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The UNIDROIT Principles 2004
Their Impact on Contractual Practice,
Jurisprudence and Codification

Reports of the ISDC Colloquium (8/9 June 2006)

Eleanor Cashin Ritaine and Eva Lein (eds.)
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Tadas Žukas*

Reception of the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania

I. Introductory Remarks

This paper provides a short overview of the reception of the Unidroit Principles of International Commercial Contracts (UPICC) and Principles of European Contract Law (PECL) (together referred to as codification frameworks) into Lithuanian law. When analysing this process and evaluating the results and the problems which have emerged, one must bear in mind that we are dealing with a small country in Europe which is very much influenced by the general trend of internationalization and Europeanization in private law. At the same time, the country continues to feel the consequences and influence of its Soviet experience and its legal system is still “in transition”. This means that the Lithuanian legal system and, especially, legal thinking are still very positivistic and formalistic. In addition, the “new” legal system cannot yet be described as established, though much has been accomplished in this field in the 16 years since the restoration of independence. All this obviously influences the entire reception process (however, one should not focus too much on the negative aspects of this situation¹).

I will analyse the reception of the UPICC and the PECL in Lithuania at the following three levels of reception:

- The text of the new Lithuanian Civil Code (CC);
- The interpretation of the “imported” provisions in the Lithuanian doctrine;
- The application and role of the UPICC and the PECL in the Lithuanian courts.

* Research Assistant and Ph.D. Candidate at the University of Lucerne; Attorney-at-Law (Lithuania), LL.M. in International Business Law (University of Zurich), Bachelor of Law (Mykolas Romeris University Faculty of Law, Vilnius). I thank Dr. EGLĖ ŠVILPAITĖ, Dr. MEL KENNY, Prof. VAIDOTAS LUKOŠIUS, and LORETA ŠALTINYTĖ for their valuable comments on the earlier draft versions of this article. I am also grateful to all the participants of the workshop on ‘The Principles as Supplementary Applicable Law or as an Element of Interpretation in the Context of National and International Law’, especially to Professors MICHAEL JOACHIM BONELL, PIERRE WIDMER, THOMAS PROBST, ULRICH MAGNUS, OLIVER REMIEN, ELEANOR CASHIN RITAINE (Director ISDC), and also to EVA LEIN (Staff Legal Counsel ISDC, moderator of the workshop) – for their comments and inspiring discussions on the ideas expressed in my presentation held at this workshop. This workshop was a part of the international colloquy on ‘THE UNIDROIT CONTRACT PRINCIPLES 2004: Their Impact on Contractual Practice and Jurisprudence, as well as on National, Regional and Supranational Codification’ organized by the Swiss Institute of Comparative Law (ISDC) in Lausanne (Switzerland) on 8 / 9 June 2006. This paper is based on my presentation held at this colloquy. The usual disclaimer applies.

¹ For an interesting general observation on a related phenomenon see ABEGG, A., “Evolutorische Rechtstheorie”, in: BUCKEL/CHRISTENSEN/FISCHER-LESCANO (ed.), *Neue Theorien des Rechts*, Stuttgart, Lucius & Lucius, 2006, p. 382.

After giving a short overview of our experience at each of these levels, I will discuss the problems of the reception that arise at the respective level. I will concentrate my analysis on the role of the UPICC and the PECL for the interpretation process of the national law provisions. Finally, I will discuss the possible strategies to integrate the UPICC and the PECL more intensively into the interpretation and application of the “imported” parts of the domestic law in Lithuanian legal practice.

II. The Context of the Lithuanian Civil Law Codification Process

After the restoration of independence in 1990, one of the main goals of Lithuanian society was to modernize its legal system, inherited from the Soviet era. As one of the most ambitious tasks of the newly reborn state was to reform its economic system from a planned to a free market economy, law reform was of the utmost relevance in the fields of private and commercial law – parts of the legal system directly related to the regulation of free market relationships. Thus, the progressive regulation of the core institutions of private law became the main task of the Drafting Group of the new Civil Code established by the Parliament in 1990.

From the very beginning of the Lithuanian civil law codification process, the New Civil Code was seen as a symbolic act – the country’s new economic constitution. However, as the major part of the content of civil codes is commonly regarded as mainly “politically neutral” (compared to such fields as labour law, social security law, consumer protection law, competition law, environmental law, etc.) it has received practically no attention in the Guidelines on the Law Reform adopted by the Parliament. In this document, the sole sentence from which the guidelines for the preparation of the new Civil Code could be derived read simply: “The creation of the Lithuanian law shall follow the European tradition, the experience of Lithuania between the two World Wars, [as well as] contemporary legal standards, and shall combine different methods of regulation.”² Draft laws shall also implement the standards set by the European Convention of Human Rights, and the requirements of EU law.

