as well as case law of these countries.[61]

When the second (final) draft of the CCRL was finished, V. Mikelėnas mentioned the laws of the Netherlands, Québec, and Germany as the main sources of inspiration for the new Code.[62] In an article published when the CCRL was already adopted by the Parliament, he mentions the impact of foreign legal orders on different areas of private law and points out the importance of German, Italian, Dutch, French, Swiss, Swedish, and Québec laws for the drafting of the CCRL.[63]

Information about the foreign legal orders that were used when drafting the CCRL can also be found in the *travaux préparatoires*. The explanatory note for the first version of the new Civil Code in 1996 mentions that the experiences of France, Germany, Italy, the Netherlands, Latvia, Switzerland, and Canada in codifying private law had been considered.[64] When the different books of the CCRL were presented in the *Seimas*, it was mentioned that Book V - 'Law of Succession' had been prepared on the basis of the civil codes of the Netherlands

57 V. MIKELĖNAS (n. 45), p. 144.

58 V. MIKELĖNAS (n. 41).

59 *Protocol of the 67th Sitting of the Seimas of the Republic of Lithuania,* 1994, No. 113.

60 V. MIKELĖNAS (n. 18), p. 54.

61 V. MIKELĖNAS (n. 44), p. 16.

62 D. SAULIŪNAS (n. 49), p. 2.

63 V. MIKELĖNAS (n. 22), pp. 249-251. In the last paper, it is mentioned that the civil codes of the Netherlands and Québec, as the newest examples of private law codification, had a major input on the national Civil Code, V. MIKELĖNAS (n. 45), p. 144.

64 *Explanatory Note on the Civil Code of the Republic of Lithuania,* 1996, No. 2648.

and Germany.[65] During the sitting for Book II - 'Persons' and Book III - 'Family Law', the Minister of Justice who presented the drafts to the members of the *Seimas* emphasized that the Civil Code of the Netherlands had been taken as the main model for preparing the CCRL, as well as some provisions of the Civil Code of Québec.[66]

The importance of comparative law is also mentioned in the official commentary of the CCRL. Almost all members of the working group participated in preparing this commentary.[67] The preface of the commentary sets out that the main sources of inspiration for the CCRL were the civil codes of the Netherlands (1992) and Québec (1994) and that the civil codes of Italy (1942), France (1804), Switzerland (1907), Germany (1896), the Russian Federation (1994), and the Swiss Code of Obligations (1911) were also used when drafting the new Code.[68]

Interestingly, the commentary is the only source that confirms the influence of the Civil Code of the Russian Federation.[69] This could be explained by historical and political circumstances. The Russian Federation is officially recognized as the successor state of the former Soviet Union, which had occupied Lithuania for 50 years. It was impossible to imagine that after a hard and long process of restoring independence, Lithuania could find the inspiration for the drafting of its civil code in the law of the former occupant. Therefore, during the whole period when the CCRL was drafted, the working group never consciously pointed out an influence of the Russian Civil Code. However, it seems likely that the Russian Civil Code was even used as one of the main models for the CCRL. As mentioned above, the members of the working group had received their education in the Soviet period, so for them it was easier to understand the private law of the Russian Federation than that of Western countries.[70] Moreover, there was no language problem as all the members of the working group had a good knowledge of the Russian language. Finally, all the information about the Russian Civil Code, including legal doctrine and case law, was much more easily accessible to the drafters than any legal sources of the Western jurisdictions. The influence of the Russian Civil Code is also disclosed by other Lithuanian legal scholars who,

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65 *Protocol of the 9th (444) Sitting of the Seimas of the Republic of Lithuania,* 2000, No. 9(444).

66 *Protocol of the 61st (424) Sitting of the Seimas of the Republic of Lithuania,* 2000, No. 61(424).

67 That is, A. TAMINSKAS, V. TIAŽKIJUS, A. VILEITA, V. STASKONIS, G. BARTKUS, and V. MIKELĖNAS, who headed this group of authors.

68 V. MIKELĖNAS (ed.), *Lietuvos Respublikos civilinio kodekso komentaras. Pirmoji knyga. Bendrosios nuostatos*, Justitia, Vilnius 2001, pp. 11-12.

69 Гражданский кодекс Российской Федерации (the Civil Code of the Russian Federation). Available at <http://www.interlaw.ru/law/docs/10064072/toc> and <http://www.wipo.int/wipolex/en/details.jsp?id=6775 > (in English).

70 Despite the fact that the Russian Civil Code is not a product of the soviet ideology, it was influenced by the former legal thought.

while analysing particular problems of private law, stress the huge impact of Russian legal doctrine on Lithuanian law.[71]

All things considered, it could be concluded that the main emphasis by the drafters was given to the most recent civil codes, that is, the Civil Code of the Netherlands (of 1992) and the Civil Code of Québec (of 1994). Also, the civil codes of Italy, Switzerland, France, Germany, Latvia, Japan; the Code of Obligations of Switzerland and Swedish civil laws; and last but not least the Civil Code of the Russian Federation influenced the drafting of the CCRL in one or another respect.

3.2.3. Tracing the Influence of Foreign Law on Particular Books of the New Civil Code

While the influence of foreign law on the CCRL is frequently mentioned, the sources are not entirely consistent when it comes to explaining the exact input of foreign law on the different provisions of the new Civil Code. After the declaration of statehood, it was very important for the Lithuanian people to stay fully independent from other countries. Therefore, in order not to cause disappointment, the working group preferred not to highlight the connection between the CCRL and foreign legal orders or did so in a very abstract way, although the importance of the comparative legal method was more than obvious for the members of that group. Some scholars went as far as criticizing that the CCRL was not a national law but rather a compilation of foreign and international laws.[72]

Although precise information would undoubtedly be very important and helpful for courts and legal practitioners faced with the task of applying and interpreting the Code, no such detailed information has been given so far. It might well be considered mentioning in further editions of the commentary to the Civil Code if a particular provision was based on foreign or international laws and, if so, on which of them. In this sub-chapter, we will try to retrace the particular impact of some of the aforementioned jurisdictions on certain books of the CCRL.

