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ARTICLES

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Rethinking the labour contract law of China

Wei Qian, [*] *Yan Dong* [**] *and Ye Jingyi* [***]

Abstract

The article presents some of the principal features of the new Chinese regulation on labour law contained in the 2007 Labour Contract Law. The article first focusses on the situation on the Chinese labour market under the old regulatory regime and presents the main features and innovations that the Labour Contract Law has introduced. New rules on the signing of labour contracts, on workplace rules, on the penalties for the violation of the contract and provisions concerning dispatched employment. Throughout this presentation, the article offers a comprehensive picture of the new Chinese labour law framework along with a view as to its benefits and its shortcomings.

I. INTRODUCTION

China has entered its best era for labour legislation since 2007 when the Labour Contract Law (hereinafter "LCL") was finally passed by the Standing Committee of National People's Congress. There is no doubt that the LCL is the most important piece of labour legislation since the 1994 Labour Law has been enacted. In comparison to the 1994 Labour Law that had provided a set of new rules for the emerging labour market under the reform and opening-up policy, the LCL has adopted a more dedicated and systematic approach to labour relations since it not only regulates individual contracts of employment but also restates some of the principles stipulated by the 1994 Labour Law. Moreover, the LCL refers to collective agreements and informal employment (dispatched employment and part-time workers) as well.

This paper tries to review the nature of the LCL in a neutral manner and to shed some light on its recent amendments. Moreover, it argues that despite the fact that the LCL is still relatively new in the field of labour relations, it tries to balance the protection of employment rights and the flexibility of employment. Interestingly, the most recent amendments that are designed to uphold

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this balance in the fast-changing social context can have an uncertain impact on the Chinese modern labour market.

The LCL was created as a response to the new and pressing problems created during the social and economic developments of the Chinese society, such as the underpayment of employees or the non-payment of wages, the abuse of the probation period, the short-term trend of labour contract relationships and the deficient ruling on informal employment. The LCL stimulated debates in China[1] and encountered many problems during its implementation period. Sceptics believed that the problem of the poor enforcement of Labour Law i.e. the wage payment[2] was not tackled by the LCL.[3] Apart from its poor enforcement the rigidity and inflexibility of its mechanic design prevents it from addressing the market reality.[4]

II. THE ADVENT OF THE LCL

The year of 2007 has a special meaning for millions of Chinese workers. That year, there was a boom in labour legislation due to the the promulgation of three important national laws: the Labour Contract Law, the Employment Improvement Law and the Labour Disputes Mediation and Arbitration Law (amendment). Especially the LCL was recognised as the most important piece of legislation on labour issues in China since the enactment of the 1994 Labour Law. In addition, the promulgation of the LCL provided the central government of China with the confidence to pursue social stability and harmony.

A. What's new in the LCL

The LCL is not only a contract law which regulates the individual employment relationship, but it is also, to a certain extent, a labour law with a broad vision which deals with collective agreements and informal employment, dispatched employment and part-time employment. Particularly, regarding the collective agreements in China, it was originally considered as a special contract covered by the 1994 Labour Law. Many Chinese scholars called for a separate legislation concerning the process of collective bargaining and enforcement of collective agreements. As compared with

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[1] See Dong Baohua, *The Position of the Labour Contract Law, Studies in Law and Business* (Vol. 3 2006)

[2] Sean Cooney, 'Chinese Labour Law Work: The Prospects for Regulatory Innovation in the People's Republic of China' (2007) Fordham International Law Journal

[3] The wage payment is still an important problem in Chinese labour laws. Intentional non-payment or underpayment of wages have become a crime pursuant to the Amendment of Criminal Law in 2011, and the Judicial Interpretation by the Supreme People's Court issued in early 2013 made the criminal punishment more feasible and practical.

[4] Anthony Ogus, *Regulation: Legal Form and Economic Theory 4* (1994) 245-256

the 1994 Labour Law, the LCL developed the Third Chapter of Individual Labour Contract and Collective Agreement (see Table I: Structures of Labour Law in 1994 and Labour Contract Law in 2007). Rules on general provisions in relation to labour contracts have been further articulated in the LCL. For instance, the length of probation period that was vaguely stated as no longer than 6 months in the former legislation, was divided into three categories depending on the terms of the contract. Moreover, the legitimate conditions for contract termination and dismissal have been further integrated and enriched and the protection of the employees' dignity and freedom has been clearly stated by the LCL.

Table I: Structures of Labour Law in 1994 and Labour Contract Law in 2007

Labour Law of 1994	***Labour Contract Law of 2007***
Chapter 1. General Principles *Chapter 2. Employment Improvement* *Chapter 3. Labour Contract and Collective Agreement* *Chapter 4. Working Time, Rest and Leaves* *Chapter 5. Wages* *Chapter 6. Occupational Health and Safety* *Chapter 7. Special Protections on Female Workers and Minor Workers* *Chapter 8. Occupational Training* *Chapter 9. Social Insurance and Benefits* *Chapter 10. Labour Disputes* *Chapter 11. Surveillance and Inspection* *Chapter 12. Legal Liabilities* *Chapter 13. Supplements*	*Chapter 1. General Principles* *Chapter 2. Conclusion of Labour Contracts* *Chapter 3. Performance and Alteration of Labour contract* *Chapter 4. Discharge and Termination of Labour Contract* *Chapter 5. Special Rules* *Section 1.Colllective Agreement* *Section 2. Dispatched Employment* *Section 3. Part-time Employment* *Chapter 6. Surveillance and Inspection* *Chapter 7. Legal Liabilities* *Chapter 8. Supplementary Rules*

There is a number of issues that the LCL is designed to address: (1) wage arrears or non-pay of other benefits (i.e. overtime wages, social insurance contributions, work-related injuries liabilities by employers) due to the fact that employers refuse to recognize the existence of a labour contract relationship where the labour contract has not been formed; (2) abuse of the probation period; (3) short-term trend of labour contracts; (4) rapid growth of informal employment and insufficiency of existing legal instruments to regulate these particular areas and (5) employment instability derived from points (3) and (4). With regard to the issues stated in note (1), the heavily effected group is that of the Chinese rural migrant workers since the difficulty to confirm the existence of labour relationship was the major barrier for their wage claims. Although the 1994 Labour Law allows the existence of a *de facto* labour relationship,[5] and has created several rules to ease the burden of proof for the employee, the original scheme to recognize labour relationship remains burdensome for the workers. In order to avoid disputes on wage payment or other right infringements that are led by the determination of labour relationships, the requirement of the written labour contract is strictly stated by the LCL. To resolve the problems mentioned in Note (3) and (4), the LCL reinforced the functioning of its protection mechanism against the open-ended contract, thus securing employees from the employers' right to terminate an open-ended contract. An open-ended contract can be concluded in the following cases, (i) an employee has been working for the same employer continuously over ten years; (ii) when an employer initially adopts the labour contract system, or State-owned enterprises renew their labour contract for transformation to break away from residual impact of the planned economy, the employees could ask for the conclusion of the open-ended contract, when they have been working for the employer continuously over ten years and have no more than ten years left until legal retirement; (iii) an employee signed two consecutive fixed-term contracts with the employer, when the contract for a renewal and the employee requite to change into the open-ended contract; and (iv) an employer did not sign the written contract with an employee and one year passed, the labour contract relationship should be treated as an open-ended contract. The open-ended labour contract was initially addressed in the 1994 Labour Law[6] where one may find a similar statement in relation to the situation of (i). Meanwhile, (ii) and (iii) are pretty new and can be regarded as the outcome of employment stability policy, and

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[5] Detailed rules refer to Several Opinions on the Implementation of Labour Law (enacted by Ministry of Labour in 1995) and the Notice of Relative Issues on Establishment of Labour Relationship (enacted by Ministry of Labour and Social Security in 2005).

[6] Labour Law of 1994, article 20

certain concerns about age discrimination.[7] Indeed, the rule in (iv) is to stimulate the signing of labour contracts. On the other hand, the other innovation of the LCL is the further extension of the instrument of economic compensation. It is no longer merely compensation towards the employee who has been wrongfully dismissed. Instead the economic compensation addresses the summary dismissal as well as it promotes the goal of employment stability. That is, even if the labour contract is terminated as to the expiration of its term, the employer pays the economic compensation to the former employee.

Furthermore, the LCL has made other attempts to protect the rights of employees. Not only did it introduce the right to be informed for both sides before conclusion of a labour contract but in addition, regulated the enterprise work rule, which were usually formulated by an employer unilaterally. The 1994 Labour Law was silent about the regulation of the code of conduct at work, whereas the LCL clarifies its legal procedure, stating that it requires the employees' participation. Lastly, the LCL contains for the very first time some of the legal instruments regarding the informal employment relationship.

B. Debates on the Law Making Process of the LCL

China faced heated debates[8] at the time the LCL was drafted, some of which remain active five years after. From 2005 to 2007, there were altogether five different versions of the draft law published by the State Council, let alone the various versions provided by the P.R.C. National Federal of Trade Union. After the 1994 Labour Law was passed, the Chinese legislators had designed the blueprint of future legislations including Labour Contract Law, Employment Improvement Law, Labour Disputes Resolution Law and Social Insurance Law.[9] The original plan was initiated from Social Insurance Law, which was aimed to define the State duties to provide public service of social insurance and to name institutional obstacles. Thereafter, the LCL aimed at clarifying the employers' duties and liabilities.

Debates about the LCL concentrated on the following questions: (a) shall employment stability prevail over employment freedom or market liberty? (b) shall the law declare to protect workers only or protect both parties of employment relationship? (c) shall the law encourage more

[7] Another illustration can be made with the contract discharge. The employee could not be discharged in case he/she has been working for the same employer consecutively for over 15 years, and is no more than 5 years away from his/her legal retirement. Labour Contract Law of 2007, article 42 (5).

[8] See serial comments from Steven Cheung, <http://www.doc88.com/p-996190579400.html> accessed 20 December 2014. Debates between labour law scholars, see Wang Quanxing, 'Debates on the Formation of Labour Contract Law' China Legal Daily April 12 2006; Dong Baohua, *Contend and Thought of Chinese Labour Contract Law* (Shanghai Renmin Press, 2011)

[9] Liu Tao and Wang Qi, *Labour Contract Law, Wrangles and Impacts, China Entrepreneur* (2008)

administrative interference on the contract relationship? (d) how should formal and informal employment relationships be dealt with?[10]

As numerous critics have pointed out, questions of (a), (b), and (c) are actually the same and concern the question of the goal of the law and whether this goal should be to pursue the harmony of labour relation through enforcing employment stability or to approach flexibility achieved by the market principles.[11]

Another criticism is about whether the LCL could affect the position of employees in lower positions, bearing in mind the special hierarchy of the labour market in our modern societies. Critics considered that the LCL could not benefit employees at a lower level i.e. migrant workers, since compensation provisions could hardly be implemented for this group. Furthermore, it has been argued that when the contract is ended by an employer, an employee at this level usually would select to leave rather than claim compensation. Under the new legal provisions, only those workers powerful enough could manage to win the case, because they would be able to enjoy stronger protection due to their high wages and thus manage to maintain employment stability easily.

III. THE BALANCE BETWEEN THE EMPLOYEE'S EMPLOYMENT RIGHTS AND THE EMPLOYER'S FLEXIBILITY

Unlike many others we believe the LCL set up new balances in the Chinese labour market. On a macro-level, it provides choices for the employer to be a "good" labour user since he can enjoy some sort of labour flexibility by forming fix-term employment contracts or other employment relationships. On a micro-level, there are several new instruments for both employees and employers to approach a balanced labour relation by their own means.

A. Contract Signing and Economic Penalty

In order to set up a contract system, forming a written labour relationship is emphasized as a compulsory duty for both the employee and the employer. Since in most cases, it was an employer who refused to sign the contract, the LCL added the instrument of economic punishment to impel a self-enforcement of contract signing. If an employer illegally refuses to sign the contract, he should pay the employee a one-month wage for each month. This fine is not an administrative punishment but a compensation for employee similar to tort liability, which means an employee

[10] Dong Baohua (n 8) 159
[11] ibid

can benefit from it directly. It is aimed to avoid difficulties and costs to prove the *de facto* employment relationship. Moreover, it can be helpful to solve labour disputes by reducing the effects of the verification of an employment relationship by the authority. In regard to the employer side, restrictive covenant and confidential liability reduce the risk of illegal competition.

B. Workplace Rules

Workplace rules at the level of an enterprise were from early on regulated by law provisions. Prior to the 1994 Labour Law, workplace rules had to be introduced in a democratic process during which workers' representatives and trade unions could participate in co-determination. The 1994 Labour Law changed this rule since it only articulates that workplace rules should be formulated in accordance with the law. The trade unions' opinion should be heard during this process. This vague provision was proposed to release enterprises from original restrictions and served for the policy of freedom of doing business. The LCL restates the principle of codetermination, the legitimate validity of workplace rules is determined by its rulemaking process in which the voices of the employees' or those of their representatives (trade unions) are equally important. The aim of this change is to balance the employees' and employers' powers and to improve industrial democracy.

C. Penalty for Contract Violation

Penalties, including compensation and fines, which are imposed in cases of violations of labour contract, strengthen economic punishment. A penalty equals to one or two months' wage and is directly owed to an employee once an employer violates labour contract duties.

However, the amount of penalties counterbalances the interests again. In order to protect employees, the compensation or the amount of the fine cannot be lower than the local monthly minimum wage. To avoid unfairness towards the employer, different types of compensation could not be claimed together, which means that if an employee chooses one form of compensation (for example double wages fine for illegal discharge) he could not claim other types of compensation at the same time. In addition, if the employee's wage is too high (three times higher than average local wage level), the compensation he could claim maximum three month wages and no more than 36 months wages for the total amount.

D. Restrictive provisions

In order to secure trade secrets and intellectual property, the LCL states a confidentiality obligation of the employee. However, the obligation is not unlimited: the applied scope is limited

to senior managers, senior technicians and other important personnel. An employer is obliged to compensate the employee on a monthly basis, during the term of the competition restriction after the termination of the employment contract. The LCL does not specify a compensation rate and only states that it should be reasonable compared to the employee's wage level. Thus, it gives leeway to local governments to calculate it by taking into account the level of development of the local economy. In most areas, the compensation rate ranges from 20% to 60% of the wage, i.e. Zhejiang and Guangdong are 50% of the wage.

E. Dispatched Employment

Efforts to balance the interests of the employers with those of the employees can also be seen in provisions regarding dispatched employment. In order to protect employment stability of dispatched workers, the LCL requires that a fixed-term labour contract lasts for a minimum of 2 years. Moreover, it holds that dispatched workers shall earn no less than the local minimum wages, even for the time period when they are not dispatched. The *de facto* user of the dispatched workers has to provide protection and appropriate working conditions to them. As distinct from other countries, liability imposed on the real user of dispatched workers is the same as that of the employer who concludes a labour contract with the employee directly. In other words, when the employee claims compensation due to the violation of the labour contract by an employer or a real user, both the employer and the real user are jointly liable.

IV. REBALANCE AND REGULATION OF DISPATCHED EMPLOYMENT

Five years after the implementation of the LCL, it must be stated that it is an instrument that significantly influenced the Chinese labour market. To that end, of great importance is the fact that the rate of formally concluded employment contracts has increased dramatically. This is directly linked to the fact that an employer who fails to conclude a labour contract with an employee is supposed to be severely penalized. According to the latest research, within enterprises of more than a 1000 employees, the rate of signed labour contracts has reached 89%.[12] In large-scale enterprises the rate already reached 94% in 2010.[13] Moreover, it was found that the high signing rate increases employment stability but, as some argue, this could be attributed to the very important

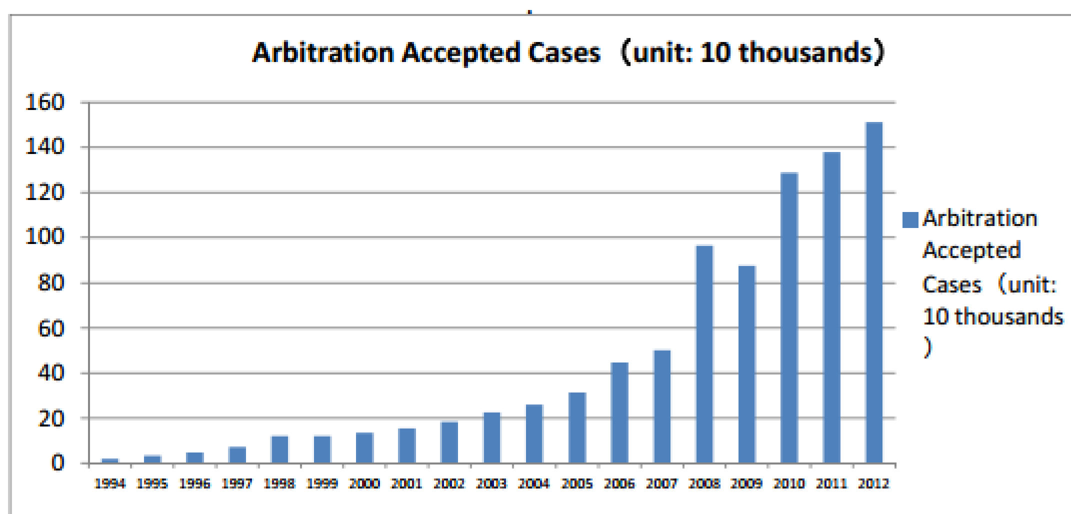
[12] Xu Daowen, 'Labour Contract and Its Effect of Protecting Rights- Based on Survey Data of Nine Cities' (2011) 29 Hebei Law Science 7

[13] Survey Report of Migrant Workers in Zhujiang Delta Zones, Zhujiang Economics 2007

role of the trade union in the ongoing changes. Today, the fix-termed contract is usually a three-year one.

The high rate of formally concluded employment contracts affects social insurance benefits (especially medical insurance) which are better protected today. On the down-side, as many commentators have pointed out, that not only has there been an alarming increase in the number of labour dispute cases in last few years (see Table II: Labour Arbitration Accepted Cases from 1994-2012), but also, the use of labour dispatching workers has become out of control. The latter seems particularly worrisome for the top legislature bodies in China.

Table II: Labour Arbitration Accepted Cases from 1994-2012



Notes:

(1) The statistics is based on annual data release by Ministry of Human Resource and Social Security of China.

(2) Data from 2008 includes labour disputes accepted by the mediation process.

Therefore, the Standing Committee of the National People's Congress launched its revision project in 2011, introducing an amendment to the LCL in 2012 which limited to a certain extent the labour dispatching service. By Chinese standards, the fact that this amendment to the existing labour law regulation was introduced so rapidly is extraordinary and proves the urgency of dealing with the issue of labour dispatching service and of that of the determination of central authorities to drive the labour market back on "track". The amendments of the LCL focus on five issues: firstly, the threshold of entering labour dispatching businesses' has been raised, since now the requirement of the deposit for registering a labour dispatching business is 2 million RMB instead of 500,000 RMB. Secondly, the registration of a labour dispatching company is subject to the pre-approval of labour authorities prior to entering into a formal procedure of registering a company. Thirdly, the new laws clarify the terms; "temporary, auxiliary, or substitute positions". Fourthly,

the equal pay principle for dispatched workers has been reemphasized and adjusted. Fifthly, the legislator may authorize the Ministry of Human Resource and Social Security to decide a cap for a maximum portion of dispatched workers that can be present in a given company.