For drawing up Book I on 'General Provisions' of the CCRL, the Russian Civil Code was used as a basis. Although the structure of Book I differs from one code to the other (e.g., the sub-chapters on objects of civil rights, exercise and protection of civil rights are to be found in the beginning of the Russian Civil

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71 See, for example, V. PAKALNIŠKIS, 'Nuosavybės teisės doktrina ir Lietuvos Respublikos civilinis kodeksas', 28(20). *Jurisprudencija* 2002, p. 72; A. JAKUTYTĖ-SUNGAILIENĖ, 'Turto samprata Lietuvos civilinėje teisėje', 3(3). *Socialinių mokslų studijos* 2009, p. 218. G. LISAUSKAS, 'Finansinės nuomos samprata pagal Lietuvos Respublikos civilinį kodeksą', 34(26). *Jurisprudencija* 2002, pp. 16-17; P.A. MIŠKINIS, 'Savigyna Lietuvos civilinėje teisėje', 28(20). *Jurisprudencija* 2002, p. 22.

72 See R. BAŠKEVIČIENĖ, 'Ar turime savo kodeksus?' Available at <http://www.delfi.lt/news/daily/law/ar-turime-savo-kodeksus.d?id=5565911>.

Code, while in the CCRL those parts are at the end of Book I), many provisions on transactions, voidability of transactions, objects of civil rights, time limits, and prescription are very similar or even identical in both codes. Moreover, the principles on legal regulation of civil relationships, the sources of civil law, and the rules on analogy are similar in both codes.[73]

Book II of the CCRL on 'Persons' is divided into three parts: natural persons, legal persons, and representation (agency). Part 1 dealing with natural persons is, again, very similar to the regulation in the Russian Civil Code. The provisions on legal persons, as well as on Lithuanian company law, are, on the other hand, in general much influenced by German legal doctrine.[74] It seems that the rules on representation are based on different foreign sources. For example, the CCRL's provisions on apparent authority are very similar to those of the Dutch Civil Code.[75] Under the influence of the German *Handelsgesetzbuch*, the CCRL uses commercial procuracy as a separate kind of agency,[76] and so forth.

It is stated that the French Civil Code was used mainly in preparing Book III - 'Family Law', in particular with regard to matrimonial ownership, whereas Swedish family law was used for the preparation of a special chapter on cohabitation.[77]

Book IV - 'Property Law', in contrast, is again strongly influenced by Russian doctrine.[78] The structure of this book is almost identical to the one that can be found in the Russian Civil Code.

With respect to the 'Law of Succession', the Lithuanian legal doctrine emphasizes the influence of the German Civil Code (BGB)[79] and of the Civil Code of the Netherlands.[80] It seems however that the Russian Civil Code has also had an impact in this field.

3.2.4. *Soft Law Instruments and International Treaties Used in Preparing the Civil Code*

In contract law, the UNIDROIT Principles of International Commercial Contracts (hereinafter 'UNIDROIT Principles') played a crucial role for the drafting

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73 This does not apply to the rules on private international law (PIL) in Book I of the CCRL, which are not based on one particular jurisdiction but are inspired by international PIL instruments or the rules of several foreign jurisdictions.

74 V. MIKELĖNAS (n. 22), p. 249.

75 Compare Art. 2.133 with Art. 3:61(2) of the Dutch Civil Code.

76 V. MIZARAS, 'Agency Relationship: The Definition and Peculiarities of Procuracy', 1(63). *Justitia* 2007, p. 32.

77 V. MIKELĖNAS (n. 22), p. 249.

78 V. PAKALNIŠKIS (n. 71), p. 72.

79 D. SAULIŪNAS (n. 49), p. 3.

80 *Protocol of the 9th (444) Sitting of the Seimas of the Republic of Lithuania,* 2000, No. 9(444).

of the CCRL. For the working group, it was clear that the UNIDROIT Principles of 1994 represent some kind of 'better law' that could serve as a model for the contract law of the new millennium.[81] It was consequently decided to take as many provisions as possible of the UNIDROIT Principles and incorporate them into Part 2 - 'Contract Law' of Book VI - 'Law of Obligations' (see Arts 6.154-6.228 CCRL).[82] Some provisions were however rejected by the drafters in light of the Lithuanian legal context. This was the case of, for example, Article 1.2 of the UNIDROIT Principles (No Form Required) and Articles 3.14-3.17 of the UNIDROIT Principles (Avoidance of a Contract), which were not incorporated in the CCRL.[83]

Incorporating the rules of the UNIDROIT Principles in the CCRL has the beneficial consequence that today the contract provisions of the CCRL are, in the field of contracts, among the most modern in Europe. What is more, some issues are addressed in the new Code that have not yet been addressed in most other European codifications (such as the 'battle of forms' in Article 6.179 or apparent authority in Article 2.133, to name just two examples).

When the CCRL was drafted, the first part of the Principles of European Contract Law (PECL), published in 1995, was already available, whereas Parts II and III of the PECL were published in 1999 and 2002 and could therefore not be used by the working group. It seems however that even Part I of the PECL was used rather as a general source of inspiration than as a practical tool for drafting specific provisions of the CCRL.[84]

Other soft law instruments, in particular the Principles of European Tort Law (PETL) and the Draft Common Frame of Reference, were adopted after the CCRL came into force and could therefore not be used for its preparation.

International treaties in the field of private law were another important source of inspiration for drafting the CCRL. In this respect, the drafters chose a

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81 V. MIKELĖNAS (n. 45), p. 145.

82 V. MIKELĖNAS (ed.) (n. 68), p. 12; see, for example, on Art. 6:200(4) of the Lithuanian Civil Code, inspired by Arts 5.4 and 5.5 of the International Institute for the Unification of Private Law (UNIDROIT) Principles; E. HONDIUS, 'Obligations de résultat et obligations de moyens: The Lithuanian Experience', *Festschrift Mikelenas* 2009, pp. 139-143.

83 V. MIKELĖNAS (n. 45), pp. 146-147.

84 S. DRAZDAUSKAS, 'Bendrosios sutarčių teisės vienodinimo įtaka Lietuvos sutarčių teisei', *Doctoral Dissertation*, Vilnius 2008, p. 60, <http://www2.lat.lt/lat_web_test/3_nutartys/senos/nutartis.aspx?id=34065>. In some articles, V. Mikelėnas highlights that two important documents, that is, the UNIDROIT Principles and the Principles of European Contract Law (PECL), influenced the new Civil Code, see V. MIKELĖNAS (n. 22), p. 251; V. MIKELĖNAS (n. 41); in other publications, he analyses only the impact of the UNIDROIT Principles on the CCRL, see V. MIKELĖNAS (n. 45), p. 146; V. MIKELĖNAS, 'Unexpected Circumstances: Lithuania', in E. Hondius (ed.), *Unexpected Circumstances in European Contract Law*, Cambridge University Press, New York 2011, p. 81.

somewhat unusual procedure. It goes without saying that international treaties need to be ratified by Parliament in order to have legal effect. In Lithuania, it happened the other way round. The members of the working group regarded the process of ratifying international treaties as too time-consuming and decided to examine which provisions in international treaties particularly suited the needs of the country. They then incorporated them directly into the draft of the CCRL. Such practice was applied for the UNIDROIT Convention on Agency in the International Sale of Goods (Articles 2.169-2.175 CCRL), the UNIDROIT Ottawa Convention on International Financial Leasing (Articles 6.562-6.569), the UNIDROIT Ottawa Convention on International Factoring (Articles 6.883-6.892), and the Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests (Article 6.851).[85]

By following this procedure, the drafters made sure that the CCRL is fully in line with modern international standards. Sometimes these instruments were however incorporated without putting other rules of the Civil Code in line with them. To give just one example: as mentioned above, the UNIDROIT Convention on Agency in the International Sale of Goods was incorporated in the CCRL as a separate section (Articles 2.169-2.175 CCRL). These provisions of the CCRL are perfectly well adapted to modern standards in the law of agency. They could also have been used for the regulation of agency relations in the CCRL that do not have an international aspect (in particular, the provisions on apparent authority, ratification, the liability of *falsus procurator*, etc.). However, the rules on agency for domestic cases (Articles 2.132-2.151 CCRL) have not (or not yet) been adapted to those taken from the UNIDROIT Convention.

Another important source of influence was EU law. In 1995, an association agreement between Lithuania and the European Union was concluded, and it was expected that Lithuania would sooner or later become a full-fledged Member State of the EU. Consequently, the drafters of the CCRL decided to start incorporating the existing EU law into the new Civil Code.[86] When Lithuania became a member of the EU in 2004, further amendments of the CCRL were made.

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85 V. MIKELĖNAS (n. 41).

86 This was done, in particular, with respect to Directive 86/653/EEC on the harmonization of legislation of the Member States concerning independent commercial agents (Arts 2.152-2.168), Directive 93/13/EEC on unfair contract terms in consumer contracts (Art. 6.188), Directive 85/374/EEC concerning liability for defective products (Arts 6.292-6.300), Directive 84/450/EEC concerning civil liability for misleading advertising (Arts 6.301-6.304), Directive 85/557/EEC to protect the consumer in respect of contracts negotiated away from business premises (Arts 6.356-6.357), and Regulations 1983/83 and 1984/83 concerning distributorship (Arts 6.782-6.792).

3.2.5. *Intermediate Conclusions*

This chapter has shown that, when faced with the challenge of drafting a civil code for Lithuania, important choices had to be made. For the period during which the new legislation was drafted, several options were discussed, notably:

- copying an existing foreign civil code and putting it into force in Lithuania for a transitional period;
- restoring, for a transitional period, the laws that had been in force in Lithuania before the Soviet occupation of 1940;
- leaving the Civil Code of 1964, dating from the Soviet period, in force for a transitional period.

With respect to drafting the Civil Code, a choice had to be made between:

- taking a single foreign code as model and starting point[87] and adapting it to modern challenges and the specific needs of the Lithuanian society;
- drafting an entirely new code.

For the reasons stated above, the legislator in Lithuania preferred in each case the last of these options: the Civil Code of 1964 was thus left in force for a transitional period, while an entirely new code was drafted.

The drafters of the new Code had received their legal education in the Soviet period and were not trained in comparative law. However, since no legal doctrine on modern private law was available in Lithuanian language, the drafters of the Code soon turned to foreign sources for inspiration. When drafting the Code, an eclectic method was applied, taking inspiration from a large variety of sources comprising:

- the civil codes and statutes of the Netherlands, Germany, France, Italy, Switzerland, Latvia, Québec, Japan, and last but not least (and possibly more importantly than is mentioned in the legislative materials) Russia;
- in the field of contracts, first and foremost, the UNIDROIT Principles of International Commercial Contracts and, to a much lesser extent, the PECL (Part I);
- international private law treaties, in particular several UNIDROIT Conventions; and
- EU directives and regulations.

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87 As was planned by the working group during the first period of independence in the 1930s, see *supra* 3.1.2.

4. The Comparative Legal Method in Lithuanian Court Practice

4.1. Introduction

Given the importance of foreign sources for the drafting process of the CCRL, foreign legal materials might also serve as a source of inspiration for the judiciary when interpreting and applying the new Lithuanian Civil Code. The following chapter analyses the use of comparative law by the Lithuanian courts since the entry into force of the new code in 2001. We will first ask whether, from the perspective of Lithuanian law, it is legitimate for the courts to use the comparative method when applying domestic law.[88] Second, we will analyse if and to what extent the courts in Lithuania do indeed make use of comparative law. Last, we will address some of the practical challenges for the courts when it comes to using this method.

4.1.1. Does Lithuanian Positive Law Allow the Use of the Comparative Method?

Article 1.3(1) of the CCRL sets out that '[t]he sources of the civil law shall be the Constitution of the Republic of Lithuania, the present Code, other laws and international treaties of the Republic of Lithuania'. Article 1.9(1)-(3) of the CCRL on the 'Principles of interpretation of the Civil Code provisions' states that the provisions of the Code shall be applied, taking into account 'the structure and system of this Code', section (1); 'the wording and its general or special meaning', section (2); and 'the purposes and tasks of the Civil Code and the norm concerned', section (3). None of these provisions prevent the judge from applying the comparative method. On the contrary, given the important influence foreign sources had on the drafting of the new Code and taking into consideration that the 'structure and system' and the 'wording' of the Code were heavily influenced by foreign laws, it is very reasonable to consider foreign sources when interpreting it.

Article 1.5(4) stipulates that '[i]n interpreting and applying the laws, the court shall be guided by the principles of justice, reasonableness and good faith'. Principles of justice, reasonableness, and good faith are not linked with the law of a particular country. They can just as well be derived from comparative law when interpreting, applying, and filling the gaps in the domestic civil law.[89] The court practice in many jurisdictions confirms that it is well recognized among judges that when it comes to uncovering, detecting, or finding principles of justice, reasonableness, and good faith, judges are free to choose the methods they employ to achieve their insights, knowledge, and findings.[90]

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88 See, on this issue in general, T. KADNER GRAZIANO, 'Is it Legitimate and Beneficial for Judges to Use Comparative Law?', *ERPL* 2013, pp. 687-716.