We think it is not unreasonable to put labour dispatching service under strict scrutiny in order to protect the rights of dispatched workers. Raising the threshold necessary to be met in order to enter the labour dispatching business is definitely a way to ensure that only those entities, that are well-established, will be able to provide employment services. Furthermore, the preapproval requirement is an instrument for the labour authorities to step in and screen out those unfitting employment providers.

During and after the drafting of the LCL, many commentators pointed out to the ambiguity in the clauses of labour dispatching section, concerned that it might lead to an abuse of the labour dispatching service. As the amendment of the LCL has clarified the "equal pay" principle, the dispatched workers can now receive sufficient protection. Moreover, the clarification of the terms of "temporary, auxiliary, or substitute positions" also helps towards reducing the possibility for the employer to abuse the labour dispatched workers. However, the quota for the number of dispatched workers imposed upon a company has an uncertain impact on labour dispatching business. So far, authorities have not yet provided any indication as to the number of the quota in question. There are widespread speculations amongst commentators as to the impact of the quota on the Chinese market: On one hand, if the quota is too loose, there are concerns that the abuse of labour dispatched activities may not be curbed. On the other hand, if the quota is too tight, the entire labour dispatching service might be paralysed. Therefore, it is a careful and risky task that the government has yet to complete.

V. CONCLUSION

The advent of the LCL has lead Chinese labour regulations into a new era. Covering over 400 million workers in China, it is natural that the regulation heated debate amongst various commentators. The drafters of the LCL have made great efforts to enhance the protection of workers. However, critics pointed out that the level of protection may be too high for the employers to bear. This paper argues that any reviews of the LCL should put this instrument into the Chinese context. To that end, it is necessary to take into account the social conditions during the time the LCL was introduced into Chinese law. This article tried illustrate that the LCL created a balanced system of protection for both the workers and the employers. Five years after the LCL came into force, whilst new phenomena have emerged interfering with the existing balance, the legislature has promptly

readdressed them. Most of the LCL amendments, such as the clarification of certain vague terms, are rather positive. Finally, it may be too early to judge the real impact of the amendments as the administrative quota upon amount of dispatched workers in a company has not yet been finalized.

Europeanisation of the Polish law on administrative enforcement proceedings

Przemysław Ostojski *

Abstract

The article presents a description of the convergence of the Polish law on administrative enforcement proceedings with the corresponding EU legal framework. The presented analysis shows how Polish administrative law is mainly shaped by the harmonisation process that is occurring on the EU level. The legal mechanisms introduced by various European directives have been implemented into two Polish laws: the Administrative Enforcement Proceedings Act and the Mutual Assistance Act. Both laws have introduced new solutions and mechanisms which changed the old Polish framework and lead to the introduction of new, and previously unknown, legal institutions into Polish administrative enforcement proceedings law.

I. INTRODUCTION

European Union law has a considerable influence on the national laws of its Member States, including Polish law.[1] This also applies to the law on administrative enforcement proceedings, which has been substantially modified during the last fifteen years.[2] Firstly, significant changes related to the harmonisation of this area of law made within European Union (hereinafter "EU") law have had an impact on the act of 17 June 1966 on administrative enforcement proceedings.[3] Secondly, on 21 November 2013 the Act of 11 October 2013 on mutual assistance for the recovery of taxes, duties and other receivables (hereinafter the "Mutual Assistance Act" or "MAA")[4] came into

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[1] Zbigniew Kmieciak, *Postępowanie administracyjne i sądowoadministracyjne a prawo europejskie* (Warsaw, 2010) 19 and works cited therein: Katarzyna Celińska-Grzegorczyk, Roman Hauser, Wojciech.. Piątek, Wojciech Sawczyn, Andrzej Skoczylas, *Postępowanie administracyjne, sądowoadministracyjne i egzekucyjne* (Warsaw, 2013) 13; Andrzej Wróbel, 'Europeizacja polskiego prawa o postępowaniu administracyjnym a autonomia proceduralna państw członkowskich Unii Europejskiej' in Iwona Rzucidło, *Europeizacja prawa administracyjnego* (Lublin 2011) 20; Paweł Daniel, 'Ochrona tymczasowa przed polskim sądem administracyjnym w świetle działalności Rady Europy' in Bartosz Guzik, Natalia Buchowska, Patryk Filipiak, Paweł Wiliński *Prawo wobec wyzwań współczesności. vol. VII* (Poznań, 2011) 145; Ulrich Battis, 'Verwaltungsrecht als konkretisiertes Gemeinschaftsrecht' (2001) 54 Die Öffentliche Verwaltung 988

[2] Roman Hauser, Andrzej Skoczylas, *Postępowanie egzekucyjne w administracji. Komentarz* (Warsaw 2012) 12-13, 335-338; Andrzej Skoczylas, 'Postępowanie egzekucyjne w administracji' in Roman Hauser, Zbigniew Niewiadomski, Andrzej Wróbel, *System Prawa Administracyjnego. vol. 9. Prawo procesowe administracyjne* (Warsaw 2010) 316

[3] DzU 2012, item 1015 as amended

[4] DzU 2013, item 1289

force, by virtue of which the Polish legislator has implemented the Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.[5] The objective of the study presented in this article is to verify the hypothesis that the present shape of the Polish law on administrative enforcement proceedings is considerably determined by the process of its harmonisation within European law.

II. GENERAL REMARKS

The doctrine of law indicates – in the context of an Europeanisation of administrative law – that the use of national administrative law is necessary for the purpose of implementing EU law.[6] There are two basic forms through which Union law can have an impact on the administrative laws of EU Member States: firstly, the transposition of EU directives into national laws followed by the application of implemented provisions by the public administration; secondly, the so-called execution of Union law by national administrations.[7] An effective implementation of European law can also be achieved through administrative cooperation between the Member States of the European Union. This is because Poland's membership in the EU has an influence on the institutional system of Polish public administration and most of all, on the functioning of administrative authorities and their cooperation with the other Member States' governments and the European Commission, especially within the networks of administrative authorities.[8] The basis for that is set forth in Title XXIV of the Treaty on the Functioning of the European Union of 9 May 2008.[9]

One of the manifestations of such a significant impact of European law on the shape and functioning of the Polish administrative authorities can be seen in the implementation of the framework for cooperation in tax matters into the Polish legal system. This is also widely known as the international tax cooperation.[10] Based on the criterion of the proceedings stage, according to which

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[5] EU OJ L 84 of 31 III 2010

[6] Aleksander Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej. Sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie* (Warsaw 2010) 254; Jan Tkaczyński, 'Egzekutywa demokratycznego państwa prawa wobec współczesnych wyzwań cywilizacyjnych' (2005) 2 Politeja 310

[7] Stefan Hobe, *Europarecht* (Munich, 2010) 15, 147; Cezary Mik: 'Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej' in Sławomira Wronkowska, *Polska kultura prawna a proces integracji europejskiej* (Kraków 2005) 115

[8] Jerzy Supernat, 'Koncepcja sieci organów administracji publicznej' in Jan Zimmermann, *Koncepcja systemu prawa administracyjnego* (Warsaw 2007) 207; Peter Axer, Bernd Grzeszick, Wolfgang Kahl, Ute Mager, Ekkehart Reimer, *Das Europäische Verwaltungsrecht in der Konsolidierungsphase: Systembildung – Disziplinierung – Internationalisierung* (Berlin, 2010).

[9] EU OJ C 115/2008, p. 47

[10] Dominik Mączyński, *Międzynarodowa współpraca w sprawach podatkowych* (Warsaw, 2009) 23; Tomasz Jędrzejewski, Marian Masternak, Piotr Rączka, *Administracyjne postępowanie egzekucyjne* (Toruń, 2011) 288; Ewa Cisowska-Sakrajda, *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz*, (Warsaw, 2010) 593; Vito Tanzi, Howell Zee, 'Can Information Exchange be Effective in Taxing Cross-Border Income Flows?' in Krister Andersson, Peter Melz, Christer Sifverberg,

the administration of a Member State undertakes such a cooperation, the Polish legal doctrine distinguishes tax cooperation in the following four stages: audit activities, tax inspection, tax proceedings and enforcement proceedings.[11] A similar distinction, relating to administrative assistance with, *inter alia*, the enforcement of tax claims, is applicable under the Convention on Mutual Administrative Assistance in Tax Matters.[12] The Union law regulating cooperation in tax matters also provides for separate rules governing mutual assistance in the collection of tax debts.[13] The objective of cooperation of the Member States' administration authorities in this respect is – in the most general sense – to prevent a situation where public law liabilities incurred within one EU Member State could not be effectively claimed by competent authorities of that state by the method of execution due to the movement or accumulation of assets by the obliged subject on the territory of another Member State.[14] Cisowska-Sakrajda points, in that regard, to the binding force of 11 general principles of international legal assistance in claiming receivables.[15] For the purpose of this study those are the most important ones: the rule to apply the state's national procedural law (*lex fori processualis*),[16] the equal treatment of receivables and the adequacy of receivables of Polish and foreign creditors.

III. THE ADMINISTRATIVE ENFORCEMENT PROCEEDINGS ACT

The first step in the harmonisation of the Polish law on administrative enforcement proceedings with the European law, related to the transposition into the Polish law of the mechanism of international assistance in claiming receivables, was the extension of Chapter I of the Act on administrative enforcement proceedings (hereinafter the "Administrative Enforcement Proceedings Act" or "AEPA") with the provisions from article 66a to article 66z[17] (at present, to article 66zp) on 15 January 2001. These provisions were the result of the implementation of Directive

Liber amicorum Sven-Olof Lodin (Kluwer International, 2001) 259; Francesco Cannas, 'The Historical Development of the Exchange of Information for Tax Purposes', in O Ch Günther, Nicole Tüchler: *Exchange of Information for Tax Purposes* (Viennam 2013) 17

11 Mączyński (n 10) 18

12 Kazimierz Bany, *Międzynarodowa współpraca w sprawach podatkowych* (Warsaw 1999) 10; Andrzej Gomułowicz, Jerzy Małecki, *Podatki i prawo podatkowe* (Warsaw 2006) 683; Mączyński (n 10) 285

13 Mączyński (n 10)

14 Cisowska-Sakrajda (n 10) 236

15 ibid 236-243

16 Hauser, Skoczylas (n 2) 338; Karol Weitz, 'Europejskie prawo procesowe cywilne – stan obecny i perspektywy dalszego rozwoju' (2007) 2 Przegląd Sądowy 25

17 DzU vol 122 item 1315 as amended

76/308/EEC[18] and Directive 77/794/EEC[19]. The first one, due to its numerous amendments and tightened cooperation between EU Member States,[20] was later replaced with a consolidated version, i.e. Directive 2008/55/EC,[21] which has not been transposed into the Polish legal system.[22] However, as a result of the implementation of the two aforementioned directives, significant changes have been made in the Polish administrative enforcement proceedings. First of all they included extending the material scope of administrative enforcement and the catalogue of creditors, introducing the institution of international assistance, determining the procedure for recovering claims arising from international contracts as well as introducing principles of granting and using assistance of other states in the recovery of claims.[23] The provisions of Chapter 7 of the AEPA have been amended twice in a significant way. The first amendment took place in 2003, in relation to a change of the aforementioned directives: 76/308/EEC and 77/794/EEC, and a related obligation to adjust the Polish legal regulation concerning the institution of international assistance to the Union law in its new wording.[24] First of all, as a part of this amendment the basic terms applicable under the AEPA were harmonized.[25] The second amendment was made in 2006 and resulted from irregularities occurring in the practice of applying the provisions of Directive 76/308/EEC implemented into Polish law.[26]

IV. THE MUTUAL ASSISTANCE ACT

A. General remarks

The approximation of the Polish enforcement legislation to the deepening process of cooperation between the Member States of the European Union[27] was further expressed by the adoption of the Mutual Assistance Act for the recovery of taxes, duties and other receivables on 11 October 2013. The need for the adoption of the MAA arose from the necessity to transpose the

[18] EU OJ L 73 as amended
[19] EU OJ L 333 11
[20] Mączyński (n 10)
[21] EU OJ L 150 28
[22] Cisowska-Sakrajda (n 10) 589
[23] ibid 591
[24] DzU vol 193 item 1884
[25] Dominik Kościuk, 'Wybrane zagadnienia egzekucji administracyjnej jako przedmiot zmian dostosowawczych do prawa Unii Europejskiej' in Zbigniew Janku, Zbigniew Leoński, Marek Szewczyk, Michał Waligórski, Karol Wojtczak, *Europeizacja polskiego prawa administracyjnego* (Wrocław, 2005) 495
[26] Cisowska-Sakrajda (n 10) 592
[27] Hauser, Skoczylas (n 2) 337

Council Directive 2010/24/EU,[28] which had replaced Council Directive 2008/55/EC. Analogous acts have been passed by the parliaments of other EU Member States. As an example we can use the Austrian Act on the European legal assistance in enforcement matters (*EU-Vollstreckungsamtshilfegesetz*)[29] and the German Act on the implementation of the Directive on debt collection and amendments to tax legislation (*Beitreibungsrichtlinie-Umsetzungsgesetz*).[30] On 18 November 2011 the European Commission also issued the Implementing Regulation (EU) No 1189/2011 which lays down detailed rules in relation to certain provisions of the Council Directive 2010/24/EU,[31] as well as an implementing decision which was accompanied by patterns of requests for mutual assistance, requiring implementation into Polish law.

The main intention of the Polish legislator in the adoption of the 2013 Mutual Assistance Act was, among others: to ensure a greater exchange of information between Member States; to take into account all forms in which public administration claims concerning taxes, duties, levies, refunds and intervention can occur; to define the rights and obligations of all parties concerned; to appoint a central liaison office as well as, if necessary, a liaison office for contacts with Member States concerning mutual assistance in the collection of claims.[32] The basic form of mutual assistance is still recovering or securing receivables by competent authorities of a Member State. At the same time, mutual assistance shall also comprise an exchange of information regarding the entity. Such information constitutes an open catalogue and is intended to serve the creditor and the enforcement authority to decide whether to request assistance or not. Mutual assistance is also meant to include notification, i.e. delivery to an entity of a document referring to claims imposed on that entity (articles 38-39 of the Mutual Assistance Act).

B. The Mutual Assistance Act's impact on Polish administrative enforcement proceedings

One of the most important elements in shaping the Polish administrative enforcement proceedings came from the fact that the Mutual Assistance Act introduced very significant changes in the AEPA – as it was necessary for the functioning of mutual assistance arising from the Directive 2010/24/EU. The main reason to modify the AEPA was the inclusion of the aforementioned

[28] EU OJ L 84, 1

[29] Bundesgesetz zur Umsetzung der Richtlinie 2010/24/EU über die Amtshilfe bei der Beitreibung von Forderungen in Bezug auf bestimmte Steuern, Abgaben und sonstige Maßnahmen, BGBl. I 112/2011

[30] Gesetz zur Umsetzung der Beitreibungsrichtlinie sowie zur Änderung steuerlicher Vorschriften, BGBl. I 64/2011.

[31] EU OJ L 302 16

[32] Grounds for a government bill on mutual assistance for the recovery of taxes, duties and other receivables, Sejm form No. 1490

principle *lex fori processualis*, a consequence of which was accepting that the recovery of claims of Member States (and third states) shall be carried out using the AEPA procedure (article 4 (1) of the Mutual Assistance Act). By virtue of the Mutual Assistance Act the legislator has introduced to the AEPA a number of new mechanisms related to the necessity of adjusting enforcement proceedings to new solutions that have emerged in connection with the transposition of the Directive 2010/24/EU. In article 1a of the AEPA, provisions defining new terms were added, including "central liaison office", "security document" and "uniform instrument permitting enforcement". The terms are used by the legislator in specific provisions of the AEPA in relation to the application of that act to the recovering or securing of claims of various Member States. Furthermore, the concept of the uniform instrument permitting enforcement was identified with the institution of the instrument permitting enforcement. This means that it will perform the same function in the enforcement proceedings and its service will have the same effect as the service of the instrument permitting enforcement (article 26 (1) and (1a) of the AEPA), with the reservation that the uniform instrument permitting enforcement shall not be subject to the provisions related to the pattern, content and its examination as well as a change of the instrument permitting enforcement (article 26 (1b) of the AEPA). Moreover, in the situations specified in article 155a (1) of the AEPA, the uniform instrument permitting enforcement shall constitute, similarly to the instrument permitting enforcement, the basis for securing the claims being subject to recovery.

Notwithstanding this, in article 5 of the AEPA the definition of the creditor of claims of the Member States has been changed, which is a consequence of the solutions laid down in the Mutual Assistance Act. A solution has also been included, according to which in enforcement proceedings initiated at the request of a Member State the provisions of the Enforcement Act governing the rights and obligations of the creditor shall not be applied. The rights of the creditor in enforcement proceedings have also been limited. Article 13 of the AEPA, in the amended wording, does not provide for the necessity to obtain the creditor's consent for exempting specified components of the debtor's assets from enforcement. In the analysed amendment of the Enforcement Act, the provision of article 23 (7) was repealed. As a consequence there is no necessity to obtain the creditor's consent for suspending enforcement activities or enforcement proceedings. It should also be noted that the legislator has provided for a specific procedure for lodging and processing applications the handling of which shall be the competence of the authority of the Member State or a third state. In such situations an application, which should be processed by an authority of the Member State or a third state, shall be returned to the applicant along with an appropriate instruction.

C. The system of electronic circulation

The act under analysis also provides institutions with the possibility of using a system of electronic circulation of documents in the Polish enforcement proceedings. The amendment of 11 October 2013 introduces an alternative procedure for creditors which allows them to submit applications through a special ICT system or through other electronic communication means (article 26 (1c) of the AEPA). In the case of an instrument permitting the enforcement to be received by an enforcement authority with the use of the ICT system or electronic communication means, it should be printed out. The printout should be confirmed by placing an acknowledgement of its compliance with the content of the instrument permitting the enforcement, received via the ICT system or via electronic communication means indicating the date of the printout, the full name, the business title and the signature of the person acting under the authorization of the enforcement authority. The delivery of a printout of the instrument permitting the enforcement shall be deemed the delivery of a duplicate of the instrument permitting enforcement initiating the enforcement (article 26 (1d) and (5b) of the AEPA). However, if the obliged subject has its residing place or registered office on the territory of a Member State, instead of a duplicate of an instrument permitting the enforcement, he/she may be delivered an electronic copy of the document (article 26 (5a) of the AEPA). A consequence of the enabling of an electronic exchange of documents between the creditor and the enforcement authority is removing from the obligatory elements of the content, among others, the requirement to put an imprint of the creditor's official seal to the instrument permitting enforcement (article 27 clause 7 in fine, AEPA). As a result of enabling the creditor to electronically submit his request for enforcement proceedings, a modification was made in the AEPA, with regard to the obligation for the creditor, to demonstrate that prior to remitting the matter to the enforcement authority, they effectively delivered an admonition to the obliged subject (article 15 (1), AEPA). And so, the legislator has repealed article 27 (3) of the AEPA, which obligated the creditor to enclose a delivery acknowledgment of an admonition with the instrument permitting enforcement, unless it was not required. At the same time, the legislator extended the scope of article 15 (1) with an extra item (12), according to which the instrument permitting the enforcement should bear the delivery date of an admonition, and if the delivery of an admonition was not required, the legal basis for the lack of such obligation.