89 For a detailed discussion, see T. KADNER GRAZIANO (n. 88).

90 For references, see T. KADNER GRAZIANO (n. 88).

Last but not least, in 2011 the Lithuanian Code of Civil Procedure was amended with a provision according to which a party that refers to a decision of an international or foreign court must submit to the court a copy of it with a certified translation into the national language, Article 111(4) of the Code of Civil Procedure. This article is part of the general provisions of the Code of Civil Procedure, and neither its wording nor the system of the Code suggests or indicates that its application is limited to cases presenting a foreign element.[91] It thus arguably confirms the assumption that the Lithuanian legislator recognizes the use of the comparative method in purely domestic cases.

4.2. The Comparative Method in Lithuanian Court Practice

The following observations are based on an analysis of the Supreme Court of Lithuania's decisions in private law cases published between October 1995 and December 2012.[92] The conclusions are based on cases without any foreign element. The analysis reveals that the courts in Lithuania have so far never referred to foreign code provisions or statutes and referred only once to foreign domestic case law. They have, on the other hand, for the purpose of comparison cited *foreign legal doctrine* and frequently used various *soft law instruments*, namely the UNIDROIT Principles on International Commercial Contracts, the PECL, the Draft Common Frame of Reference, and the Principles of European Tort Law (PETL).

4.2.1. The Use of National and of Foreign Legal Doctrine and Case Law

Lithuanian courts often do not cite any doctrine at all in their decisions. Only *twenty-one* decisions with references to legal doctrine were found in the Supreme Court's practice for the last 17 years. In *twelve* of these decisions, references were made to legal doctrine in general[93] without however citing particular sources or

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91 And being governed, in the first place, by the rules of private international law, to be found in Book I of the CCLR.

92 Decisions of Lithuanian courts are available in the court's information system LITEKO, http://liteko.teismai.lt. The module of the LITEKO system enabling online publications of the decisions of courts of higher instance was installed in 2007-2008. Most of the earlier decisions adopted since the independence of Lithuania have also been uploaded to the system. Moreover, decisions of the Supreme Court are accessible on the Court's internet site: www.lat.lt.

93 See the following decisions of the Supreme Court of Lithuania (LitSCt): *RUAB 'Erama'* v. *D.E.*, 7 Jun. 2010, No. 3K-3-257/2010; *UAB 'Panevėžio spaustuvė'* v. *R.Š. and Others*, 1 Feb. 2012, No 3K-3-19/2012; *UAB 'Baltic Agro'* v. *bailiff J.K.*, 14 Feb. 2012, No. 3K-3-41/2012; *UAB 'Jurgio valda'* v. *VĮ 'Turto bankas' and Others*, 23 Feb. 2012, No. 3K-3-53/2012; *A.Č., B.Č., S.K.* v. *M.M., Administration of Rokiškis Municipality*, 9 May 2012, No. 3K-3-214/2012; *K.P., D.A., P.B. and Others* v. *UAB 'Karolinos turas'*, 18 May 2012, No. 3K-3-231/2012; *BUAB '4 vėjai ir KO'* v. *UAB 'Swedbank lizingas'*, 19 May 2012, No. 3K-3-99/2012; *UAB 'Sareme'* v. *UAB 'Wood & Houses'*, 20 May 2012, No. 3K-3-102/2012; *Chief Prosecutor of Vilnius Region* v. *K.S., V.S.*, 8 Jun. 2012, No. 3K-3-279/2012; *D.J.* v. *R.N., A.A., R.M., UAB 'Medicinos banko lizingas'*, 5 Oct.

authors.[94] *Three* decisions quote sources of the Lithuanian legal doctrine (notably the commentary on the CCRL).[95] *Five* decisions refer to the foreign legal doctrine,[96] whereas *one* decision makes use of both Lithuanian and foreign legal doctrine (dealing with contract law and the concept of fraud).[97]

Most astonishingly, the statistical analysis reveals that in the practice of the Lithuanian Supreme Court, foreign legal doctrine is cited more frequently than national doctrine, though both are cited only rarely. In its most recent case law, there seems to be a tendency to give no citations at all and to refer to 'legal doctrine' in general instead. In most of its recent decisions, the Supreme Court gives references to its own case law. Moreover, the Supreme Court often uses in its arguments the judgments of international courts, that is, of the Court of Justice of the European Union and of the European Court of Human Rights.[98]

An analysis of the personal composition of the panels of judges reveals that the method of reasoning may also depend on the judges who are dealing with a particular case. In two of the five cases referring to foreign legal doctrine, the case was prepared for the hearings by judge V. Mikelėnas, who had been the former chair of the working group for the preparation of the Civil Code. In the other three cases, two scientists from the Law Faculty of Mykolas Romeris University in Vilnius were members of the panel of judges.

The main reason for the Supreme Court to refer to foreign legal doctrine is to show that the provisions of Lithuanian private law are well in line with foreign

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2012, No 3K-3-409/2012; *Company 'Bevaleks'* v. *UAB 'Šiaurės vilkas'*, 12 Nov. 2012, No. 3K-3-484/2012; *UAB 'Rombas'* v. *UAB 'ATEA'*, 30 Nov. 2012, No. 3K-3-526/2012.

94 These decisions deal with company law, public ownership, apparent authority, unjustified enrichment, international carriage of goods by road, tortious liability, property law, protection of the public interest, and various issues on contract law.

95 These cases deal with copyright law, defamation, and family law, *R.Č.* v. *UAB (unofficial data)*, the Supreme Court of Lithuania, 9 Sep. 2002, No 3K-3-973/2002; *M.A.M.* v. *UAB 'Sanda' and Others*, 5 Nov. 2003, No. 3K-3-938/2003; *A.Š.* v. *G.Š., B.R., V.K.*, 5 Dec. 2012, No. 3K-3-549/2012. Since Lithuanian legal scholars very often use the comparative method in their papers, the use of Lithuanian legal doctrine may also imply that the courts indirectly followed the ideas of foreign legal doctrine.

96 Dealing with contract law, trademark law, telecommunications law, and arbitration law, *Ž.B. Personal Company 'Sėkmės sistemos'* v. *AB 'Lietuvos telekomas' and UAB 'Lietuvos telekomo verslo sprendimai'*, the Supreme Court of Lithuania, 10 Oct. 2001, No. 3K-3-927/2001; *UAB 'AAA' UAB* v. *The State Patent Bureau of the Republic of Lithuania*, 15 Apr. 2002, No. 3K-3-569/2002; *UAB 'Mineraliniai Vandenys'* v. *UAB 'Importiniai Gėrimai', UAB 'Lithuanian and USA Company Bennet Distributors'*, 23 Apr. 2003, No. 3K-3-465/2003; *UAB 'Vingio kino teatras'* v. *UAB 'Eika'*, 19 Jan. 2005, No. 3K-3-38/2005; *N.S.* v. *I.R.*, 26 Jun. 2009, No. 3K-3-287/2009.

97 *V.S.* v. *J.S. (V.) and L.K.*, the Supreme Court of Lithuania, 21 Jan. 2002, No. 3K-3-353/2002.

98 J. STRIPEIKIENĖ, 'Europeizuotos ir internacionalizuotos privatinės teisės aiškinimas ir taikymas Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus praktikoje: lyginamojo metodo vaidmuo', <http://www.litlex.lt/scripts/sarasas2.dll?Tekstas=1&Id=123004&Zd=BANKROT>.

and international legal doctrines. For example, in the case *UAB Vingio kino teatras* v. *UAB Eika*,[99] the Supreme Court held that the provisions of the Civil Code set out the principle of *favor contractus*, which is well known in international contract law. In only one decision did the Supreme Court refer to the case law of a foreign court in a purely domestic case.[100] The case deals with telecommunications law. The Supreme Court cited a 1996 decision of the United States District Court for the Eastern District of Pennsylvania.[101] In this case, the Supreme Court used the comparative method to tackle new problems and to introduce institutions that were not known in Lithuanian law.[102]

When it comes to the role of comparative law, the Supreme Court clearly stated that foreign legal doctrine and case law do not bind the court when applying domestic law but may be used as 'examples to be used as support for an opinion'.[103] In the terms of the Supreme Court, foreign law may be used 'only for explaining a particular case but shall not be used while interpreting national law and does not have compulsory power'.[104]

In its recent practice, the Supreme Court acknowledged furthermore that, although the decisions of foreign courts are not binding for Lithuanian courts,

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99 *UAB 'Vingio kino teatras'* v. *UAB 'Eika'*, the Supreme Court of Lithuania, 19 Jan. 2005, No. 3K-3-38/2005.

100 An exception to this statement are the decisions of the Constitutional Court of the Republic of Lithuania. This Court ensures the supremacy of the Constitution within the legal system, as well as constitutional justice by deciding whether the laws and other legal acts adopted by the *Seimas* are in conformity with the Constitution and whether the acts adopted by the President or the government are in compliance with the Constitution and laws. In terms of civil law could be mentioned the ruling of the Constitutional Court of Lithuania of 28 Sep. 2011 (No. 21/2008) on the State Family Policy Concept. In this judgment, the Constitutional Court cites the jurisprudence of the Federal Constitutional Court of Germany, Hungary, Croatia, Slovenia, the Czech Republic and the Constitutional Council of the Republic of France.

101 *Ž.B. Personal Company 'Sėkmės sistemos'* v. *AB 'Lietuvos telekomas' and UAB 'Lietuvos telekomo verslo sprendimai'*, the Supreme Court of Lithuania, 10 Oct. 2001, No. 3K-3-927/2001.

102 The Court explained the concept of spamming in the Internet and indicated ways on how to be legally protected from it. In yet another case, the issue of taking inspiration from foreign case law was raised, but the Supreme Court refused to do so. The claimant had referred to the principle of *rebus sic stantibus*, citing a decision of the French Court of Cassation of 2008. The Supreme Court refused to use the comparative method, arguing that this principle does not exist in French civil and commercial laws, *UAB 'Europa Group'* v. *UAB 'Kleta'*, the Supreme Court of Lithuania, 31 May 2011, No. 3K-3-265/2011.

103 *UAB 'Europa Group'* v. *UAB 'Kleta'*, the Supreme Court of Lithuania, 31 May 2011, No. 3K-3-265/2011.

104 *UAB 'Europa Group'* v. *UAB 'Kleta'*, the Supreme Court of Lithuania, 31 May 2011, No. 3K-3-265/2011.

they might be useful for comparative purposes, in particular when it comes to applying international treaties.[105]

4.2.2. The Use of Soft Law Instruments

While the courts in Lithuania have so far only rarely referred to foreign legal doctrine and foreign case law, they cite much more frequently international soft law instruments. Of all these instruments, the UNIDROIT Principles and the PECL are most frequently referred to.

In *twenty* decisions,[106] the Supreme Court referred to the UNIDROIT Principles of International Commercial Contracts.[107] This is not surprising since, as it was mentioned, many provisions of the CCRL were inspired exactly by this source of soft law. The Supreme Court of Lithuania started using the UNIDROIT Principles once the CCRL was in force and also with respect to cases that were still governed by the old Civil Code, which was then interpreted in the light of the UNIDROIT Principles.[108] The Court made *five* references to particular clauses of Chapter 4 (Interpretation) of the UNIDROIT Principles, *four* to Article 2.1.15(2) (Negotiations in Bad Faith),[109] *three* to Article 1.1 (Freedom of Contract) and

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105 *UAB 'Darvydas'* v. *J.K. IĮ 'Banga', J.K., UAB DK 'PZU Lietuva'*, the Supreme Court of Lithuania, 27 May 2012, No. 3K-3-227/2012. Contrary to the other cases cited, this case presented a foreign element. It was solved in applying the Convention on the Contract for the International Carriage of Goods by Road (CMR).

106 There is one more case where a reference to the UNIDROIT Principles is given; however, it is not correct. The Supreme Court mentions Art. 5:105 of the UNIDROIT Principles, which does not exist, probably having in mind Art. 5:105 (Reference to Contract as a Whole) of the PECL. *Coface Austria Kreditversicherung AG* v. *UAB 'Klaipėdos mėsinė'*, the Supreme Court of Lithuania, 10 Oct. 2012, No. 3K-3-415/2012.