D. The protection of the debtor

From the standpoint of the shape of administrative enforcement proceedings and the protection of the debtor, another significant solution introduced into the AEPA by virtue of the

amendment discussed above is a modification in article 35 (1), under which the lodging by the debtor of an objection based on article 33 (1) items 1-7 and 9-10 shall suspend by virtue of law the enforcement proceedings until the final resolution of the matter initiated by the lodging, unless after receiving the objection, the creditor submits a justified application for resuming the suspended enforcement proceedings. Pursuant to article 35 (2) of the AEPA, during the suspension of the enforcement proceedings, the enforcement authority may secure the claims based on the instrument permitting enforcement. Separate rules apply to situations where, in the course of enforcement proceedings, the enforcement authority requests a Member State for the recovery of certain claims, which are referred to in article 2 (1) items 8 and 9 of the AEPA. Then, the enforcement authority informs of the state of lodging objections by the obliged subject and may request for undertaking precautionary measures on the claims upon the rules specified in the Mutual Assistance Act or may submit a justified request for further recovery of those claims (article 35 (3) and (4), AEPA). Moreover, it should be pointed out that articles 46-50 of the Mutual Assistance Act regulate the legal institution of objections regarding the uniform instrument permitting enforcement which constitutes the basis for the recovery of receivables by a Member State on its territory, where the obligation to pay those receivables has arisen on the territory of the Republic of Poland. The objections will be vested in the entity throughout the period of processing the request by the Member State irrespective of the objections regarding enforcement proceedings regulated under article 33 of the AEPA.

It should be emphasized that the Mutual Assistance Act repealed the conditions for the admissibility of enforcement on the property of the debtor, previously regulated by article 110 (1 – 3) of the AEPA. According to the author of the draft amendment considered here, resignation from the prerequisites for initiating enforcement on property has arisen from the necessity of ensuring an equal application of enforcement measures with respect to receivables claimed under enforcement procedure in the Republic of Poland and in a Member State or a third state requested for assistance in recovery of claims.[33]

V. CONCLUSION

It should therefore be concluded that the content of the Polish law on administrative enforcement proceedings, in its present wording, has been shaped, to a major extent, by the process of harmonizing that law with EU law. The greatest changes in this respect were made by the 2013

[33] Grounds for a government bill on mutual assistance for the recovery of taxes, duties and other receivables, Sejm form No. 1490

Mutual Assistance Act, which introduced new legal institutions, previously unknown to the Polish law and, in addition, modified a number of fundamental rules of the Polish administrative enforcement proceedings. The basic source of those changes is a principle adopted by the Polish legislation, according to which the recovery and the securing of claims of the Member States are carried out under the Polish Administrative Enforcement Proceedings Act. As a consequence, it has become necessary to unify the rules for the recovery of claims both in favour of Polish creditors as well as creditors coming from other Member States of the European Union.

The legal character of the reference to investment in article 25 of the ICSID Convention – Comparing two approaches of adopted by arbitral tribunals

Maciej Gorgol *

Abstract

The following article presents a comparison and detailed description of two concepts of the definition of investment contained in article 25 of the ICSID Convention. It compares the two various approaches (the subjective and the objective one) that can be seen throughout the case law of ICSID tribunals. The objective approach towards the definition of investment seems to be the prevailing one and hence, its description constitutes a major part of the article. The analysis focuses on the different elements which have been identified as necessary criteria that need to be fulfilled in order to consider a given economic activity as an investment. Finally, the article focuses on the concept of unity of investment.

I. INTRODUCTION

The investment activity of foreign investors is a complex venture exposed to various risks of legal, political and economic character. The inherent precarious nature of foreign investment can on many occasions lead to disputes between the investor and the host state – the state in which the investment is made. Since the adoption in 1965 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[1] (hereinafter "ICSID Convention" or "Convention"), institutionalised investment arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (hereinafter "ICSID") remains the primary enforcement mechanism of international standards of protection due to foreign investors.[2]

The widespread popularity of the ICSID Convention results from the unique nature of the international procedural regime that it creates. The Convention provides for a complete, exclusive,

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[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention/ ICSID Convention) (opened for signature on 18 March 1965 entered into force on 14 October 1966)

[2] As for 2012, more than 60% of all known investor-state disputes were arbitrated under ICSID or its Additional Facility. See: UNCTAD World Investment Report, 2013, 111-112

and closed jurisdictional system, insulated from national law with a direct enforceability of arbitral awards rendered under its auspices.[3] The reference to investment in article 25 of the ICSID Convention plays an essential gatekeeping role for potential investors in their access to an internationalised substantive protection of their economic activity. The purpose of this article is to examine the legal character of the notion of investment in article 25 of the ICSID Convention by analysing the case-law of arbitral tribunals operating within the ICSID framework. The analysis of this notion is crucial as it will allow to obtain a unified understanding of investment under article 25 of the Convention and hence have a clear view of how this notion should be understood given the two diverging approaches adopted by arbitral tribunals in their case law.

II. SPECIAL JURISDICTIONAL CHARACTER OF ARTICLE 25 OF THE ICSID CONVENTION

In contrast to *ad hoc* arbitrations or institutional arbitrations held outside the ICSID, the jurisdiction of arbitral tribunals operating under the ICSID Convention's adjudication system is based on a two-layer set of conditions. On one hand, it is derived from the applicable dispute settlement clauses found in the legal instrument which conveys the parties' consent to submit any future disputes to arbitration. This instrument is usually the Bilateral Investment Treaty (hereinafter "BIT"). On the other hand, it is based on the provision in article 25 of the ICSID Convention. The Convention, however, nowhere explains what is meant by the term "investment" found in article 25.[4]

A lack of definition of the term "investment" has prompted many scholars and tribunals to discuss whether ICSID arbitration requires that the claimant's invested assets or economic transaction must meet some additional criteria than the ones expressed in the underlying BIT. As a result, two approaches emerged in this regard. One, according to which the BIT definition of in-

[3] Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution* (1987) 287-288. Contracting states to the Washington Convention are obligated to recognize and enforce arbitral awards rendered by tribunals operating under the aegis of ICSID, regardless of the fact if the states where the enforcement or recognition is sought were parties to the underlying dispute. For that purpose, ICSID arbitral awards are treated as if they were final judgments of courts of the state where the enforcement is sought. See article 54 of the ICSID Convention

[4] According to article 25 of the Convention: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre"

vestment should be taken – on a case-by-case basis – into consideration for determining the existence of the subject matter jurisdiction of a tribunal and a another, which accepts in most cases that article 25 of the Convention sets out certain objective limits to the existence of investment, independent from the BIT criteria. These respective approaches are also labelled as "subjectivist" and "objectivist".[5]

A. The subjectivist approach

According to the first approach, the interpretation of the meaning of "investment" in article 25 of the Convention using the definition found in the corresponding BIT "corresponds most closely to the object and purpose of the ICSID Convention".[6] As noted by one of the founding fathers of the Convention, "the requirement that the dispute must have arisen out of an investment may be merged into the requirement of consent to jurisdiction".[7] This reasoning has been followed to a certain degree in arbitral jurisprudence.

In *Lanco v. Argentina*,[8] the tribunal explicitly accepted that the ICSID Convention does not provide for any definition of investment, and thus it is the underlying Argentina-United States BIT that sets the limits within which the tribunal is to examine the scope of its *ratione materiae* jurisdiction.[9] It led the tribunal in that case to assert that the claimant's minority shareholding in a company set up to develop a port terminal and a subsequent concession agreement with the government of Argentina qualified as an investment in light of a broad asset-based definition contained in the BIT.[10]

The view that the consent of the parties has to be given deference in determining the existence of investment for the purposes of an ICSID arbitration was also expressed in *MCI v. Ecuador*,[11] and *Romak v. Uzbekistan*.[12] The reasoning presented in *Romak* is compelling, as it emphasizes that a failure to interpret the term "investment" from the Convention through the lenses of the

[5] Farouk Yala, *The Notion of Investment in ICSID Case Law: a Drifting Jurisdictional Requirement?* (2004) 2
[6] J Hoe, *The Meaning of Investment in ICSID Arbitrations* (2010) 664
[7] Aron Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction* (1966) 268
[8] *Lanco v. Argentina* (Decision on Jurisdiction) 8 December 1998
[9] ibid para 48
[10] ibid para 15
[11] *MCI v. Ecuador* (Award) 31 July 2007 para 157-160
[12] Although *Romak* was not an ICSID arbitration, it offered obiter dicta considerations with regard to the adjudication system under Washington Convention

underlying BIT would risk depriving the BIT's provisions, that grant the investor a choice between different arbitral venues (e.g. ICSID or Stockholm Chamber of Commerce), of any real effect.[13]

Another argument in favour of giving weight to the parties' formulation of investment were expressed in *Biwater v. Tanzania*. After reiterating that the Convention is deliberately silent on what is to be understood as an investment, the tribunal expressed doubts whether arbitral panels sitting in individual cases should impose an objective definition applicable to all cases. It also observed that BITs reflect a developing consensus in given parts of the world as to the meaning of "investment," hence "it is difficult to see why the ICSID Convention ought to be read more narrowly". [14]

Finally, perhaps the most significant contribution to the approach favouring recourse to the BIT definition of investment was offered by the *ad hoc* committee in *MHS v. Malaysia*.[15] The committee observed that some 2800 BITs and multilateral investment treaties, currently in force, tend to define investment in similar, broad and inclusive terms and are today "the engine of ICSID's effective jurisdiction". It has also been underlined that "to ignore or depreciate the importance of the jurisdiction they bestow upon ICSID […] risks crippling the institution". [16]

B. The objectivist view

The prevailing view, however, is that article 25 of the Convention sets out certain objective limits to what can be regarded as a qualifying investment[17]. This means that in order to determine the existence of an investment, and thus the jurisdiction to examine the merits of the dispute, an arbitral tribunal operating within the ICSID system has to establish that the transaction in question meets the definition contained in the relevant consent instrument, and separately that it satisfies the autonomous notion of investment under article25 of the Convention. Only when these two steps are followed, can the tribunal exercise its jurisdiction over the investment dispute. This approach has been deemed in arbitral jurisprudence as a "two-fold",[18] "double-keyhole",[19] or a "double-barreled"[20] test.

[13] *Romak v. Uzbekistan* para 195

[14] *Biwater Gauff v. Tanzania* (Award) 24 July 2008 para 312-316. A contrary view is presented by Schreuer who refuses to accept that BITs reflect a general definition of the concept of investment in the Convention, but rather fall within the scope of consent requirement, which is distinct from the subject matter requirement that there be an investment. See Christoph Schreuer, *The ICSID Convention - A commentary* (2009) 125

[15] *Malaysian Historical Salvors v. Malaysia* (Decision on the application for annulment) 16 April 2009

[16] ibid para 73

[17] Schreuer (n 14) 117; *Global Trading v. Ukraine* (Award 1 December 2010, para 43

[18] *CSOB v. Slovakia* (Decision on Jurisdiction) 24 May 1999 para 55

[19] *Aguas del Tunari v. Bolivia* (Decision on Jurisdiction) 21 October 2005 para 278

[20] *Malaysian Historical Salvors v. Malaysia* (Award) 17 May 2007 para 55

The existence of an objective understanding of the term "investment" in the Convention is supported by article 28 thereof, which permits the Secretary General of the ICSID to refuse the registration of a dispute sent to the International Centre for the Settlement of Investment Disputes on the ground that the dispute is manifestly outside its jurisdiction. There are at least two reported cases where such refusal occurred: in 1985 with regard to a mere commercial sale and in 1999 in respect of a supply contract.[21] In particular, clauses in BITs that cover disputes concerning admission or establishment of investments may not serve as a basis for the jurisdiction of the ICSID, as its jurisdiction does not extend to the pre-investment stage of foreign economic activity.[22] Moreover, the consent of the parties expressed in bilateral arrangements may not contradict a notion of investment set out in the Convention, which essentially is a multilateral treaty. Through a BIT the parties may confirm or limit the ICSID notion, but they cannot expand it.[23] In this regard, the Washington convention has supremacy over an agreement between the parties to a BIT.[24] Inserting the BIT definition of investment in interpreting the reference to investment in the Convention would mean that "its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision". [25]

The above approach, requiring a two-fold determination of the *ratione materiae* jurisdiction of an ICSID arbitral tribunal, has been followed consistently by subsequent arbitral jurisprudence.[26] The awards, however, are far from being unanimous as to the exact type of characteristics that are said to form the outer limits of investment under article 25 of the convention and whether they should be regarded as strict jurisdictional requirements, that must be met cumulatively, or rather typical features that are interdependent and should be assessed in their totality.[27]

III. THE PARAMETERS OF THE OBJECTIVE MEANING OF INVESTMENT

Since the prevalent view on the character of references to "investment" in article 25 of the Convention is that the latter requires certain objective criteria to be met by the claimant's transac-

[21] IFI Shihata, A Parra, *The Experience of the International Centre for Settlement of Investment Disputes* (1999) 308

[22] A Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment* (1997) 291, 325, 329

[23] *Phoenix v. Czech Republic* (Award) 15 April 2009 para 96

[24] *Patrick Mitchell v. Congo* (Decision on the Application for Annulment of the Award) 1 November 2006 para 31

[25] *Joy Mining v. Egypt* (Award) 6 August 2004 para 42-50

[26] For a detailed list of awards following the two-fold approach see: Schreuer (n 14) 155-156, 18

[27] For a condensed analysis of these two approaches see: *Saba Fakes v. Turkey* (Award) 14 July 2010 para 98-106

tion in the host state, requirements distinct from the BIT formulation of investment, various arbitral tribunals offered their guidance as to what constitutes such objective limits to the term "investment". There seems to be a wide consensus that the notion of investment under the ICSID Convention entails: a commitment of resources, a certain duration of the operation in question and an acknowledgment of the possible risk, usually by both sides to the transaction. Less often, these list of characteristics is extended to cover regularity of profit and return, and a significance of the investor's activity to the host state's development. At least one tribunal added an additional criterion of a protected investment, i.e. the requirement of good faith.[28] As Schreuer noted – commonly viewed as the first academic to provide the above list of criteria of an ICSID investment – they should not be treated as separate jurisdictional criteria or mandatory legal requirements, but rather typical characteristics of an investment that should be assessed in their totality in the circumstances of each case.[29] The various conditions listed above will be now analysed in greater detail.

A. Commitment of resources

There is no investment without a commitment of certain resources by the investor. This feature of investment has been interpreted by tribunals in different ways. One group of arbitral awards recognized that the commitment of resources on the part of investor needs to be substantial.[30] For instance, in Joy Mining v. Egypt[31] the tribunal had to consider whether bank guarantees supplied by the investor in connection with a contract for the supply of mining equipment to Egypt constituted an investment for the purposes of ICSID. Although the value of the bank guarantees amounted to almost 10 million GPB, i.e. 97 % of the contract price, the tribunal held that it was only a small part of the overall mining project, which "cannot be compared to the concept of '*contrats de développement económique*' or even contracts entailing the concession of public services"[32]. In conclusion, the tribunal refused to entertain its jurisdiction over the dispute as it concerned a mere commercial contract.

In *Bayindir v. Pakistan*,[33] the tribunal accepted that the requirement of substantial resources is not limited only to financial means, but that the contribution on the part of the investor may also

[28] *Phoenix v. Czech Republic* (Award) 15 April 2009 para 114

[29] Schreuer (n 14) 128-129, 133; Joseph Boddicker, *Whose Dictionary Controls: Recent Challenges to the Term "Investment"* (ICSID Arbitration, 2010) 1040-1041

[30] *Fedax v. Venezuela* (Decision on Jurisdiction) 11 July 1997 para 43; *Joy Mining v. Egypt* (Award) para 53

[31] *Joy Mining v. Egypt* (Award) 6 August 2004

[32] ibid para 57

[33] *Bayindir v. Pakistan* (Decision on Jurisdiction) 14 November 2005

occur in terms of know-how, equipment, and personnel.[34] It then considered a contract for the construction of a highway in Pakistan as a qualifying investment. In *Lesi&Astaldi v. Algeria*[35] the tribunal entertained its jurisdiction over a contract to construct a dam finding that the requirement of contribution is met when the investor commits expenditure, in whatever form, in order to pursue an economic objective.[36]

Similarly, the sole arbitrator in *MHS v. Malaysia* examined the magnitude of the expenses of the investor to decide whether a contract to salvage a cargo that sunk off the coast of Malaysia could be regarded as a covered investment. Despite the fact that the claimant in that case committed resources, equipment, know-how and personnel into the performance of the contract and its overall expenses reached at least 3.8 million USD, the tribunal held that the claimant's activity did not constitute an investment, as – *inter alia* – the size of the contributions was in no way comparable to those present in other ICSID cases, and was largely similar to those which might have been made under a commercial contract.[37] By contrast, in *Deutsche Bank v. Sri Lanka*, the tribunal held that a commitment to pay 2.5 million USD and an actual transfer of around 35,000 USD under a hedging agreement was a substantial contribution on the part of the investor.[38]

On the other hand, there are voices emphasizing that the magnitude of commitment should not be determinative for the existence of an ICSID investment, as a proposal to introduce a monetary threshold for claims submitted to the Centre was specifically rejected in its drafting history. This view was also presented in *Mihaly v. Sri Lanka*, a case regarding the treatment of pre-investment expenditures, where the tribunal held that "the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small".[39] The tribunal in *Pantechniki v. Albania* further argued that it is up to the states to define in the BITs or other international agreements what kind of investment they wish to promote, and any choice to promote small and medium investors characterized by modest contributions may not be contradicted by an overly restrictive interpretation of arbitral tribunals.[40]

Moreover, the contribution to an economic activity in the host state must not always come to a fruitful outcome for the operation to be deemed an investment. The development of economic

[34] ibid para 121, 131
[35] *LESI and Astaldi v. Algeria* (Decision on Jurisdiction) 12 July 2006
[36] ibid para 73(1)
[37] *Malaysian Historical Salvors v. Malaysia* (Award) 17 May 2007 para 109,134
[38] *Deutsche Bank v. Sri Lanka* (Award) 31 October 2012 para 298-299
[39] *Mihaly v. Sri Lanka* (Award) 15 March 2002 para 51; *Saba Fakes v. Turkey* (Award) 14 July 2010 para 112
[40] *Pantechniki v. Albania* (Award) 28 July 2009 para 45

activities must have been foreseen or intended, but need not be successful in cases when the problems faced by the investor in the conduct of his activity are caused by the host state actions.[41] For instance, in *Malicorp v. Egypt*,[42] the investor was granted a Build-Operate-Transfer concession contract to build an international airport in Egypt, which was subsequently terminated by the Egyptian government. The tribunal held that "there is nothing per se to prevent the view that the long-term contractual commitment of a party to thereafter perform services fulfilling traditional criteria also amounts to a contribution". [43] The distinguishing factor in this case was that there was an already signed, although not performed, contract between the investor and the host state. In cases where the investor incurred certain pre-investment expenses but there was no actual contract with the host state, such expenditure would not be considered as investment.[44]