107 *G.B.* v. *UAB 'Ūkio investicinė grupė'*, the Supreme Court of Lithuania, 19 May 2003, No. 3K-3-612/2003; *UAB 'Vingio kino teatras'* v. *UAB 'Eika'*, 19 Jan. 2005, No. 3K-3-38/2005; *V.Š.* v. *A.N. and A.N.*, 6 Nov. 2006, No. 3K-P-382/2006; *R.K. v. A.K., K.L., J.L., A.L*, 11 Aug. 2008, No. 3K-3-366/2008; *J.B.M.* v. *V.T. (V.T.)*, 1 Sep. 2008, No. 3K-3-405/2008; *J.G.* v. *S.M.*, 27 Oct. 2008, No. 3K-3-504/2008; *UAB 'Sofratus'* v. *UAB 'Energijos taupymo centras'*, 3 Mar. 2009, No. 3K-3-15/2009; *N.S.* v. *I.R.*, 26 Jun. 2009, No. 3K-3-287/2009; *J.K.* v. *T.R.*, 9 Nov. 2009, No. 3K-3-489/2009; *J.S.* v. *S.K., V.L., S.L., S.L., M.A.*, 27 Nov. 2009, No. 3K-3-531/2009; *E.Č.-Š.* v. *UAB 'Pakruojo parketas'*, 17 Feb. 2010, No. 3K-3-82/2010; *J.B.B.* v. *UAB 'NEO GROUP'*, 30 Apr. 2010, No. 3K-3-157/2010; *UAB 'Miaras'* v. *A.D.*, 2 Nov. 2010, No. 3K-7-409/2010; *V.U.* v. *D.R.*, 14 Mar. 2011, No. 3K-3-107/2011; *UAB 'Europa Group'* v. *UAB 'Kleta'*, 31 May 2011, No. 3K-3-265/2011; *UAB 'ŽVC'* v. *AB 'Precizika'*, 7 Mar. 2012, No. 3K-3-90/2012; *Ž.K., A.C., J.V, K.V. v. AB 'Vilniaus Sigma'*, 29 Mar. 2012, No. 3K-P-124/2012; *UAB 'Pajūrio viešbučiai', A.S. and Others* v. *AB 'Snoras'*, 6 Jun. 2012, No. 3K-3-268/2012; *J.G.* v. *AB SEB bankas*, 26 Jun. 2012, No. 3K-7-306/2012; *K.V., D.G.* v. *S.R.*, 29 Nov. 2012, No. 3K-3-531/2012.

108 *UAB 'Telšių keliai'* v. *Telšių Rajono Savivaldybės Butų Ūkio Remonto Ir Eksploatavimo Įmonė*, the Supreme Court of Lithuania, 11 Feb. 2002, No. 3K-3-281/2002; *G.B.* v. *UAB 'Ūkio investicinė grupė'*, 19 May 2003, No. 3K-3-612/2003.

109 Article 2.15 (2) of the 1994 edition.

Articles 6.2.1-6.2.3 (Hardship), *two* to Article 1.7 (Good Faith and Fair Dealing), Article 3.1.3 (Initial Impossibility),[110] and Article 3.2.2 (Relevant Mistake).[111] There was *one* reference to Article 5.1.8 (Contract for an Indefinite Period)[112] and Article 7.1.7 (Force Majeure), respectively.[113]

In some cases, reference is made to the provisions of the UNIDROIT Principles that have not even been directly referred to in the CCRL, for example, Article 4.5 (All Terms to Be Given Effect).[114]

The PECL were referred to in *eleven* cases.[115] They were first used in 2006 in a case that was tried by the plenary session, that is, by all judges of the Civil Division of the Supreme Court.[116] In five decisions, references were made to Article 2:301 (Negotiations Contrary to Good Faith) of the PECL. In two of these five decisions, references to this article are made indirectly by referring to the above-mentioned decision of the plenary session of the judges of the Civil Division.[117] There was *one* reference to Article 1:102 (Freedom of Contract), Article 1:201 (Good Faith and Fair Dealing), Article 4:102 (Initial Impossibility), Article 5:105 (Reference to Contract as a Whole), and Article 6:109 (Contract for an Indefinite Period), respectively.

Sometimes reference is made to the PECL, whereas the articles of the UNIDROIT Principles, dealing with the same issue and having had a direct influence on the provisions of the CCRL, are not mentioned.[118]

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110 Article 3.3 of the 1994 and 2004 editions.

111 Article 3.5 of the 1994 and 2004 editions.

112 Article 5.8 of the 1994 edition.

113 Usually there is no indication which edition of the Principles was referred to. An analysis of the case law reveals however that all editions of the UNIDROIT Principles have been referred to, that is, the 1994, 2004, and 2010 editions.

114 *UAB 'Sofratus'* v. *UAB 'Energijos taupymo centras'*, 3 Mar. 2009, No. 3K-3-15/2009.

115 *V.Š.* v. *A.N. and A.N.*, the Supreme Court of Lithuania, 6 Nov. 2006, No. 3K-P-382/2006; *VšĮ Įstros aerodromas* v. *UAB 'BTA draudimas'*, 27 Nov. 2006, No. 3K-3-600/2006; *J.B.M.* v. *V.T. (V.T.)*, 1 Sep. 2008, No. 3K-3-405/2008; *V.Š.* v. *A.N. and A.N.*, 22 Oct. 2008, No. 3K-3-483/2008; *UAB 'Sofratus'* v. *UAB 'Energijos taupymo centras'*, 3 Mar. 2009, No. 3K-3-15/2009; *J.K.* v. *T.R.*, 9 Nov. 2009, No. 3K-3-489/2009; *J.B.B.* v. *UAB 'NEO GROUP'*, 30 Apr. 2010, No. 3K-3-157/2010; *UAB 'Miaras'* v. *A.D.*, 2 Nov. 2010, No. 3K-7-409/2010; *UAB 'Otega'* v. *BAB 'Ekranas', UAB 'Baklis'*, 31 Jan. 2011, No. 3K-3-81/2011; *UAB 'ŽVC'* v. *AB 'Precizika'*, 7 Mar. 2012, No. 3K-3-90/2012; *K.V., D.G.* v. *S.R.*, 29 Nov. 2012, No. 3K-3-531/2012.

116 *V.Š.* v. *A.N. and A.N.*, the Supreme Court of Lithuania, 6 Nov. 2006, No. 3K-P-382/2006.

117 *V.Š.* v. *A.N. and A.N.*, the Supreme Court of Lithuania, 22 Oct. 2008, No. 3K-3-483/2008; *UAB 'Otega'* v. *BAB 'Ekranas', UAB 'Baklis'*, the Supreme Court of Lithuania, 31 Jan. 2011, No. 3K-3-81/2011.

118 For example, *VšĮ Įstros aerodromas* v. *UAB 'BTA draudimas'*, the Supreme Court of Lithuania, 27 Nov. 2006, No. 3K-3-600/2006, refers to the Contra Proferentem Rule of Art. 5:103 of the PECL but does not refer to Art. 4.6 of UNIDROIT Principles implementing a similar rule. In the case *V. Š.* v. *A. N. and A. N.* of 6 Nov. 2006, No. 3K-P-382/2006, the PECL are cited, but there is no reference to the provisions of the UNIDROIT Principles (however, the reference is given to

Usually the Supreme Court uses the UNIDROIT Principles and the PECL in order to find support for its decisions or to state that Lithuanian law is identical or very similar to international law instruments and to thereby demonstrate that Lithuanian law is in line with modern developments.