A different issue addressed in ICSID arbitral jurisprudence is whether the investment has to be financed only trough foreign capital in order to be granted protection. In one of the first cases faced with this issue, *Tradex v. Albania*, the tribunal held that the origin of funds used by the investor in its activity is irrelevant, in particular it may finance this activity through third-party resources.[45] As observed in *Tokios Tokeles v. Ukraine*,[46] one has to look at the parties' consent reflected in the underlying BIT. If there is no such requirement that the funds invested should have a foreign origin, the tribunal may not impose such a condition on the parties.[47] Hence, under the ICSID Convention, the only element that has to be of a foreign character is the nationality of the investor. In particular, such investor may finance his investment from profits made in the host state, or from any other locally-obtained capital.[48] This view remains valid as long as there are no limitations imposed in the BIT requiring a minimal amount of foreign capital to be imported by the investor.[49]

Also, many objections to the *ratione materiae* jurisdiction of ICSID arbitral tribunals referred to the fact that the commitment of resources composing the investment has to be made in the territory of the host state. In *Fedax v. Venezuela*,[50] although the underlying BIT contained references to the territory of the host state, the tribunal distinguished between typical forms of investment,

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[41] *Phoenix v. Czech Republic* (Award) 15 April 2009 para 133
[42] *Malicorp v. Egypt* (Award) 7 February 2011
[43] ibid para 111; *PSEG v Turkey* (Award) 19 January 2007 para 304
[44] *Mihaly v. Sri Lanka* (Award) 15 March 2002 para 48-50, where the claimant signed a letter of intent with Sri Lankan authorities that was intended to be a basis for a subsequent BOT contract for the construction of a power plant.
[45] *Tradex v. Albania* (Award) 29 April 1999 paras 109-111
[46] *Tokios Tokeles v. Ukraine* (Decision on Jurisdiction) 29 April 2004
[47] ibid para 80
[48] *Tokios Tokeles v. Ukraine* (Decision on Jurisdiction) 29 April 2004 para 80-81
[49] *Amco v. Indonesia* (Award) 20 November 1984 para 481-489
[50] *Fedax v. Venezuela* (Decision on Jurisdiction) 11 July 1997

such as acquisition of property or interest in companies, and investments of a financial character. The dispute at issue concerned the latter category, i.e. a promissory note issued by Venezuela to a Venezuelan corporation for its services provided to the state, which was later assigned to Fedax, a Dutch company, by way of endorsement. The tribunal observed that with regard to financial instruments, the funds involved are typically not transferred to the beneficiary in the host state, but rather are put at his disposal elsewhere. Thus, what is essential – the tribunal found – is to examine whether the funds in such cases were made available and utilized by the beneficiary of the credit.[51] This line of reasoning was followed in *Abaclat v. Argentina*,[52] a mass arbitration initiated by over 60,000 Italian bondholders of Argentinian securities acquired in the secondary market. The majority of arbitrators held that when it comes to the territorial link between the investment and the host state, the criteria applied to investments of a purely financial character should differ from those applicable to an investment consisting of business operations or involving manpower and property. With regard to the former category, the relevant question to be answered is where and for the benefit of whom the funds connected with such financial instrument are eventually used.[53] This was further supported by the ruling in *Deutsche Bank v. Sri Lanka*, where the tribunal reiterated that purely financial investments need not to be further linked to a specific economic enterprise or operation taking place in the territory of the host state.[54]

Finally, the contribution of resources has to be made with a true intention to conduct an economic activity. In *Phoenix v. Czech Republic*, the tribunal was confronted with a claim of an Israeli company, Phoenix, over its acquisition of two Czech companies that were previously associated with the owner of Phoenix, who fled from the Czech Republic to Israel to avoid prosecution for tax evasion. The tribunal refused to grant protection to the alleged investment made by Phoenix, as it found that the sole purpose of Phoenix's transaction was to acquire a claim under international law against the host state, and not to perform any economic activity. Such a move by Phoenix was deemed to be "an abuse of the system"[55] and was sufficient to refuse protection to the alleged investor.

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[51] ibid para 41. For a critique of this finding see: Zachary Douglas, *The International Law of Investment Claims* (2009) 181-182

[52] *Abaclat and others v. Argentina* (Decision on Jurisdiction and Admissibility) 4 August 2011

[53] ibid para 374

[54] *Deutsche Bank v. Sri Lanka* (Award) 31 October 2012 para 289-292

[55] ibid para 91

B. Certain duration of operation

What distinguishes investment from a ordinary commercial transactions such as a one-off trade of goods or a transient provision of services is a certain duration of the economic activity pursued by an investor. The tribunal in *Bayindir v. Pakistan* deemed this feature as a paramount factor of an investment.[56] Although any clear-cut dividing line is hard to be drawn, some arbitral tribunals have accepted, on the basis of facts of each case, that the period between two and five years is sufficient to regard a given activity as an investment.[57] Other tribunals have furthered the view that duration of an operation has to be assessed in more flexible terms.[58]

An important issue in this context is to establish from and until when the duration of a given activity is to be measured. For instance, in *Saipem v. Bangladesh*,[59] an arbitration over the construction of a gas pipeline, the contractual timeframe set for the performance was 14 months. This was subsequently extended by another 12 months due to delays in performance caused by local protests. In regard to this issue, the tribunal observed that it will consider the duration of the entire operation during which claimant was exposed to an investment risk, i.e. the contract, the duration of the performance, the warranty period after the performance and a subsequent commercial arbitration regarding the dispute.[60] In *Jan de Nul v. Egypt*,[61] a dispute concerning a dredging project in the Suez canal conducted by two Belgian companies, the tribunal started its analysis with the pre-contractual stage of the project including the Egyptian tender for a contractor, and finished it on the date when the last ships involved in the operation went back to the home state of the investor.[62]

Despite those approaches, concentrating on the period of risk to which the investor was exposed, the tribunal in *MHS v. Malaysia* assessed the issue of the underlying salvage operation's duration with regard to its potential contribution to the economic development of the host state. The tribunal applied the principle that "where the underlying contract does not promote the economy and development of the host State, there may be less justification to factor in the extensions granted under the contract". [63] Although the actual performance of the salvage contract took place over four years, the tribunal ascribed greater weight to the original contractual timeframe, which

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[56] *Bayindir v. Pakistan* (Decision on Jurisdiction) 14 November 2005 para 132

[57] *RFCC v. Marocco*, Decision on Jurisdiction, 16 July 2001 para 61; *Salini v. Marocco*, Decision on Jurisdiction, 23 July 2001 para 54; *Bayindir v. Pakistan*, Decision on Jurisdiction, 14 November 2005 para 133

[58] *MCI v. Ecuador* (Award) 31 July 2007 para 165; *Deutsche Bank v. Sri Lanka* (Award) 31 October 2012 para 303

[59] Saipem v. Bangladesh (Decision on Jurisdiction) 21 March 2007

[60] ibid para 110

[61] *Jan de Nul v. Egypt* (Decision on Jurisdiction) 16 June 2006

[62] ibid para 94

[63] *Malaysian Historical Salvors v. Malaysia* (Award) 17 May 2007 para 111

was 18 months before its extension by the parties. This has led the tribunal to find that the requirement of duration was met by the claimant only quantitatively, but not - as required - in a qualitative sense.

C. Assumption of a risk by the investor

The existence of a risk is a central characteristic of every economic activity. The risk inherent in an investment activity, however, is different from an ordinary commercial risk.[64] As noted in *Joy Mining v. Egypt*, if one fails to draw a distinction between these two types of risks, the result would be that any sales contract would qualify as an investment, which would undermine the stability of the legal order distinguishing between trade and investment on one hand, and commercial and investment arbitration on the other[65]. In *Lesi & Astaldi v. Algeria*, the tribunal explained that an investment risk refers to cases when an investor does not know with certainty what the outcome of the transaction would be.[66] In the same vein, the tribunal in *Global Trading v. Ukraine* dismissed claims before it in an expedited procedure under Rule 41(5) of the ICSID Arbitration Rules on the ground that the contract for the sale and supply of poultry to Ukraine was a simple commercial transaction excluded from the jurisdiction of the International Centre for the Settlement of Investment Disputes.[67]

Further, the tribunal in *Fedax v. Venezuela* accepted that the risk involved in the purchase of promissory notes was a risk required of an investment, as the risky nature of such an acquisition was evidenced by the existence of a dispute between the parties over the payment of the sums due under this debt instruments.[68] In *Salini v. Marocco*, the tribunal held that a contract for a construction of a 50-km long stretch of highway from Rabat to Fes created sufficient risk for the claimants for the reason that it was a long-term venture, whose total cost could not be established with certainty in advance. In particular, it was irrelevant for such a determination that the risk was freely assumed by the contractors.[69] This reasoning was followed in *Bayindir v. Pakistan*, a similar arbitration over the construction of highway, where the respondent questioned the existence of a risk for the reason that the claimant was given a substantial mobilization payment in advance which it could retain

[64] The tribunal in *Ambiente Uffico* used the term "operational risk" to distinguish it from commercial risk. See: *Ambiente Uffico v. Argentina* (Decision on Jurisdiction and Admissibility) 8 February 2013 para 485
[65] *Joy Mining v. Egypt* (Award) 6 August 2004 para 58
[66] *LESI and Astaldi v. Algeria* (Decision on Jurisdiction) 12 July 2006 para 73 (iii)
[67] *Global Trading v. Ukraine* (Award) 1 December 2010 para 55-56
[68] *Fedax v. Venezuela* (Decision on Jurisdiction) 11 July 1997 para 40
[69] *Salini v. Marocco* (Decision on Jurisdiction) 23 July 2001 para 55-56

until the end of the contractual performance. The tribunal found, however, that besides the inherent risk linked to a long-term project, the existence of a defect liability period and of a maintenance period connected with the construction constituted also a substantial risk on the part of the investor.[70]

Interestingly, in *Kardassopoulos v. Georgia*,[71] a dispute concerning the claimant's interest in a joint venture established to develop an oil and gas pipeline, the additional type of risk accepted by the tribunal was the risk connected with the unstable political and economic climate in Georgia at the time of the investment.[72] Other tribunals held that intervals in the works performed under the contract,[73] volatility in production costs,[74] the risk of state intervention in sovereign debt instruments,[75] and the risk of no commercial success in the upgrading of a four-star hotel[76] were also sufficient to find the existence of an investment risk.

D. Expectation of a return

A *pro bono* transaction may not be regarded as an investment qualifying for the special procedural regime of the ICSID Convention. Thus, the expectation of return is an indispensable aspect of any investment activity.77 Some tribunals referred to a modified concept of "regularity of profit and return" in order to find that a one-time payment under a contract could not be regarded as an investment.78 What is sufficient, in light of the facts of a given case, is that the regularity of profits is merely anticipated throughout the duration of an investment. In MHS v. Malaysia, however, where there was no regularity of payment made under the contract, the sole arbitrator held that the absence of this feature of investment is essentially immaterial, as it is not a classical hallmark of investment. In doing so, the arbitrator was convinced by the arguments presented by the claimant which cited an example of an investment of a pharmaceutical company in inventing a medication which although being an investment, has no regularity of return, as before any returns are perceived, the medication has to undergo lengthy testing and validation procedures.[79]

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[70] *Saipem v. Bangladesh* (Decision on Jurisdiction) 21 March 2007 para 135-136
[71] *Kardassopoulos v. Georgia* (Decision on Jurisdiction) 6 July 2007
[72] ibid para 117
[73] *Saipem v. Bangladesh* (Decision on Jurisdiction) 21 March 2007 para 109
[74] *R.F.C.C v. Marocco* (Decision on Jurisdiction) 16 July 2001 para 63
[75] *Ambiente Ufficio* (Decision on Jurisdiction and Admissibility) 8 February 2013 para 485
[76] *Helnan v. Egypt* (Decision on Jurisdiction) 17 October 2006 para 77
[77] *CME v. Czech Republic*, UNCITRAL (Separate Opinion of Ian Brownlie) 13 March 2003 para 34
[78] *Joy Mining v. Egypt* (Award) 6 August 2004 para 57
[79] *Malaysian Historical Salvors v. Malaysia* (Award) 17 May 2007 para.108

E. Contribution to the development of the host state

The view that a transaction has to contribute to the development of the host state, in order to be deemed as a qualifying investment, has turned out to be the most controversial feature of the definition of investment in ICSID arbitral case law.[80] It also differs from the other four characteristics discussed above since instead of concentrating on the investor's activity, it refers to the state's motivation to admit and protect the activity in question. The provenance of this hallmark of an investment can be traced back to the preamble of the ICSID Convention which speaks of "the need for international cooperation for economic development, and the role of private investment therein". The Report of the World Bank's Executive Directors accompanying the Convention confirms that the Convention was "prompted by the desire to strengthen the partnership between countries in the cause of economic development". [81] This has led some academics to state that the purpose of ICSID is to promote only such investments that contribute to the economic development of the host state.[82]

One of the first references to the discussed feature of investment was made by the tribunal in *Fedax*. The tribunal, however, employed a more general wording –"significance for the host state's development" – without specifying that the investors' activity has to contribute to the economic growth of the host state.[83] By contrast, in *Salini v. Marocco* the activity at question was examined in terms of its "contribution to the *economic* development of the host state". [84] Other tribunals have analysed such contribution in qualitative terms, requiring it to be significant.[85] In particular, the tribunal in *MHS v. Malaysia* was confronted with the issue whether the claimant's recovery of an underwater cargo met the development criterion. Although the claimant employed over 40 local residents during its salvage operation, imparted valuable know-how and knowledge on the process of historical marine salvage, helped to raise the international profile of Malaysia and contributed over 1 million USD in taxes, the tribunal stated that this contribution was largely of a cultural and historical value, and hence fell below the threshold of a significant contribution to the economic

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[80] Schreuer (n 14) 131

[81] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 25

[82] M Endicott, 'The Definition of Investment in ICSID Arbitration: Development Lessons for the WTO?' in Markus Gehring, Marie-Claire Segger, *Sustainable Development in World Trade Law* (2005) 383; Omar Garcia-Bolivar, *Economic Development at the Core of the International Investment Regime* (2010) 5-6

[83] *Fedax v. Venezuela* (Decision on Jurisdiction) 11 July 1997 para 43

[84] *Salini v. Marocco* (Decision on Jurisdiction) 23 July 2001 para 52, 57

[85] *Joy Mining v. Egypt* (Award) 6 August 2004, para 53; *Bayindir v. Pakistan* (Decision on Jurisdiction) 14 November 2005 para 137, *Malaysian Historical Salvors v. Malaysia* (Award) 17 May 2007 para 123

development of Malaysia.[86] Interestingly, the substantial character of the investor's contribution is to be measured with regard to the nature of benefits accruing to the host state and their lasting character, rather than their magnitude.

A more nuanced view on the development criterion was offered by the *ad hoc* committee in *Mitchell v. Congo.*[87] The committee accepted that the contribution to the economic development serves as an essential, although not sufficient characteristic of an investment. Such contribution, however, does not need to always be sizable or successful and ICSID tribunals should rather examine whether the claimant's operation contributes "one way or another" to the economic development of the host state. The committee concluded that this concept is "extremely broad" and fact-specific.[88] Applying these principles to the case before it, the committee annulled the original award of the tribunal on the point that a law firm in Congo could not constitute an investment under article 25 of the Convention, as it did not meet the development criterion.[89]

A flexible approach to the effects of investment on the host state was also present in the tribunals' findings in *Bayindir*[90] and in *LESI and Astaldi*[91], which held that the development criterion is implicitly covered by the requirements of contribution, duration and risk. An interesting observation was made in *Casado v. Chile*, where the tribunal noted that the contribution to the economic development is not so much a condition of an investment, but rather a natural consequence of it, therefore it should not be applied as a jurisdictional requirement.[92]

Further, an important question with regard to the development criterion is whether there has to be an actual contribution on the part of the investor, or is it sufficient that such a contribution is only expected or intended. The *CSOB v. Slovakia* award reads in the relevant part: "[the language of the Washington Convention's preamble] permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention".[93] The use of the words "designed" and "promote" suggests that the intention to contribute on the part of the investor should be sufficient to qualify him for protection. Other tribunals went even further, holding that the contribution to the economic development of the host state is not a

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[86] *Malaysian Historical Salvors v. Malaysia* (Award) 17 May 2007 para 131-133, 137
[87] *Patrick Mitchell v. Congo* (Decision on Annulment) 1 November 2006, para 33
[88] Ibid para 33
[89] Ibid para 39-41
[90] *Bayindir v. Pakistan* (Decision on Jurisdiction) 14 November 2005, para.137, citing *L.E.S.I-Dipenta v. Algeria* (Award) 10 January 2005, para 13(iv) in fine
[91] *LESI and Astaldi v. Algeria* (Decision on Jurisdiction) 12 July 2006, para.72 (iv) in fine
[92] *Casado v. Chile* (Award) 8 May 2008 para 232
[93] *CSOB v. Slovakia* (Decision on Jurisdiction) 24 May 1999 para 64

requirement for the existence of an investment.[94] Most notably, the tribunal in *Phoenix v. Czech Republic* held in this respect that there are highly divergent views on what "development" itself means, thus it is impossible to ascertain whether the development factor is present in a given case.[95]

IV. THE CONCEPT OF UNITY OF INVESTMENT

As observed in *Holiday Inns v. Marocco* "it is well known, and it is being particularly shown in the present case, that an investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others". [96] This has led the tribunal in the case at hand to entertain its jurisdiction over claims that were brought on the basis of a dispute resolution clause from the main investment contract, but regarded separate, secondary agreements, the parties to which were not identical to those in the main contract. This approach was further developed in *CSOB v. Slovakia* where the tribunal observed that an investment is not rarely a complex operation that is composed of multiple intertwined elements, which if analysed in isolation might not in all cases qualify as an investment. Where however, such an isolated transaction forms an integral part of an overall operation satisfying the notion of investment, a dispute brought to ICSID with regard to such a transaction can be deemed to arise directly out of an investment.[97] These examples suggest that in cases of interrelated contracts or operations involving a bundle of legal rights, ICSID tribunals tend to take a flexible view with regard to the requirement set out in article 25 of the Convention that a dispute has to directly arise out of an investment.

This was particularly evident in recent arbitrations regarding sovereign debt instruments. In *Abaclat and others v. Argentina*,[98] and *Ambiente Ufficio and others v. Argentina*,[99] the tribunals had to deal with the issue of Argentinan bonds that were originally purchased by Italian banks and then sold in the secondary (retail) market to the claimants. Argentina argued that the claimants' legal position could be described as holders of mere security entitlements, and thus they should not be

[94] E.g.: *Biwater v. Tanzania* (Award) 24 July 2008 para 312-313; *Malaysian Historical Salvors v. Malaysia* (Decision on the Application of Annulment) 16 April 2009 para 69, 72; *Pantechniki v. Albania* (Award) 28 July 2009 para 36, 43; *Saba Fakes v. Turkey* (Award) 14 July 2010 para 111; *Deutsche Bank v. Sri Lanka* (Award) 31 October 2012 para 295; *KT Asia v. Kazakhstan*, Award, 17 October 2013 para 171-173
[95] *Phoenix v. Czech Republic* (Award) 15 April 2009 para 85
[96] *Helnan v. Egypt* (Decision on Jurisdiction) 12 May 1974
[97] *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999 para 72
[98] *Abaclat and others v. Argentina* (Decision on Jurisdiction and Admissibility) 4 August 2011
[99] *Ambiente Ufficio and others v. Argentine Republic* (Decision on Jurisdiction and Admissibility) 8 February 2013

regarded as bondholders. The host state further pointed to the lack of a direct relationship of the claimants with Argentina, since the claimants made no direct transfer to the Argentinian treasury, but merely to the selling dealers engaged in the transaction.[100] Argentina also emphasized that what the claimants acquired were volatile and easily tradable assets, in that their sale or termination could be made instantaneously on the secondary market, hence they were outside the scope of the outer limits of the term "investment" under article 25 of the Convention.[101] In deciding the issue, the tribunals held that "whatever the technical nuances between bonds and security entitlements may be, they are part of one and the same economic operation and they make only sense together".[102] Under the facts of the discussed cases, the security entitlements would have no value should they be separated from the bonds.[103] In conclusion, both tribunals asserted their jurisdiction over the claimant's activity by characterizing it as either a right to claim reimbursement of the principal amount plus interest attached to security entitlements in bonds,[104] or as overall loans that provided respondent with available funds to finance its budgetary needs.[105]

V. CONCLUSION

The reference to investment found in article 25 of the ICSID Convention is not an empty vessel; rather it directs an arbitral tribunal in the jurisdictional phase of investment arbitration to examine the existence of an investment in its objective meaning, independent from the underlying BIT.

While the arbitral jurisprudence is not unanimous as to all the parameters of the objective meaning of the term "investment" in the ICSID Convention, the common denominator is that this term entails an ordinary meaning of investment, i.e. a contribution of resources of economic value to the host state by the investor involving an assumption of an investment risk in the expectation of commercial return. Under this approach, a one-off transaction such as a sales contract or a transient provisions of services may not qualify for investment, as it does not meet the fundamental element of investment risk.

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[100] ibid para 359

[101] ibid para 363

[102] *Abaclat and others v. Argentina* (Decision on Jurisdiction and Admissibility) 4 August 2011 para 358; *Ambiente Ufficio and others v. Argentine Republic* (Decision on Jurisdiction and Admissibility) 8 February 2013 para 423

[103] *Abaclat and others v. Argentina*, (Decision on Jurisdiction and Admissibility) 4 August 2011 para 364; *Ambiente Ufficio and others v. Argentine Republic* (Decision on Jurisdiction and Admissibility) 8 February 2013 para 424

[104] *Abaclat and others v. Argentina* (Decision on Jurisdiction and Admissibility) 4 August 2011 para 361, 367

[105] *Ambiente Ufficio and others v. Argentine Republic* (Decision on Jurisdiction and Admissibility) 8 February 2013 paras 425, 472, 495

The analysis of awards rendered by ICSID arbitral tribunals shows that the notion of investment set forth in article 25 of the Convention encompasses a wide array of economic operations. As an exemplary list, the following types of assets used in economic activity have been deemed to qualify for protection as investments:

- Immovable property;[106]
- Movable property;[107]
- An enterprise;[108]
- Shares in companies,[109] including both minority shareholding[110] and shares held by intermediate companies;[111]
- Contracts, in particular:
    - Construction contracts, including contracts referring to the construction of a highway,[112] a dam,[113] a gas pipeline;[114]
    - A hotel refurbishment and management contract;[115]
    - A lease agreement;[116]
    - Contract for pre-shipment inspection services;[117]
    - Contract for the conversion, equipment and operation of fishing vessels;[118]

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[106] E.g.: *CDSE v. Costa Rica* (Award) 17 February 2000 (30 km coastline acquired by US investors in Costa Rica for tourism development); See also: *Siag v. Egypt* (Decision on Jurisdiction) 11 April 2007 para 211

[107] E.g.: *Middle East Cement v. Egypt* (Award) 12 April 2002 para 132 (Greek ship used for export of cement to Egypt)

[108] *AAPL v. Sri Lanka* (Award) 27 June 1990 para 3, 59 (agricultural enterprise in the form of a shrimp farm); *Kardassopoulos v. Georgia* (Decision on Jurisdiction) 17 October 2006 para 107 (gas distribution enterprise)

[109] *Genin v. Estonia* (Award) 25 June 2001 para 319, 324 (ownership interest in an bank enterprise)

[110] E.g.: *CMS v. Argentina* (Decision on Jurisdiction) 17 July 2003 para. 53-56. (29,42% US shareholding in an gas transportation company); *Lanco v. Argentina* (Decision on Jurisdiction) 8 December 1998 para 10 (18.3% US shareholding in a consortium company granted a concession to build a port terminal)

[111] E.g.: *Noble Energy v. Ecuador* (Decision on Jurisdiction) 27 April 2006 para 71-83 (where a parent company brought claims with regard to a company that it held through two intermediate layers of ownership)

[112] E.g.: *Autopista v. Venezuela* (Decision on Jurisdiction) 27 September 2001 para 101 (contract for the partly construction and renovation of Caracas-La Guaira Highway System)

[113] *L.E.S.I-Dipenta v. Algeria* (Award) 10 January 2005 para 15

[114] E.g.: *Saipem v. Bangladesh* (Decision on Jurisdiction) 21 March 2007 para 111

[115] *Helnan v. Egypt* (Decision on Jurisdiction) 17 October 2006 para 77

[116] *Generation Ukraine v. Ukraine* (Award) 16 September 2003 para 18-29 (lease agreement over an office building construction site in Ukraine)

[117] *SGS v. Pakistan* (Decision on Jurisdiction) 6 August 2003 para 75-78, 123-129, 133-140

[118] *Atlantic Triton v. Guinea* (Award) 21 April 1986

  - o Concession contracts;[119]
  - o Technical and licensing agreement;[120]
  - o Hedging agreement;[121]
- Administrative rights granted in the pursuit of economic activity;[122]
- Financial instruments, including promissory notes,[123] loans,[124] and bonds.[125]

It follows from the above, that the concept of investment under article 25 of the ICSID Convention has been given a broad meaning in the awards of arbitral tribunals. It is also noticeable that since the first award dealing with objections to jurisdiction *ratione materiae* was rendered,[126] the acceptance for new non-traditional forms of investment including portfolio investments and contractual rights has subsequently gained ground.

[119] E.g.: *Azurix v. Argentina* (Decision on Jurisdiction) 8 December 2003 para 62 (concession contract for the water treatment and distribution); Telenor v. Hungary (Award) 2 August 2004 para 62 (concession contract for the provision of public mobile phone services)

[120] *Colt Industries v. Republic of Korea*, Case ARB/84/2 (case settled)

[121] *Deutsche Bank v. Sri Lanka* (Award) 31 October 2012 para 312

[122] E.g.: *LG&E v. Argentina* (Decision on Liability) 3 October 2006 para 133 (gas distribution license)

[123] *Fedax v. Venezuela* (Decision on Jurisdiction) 11 July 1997 para 43

[124] *CSOB v. Slovakia* (Decision on Jurisdiction) 24 May 1999 paras.76, 91

[125] *Abaclat and others v. Argentina* (Decision on Jurisdiction and Admissibility) 4 August 2011 para 361, 367, 371

[126] *Amco v. Indonesia* (Decision on Jurisdiction) 25 September 1983

Right to homebirth in Lithuania

Laura Šimkutė[*]

Abstract

Lithuania neither guarantees nor in any way regulates women's right to choose where to give birth. Therefore, pregnant women who would like to give birth outside hospitals, cannot fully realize their right to private life guaranteed by article 8 of the European Convention on Human Rights (ECHR). Lithuanian Law does not prohibit giving birth at home but it also does not ensure the ability to realize this right. It is so due to the fact that physicians are not allowed to help the woman wishing to give birth at home. According to Order No. 117 of the Minister of Health Care of the Republic of Lithuania of 15 March 1999, women can only give birth in health care hospitals. The obstetrician's legally defined competence does not include attending a delivery outside a hospital, e.g. mother's home. This article aims at proving that the current legal situation in Lithuania violates human rights, in particular the woman's right to private life under article 8 (1) of the European Convention on Human Rights. The article consists of an examination of article 8 of the ECHR and of an explanation of the concept of private life as well as of the legal situation in Lithuania.

I. THE MAIN ELEMENT OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 8(1) protects: "private life, family life, home and correspondence.[1]" Under article 8(1) of the European Convention of Human Rights (hereinafter "ECHR") the state has a negative obligation[2] not to interfere with rights protected by article 8.[3]

However, in certain circumstances the state also has positive obligations, including taking appropriate measures to ensure the protection of the rights in question.[4] This obligation means more than a mere non-interference with human rights. Rather, article 1 ECHR requires that the

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1 Philip Leach, Taking a Case to the European Court of Human Rights (OUP 2005) 285
2 Negative obligations have always been regarded as inherent in the European Convention (Jean-François Akandji-Kombe, Positive obligations under the European Convention on Human Rights available on <http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-07%282007%29_en.pdf > last accessed on 20 December 2014.
3 ibid
4 Philip Leach (n 2) 285

states that have ratified the ECHR "secure"[5] the rights contained therein to every person under their jurisdiction.

As an international treaty, the European Convention on Human Rights is to be interpreted in accordance with the general rules for the interpretation of international treaties. Not only is it part of customary international law but it was also codified in the Vienna Convention of the Law of Treaties[6] (hereinafter "VCLT"). According to article 31 VCLT, the ordinary meaning of the words contained in the provisions of international treaties forms the fundament for the interpretation of the provision in question.[7] The ordinary meaning of the term "secure" goes beyond the ordinary meaning of the term "respect". The word "secure" already implies that some kind of positive action can be taken. The positive dimension of human rights obligations' is therefore already inherent in the ECHR itself. But that does not mean that every substantial[8] article of the Convention or of the Protocols of the Convention triggers a positive obligation on the part of the states.

As the European Court of Human Rights decided in *Sheffield and Horsham v. the United Kingdom*[9] "The notion "respect" is not clear-cut, especially as far as the positive obligations are concerned."[10] The European Convention on Human Rights is binding on 47 states.[11] These states often have different ideas as how to best fulfil their obligation under the ECHR. This is also recognised by the Court, which applies a case-by-case approach to interpret the obligation of states to respect human rights.[12] This is only in fact a natural consequence of the way the ECHR functions - it can only react to the cases brought before it. The way in which the Court determines the existence of a positive obligation might seem rather vague because it holds that: "[I]n determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual."[13] It has to be noted that such a "search for balance is inherent in the entirety of the Convention"[14] Therefore it is not an

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[5] ECHR article 1

[6] United Nations, Treaty Series, vol. 1155, Vienna Convention of the Law of Treaties 331, 27 January 1980, No. 18232

[7] ibid article 31

[8] For the purposes of this article, the term "substantial articles" refers to those provisions of the ECHR or the Protocols thereto which contain material rules regarding specific rights

[9] *Sheffield and Horsham v. United Kingdom* ECHR (1998)

[10] ibid para 52

[11] The Treaty Office of the Council of Europe <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> last accessed 20 December 2014

12 Sheffield and Horsham v. United Kingdom ECHR (1998) para 52

[13] ibid

14 ibid

entirely new concept. Based on the premise that the state has to "secure" the human rights contained in the Convention, the Court asks itself how the obligation can be fulfilled and also if negative or positive obligations are sufficient and necessary to ensure the abovementioned security.

Positive obligations may arise directly in relation between an applicant and a public body, but the obligations under article 8 (1) of the European Convention on Human Rights may also arise where there is a duty of a public body to prevent an individual or other private entity from violating the rights of another right holder.[15] According to the Court, the state has a duty to protect human rights which might "involve the adoption of measures even in the sphere of the relations of individuals between themselves."[16] In that case, it is often enough to take efficient legal actions. What is hence required is an effective protection of human rights, implied by the word "secure", which is used to describe the extent of the obligations of the states under the Convention. Furthermore, it has to be noted that while the choice of the means to secure compliance with article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.[17]

Governments of the countries that ratified the ECHR have on many occasions sought to argue that there is no interference by public authority with the rights which are included in the material scope of article 8(1) ECHR on the basis that the interference or the violation in question has been carried out by a private individual rather than the authorities.[18] However, such arguments are likely to be rejected by the European Court on Human Rights (hereinafter "ECtHR") if there was in fact state involvement.[19]

Beyond the direct involvement of the state, the Court can find a violation if there has been a failure of the organs of the state to take positive action to prevent human rights violation. In this case the state would not be directly responsible for the act which ultimately harmed the applicant but would have to have enabled the damaging act's occurrence through a lack of legislation.

It will be shown that the failure by Lithuania to establish a legal framework which would enable physicians and midwives to attend to women who want to give birth at home without fear of negative consequences for the midwives and physicians amounts to a violation of the right to private life under article 8 (1) ECHR.

15 Philip Leach (n 2) 285
16 *M.C. v. Bulgaria* ECHR (2003) para 150
17 ibid
18 Philip Leach (n 2) 285
19 ibid

II. THE CONCEPT OF PRIVATE LIFE

First and foremost, a definition of the material scope of the right to private life under article 8 (1) ECHR must be provided. The extent of this right has never been defined unambiguously[20] and it appears impossible to do so. Rather, the ECtHR will have to decide on a case by case-basis if a particular right claimed to fall within the scope of the right to private life actually does so. The Court has had many opportunities do so since the right to private life is invoked very often in ECtHR cases.[21] With regard to privacy, the Court has ruled that it is not necessarily restricted to the core aspects of the right to private life.[22] Among other things it "includes [the applicant's] physical, psychological and moral integrity"[23] but also, as the Court held in *Bensaid v. the United Kingdom*[24] the "preservation of mental stability"[25] as "an indispensable precondition to effective enjoyment of the right to respect for private life".[26]

This does not mean that article 8 (1) ECHR will protect an applicant against everything which is deemed stressful. A decrease in stress when compared to giving birth in a hospital is sometimes given as a reason why women want to give birth at home.[27] Despite the ruling in *Bensaid v. the United Kingdom,*[28] this alone would appear to be insufficient to establish a legal right to home birth under article 8 (1) ECHR.

In the case of *R.R. v. Poland*[29] the European Court of Human Rights ruled that "private life" is a broad concept, encompassing, *inter alia*, the right to personal autonomy and development, a person's physical and psychological integrity, incorporates the right to respect for both the decisions to become and not to become a parent".[30] However, the ECtHR had the opportunity to be more precise in the case of *Odièvre v. France*[31] in which it emphasised that "matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning

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20 ibid
21 ibid
22 ibid
23 ibid
24 *Bensaid v. the United Kingdom* ECHR (2001); *Odièvre v. France* ECHR (2005) para 29
25 ibid para 47
26 ibid para 47
27 Pat Jones, 'Advantages and Disadvantages of Birthing at Home, Birth Center, and Hospital' <http://www.houston-naturalbirth.com/adv_homebirth.shtml> last accessed 20 December 2014
28 *Bensaid v. the United Kingdom*; *Odièvre v. France* para 29
29 *R.R. v. Poland* ECHR (2011)
30 ibid para 180
31 *Odièvre v. France* ECHR (2003)

important aspects of one's personal identity, such as the identity of one's parents. Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by article 8 of the Convention" .[32]

This means that the child has to be taken into account when deciding about the permissibility of giving birth at home. This consequence was predictable because in *Brüggemann and Scheuten v. Germany*[33] it was held that a woman's pregnancy is closely related to the child and not exclusively to the woman's right to private life.[34] In other words, while the right to private life can be very wide in terms of its material scope, not every decision related to the pregnancy can fit within the right to private life under article 8 (1) of the ECHR. This has been repeated in another context in the case of *A, B and C. v. Ireland.* [35] In this case, the ECtHR held that states have a margin of appreciation[36] concerning the regulation of abortion[37] and are permitted to forbid abortion[38] because article 8 (1) ECHR does not give a pregnant woman the right to have an abortion.[39]

The right to private life therefore does not necessarily allow a woman to make any decision with regard to her pregnancy. This is why the question whether there actually is a human right to give birth at home was bound to be asked in front of the ECtHR.

A few years ago the ECtHR had indeed the opportunity to hear such a case. In the case of *Ternovszky v. Hungary*[40] the applicant was a pregnant women, wishing to give birth at home.[41] However, under Hungarian law: "any health professional assisting a home birth runs the risk of conviction for a regulatory offence".[42] The applicant in *Ternovszky v. Hungary* complained that the ambiguous legislation on home birth stopped a medical professional from assisting her when giving birth at home which therefore resulted in discriminatory interference with her right to her private life under article 8 ECHR.[43] In its judgement the court ruled that: "Private life" is a broad term [which] incorporates the right to respect for both the decisions to become and not to become a parent". [44] The right to personal autonomy, which is also included under the term of "private life",[45] allows to

32 ibid para 29
33 *Brüggemann and Scheuten v. Germany* ECHR (1977)
34 ibid para 3
35 *A, B and C. v. Ireland* ECHR (2010)
36 ibid para 112
37 ibid para 112
38 ibid para 175
39 ibid para 172
40 *Ternovszky v. Hungary* ECHR (2011)
41 ibid para 6
42 ibid para 6
43 ibid para 12
44 ibid para 22
45 ibid para 22

identify the specific guarantees which are contained in article 8.[46] Therefore the right concerning the decision to become a parent includes the right of choosing the circumstances of becoming a parent.[47] It is clear from this decision that the concept of "circumstances of giving birth" falls into the scope of "private life" under article 8(1) ECHR.[48] For the Court, the right to choice in matters of child delivery includes also the legal certainty that the choice is lawful and not subject to sanctions, directly or indirectly.[49]

The conclusion that the right to private life includes within its scope a right to decide where to give birth does not mean that this right cannot be restricted. Article 8 (2) ECHR provides certain ways as to how and in what circumstances the right to private life can be restricted. Regarding the issue of homebirths, possible limitations could be applied for the protection of health, of morals or for the protection of the rights and freedoms of others, i.e. the fetus.

States have a certain margin of appreciation when it comes to the question how they implement the ECHR in domestic law. This means that the ECHR regulates what obligations states have but it does not always regulate the way in which states need to act in order to protect these rights. In some cases it can be enough not to interfere with human rights. This concerns the above mentioned negative dimension of human rights obligations. In other cases, states have a positive obligation, meaning that they have to grant a right to the individual. At the very least, this can require a legal regulation in order to ensure legal certainty to individuals. This can be a way in which the state fulfils its obligation to "secure" the human rights which are included in the Convention.