For the time being, these instruments have rarely been used to reveal the true content of the Lithuanian legal rules. Some recent decisions of the Supreme Court state, however, that the provisions of the CCRL, which were adopted under the influence of the UNIDROIT Principles, shall be interpreted in the light of the Principles![119]

The PETL were explicitly cited in *three* cases so far.[120] In all of them, reference to Article 2:105 (*Proof of Damage*) of the PETL was made. Article 2:105 provides that '[t]he court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly'.[121] According to the Court, this provision of the PETL matches with Article 6.249(1) of the CCRL, which provides that if a party is unable to prove the exact amount of damages, then the amount of the damages is decided by the court upon consideration of the evidence.

In some cases, it is obvious that the provisions of the PETL were used by the Supreme Court but they were not expressly cited. For example, this is the case in the Supreme Court's decisions on the evolution of the concept of causal link as a condition for delictual liability. Prior to 2005, the Supreme Court of Lithuania paid little attention to the details of the process of establishing the causal relation in cases of delictual liability. It was only in 2005, in the case *J.R. and Z.R.* v. *Santariškių klinikos*, that for the first time it was stated that the establishment of a causal relation in a civil case can be divided into two stages: first by

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the commentary of the Principles). *UAB 'Miaras'* v. *A. D.*, the Supreme Court of Lithuania, 2 Nov. 2010, No. 3K-7-409/2010 makes a reference to Art. 5:105 of PECL (Reference to contract as a whole), but do not make a reference to Art. 4.4 of the UNIDROIT Principles. *UAB 'Otega'* v. *BAB 'Ekranas', UAB 'Baklis'*, the Supreme Court of Lithuania, 31 Jan. 2011, No. 3K-3-81/2011 cites Art. 2:301(2) of the PECL and does not cite Art. 2.15(2) (editions of 1994 and 2004) or Art. 2.1.15(2) (edition of 2010) of the UNIDROIT Principles.

119 *J.B.B.* v. *UAB 'NEO GROUP'*, the Supreme Court of Lithuania, 30 Apr. 2010, No. 3K-3-157/2010; *UAB 'Europa Group'* v. *UAB 'Kleta'*, 31 May 2011, No. 3K-3-265/2011.

120 *V.M.* v. *S.P.*, the Supreme Court of Lithuania, 17 Feb. 2009, No. 3K-3-69/2009; *B.Z.* v. *Šiaulių apskrities viršininko administracija*, 30 Nov. 2010, No. 3K-3-493/2010; *UAB 'Geosprendimai'* v. *G.K.*, 12 Apr. 2011, No. 3K-3-177/2011.

121 Article 2:105 of the Principles of European Tort Law (PETL) reads: Art. 2:105. Proof of damage. Damage must be proved according to normal procedural standards. The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly. - In the first case where the court made reference to Art. 2:105 of the PETL the problem under investigation was not that of delictual liability but that of compensation for damages inflicted through a lawful act: The claimant brought an action for compensation following the imposition of an easement.

investigating whether the harmful consequences result from an illegal action, that is, it is determined whether the harmful consequences would not have occurred but for the illegal act (factual causation) and, second, a legal causal relation is established by investigating whether the consequences are not excessively alienated from the illegal action from the legal point of view (legal causation)[122] – just as this is done in Article 3:101 PETL, on the one hand, and in Article 3:201 PETL, on the other. Later, similar statements were made in other decisions by the Supreme Court of Lithuania.[123] In the recent case *L.B., I.V., I.Z.A. and Others* v. *daugiabučio namo savininkų bendrija 'Medvėgalis' and Others* tried by an extended panel of seven judges, it was additionally stated that when establishing a causal relation it is necessary to consider the foreseeability of the damage to a prudent and reasonable person at the time of the activity, the nature and the value of the protected interest or right, and the protective purpose of the rule that has been violated; the basis of liability and the ordinary risks of life are also important.[124] These parts of the judgment bear a remarkable resemblance to the wording of Articles 3:101 (*Conditio sine qua non*) and 3:201 (*Scope of Liability*) PETL.

Prior to the decision in the case *J.M.Š.* v. *Center of Registers Kaunas Branch and Others*[125] made by an extended panel of seven judges in 2008, the application of joint and several liability was extremely rare in the Supreme Court of Lithuania's case law. Meanwhile, in this case a remarkable number of seven events were named when joint and several liability should be applied to non-contractual relations. Although the PETL are not expressly mentioned by the Supreme Court, its reasoning makes it clear that references to the provisions of Chapter 9 of the PETL (*Multiple Tortfeasors*) were made.

Last but not least, the Draft Common Frame of Reference has been referred to by the Supreme Court in *one* case so far.[126]

4.2.3. *Challenges When It Comes to Using the Comparative Method*

Comparing laws is a demanding task. One challenge results from the requirement of understanding foreign languages. According to statistics established by the authors of this contribution and relying on information provided by the judges themselves, 105 out of about slightly more than 700 Lithuanian judges speak one

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122 *J.R. and Z.R.* v. *Santariškių klinikos*, 30 Mar. 2005, No. 3K-3-206/2005.

123 *R.B.* v. *Santariškių klinikos*, the Supreme Court of Lithuania, 9 Nov. 2005, No. 3K-3-556/2005; *L.B., I.V., I.Z.A. and Others* v. *Daugiabučio namo savininkų bendrija 'Medvėgalis' and Others,* 26 Nov. 2007, No. 3K-7-345/2007.

124 Similar statements about the causal link are made in *S.R.* v. *UAB 'Klaipėdos autobusų parkas'*, 1 Mar. 2010, No. 3K-3-53/2010.

125 *J.M.Š.* v. *Center of Registers Kaunas Branch and Others,* the Supreme Court of Lithuania, 26 Mar. 2008, No. 3K-7-59/2008.

126 *UAB 'ŽVC'* v. *AB 'Precizika',* the Supreme Court of Lithuania, 7 Mar. 2012, No. 3K-3-90/2012.

foreign language, 451 - two, 138 - three, 15 - four, 1 - five, and 1 - six.[127] The most popular foreign language is Russian (706 judges speak it). A number of 454 judges also speak English, 176 - German, 102 - Polish, 78 - French, and 16 judges have knowledge of other languages. Compared to many of their foreign colleagues, as far as their linguistic competences are concerned, Lithuanian judges thus seem rather well prepared for the use of the comparative method.

Another challenge is due to law reform: 553 Lithuanian judges, that is, more than 80%, studied and received their professional training before the restoration of Lithuania's independence, that is, during the socialist or communist period. Implementing the new legislation is thus in itself a challenge for the judiciary.