In case of *Ternovszky v. Hungary*[50] the European Court on Human Rights considered it necessary that there was some sort of regulation in Hungary's national law concerning the question of where to give birth: "[W]here choices related to the exercise of a right to respect for private life occur in a legally regulated area, the State should provide adequate legal protection to the right in the regulatory scheme, notably by ensuring that the law is accessible and foreseeable, enabling individuals to regulate their conduct accordingly. [I]n this regard, the State has a wide margin of appreciation; however, the regulation should ensure a proper balance between societal interests and the right at stake. In the context of home birth, regarded as a matter of personal choice of the mother, this implies that the mother is entitled to a legal and institutional environment that enables her choice, except where other rights render necessary the restriction thereof."[51]

46 ibid para 22
47 ibid para 22
48 ibid para 22
49 ibid para 22
50 ibid
51 ibid para 24

In other words, the right of private life under article 8(1) ECHR includes a right of the mother to determine circumstances of giving birth, including the location, and hence the right to choose to give birth at home.

III. LEGAL SITUATION IN LITHUANIA

The legislation in Lithuania, specifically the Order of the Health Care minister concerning Medical Standards for Lithuania MN 64:2008 "Obstetrician. Rights, duties, responsibility and liability''[52] does not allow the obstetrician to help a woman who decided to give birth outside a hospital.[53]According to the Order, the obstetrician's competence does not include delivery at the mother's home.[54] Not to mention the fact that if the obstetrician fails to see to this responsibility he faces a potential malpractice claims.[55] Furthermore, according to the Order No. 117 of the Ministry of Health Care of the Republic of Lithuania[56] birth can be given only in health care institutions.[57] Order No. 117 regulates how an obstetrician is to treat pregnant women before and after labour.[58] This regulation is unfavourable for pregnant women who would like to give birth at home and receive medical care.

The Human Rights Monitoring Institute (hereinafter "HRMI") (*Žmogaus teisių stebėjimo institutas*) is a non-governmental organisation, which monitors how human rights are respected in Lithuania.[59] The HRMI has pointed out[60] that the public outrage caused by events related to the pre-trial investigation in the case was provided in the context of the home births, are rigid and do not provide the protection of human rights in public health policy implications.[61]

52 The Order of the Health Care Minister concerning Medical Standards for Lithuania MN 64:2008 Obstetrician. Rights, duties, responsibility and liability (2008-03-27, V-170)

53 ibid para 10

54 ibid para 10

55 ibid para 20

56 The Order No. 117 of Ministry of Health Care of the Republic of Lithuania (1999-03-26 Nr.28-811)

57 ibid para 2

58 ibid appendix No. 4 Outpatient prenatal care

59 The Human Rights Monitoring Institute was founded in 2003 by the Open Society Foundation with the mission to promote an open democratic society through the consolidation of human rights and freedoms. Information is based on the official internet page of the Human Rights Monitoring Institute available at <https://www.hrmi.lt/en/about-us/> last accessed 20 December 2014

60 The official internet page of the Human Rights Monitoring Institute, news section, available at <https://www.hrmi.lt/naujiena/830/> last accessed 20 December 2014

61 ibid

An application to European Court of Human Rights was presented by a group of women who wanted to give birth at home.[62] The applicants (in *Kosaitė – Čypienė and others v. Lithuania*) filed a complaint under articles 2 and 8 of the ECHR because of the fact that they cannot benefit from adequate professional assistance during a home birth in view of the domestic legislation. The applicants argued that the state thus puts health and even the lives of mothers and babies at risk. They asked the ECtHR to rule that the state should not prohibit and obstruct medical specialists who want to help pregnant women by providing them the assistance during home birth.[63] As of the 14th of May 2014 the case is still pending.

On the 8th of November 2013 the Lithuanian Association of Obstetricians and Gynaecologists, the Lithuanian University of Health Sciences Department of Obstetrics and Gynaecology, and Public Institution Parenting Centre organised an international conference entitled "*Birthing models: opportunities and the right to choose*".[64] The organisers prepared a resolution,[65] proposing a change of legislation, which was sent to the Chair of the Parliament, the Parliamentary Health Committee, the Prime Minister, and the Minister of Health[66]. The Ministry of Health Care of the Republic of Lithuania replied that[67] in its opinion the decision in the case of *Ternovszky v. Hungary* does not require Lithuania to create legislation which: "would allow health care professionals to provide services to women giving birth at home".[68]

In principle, one could assume that the view held by the Ministry of Health of Lithuania is correct. After all, decisions in cases before the ECtHR only have an effect *inter partes,* that is only between the parties to the case in question. However, in the Brighton Declaration[69] the states which are parties to the ECHR declared that they would implement the Convention in accordance with the case law of the ECtHR even if they were not parties to the case in question.[70] This declaration itself might not be an international treaty it is not necessary for this declaration to have a legal effect

62 *Elena Kosaitė - Čypienė and others v. Lithuania* ECHR lodged on 19 October 2012
63 ibid
64 Information about the conference is presented on the Lithuanian Association Obstetricians and Gynecologists internet page, available at < http://www.lagd.lt/index.php?id=525> last accessed 20 December 2014
65The copied version on the resolution is available on the informal community's of families supporting out-of-hospital birth <http://gimimas.lt/?p=1500> last accessed 20 December 2014
66 Information is based on the informal community's of families supporting out-of-hospital birth <http://gimimas.lt/?p=1521> last accessed 20 December 2014
67 ibid
68The copied version of the reply is available on the informal community's of families supporting out-of-hospital birth <http://gimimas.lt/wp-content/uploads/2014/01/SAM-atsakymas-del-GM_2013-12-20.pdf> last accessed 20 December 2014
69 Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights, 19 and 20 April 2012
70 ibid para 3

on the states in question. The European Convention on Human rights is an international treaty. Therefore, the general rules of treaty interpretation apply to it as they apply in the implementation of the ECHR. This includes the customary law obligation which is enshrined in the concept of estoppel[71] or *non venire contra factum proprium*.[72] This rule prevents states from changing their behaviour. In other words, states would violate the customary law principle if they were to say in the aforementioned declaration that they will implement the ECHR in one way (that is, in accordance to the current jurisprudence) and then to implement it differently. Lithuania has signed the Brighton Declaration on 20 April 2012.[73] The principle of *non venire contra factum proprium* therefore means that the Lithuanian government cannot rely on the limited effect of ECtHR judgements *inter partes* without violating customary international law with respect to the other 46 states which have ratified the ECHR.

The opinion expressed by the Ministry of Health of Lithuania could still be correct, if the judgement in *Ternovszky v. Hungary* did not have to be interpreted in a way which would require states to enact legislation which regulates giving birth at home. It is the latter issue which will be dealt with in the following paragraphs.

IV. LIMITATIONS

The right to respect private and family life under article 8 of the ECHR is not unlimited or absolute. The second part of this article states: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others."

Forcing a woman to give birth in a hospital against her will is not different from forcing her to undergo a medical treatment or examination without her consent. Such treatments or examinations interfere with the right to a private life,[74] especially in cases in which the person in question

71 "The essence of estoppel is the element of conduct which causes the other part, in reliance on such conduct, detrimentally to change its position." Ian Brownlie, Principles of Public International Law (OUP 1988) 646

72 "The principle responds to the doctrine of venire contra factum proprium in legal systems based on civil law.", Christina Voigt, 'The Role of General Principles in International Law and their Relationship to Treaty Law' (2008) 2 RETFÆRD ÅRGANG

73 "On April 20, 2012, the 47 Member States of the Council of Europe, at a high-level ministerial conference in Brighton, United Kingdom, unanimously voted to adopt a series of measures, known as the "Brighton Declaration" aimed at reforming the European Court of Human Rights (ECtHR)." <http://www.loc.gov/law-web/servlet/lloc_news?disp3_l205403131_text> last accessed 20 December 2014

74 *X v. Austria* ECHR (1979); Cieslar v. Sweden ECHR (1996) para 1

has no real choice[75] and the medical procedure is done "without the free, informed and express consent of the subject".[76] In the case of a woman who agrees to give birth in a hospital because it is impossible for her to give birth at home without endangering her child due to the lack of medical services, it is likely that her consent is not truly free. It therefore appears likely that many if not most cases in which home births are wanted but denied, began to interfere with the mother's right to private life. Such interference requires a justification in order to be compatible with the ECHR.

A. Health of the unborn child

While a mother may consent to risk her own health, it has to be clear if she is permitted to endanger the health of her child[77] and if so what limitations are put upon the pregnant woman. In home birth cases, this justification can consist in the protection of life and health of others. The next question is: if the unborn child is an „other person" within the meaning of article 8(2) ECHR. Article 8(2) ECHR does not require the right to health and also includes the health of the mother or public health as protected goods.

On the 14th of October 2013 the Government of Lithuania rejected the idea of an Act of Life Protection in the prenatal phase (*Gyvybės prenatalinėje fazėje apsaugos įstatymo projektas*, Nr. XIIP-337)[78]. The main argument was that the "woman's right to private life would be narrowed by this Act."[79] The home births could have a limitation, related to the life and health of the unborn child.

B. The right to private life of the unborn child

Article 8 (2) of the ECHR also protects the rights of others. Although it sounds counterintuitive at first, unborn child already fall within the personal scope of the right to private life under article 8 (1) ECHR. In the case of Odièvre v. France,80 it was held that the decision regarding the circumstances of the birth affects the unborn child's right to private life.81 Therefore, the personal scope of the right to private life can be understood to include the unborn child at least at the time

75 Christoph Grabenwarter, European Convention on Human Rights – Commentary (C. H. Beck, Munich) 199
76 ibid
77 More about the unborn child's and mother's rights see Stefan Kirchner, 'The Personal Scope of the Right to Life Under article 2(1) of the European Convention on Human Rights After the Judgment in A, B and C v. Ireland' (2012) 13 German Law Journal 6
78 The conclusion of the Act of Life protection in prenatal phase project <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=457720&p_query=Gyvyb%EBs%20prenatalin%EBje%20faz%EBje%20&p_tr2=2> last accessed 20 December 2014
79 ibid
80 *Odièvre v. France* ECHR (2003)
81 ibid para 29

when the final decision about the place (and other circumstances) of the birth is made. Because article 8 (2) ECHR allows restrictions of the mother's right to private life for the purpose of protecting the rights of others, the unborn child's right to private life has to be taken into account. As two identical rights (the right to private life of the mother and the right to private life of the unborn child) clash with each other, the unborn child's (very tentative) right to a private life (if one wants to infer in its existence from the judgment in Odièvre in the first place) will hardly be sufficient to limit the mother's choice of the location of giving birth.

C. Prescribed by law

In order to be justified under article 8 (2) ECHR, the interference has to be prescribed by law. This is not the case because Lithuanian law, does not directly forbid homebirths. Instead, it outlaws medical support for such births. Only midwives and physicians are directly mentioned by Order No. 117. The Order does have a practical effect on the mothers who therefore will be unable to give birth at home. For this reason, the current Lithuanian legislation – or rather, the lack thereof – is incompatible with the ECtHR.

D. Necessary in a democratic society

In the case of *Tysiąc v. Poland*[82] the European Court of Human Rights ruled that "the essential object of article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and in particular that it is proportionate to one of the legitimate aims pursued by the authorities."[83]

The regulation to the effect that home births with medical support are made impossible in Lithuania (by not regulating home birth medical services) has to be necessary in a democratic society. The question then is what regulation of homebirths is necessary in a democratic society for the purpose of protecting the health of the mother and that of the child.

The regulation should protect the unborn child's right to life and health. It would therefore be appropriate to obligate obstetricians to give or deny the permission to home births depending on the risks and complications which can be expected during the birth. Only women who would

[82] *Tysiąc v. Poland* ECHR (2007)

83 ibid para 109

be classified as 'low risk' by their physicians would be able to give birth at home. The decision should be medically justified, not based on economic factors. While the mother's right to private life under article 8 (1) ECHR includes the right to determine whether she wants to undergo a medical procedure or not, this right can be limited in accordance to article 8 (2) ECHR for the purpose to protect the health of the child.

E. Obligation to regulate

Article 8 (2) ECHR requires that limitations to the rights of a mother be based on a legal norm. Having provided that the current legal situation in Lithuania violates the woman's right to private life under article 8 (1) of the ECHR, the obligation is laid upon Lithuania to regulate home-births. This obligation has two grounds. First, mothers have to be given the possibility to give birth at home. The absence of a regulation currently makes this impossible. Second, the right to give birth at home is being part of the yet limited right to a private life. Any limitation on the grounds of protecting the health of the child has to be based on a domestic law. Therefore, Lithuania has two reasons why such a regulation is necessary.

It is not a novelty for Lithuania to have such an obligation to fill a gap in a domestic legislation. In *L. v Lithuania*[84] the ECtHR emphasised the positive obligation upon states to ensure the respect of private life, including the respect for human dignity and the quality of life in certain aspects.[85] The Court found that the circumstances of the case revealed a legislative gap in gender reassignment surgery, which leaves the applicant in a situation of distressing uncertainty *vis-à-vis* the right to a private life.[86] The Court concluded that there has been a violation of article 8 of the ECtHR.[87] Although the judgment was given on the 31st of March 2008, more than 6 years later there is still no legislation regulating full gender reassignment surgery.[88]

[84] *L. v Lithuania* ECHR (2007)

85 ibid para 38, 45

86 ibid para 59

87 ibid

88 The legal documents search in the *Seimas* of the Republic of Lithuania database <http://www3.lrs.lt/dokpaieska/forma_e.htm> last accessed 20 December 2014

V. CONCLUSION

Any limitations on the mother's right to private life under article 8(2) have to be based on national law. Lithuania still lacks such a regulation when it comes to the woman's choice of the location to give birth. Thereby, Lithuania violates the woman's right to private life under article 8 (1) of the ECHR.

One-tier v. two-tier board in public companies - Dutch and Polish perspective. Comparative analysis.

Joanna Kuc,[*] Marek Szolc[**]

Abstract

The aim of this article is to examine board structures available in Dutch and Polish company law for public companies. It describes the one-tier and two-tier model of managing and supervising a company, and presents both models, pointing out their strengths and weaknesses. The paper also outlines the core aspects of recent reform of Dutch company law and summarizes the ongoing debate as to the proposed developments in Polish law concerning the structure of the board.

I. INTRODUCTION

The board plays a crucial role in every corporation. It is the body situated right between the company and its shareholders. Simultaneously, it is seen as a representation of the company before its stakeholders, making it a crucial player of the company's both internal and external relations. As a result, it is the board which takes strategic decisions and organizes the general functioning of the company. Such a conclusion is clear and simple, yet not sufficient. The precise determination of the board's functions, duties and competence is a perplex exercise.

The first aspect of convergence in the analysed area is that the board's role is regulated in the company law and corporate governance codes of all industrialised countries.[1] The roots of the concept of a board and their core tasks are the same for all legal systems.[2] The ongoing harmonization within the European Union (hereinafter "EU") that introduced the concept of the European Company (hereinafter "SE") also contributed to an increasing convergence of European legal systems.

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1 Paul Davies, Klaus Hopt, 'Boards in Europe – Accountability and Convergence' (2013) 61 American Journal of Comparative Law 301
2 For a description of the purpose and core task of the corporate board see Section II of the article.

This article aims to discuss, in the way of a comparative analysis, the recent developments in the supervision model that took place in the Netherlands, namely, the introduction of a one-tier model of supervision, and compare its functionality to a classic two-tier model existing currently in Poland. Moreover, it intends to provide recommendations for possible adjustments in the Polish supervisory model in light of the recent Dutch legislative experience on corporate law. In this article the terms 'public company' and 'listed company' will be used interchangeably.

II. THE CONCEPT OF A PUBLIC COMPANY

The choice of management and supervision models is of significant importance for public companies, even though the issue of an adequate design of these models can also apply to private companies. However, in a public company the problem of defective supervision and management is fundamental, owing to a possible breach of the interests of unidentified, mass shareholders (as the shares are publicly traded). Thus, as far as public companies are concerned, deficiencies in supervision or management may have particularly severe consequences.

Proper analysis of the issues of supervision and management in a publicly listed company, and correct understanding of their role demands a precise identification of the essential features of the company itself. The underlying idea behind public companies is that such entities enable business actors to legally acquire from a vast number of investors the capital necessary to run an enterprise of a major size and conduct large investments.[3] A public company thus usually has a wide range of shareholders who invest in its shares, and this, in turn, results in a number of consequences. Conflicting interests of various groups of shareholders, severance of the relationship between capital and management or a constant need for financing are only the most important among them. However, thanks to these features, institutions like the general meeting, the board of directors, issuing of shares or questions of corporate governance significantly gain on their practicality.[4] Moreover, the principle of equal treatment of shareholders, the principle of the majority rule and the protection of minorities, as well as the possibility of challenging the general meeting's resolutions need to be properly applied in light of the company's interest and relevant provisions of the law.

Due to the character of a public company it is therefore impossible for an entire group of shareholders to make decisions concerning the company on a daily basis. Of course, it may not be

3 Krzysztof Oplustil, Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej (Warsaw 2010) 89

4 Michał Romanowski, 'W sprawie pojęcia i natury spółki publicznej' (2009) 3 Przegląd Prawa Handlowego 11

the issue for companies being run by shareholders with large majorities. Nevertheless, the idea underlying the functioning of a public company is in principle to enable the financing of the company by the largest possible group of investors, while ensuring at the same time the effective management of a company by a competent body. The sphere of ownership and the sphere of management are, as a consequence, largely separated, and day-to-day decisions on company matters become the responsibility of a group of managers – members of the abovementioned authority. Naturally, this does not mean that shareholders are deprived of any influence on the fate of their company. On the contrary, they have many tools to exercise their ownership rights, such as the right to vote at the shareholders' meetings, the possibility to appoint and dismiss the company's management, or the right to challenge decisions made by the general meeting. However, all these measures are related merely to the owner's control over the affairs of the company and do not encompass any management tools employed in daily activities which have a direct impact on the companies' performance and revenue.

III. SUPERVISION AS A MEAN OF TACKLING THE 'AGENCY PROBLEM'

It seems evident that in a public company the selection of a competent group of managers becomes the most pressing issue. The risk of abuse of power for personal benefit, which is a direct result of the already mentioned separation of management and ownership, has therefore been widely discussed in related literature.

The crux of the matter is the advantage that the managers have over the shareholders. On one hand, they are in most circumstances better informed as to the situation of a company. On the other, it is within their power to significantly influence the company's conduct which often includes the risk of doing it in accordance with personal motivations and the willingness to exploit their position for their own gain rather than for the corporation's best interest. Therefore, the need to rely on an agent, as much as it is presumably the only viable solution to running effectively a public company, leaves a lot of room for actions that may have dire economic consequences for the company and all of its shareholders. The moral stigma attached to undertaking actions that lower the quality of management services, or even lead to direct losses, does not always outweigh the temptation to financially benefit from the function of an agent beyond the offered remuneration.[5]

5 Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Edward Rock, The Anatomy of Corporate Law (New York 2009) 35

As the agency problem poses many challenges to the effective management of companies, numerous ideas have been developed to prevent or alleviate its negative consequences. A significant part of these theories is focused on the role of a supervisory authority in form of the supervisory board, or non-executive directors, tasked with the power to supervise the company and guard of the stakeholders' interests. Shareholders assume that supervisory boards or non-executive directors are cost-effective, because thanks to them agency costs are reduced[6] and the risk associated with the management can be addressed properly.

In conclusion, a public company cannot operate effectively without establishing supervisory bodies. In a perfect world, no ongoing activity would have to be overseen in order to ensure the interest of shareholders is protected. However, as previously discussed, the reality behind management may be starkly different. Most legal systems are constantly in search for new and more efficient solutions, and Poland is no exception here. The following section of the article engages in a comparative analysis of the current Polish, two-tier model of supervision, with other models introduced in different legal systems, with a special focus on the one-tier supervisory system recently introduced in the Netherlands.

IV. POLISH REGULATION

A. Polish two-tier model of supervision

The terms 'public company' and 'listed company' are often used interchangeably due to the fact that in most legal systems a public company is defined as a company the shares of which are traded on a regulated market. Nonetheless, as the interchangeable use of these terms under Polish regulations can raise doubts, it is necessary to clarify the definition of a public company under Polish law.

According to Polish regulations, a public company is a special type of a joint stock company. In principle the joint stock company is regulated in the Polish Code of Commercial Companies (hereinafter "the Polish CCC" or "CCC"). However, currently the definition of a public company can be found in article 20 (4) of the Act on Public Offering[7] which defines a public company as a company with at least one dematerialized share within the meaning of the Act on Trading in

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6 Andrzej Koch, Jacek Napierała, Prawo spółek handlowych. Podręcznik akademicki (Warsaw 2013) 448

7 Act on Public Offering and the Conditions for Introducing Financial Instruments to the Organized Trading System and on Public Companies from 29.07.2005: Journal of Laws of the Republic of Poland No. 184, section 1539 with changes

Financial Instruments.[8] As such, it is primarily based on a purely technical aspect, namely the dematerialization of shares.[9] Moreover, it mainly refers to the constitutive feature of a regulated trading system, which is dematerialization – trading of shares without the 'participation' of a share document.[10] Thus, it can be asserted that under Polish law any constitutive features of a public company are in fact disregarded in its legal definition.

Polish doctrine thus treats public companies as a special and atypical kind of a joint stock company.[11] Indeed, the definition of a public company is based not on its nature, but on the principle of dematerialised trading on a regulated market. This situation gives rise to a number of adverse legal consequences of major practical importance.[12]

Polish company law recognizes only the two-tier model, both in public and private companies.[13] The provisions of the Polish CCC, posing obligatory duties on companies, are crucial for the regulation of board structures. As stated above, the definition of a public company is to be found in the Act on Public Offering, even though a public company, being still a joint stock company, has to comply with the rules provided in the CCC. Furthermore, the Code of Best Practices of the Warsaw Stock Exchange[14] (hereinafter "The Code of Best Practices" or "CBP") should also be borne in mind. The Code of Best Practices, a typical corporate governance code, is based however on a comply-or-explain rule (*i.e.* soft law). It means that in principle it should be applied by companies listed on Warsaw Stock Exchange (hereinafter the "WSE") and in case of non-compliance the only consequence for the company is the duty to disclose and justify such non-compliance. The CBP includes mainly practical recommendations aiming at fostering order in a company and maintaining corporate values.

According to the Polish CCC, in joint stock companies there are two bodies responsible for the management and supervision – the management board and the supervisory board. Consequently, the Polish company law, by introducing two separate organs, is an example of a system supporting a strong organizational division of powers.

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8 Act on Trading in Financial Instruments from 29.07.2005: Journal of Laws of the Republic of Poland No. 183, section 1538 with changes

9 Michał Romanowski, 'W sprawie pojęcia i natury spółki publicznej' (2009) 3 Przegląd Prawa Handlowego 10 available on the following website: http://www.lex.pl/akt/-/akt/w-sprawie-pojecia-i-natury-spolki-publicznej accessed on 20 December 2014

10 Marek Michalski, 'O pojęciu i zakresie regulacji spółki publicznej' (2008) 1 Przegląd Prawa Handlowego 8

11 Romanowski (n 11)

12 ibid

13 The one-tier model is the only available in the European Company.

14 'Dobre Praktyki Spółek Notowanych na GPW', < http://www.corp-gov.gpw.pl/assets/library/polish/regulacje/dobre_praktyki_16_11_2012.pdf> accessed on 20 December 2014

1. Management board

The Polish CCC, providing numerous competencies for the management board, makes it the most crucial body of a company.[15] Among those competencies, in first place, is managing and representing the company.[16] As a result, the management board is responsible for running the business and taking day-to-day decisions.

It should be noted that the management board, as well as the supervisory board, is a collegial organ, which means that meeting decisions are a result of passing resolutions. The management actions' collective character is strengthened by the fact that delegating certain powers on to a specific board member requires proper provisions in the articles of association or those enacted by law.

The management board is the only body in a Polish joint stock company operating on a regular basis, conversely to the supervisory board and the general meeting of shareholders, which convene from time to time.[17] The Polish model thus provides for a presumption of competence of the management board to act in all matters, for which the general meeting of shareholders or the supervisory board is not empowered.[18] As a result, the management board makes the majority of crucial decisions in a company. It is not subordinated to the opinions of the supervisory board, since the latter is not entitled to give binding recommendations to the management board.[19] Despite that, in practice, the management board is not likely to ignore the supervisory board's opinion, as the latter is empowered to dismiss the management.

2. Supervisory board

According to article 381 of CCC, establishing a supervisory board is mandatory for joint stock companies. The main task of this body is described very vaguely, since the CCC states only that the supervisory board is responsible for constant supervision of a company's functioning in all of its aspects.[20] Detailed duties of the supervisory board are enlisted in article 382 (3) of CCC and include: appraising financial reports to the extent of their conformity with the books, documents and actual state, appraising the management board's motions on the distribution of profits

15 Paul Davies, Klaus. Hopt, Richard Nowak, Gerard van Solinge, 'Corporate Boards in Law and Practice. A Comparative Analysis in Europe' (New York 2013) 552
16 Art. 368 of Polish CCC
17 Davies, Hopt, Nowak, van Solinge (n 15) 565
18 ibid
19 Art. 3751 of Polish CCC
20 Art. 382 (1) of Polish CCC

or the covering losses, and submitting annual reports with results of the appraisals to the general meeting of shareholders. To exercise its duties, the supervisory board is entitled to analyse all of the company's documents, as well as to request reports and explanations both from the management board and the employees.[21]

Additionally, the powers of the supervisory board include also suspending one or all members of the management board for important reasons, and delegating the supervisory board's members to temporarily fill in, for a period not exceeding three months, for those management board's members who have been recalled, resigned or who are not capable of performing their duties.[22] The supervisory board is also empowered to appoint and remove the management board.[23]

As it has been mentioned, the supervisory board is responsible for constant supervision of the company's activities. However, membership in the supervisory board is very often an additional activity for persons sitting on it. Again, it should be also emphasized that the supervisory board does not meet regularly. In accordance with article 389 (3), the supervisory board should be summoned as often as required, however at least three times in a financial year. In practice, in Polish companies, the supervisory boards meet 3 or 4 times during the financial year. It is often seen as a weakness of this organ, as many argue that in the two-tier model, like the Polish one, the supervisory board cannot be informed sufficiently as it is distanced from the management board. Additionally, the argument is that three meetings for one financial year are not sufficient to exercise proper supervision over all of the company's activities.

On the other hand, the strength of the two-tier system lies arguably in the strict division of powers in the company. It is achieved by two prohibitions. One, is the holding of both position in management and supervisory board.[24] The second consists in issuing binding instructions to the management board by the supervisory board as to the running of the company.[25]

21 Art. 382 (4) of Polish CCC
22 Art. 383 (1) of Polish CCC
23 Art. 368 (4) of Polish CCC
24 Art. 387 (1) of Polish CCC
25 Art. 3751 of Polish CCC

IV. DUTCH REGULATION

A. Dutch two-tier model of supervision

By introducing a one-tier system of supervision, the Netherlands departed from a traditional model that traces its history back to the 17th-century Dutch Republic.[26] However, as the two-tier system has not been abolished, it is indispensable to briefly outline its present day modalities, before engaging into a comparative analysis between the Polish and the Dutch models.

As it has been previously indicated, the traditional two-tier model implies that the management and supervisory functions are separated and delegated to different bodies, which in turn, implies a clear identification of a governing and a supervisory authority. Indeed, in the classical two-tier Dutch model there is a management board (*bestuur*) and the supervisory board (*raad van commissarrisen*) that coexist within a company.

Two pieces of legislation constitute the basis for the two-tier model. The Dutch Civil Code (hereinafter "DCC") provides a comprehensive regulation of the model for public companies in its Book 2, Title 2.4.[27] The other relevant act is the Dutch Corporate Governance Code (*Frijns Code*), which regulates the role of the supervisory board. To fully comprehend how those codes operate, a brief look at the basic characteristics of the Dutch legal system is necessary, as the latter has some peculiar quirks.

1. Management board

Article 2:129 DCC constitutes a crucial regulation, as it enumerates the powers and duties of a board of a public company. That includes the obligation to manage matters which are not expressly reserved in the statute of a company for other bodies, the duty of loyalty, and obligations to act in the interests of the company or to refrain from making a decision in the case of a conflict of interests. Subsequent provisions outline the scope of representation of a company by a board member,[28] and determine the procedures for the appointment, suspension and dismissal of a member of the board by the general meeting of shareholders.[29] The following provision of article 2:132a,

26 Willem Calkoen, The One-Tier Board in the Changing and Converging World of Corporate Governance (Rotterdam 2011) 307

27 Dutch Civil Code (Burgerlijk Wetboek) from 28.12.1859, Journal of Laws of the Kingdom of the Netherlands, 2004, No. 25, with changes

28 Art. 2:130 of the DCC.

29 Art. 2:132 to Art. 2:134a of the DCC.

common both in the two-tier and one-tier model, specifies who cannot be appointed to the position of a management board member (or an executive director). It is supplemented by article 2:135, which establishes the rules on the remuneration of board members. In the first paragraph it stipulates that the remuneration policy is determined by the general meeting of shareholders. Article 2:139 concludes the Section on the position of a board with provisions on the scope of liability of board members for misrepresenting the company financial status.[30]

2. Supervisory board

DCC allows for the establishment of a supervisory board, and specifies that such a board may be created if the company does not opt for a one-tier system. It shall consist of at least one individual, but in practice, supervisory boards of public companies under Dutch law have circa 6 members. A Board is obliged to perform their duties in accordance with the interest of a company and of its subsidiaries. The supervisory board's competences consist of, *inter alia*, exercising supervision over the process of management of a company and of the policy adopted by the management board, as well as overseeing the general course of events in the company and on its subsidiaries.

Under the Dutch company law the supervisory board has been designed as a body intended not only to control the management but also to advise it.[31] DCC allows members of the management board to wear two hats – they can simultaneously sit on the management board and on the supervisory board. The statute may additionally delegate additional competences and duties to other members of the supervisory board that exceed these discussed above.

The final paragraphs of article 2:140 of the DCC govern the voting powers in supervisory boards. They also impose an obligation to refrain from making a decision in case of a conflict of interest, similarly to what applies to the management board. Articles 2:142 to 2:144, which determine the procedure for the appointment, suspension and dismissal of members of the supervisory board, resemble these on the management board as well.

Nonetheless, the issue of remuneration of a supervisory board is approached differently then in the case of a management board. Provisions regarding the supervisory board are limited to article 2:145, which states that the general meeting of shareholders may grant remuneration to members of a supervisory board. Lastly, the DCC grants a major power to supervisory boards, namely the right to suspend the management board's members. Article 2:147 (1) provides that

30 The DCC establishes joint and shared liability of the board members for misrepresenting the financial status of the company, unless a board member can demonstrate that he/she bears no responsibility for such action. A Similar rules apply to members of the supervisory board.

31 Calkoen (n 27) 356

unless a statute provides otherwise, the supervisory board is authorized to suspend at any time any member of the management board appointed by the general meeting of shareholders. This right encompasses the position of the supervisory board towards the management board in the Dutch two-tier model.

B. Dutch one-tier model of supervision

1. Reform of the Dutch company law

It is a global tendency to reform the countries' legal systems in a way that would attract as many companies as possible and create conditions in which they can actively operate in the territory of a given state. The Netherlands is not an exception to this widespread pattern. It is undoubtedly an example of a state that takes into account the perspective of entrepreneurs in shaping its legislation. As a result, the Netherlands is considered to be one of the most investor-friendly locations worldwide. Even a quick glimpse at the list of companies registered in the Netherlands leads to the conclusion that the Dutch efforts brings positive results not only because of the sheer numbers, but also due to the size and market position of the companies established there. While the favourable tax policy contributes to such a state of affairs, the Dutch corporate law undoubtedly also plays a significant part in the overall success.

The reform mentioned in this article was a result of lengthy efforts of the Dutch legislative bodies to introduce deep changes to the corporate order of this country. The introduction of the so-called One-Tier Act was part of this comprehensive change and led to creation of a legal regime for the supervision of public companies that is of particular interest, especially in light of the potential constructive proposals for changes in Polish corporate law.

2. One-tier model – introduction, solutions and functioning

The Dutch, regardless of their strong affinity with the two-tier model,[32] decided to make their supervisory system more flexible by introducing a one-tier model, giving companies a choice as to the form they may employ. As a result of the 2012 reform, from January 1, 2013, Dutch company law allows both public companies (NV*, Naamloze Vennootschap*) and private companies (BV*, Besloten Vennootschap*) to choose the model they deem best suited for their needs.

32 ibid 334

The English and American laws have evidently been an inspiration for the solutions introduced into the Dutch legal system. Prior to the 2012 reform, the two-tier model was strongly embedded into Dutch law. Indeed, the one-tier model had marginal presence on the Dutch market since the twentieth century. As a notable example we can point one of the largest corporations in the Netherlands, Koninklijke Olie NV (widely known as Royal Dutch Shell). Thus, regardless of a certain familiarity of the Dutch market with this form of supervision, its influence remained negligible. It is reasonable to expect that as a result of recent developments, actors on the Dutch market will familiarize with it, and will be more prone to recourse to it.

The choice of a one-tier system has to be explicitly established in the statute of a company. The structure of a company in such a case is limited to a single organ of management and control, namely the board of directors. Article 2:129 of the DCC, added as a result of the discussed reform, provides a framework for the model at hand. The first paragraph of this provision indicates that the company's memorandum of association shall stipulate that the duties of directors are divided between one or more non-executive directors and one or more executive directors. Despite the fact that there is a possibility of a division of responsibilities, the paragraph states that the duty of supervision over the execution of the directors' duties cannot be assigned to the executive directors. It amounts to a clear distinction between management and supervision tasks within a single board of directors. In addition, article 2:129a(1) of the DCC provides that issues such as chairing the board of directors, proposing the appointment of a director and adopting remuneration for the executive directors cannot be delegated to the executive directors. The provision of Article 2:129a(1) of the DCC ends with a requirement that non-executive directors must be natural persons.

Subsequently article 2:129a(2) of the DCC is pivotal for the delimitation of competences between executive and non-executive directors and stipulates that the former cannot take part in decisions concerning their remuneration. Further sections specify that, in accordance with the statute of the company, one or more directors may decide on matters assigned to its area of competence. In this case, the particular type of decisions is attributed to selected directors responsible for a specified field of activity. Such an attribution must be expressed in writing. The intent of this provision is, as it seems, to improve the functioning of a board of directors by encouraging the division of tasks and the assigning of specific directors to respective aspects of the company's activity.

Article 2:132(1) of the DCC is also worth mentioning, as it further clarifies the position of directors in a one-tier system. Indeed, the provision clearly states that in the case of the appointment of a director in a one-tier model, the general meeting of shareholders shall determine whether such a director is an executive or non-executive one.

As a wrap up of the analysis of the legal status of a one-tier model company, it should be underlined that after the 2012 reform, the DCC contains no separate set of provisions regulating the one-tier model company as a completely separate entity. Dutch law rather provides two options, where the one-tier model regulation has to be, in some cases, supplemented by provisions initially envisaged for the two-tier model. To determine the position of a board of directors in a one-tier company, one has to either use individual provisions added to the DCC referring only to the one-tier model, or apply the provisions referring to the supervisory board and the management board.

The question of a correct application of the rules on the two-tier model has not been yet clearly resolved. It is assumed, however, that the board of directors from the one-tier model should be as far as possible subject to the provisions referring to the management board (*bestuur*). One of the problems is the correct application of existing regulations on the supervisory board, and the issue of whether they can be applied to the entire board of directors or only to non-executive directors. It has been suggested in the literature that it might be resolved by applying the relevant regulation *mutatis mutandis*, but it remains to be seen whether it is in practice viable.[33]

V. CONCLUSION

The comparative analysis of board models available in Polish and Dutch company law reveals the both one-tier and two-tier model has its own strengths and weaknesses.

The overview of the provisions regulating the two-tier model suggests that it provides effective supervision of the company by including clear division of powers between the management board and the supervisory board. In companies with a two-tier board structure there is a specialised organ which is appointed solely for controlling the activities of management and supervising the company's functioning. The fact that one person cannot be a member of both boards guarantees independence of supervision. Additionally, the management's independence is also secured, since the supervisory board is not entitled to formulate binding recommendations for the management board.

33 Davies, Hopt, Nowak, van Solinge (n 27) 487

On the other hand, the analysis of the one-tier model leads to the conclusion that applying this structure might in some cases result in a more effective management and supervision, since all directors sit on the same board. As a consequence, both executive and non-executive directors have quick access to all necessary information. Some also argue that the one-tier model is superior to the two-tier one due to the fact that it is more flexible and enables a convenient division of tasks within a given board.

As it is usually the case in a comparative analysis, an unequivocal determination that one solution is superior to the other is far from easy. It seems that the accurate functioning of a company and its bodies depends in the first place on the level of professionalism of directors appointed to company's bodies. The board structure, being solely an abstract concept, cannot preserve the company from pathology in exercising supervision. However, it might be the case that one of the presented models is simply more suitable for the specific cluster of companies. Indeed, companies have different sizes, structures and needs. Consequently, choosing a more effective model will depend only on a variety of factors of the specific company.

A need to give entrepreneurs the choice of what model fits them best is also evident in Poland.[34] A possibility to opt for a one-tier system is present in the majority of European countries. Their experiences show that introducing legal solutions which leave the choice of board structure to the company itself attract entrepreneurs what, in turn, leads to the development of country's capital market.

Considering the abovementioned proposal, the Polish legislator should cautiously analyse the 2012 Dutch reform. It has to be borne in mind that the Netherlands, similarly to Poland, are an example of a country the legal system of which is strongly relying on the two-tier model. Despite that fact, the Netherlands decided to officially introduce the one-tier model in order to increase the competitiveness of the Dutch market among other European systems, especially the English one.

It seems natural that the Polish system, to ensure a sustainable growth, shall provide for the possibility of a one-tier board in public companies. Such a solution would surely attract foreign investors who are used to the one-tier model, as it is present in the majority of legal systems. Finally, it would help to create a modern, entrepreneurs-friendly image of the Polish capital market law.