What is more, in Lithuania - as in many other countries - there is an increase of the number of cases brought before the courts, in particular before courts of lower instances. According to statistics for 2011, the average workload of a district court judge in Lithuania is 67 cases per month and of judges in regional courts, 9.6 per month.[128] Just as in other countries, this does not leave much time for the courts to proceed with demanding studies on comparative law.

Finally, judges are often not trained in comparative law and frequently lack a deeper knowledge of foreign legal systems.

Language barriers, time constraints, and a lack of training in comparative law are not a problem for judges in Lithuania alone. English Judges of the House of Lords have repeatedly stated that had it not been for law review articles or studies provided by comparatists, published in English, they would have been unable to take into consideration foreign laws and to make a comparative analysis in their decisions. To cite just one example: in the English case *White* v. *Jones*, the *House of Lords* had to deal with a case in which a solicitor had negligently omitted to take the necessary steps for a testator to change his testament. The testator died, and his daughter who would have benefitted from a change of the testament sued the lawyer for damages. The issue raised difficult conceptual problems, given that the lawyer did not have a contract with the disappointed beneficiary (the daughter) and thus no contractual duties towards her. Liability in tort was also difficult to establish since, under English law, in the performance of his duties to his client a solicitor owed no duty of care in tort to a third party such as the disappointed daughter. The House of Lords was unsatisfied with this state of the law and turned to foreign sources for inspiration and support. Lord Goff of Chieveley stated in his opinion:

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127 During our survey, only 22 judges did not provide information about their knowledge of foreign languages. These statistics also include information about knowledge of foreign languages of the judges of administrative courts.

128 This reflects the number of standard cases (civil cases, criminal cases, and cases of administrative offences).

> The fact that the problems which arise in cases such as the present have troubled the courts in many jurisdictions, both common law and civil law, and have prompted a variety of reactions, indicates that they are of their very nature difficult to accommodate within the ordinary principles of the law of obligations. [...] Strongly though I support the study of comparative law, I hesitate to embark in an opinion such as this upon a comparison, however brief, with a civil law system; because experience has taught me how very difficult, and indeed potentially misleading, such an exercise can be. Exceptionally however, in the present case, thanks to material published in our language by distinguished comparatists, German as well as English, we have direct access to publications which should sufficiently dispel our ignorance of German law and so by comparison illuminate our understanding of our own.[129]

This quote perfectly illustrates that judges usually hesitate to engage in a demanding comparative research *themselves*. Instead, they usually rely on comparative literature or studies prepared by academics and made available to them in languages that are easily accessible for the court. The academic community thus has the task, and the responsibility, to provide the courts with reliable information about foreign laws and with comparative studies on topical issues. Comparative law journals and libraries equipped with comparative legal literature also play an important role when it comes to providing the courts with information on foreign and comparative laws. Last but not least, a comparative research could very well be carried out by lawyers trained in the comparative method and using it in court in the interest of their clients. Courts, academics, and lawyers thus have to cooperate in order to enable the judiciary to benefit from the comparative method when it comes to dealing with topical legal issues.[130]

5. Conclusions

Concerning the role of the comparative method in the process of drafting the new Lithuanian Civil Code and its application by the Supreme Court of Lithuania, several conclusions can be drawn from the above analysis:

(1) When preparing the Lithuanian Civil Code of 2000, the legislator and the drafters relied heavily on the comparative method. The drafters decided not to use a single foreign codification as starting point and model but to apply an eclectic method taking inspiration, in particular, from

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129 House of Lords, 16 Feb. 1995 [1995] 2 AC 207 (opinion of Lord Goff of Chiveley).

130 For the numerous benefits that judges may derive from using the comparative method, see T. KADNER GRAZIANO (n. 88), pp. 702-716.

- the civil codes of the Netherlands, Germany, France, Italy, Switzerland, Latvia, Québec, Japan, and Russia;
- the UNIDROIT Principles of International Commercial Contracts and, to a much lesser extent, Part I of the PECL;
- international private law treaties, in particular several UNIDROIT Conventions; as well as
- EU directives and regulations.

(2) The Lithuanian Civil Code is one of the most recent European private law codifications. The new Code integrates some of the most modern instruments and civil law treaties. Some of the issues governed by the Code have not been expressly dealt with in other European civil codes so far. With respect to these areas, the Lithuanian Civil Code is possibly one of the most modern codifications of our time.

(3) The Lithuanian Supreme Court has been using the comparative method since the entry into force of the new Code in 2001.

On the one hand, the Supreme Court rarely cites domestic and foreign legal doctrines, and it seems that no references to foreign code provisions or statutes have been made so far. Only one reference to foreign case law could be found in private law cases.

On the other hand, the Supreme Court refers frequently to modern soft law instruments, namely the UNIDROIT Principles on International Commercial Contracts (in 20 cases), the PECL (in 11 cases), the Draft Common Frame of Reference (in one case), and the PETL (in three cases explicitly cited, in others implicitly referred to). It will certainly not be easy to find many other jurisdictions in which the highest civil law court has already used and cited all of these modern soft law instruments.

(4) The Supreme Court has referred to the UNIDROIT Principles and the PECL in order to demonstrate that Lithuanian law is in line with modern developments. For the time being, these instruments have rarely been used for the sake of interpretation of the provisions of the Lithuanian Civil Code. In two recent decisions in 2010 and 2011, the Supreme Court stated however that the provisions of the CCRL, which were adopted under the influence of the UNIDROIT Principles, shall be interpreted in the light of these Principles.

(5) When judges compare, they usually rely on comparative literature or comparative studies prepared by academics and made available in languages that are easily accessible for the court. The scientific community thus has an important role to play when it comes to providing the courts with reliable information about foreign laws and with comparative studies on topical issues. Comparative input could also very well be provided by lawyers trained in the comparative method and using it in court in the interest of their clients.

Are the benefits that are to be derived from a comparative analysis worth the (considerable) effort that such an analysis often requires? Comparative law provides access to experiences in other jurisdictions. This can be particularly welcome and helpful when it comes to solving difficult, highly topical, or new legal issues that have already been addressed and dealt with in other jurisdictions. Not benefitting from foreign experiences and reinventing the wheel time and again may eventually be more time consuming and costly than embarking on the challenge of comparing. The drafters of the Lithuanian Civil Code quickly turned to foreign law for inspiration when preparing the Code. This suggests that the courts should use the same method when it comes to applying the new code and when interpreting its provisions - and that they may benefit from the comparative method even more frequently in the future.