34 It was formulated for the first time by prof. Michał Romanowski and prof. Adam Opalski in the article 'O potrzebie zasadniczej reformy polskiego prawa spółek' 6 Przegląd Prawa Handlowego (2008), available on the following website: <http://www.lex.pl/akt/-/akt/o-potrzebie-zasadniczej-reformy-polskiego-prawa-spolek> accessed on 20 December 2014

The concepts of "wrongful life" and "wrongful birth" in the case law of Germany's Federal Courts 1980-2000 — A comparative bio law perspective

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Abstract

The legal concept of "wrongful life" and "wrongful birth" emerged in the United States in the 1970s and has been controversial in many legal systems. When Germany was reunited in 1990, two fundamentally different approaches to the protection of unborn human life collided. Around the same time the groundwork was laid down in the German federal courts – in the Bundesverfassungsgericht and particularly the Bundesgerichtshof – for rules dealing with claims related to "wrongful life" and "wrongful birth". This article looks at this development in the 1980s and 1990s from both a private and a constitutional law perspective, culminating in the possibility of such claims despite the constitutional decision that the unborn child, too, has human dignity. In a sign of the continued weakening of the protection of unborn life which can still be seen in German law today, Germany's federal courts slowly eroded the fundamental concepts which are meant to be a central part of Germany's constitution.

I. GENERAL REMARKS

Today the legal systems of many nations are facing significant challenges due to the development of biomedicine. This is particularly so in the context of reproductive medicine. While many states might be in a situation in which they have to find solutions for bio legal challenges, German legal history provides a particularly interesting case study around the time of the reunification of Germany in 1990 due to the very different approaches to life before birth in both East and West Germany. During years of national-socialism in Germany, the idea was prevalent that some live were not worth being lived ("*lebensunwertes Leben*"). Today, this idea is back and it has serious effects, in particular, on the most vulnerable members of human society. In the summer of 2014, German

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politicians were discussing weakening the rules which prohibit euthanasia, in response to the growing suicide tourism to neighbouring Switzerland where assisted suicide is offered in a more permissive legal environment.

One way in which the idea that handicapped people are a burden has been institutionalized is through a jurisprudence which considers the birth of children born despite the wishes of their parents, in particular handicapped children, to amount to a damaging act for which compensation can be claimed in court. This line of jurisprudence is referred to in German as the *Kind als Schaden-Rechtsprechung*, literally the "child as damage-jurisprudence". This reasoning seems to be hardly compatible with the spirit of Germany's constitution - the Basic Law, the *Grundgesetz*[1] (hereinafter "GG") - which gives and important place to the protection of human dignity.[2] The idea behind such lawsuits is that a child that was born should not have been born, either because the parents did not want to have any children at all (for example in the case of a botched vasectomy) or because the parents did not want this particular child (for example in the case of a failed abortion). In particular, cases in which the parents already knew that their unborn child would be handicapped or would suffer from a chronic disease have given rise to lawsuits as a handicapped child (and later adult) will naturally require a lot of attention and care, which often is expensive and not fully covered by health insurance policies or similar schemes. Being able to put a price tag on the care needed by a handicapped child makes it easier (from a legal perspective but also from the perspective of litigation psychology) to bring a lawsuit against physicians which, in the mind of the plaintiff parents, were supposed to have prevented the birth of this child. The implication is that the child is somehow 'defective' due to the handicap or chronic disease, and therefore should not have been born. Following this logic, only a healthy life seems to be worth living.

First of all, it must be noted that claims for wrongful life are aimed at damages for the additional needs of the plaintiff, a fact emphasized by supporters of such claims like Erwin Deutsch.[3] The opposition against such claims is based on a different fact, namely on the approach chosen to achieve the goal of compensation. The plaintiff claims to be in a situation which is worse than not having been born at all, a claim which implies a certain disrespect for life.

While the basic argument underlying claims for wrongful birth or wrongful conception is the general one of malpractice or negligent counselling, the rational supporting claims for wrongful

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1 Grundgesetz für die Bundesrepublik Deutschland (hereinafter "GG"), 8 May 1949, 1949 Federal Gazette 1

2 Article 1 (1) GG

3 Erwin Deutsch, Andreas Spickhoff, *Medizinrecht* (4th ed., Berlin 1999) 190

life by the "victim" is often that of he would be better off was he not alive.[4] This rationale seems to be in contradiction with the desire of every living thing to remain alive, and of mankind's aim to survive as a species. That the aforementioned desire exists[5] is more than obvious since killing a human life is a general "wrong" and its prohibition is undisputed in all cultures aimed at the preservation of the human race as such.[6] Therefore the question must be asked whether the issue of allowing wrongful life claims can be a question of law at all. This question has been answered to the affirmative by some, but if you allow wrongful life claims as is the case in France since last year's decision by the *Cour de Cassation* in *Perruche*[7], one opens the way not only for frivolous claims; e.g. by children against their parents for not having chosen a better doctor who could have provided better genetic counselling or by people rescued from danger but left severely disabled as a result suing their rescuers, but also for the ideas that life as such has a certain value which can be expressed in a certain amount of money, and that some lives are not worth living (*lebensunwertes Leben).*

A reintroduction of the notion of *lebensunwertes Leben* is what seems to be attempted by those who want to take into account the notion that it might be in the patient's best interest (given a certain quality of life) to be dead; thus linking the quality of life to the question of what is best for somebody else.[8] Consequently, the right to be born healthy[9] has been accepted by US Courts in several cases,[10] a right which means that, if born with a defect, the child can sue for the defect but not for being born. Such claims for a defect are claims with regard to pre-natal damages,[11] but not claims for wrongful life since the latter are made from the child's point of view in cases of wrongful birth, e.g. after an unsuccessful abortion of a handicapped child. Other claims like the one in the English case of *McKay v. Essex Area Health Authority*[12] are in fact claims for either pre-

4 *Harbeson v. Parke- Davis*, 98 Wash 2d 460 (1983) which is more a case of prenatal damages than a 'real' wrongful life case, since the children in question were meant to be born and were damaged by the improper use of Dilantin; M Skolnick, *Medlaw* (1985) 283

5 Although it must be noted that some argue that newborn (*i.e.* already born) children do not have any interest in staying alive (Peter Strasser*, Personsein aus bioethischer Sicht Tagung der österreichischen Sektion der IVR in Graz 29. und 30 November 1966* (Stuttgart 1996) 76.

6 Peter Inhoffen, 'Personsein aus theologisch-ethischer Sicht' in Strasser (n 6) 43

7 *Nicholas Perruche*, Cour de Cassation, 17 November 2000, case No. 99-13.701

8 Helga Kuhse, *The Sanctity-of-Life Doctrine in Medicine. A Critique* (Oxford 1987) 214

9 'Editorial' (1971) 285 New England Journal of Medicine 799, 800

10 *Park v. Chessin,* 400 N.Y.S 2d 110,112 (1977); *Curlender v. Bio-Science Labatories,* 106 Cal. App. 3d 811 (1980); *Turpin v. Sortini,* 182 Cal. Rptr. 337 (1982); *Smith v. Brennan*, 31 N.J. 353, 364 (1960); *Sylvia v. Gobeille*, 220 A, 2d 222,224 (1966)

11 Under German Law, restitution can be claimed for a damage which has been inflicted upon the victim in the moment of his or her conception or at any time later, cf. BGHZ 8, 243

12 *McKay v. Essex Area Health Authority* (1982) Q.B. 1166

natal damage (as in the *McKay* case), which can be dealt with by applying the general rules on medical malpractice,[13] or claims for dissatisfied life.[14]

In general, litigation is an inappropriate attempt to relieve such grievances[15] and it hard to compare being handicapped, but at least alive, to not being born at all.[16] Especially in Germany, such alleged claims for wrongful life should be regarded as unconstitutional with regard to article 1 (1) of the German Basic Law of the Federal Republic (*Grundgesetz* – hereinafter "GG") which protects human dignity in all its forms and without exceptions.

Moreover, any claim of wrongful life would lead to a *contradictio in legem* under German law since, in contrast to e.g. Dutch law, restitution under German law has to be restitution in kind (*restitutio in integrum*);[17] restitution by payment of money is only a secondary – and, as it seems impossible to establish any principled basis for the offsetting benefit of life,[18] also an inapplicable – option. Restitution in kind would, in cases of wrongful life, mean that the plaintiff asks the court to order the defendant to make sure that the plaintiff is not alive, i.e. the plaintiff would ask the court to order the defendant to kill him, which is obviously unthinkable. Therefore, it is proposed that claims for wrongful life are inadmissible under German Law.[19] In the following, we will therefore deal mainly with cases of wrongful birth when analysing some of the jurisprudence of the German Federal Courts of the last two decades.

The paper at hand deals with the issue of wrongful birth/ life/ conception and the way in which the High Federal Courts in the Federal Republic of Germany, especially the Federal Supreme Court (*Bundesgerichtshof* – hereinafter "BGH") have dealt with it during the last two decades. Several landmark decisions are analysed briefly in an attempt to find out whether or not there is a certain trend in the jurisdiction of the BGH, and what impact the decision by the Federal Constitutional Court (*Bundesverfassungsgericht* – hereinafter "BVerfG") in the so-called 2nd Abortion case had on the view of the BGH. Before reaching this point, we will have a brief look at the ethical context of the topic, combined with a look at the importance of the issue of the quality of life, which is of foremost importance in the sensible political context of post-war Germany. However, first of all, we

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13 If such claims are rejected it might well be for the ill-chosen label of "wrongful life" which implies a certain denigration of life, cf. Joseph Kashi, 'The Case of Unwanted Blessing. Wrongful Life' (1977) 31 University of Miami Law Review 1432

14 *Zepeda v. Zepeda*, Appellate Court of Illinois 41 III App. 2d 240 (1963)

15 Harvey Teff, 'The action for "wrongful life" in England and the United States' (1985) ICLQ 428

16 *Gleitman v. Cosgrove*, Supreme Court of New Jersey, 49 N.J. 22 (1967)

17 § BGB. Under U.S. Law for example, no claims are made for a specific performance *i.e.* killing the plaintiff, but for money, see Stolker (n 5) 525; Decision of the Landgericht München I (1970) Versicherungsrecht 428 in which this reasoning was used to deny even wrongful birth claims

18 *McKay* (n 14)

19 1983 decision of the Bundesgerichtshof (n 35)

have to determine the differences between wrongful life, wrongful birth and wrongful conception, as the damage suffered in cases of wrongful life is distinct from the damages in wrongful birth and (related) wrongful conception cases.

II. TERMINOLOGY

A. Wrongful birth

In cases of medical malpractice or negligent counselling, claims for wrongful birth are claims for a damage done to the family planning of the plaintiffs.[20] However, the common law idea that the parents' denial of allowing the child to be aborted or adopted by others would amount to a partial *culpa* on the parents' side which consequently would mean that the parents are entitled to a lesser amount of money,[21] led to restrictions regarding the parents' entitlement under German Law: the parents will only receive the minimum amount of money which is deemed necessary to raise a child, even if their actual needs are higher.[22] Additionally, a mother will receive payments for immaterial damages in cases of unsuccessful abortions if the pain she endures while giving birth to her unwanted child exceeds the normal pain a women suffers when giving birth.[23]

B. Wrongful conception

In some cases, the conception alone causes the damage because of an extraordinary high risk for the health of the child. This not only includes wrongful conception claims in which the child is not born (abortion, stillborn etc.) but also claims for wrongful pre-conceptive genetic counselling.[24]

Wrongful birth/conception cases can also include the conception and/or birth of healthy but unwanted children.[25] While parents and siblings[26] may claim damages in such cases because

20 Deutsch, Spickhoff (n 3) 189
21 *Emeh v. Kensington, Chelsea and Fulham Area Health Authority* (1985) 2 WLR 233
22 BGHZ 1976, 249; BGH NJW 1985, 671; BGH Monatsschrift für Deutches Recht 1997, 644. See also Waibl, NJW 1987, 1513
23 Oberlandesgericht Frankfurt am Main, Verischerungsrecht 1987, 416
24 Deutsch, Spickhoff (n 3), 191
25 Teff (n 17) 426
26 *Bowman v. Davies*, 48 Ohio St, 2d 41 (1976)

they have suffered financial harm,[27] the born children cannot bring forward a claim as, considering they were born healthy, they suffered no damage.[28]

III. THE DEVELOPMENT OF WRONGFUL BIRTH/CONCEPTION CLAIMS BEFORE THE *BUNDESVERFASSUNGSGERICHT* AND THE *BUNDESGERICHTSHOF*

A. Contract law Origins

In the 1980 decision BGHZ 76, 249[29] the BGH allowed such claims based on the private law contract between the mother and the doctor, and included even the mother's husband as a possible victim.[30]

What is also of particular interest, is the amount of information a physician has to give to his patient before performing a sterilization, and the BGH's view on the issue. The BGH requires an extraordinary high degree of information to be given to the patient regarding the possibility of failure of the method of sterilization which is to be applied. This duty to inform, which follows from the private law contract between patient and doctor,[31] requires more than the duty to inform of risks or possible side-effects of treatments etc., since there is no space for therapeutic restrain in giving information to the patient.[32]

B. Tort

In 1983, the BGH had to decide on a case of a girl born handicapped because of negligent counselling.[33] The Court allowed the mother's claim for wrongful birth caused by negligent counselling and awarded damages because of the higher expenses required to raise a handicapped child instead of a healthy child, as was expected by the mother. The daughter's wrongful life claim was

27 Teff (n 17)

28 The US system allows for claims by children but a distinction must be made between claims by children against for instance the producers of multifunctioning contraceptives (which should be rejected) on one hand and claims against doctors who unsuccessfully attempted a legal abortion or conducted any form of pre-natal medical action at the fetus.

29 Entscheidungen des Bundesgerichtshofs, Volume 76, 249

30 ibid

31 Adolf Laufs, *Arztrecht* (5th ed, München 1993) 180

32 Oberlandesgericht Düsseldorf**,** Versicherungsrecht 1992, 751; BGH, MedizinRecht 1993, 70

33 The mother had measles during the early months of pregnancy which lead to a handicap. Her doctor whatsoever did not inform her about the risks. If he had done so, the mother would have chosen an abortion. *Juristenzeitung* 1983, 450

however rejected since the limits of the law had been crossed by making such a claim:[34] the claim that the plaintiff's life was "not worth living" was held to constitute an "alien element within the sphere of tort standards of conduct which are generally focused on protecting the integrity of human life",[35] an element which of course cannot exist. If a judge would allow such a claim, he or she would admit that human life has a measurable value and is not invaluable, which is- hardly acceptable. Furthermore, it would go against the fact that there can be no "right to be aborted" under German law since abortion is still a crime under § 218 of the Criminal Code (*Strafgesetzbuch*).[36]

But even if one is willing to accept the idea that children can sue for damages for pre-natal injuries, it is not the respondent, but the doctor, who causes the child's handicap (although the case is of course of a totally different nature if e.g. a prenatal surgery results in the injury of the child).[37] The doctor only failed to see the damage the daughter had already suffered, and consequently did not fulfil his contractual obligations towards the mother correctly. The mother is therefore perfectly able to sue the doctor for a breach of contract, or at least for insufficient performance. But there had been no contractual relations between the child and the doctor since treating the child is based on the contract with the mother, of which the child is a part in both the biological and legal sense. Therefore there is no contractual basis for a wrongful life claim by the child since the interests of the mother/parents are already taken care of by the possibility of a claim for wrongful birth. If the fact that usually the biological parents, who are able to bring a claim for wrongful birth, are the ones responsible for the care of the child, is taken into account, there is also no economic need on the part of the child to bring a claim for wrongful life against the doctor who can easily be held liable by the parents.

In the above mentioned decision, the Court allowed the mother's wrongful birth claim and thereby accepted the distinction between wrongful life and wrongful birth/conception.

C. Defining the damage

On 15 February 2000, the BGH overruled the prior decisions by the 7th Civil Senate of the *Oberlandesgericht Karlsruhe* and by the *Landgericht Heidelberg* and decided that the foreseeable expenditures caused by the birth of an unwanted child, especially the costs to feed and support this child

34 *Becker v. Schwartz*, 46 N.Y. 2d 401 (1978)
35 ibid
36 For the comparable English case of *McKay,* Tony Weir argues that there might be a duty towards the mother to abort the fetus and that this fact makes the same duty towards the child at least thinkable. (1982) 41 C.L.J 227
37 On a doctors tort liability see BGH NJW 1981, 630

which parents are obligated to bear under §1631 (1) of the *Borgerliches Gesetzbuch*,[38] are a damage open to restitution only if the protection against such unwanted obligations was an aspect of a private law contract on medical services or counsel.[39]

D. Abortion Jurisprudence

In 1993, the 2nd senate of the BVerfG dealt with the idea that a child could be regarded as some form of' 'damage' based on the human dignity principle of article 1 (1) of the Constitution, albeit only in an *obiter dictum* to a case concerning the constitutionality of a norm of law.[40] The Court argued that the jurisprudence of the Courts of Civil Law needed to be revised with regard to both medical malpractice and unsuccessful abortions. Medical malpractice claims by children against doctors for injuries received during an unsuccessful abortion of the plaintiff were to be allowed as a form of pre-natal injuries (*vorgeburtliche Schädigungen*).

E. Dissent

The BGH, however, decided in a rare and rather spectacular decision not to follow the Federal Constitutional Court and continues to allow claims for wrongful conception[41] based on the idea that the existence of the child and the necessary expenses for it are related, but not the same, which makes the latter a valid reason to claim payment of damages.

F. Failed abortion

The jurisprudence of the BGH was supported by the 1st Senate[42] of the BVerfG in 1998 when the BGH decided that its jurisprudence on unsuccessful abortions and negligent counselling was consistent with the child's right to human dignity which follows from article 1(1) GG: it is not the existence of the child as such, but the fact that the child's parents have to pay for their child which constitutes a damage. Consequently, the child is not considered a damage and thereby his or her human dignity is not violated. The decision of the Court is even intended to benefit the child.

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38 German Civil Code, in the version promulgated on 2 January 2002, Federal Law Gazette
39 BGH 2000, VI ZR 135/99
40 BVerfGE 88, 203 (296); NJW 1993 1751., *obiter dictum* by Judges Mahrenholz and Sommer, 1778
41 BGHZ 124, 128
42 Which is in charge of constitutional complaints against BGH decisions on medical liability. The above mentioned 2nd Senate had to decide on a complaint by the Free State of Bavaria against the Federal Republic of Germany, in a different kind of procedure (Normenkontrollklage)

Moreover, the BVerfG considered the earlier decision of its 2nd Senate to be a non-binding *obiter dictum*, which was consequently rejected by the 2nd Senate.[43]

IV. CONCLUSIONS

With regard to claims for wrongful life, it can be concluded that they are inadmissible under German Law while claims for wrongful birth and wrongful conception seem to be legally possible, although the political discussion about this topic has been fuelled unnecessarily by the ill-chosen but often heard phrase *Kind als Schaden*[44] (child as damage) which seems to de-humanise the child and eventually led to the above cited decision of the BVerfG. Reunified Germany uses the old West German constitution which places strong emphasis on human dignity, but the case law of Germany in federal courts on these issues between 1980 and 2000 shows a move away from the respect for the fundamental concept of human dignity, in line with the secularisation and commercialisation of German society at large after the reunification.

43 Deutsch, Spickhoff (n 3) 188

44 For the use of the term see Wolfgang Frahm, Wolfgang Nixdorf, *Arzthaftungsrecht: Leitfaden für die Praxis* (1st ed.) (Karlsruhe 1996) 107

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