Professor VALENTINAS MIKELĖNAS, who was highly influential during the codification process, was appointed as the Head of the Drafting Group in 1991. In 1997, he left private practice for the post of Judge of the Supreme Court of Lithuania with the clear aim to ensure the proper application of the new Civil Code in practice. MIKELĖNAS’ openness towards foreign ideas and international trends in the regulation of contract law is best put in his own words: “[...] the main task in the process of drafting the new Civil Code was to create new, modern and effective contract rules, which had to correspond to the changed economic situation. On the other hand, contract law is an institution of private law in which the ideas of unification and harmonisation of law are realised in the broadest manner. Thus, the creation of new national rules for contracts means in fact the transformation of

results of the regional or transnational unification and harmonisation of contract law at the level of the national legal system.”³

III. Impact of the UPICC and the PECL on the Lithuanian Civil Law Codification Process and on the Text of the New Lithuanian Civil Code

According to the Explanatory Note by the Ministry of Justice on the Book 6 of the Civil Code⁴, one of the most important tasks during the process of preparation of Book 6 of the new Civil Code was “to harmonize the law of obligations of the Republic of Lithuania, especially the contract law and regulation of consumer contracts, with respective acts of European Union law as well as with conventions and other international documents prepared by UNCITRAL⁵, UNIDROIT⁶, Council of Europe and other international organizations active in the field of harmonization and unification of private law”. In the same document, we find another important statement: “The second part of Book 6 of the CC regulates general questions of contract law and *incorporates* into the code the Principles of International Commercial Contracts prepared by UNIDROIT” (emphasis added).

As a result of this, most of the provisions of the UNIDROIT Principles of International Commercial Contracts (1994) were “incorporated”, often by way of a simple “copy and paste” process, into the text of the final version of the General Provisions of Contract Law (Book 6, Part II of the new Lithuanian Civil Code, Arts. 6.154-6.228). This is best illustrated by the following statements in the commentary on Book 6, Part II of the CC written by MIKELĖNAS⁷: “Art. 6.156 of the CC, corresponds” (Lith.: “*atitinka*”) to Art. 1.1 of the UPICC” or “par. 1 of Art. 6.157 of the CC “repeats” (Lith.: “*pakartoja*”) Art. 1.4 of the UPICC.” MIKELĖNAS uses the same formulation (“repeats”, Lith.: “*pakartoja*”) and gives references to the respective provisions of the UPICC when commenting Arts. 6.158, 6.162 par. 1, 6.153, 6.164, 6.166, 6.167 par. 1, 6.168, 6.169, 6.170, 6.173, 6.174, 6.175, 6.176, 6.177, 6.178, 6.179, 6.180, 6.181 par. 3, 6.182, 6.185 par. 1, 6.186, 6.187, 6.193, 6.194, 6.195, 6.196, 6.197, 6.198, 6.199, 6.202, 6.203, 6.204, 6.205, 6.206, 6.207, 6.208, 6.209, 6.211, 6.212, 6.213 of the new CC. When commenting some of the other provisions of the CC, e.g. Arts. 6.214-216, 6.217-222, 6.226, 6.228 the phrase “see UPICC ...” is used, while in the commentary on Art. 6.200 he uses the phrase “the provision of the UPICC says ...”

Most likely, each of these slightly different and, at times, perhaps even misleading, phrases referring in one or another way to the UPICC, should be interpreted as explanations of the general statement of MIKELĖNAS given in the beginning of the

² Guidelines on the Law Reform (New Edition), 1998. Adopted by the Resolution of the Seimas of Lithuania of 25 June 1998, Nr. VIII-810.

³ MIKELĖNAS, V., “The Main Features of the New Lithuanian Contract Law System Based on the Civil Code of 2000”, in: *Juridica International*, 10/2005, pp. 42-43.

⁴ Cf. Explanatory Note on the Book 6 of the Civil Code, Ministry of Justice, 16 May 2000; <http://www3.lrs.lt/cgi-bin/getfmt?C1=w&C2=100914> (last visited 2 June 2006).

⁵ United Nations Commission on International Trade Law.

⁶ International Institute for the Unification of Private Law.

⁷ MIKELĖNAS, V., *Lietuvos Respublikos civilinio kodekso komentaras*. (hereinafter referred to as CC Commentary) – Kn. 6: *Prievolių teisė. T. 1.*, Vilnius, Justitia, 2003, pp. 191 ff.

chapter on the general part of contract law, informing us that “Part II of Book 6 of the CC (Arts. 6.154-6.228) is *modelled after* the [UNIDROIT] Principles of International Commercial Contracts prepared by the International Institute for the Unification of Private Law (UNIDROIT) and after the Principles of European Contract Law prepared by the special Commission on European Contract Law (emphasis added).”⁸ Finally, references to the UPICC are also given when commenting Arts. 1.90 and 1.91 of the new CC concerning, respectively, the obligations made under the influence of mistake, fraud, threat and gross disparity.

Moreover, many provisions of the new Lithuanian general contract law were modelled after the the PECL. However, further details pertaining to the influence of this codification framework on the text of the new CC are not demonstrated by MIKELĖNAS.

Obviously, the comparative perspective brought by Professor MIKELĖNAS to the drafting process was one of the main reasons why the UPICC and the PECL made such a major impact on the new Lithuanian contract law. However, a pure coincidence also played a role for their “import” into the new Civil Code, as when the Drafting Group received the texts of the UPICC and the PECL the general part of contract law had been already drafted. MIKELĖNAS recalls this process as follows: “The first version of Part II [General Part of the Contract Law/Draft Lithuanian CC] totally coincides with Chapter II of Book 5 of the Civil Code of Québec. For example, a contract was initially defined by several elements including cause and object. However, two important documents, received after the first draft of the Civil Code has been prepared, called for some issues to be reconsidered. The first of these documents was the UNIDROIT Principles of International Commercial Contracts; the second, the Principles of European Contract Law. A detailed study of these texts persuaded the working group that the Chapter on general provisions of contract law had to be redrafted, and it was decided to incorporate into the Civil Code as many provisions of the UNIDROIT Principles of International Commercial Contracts as possible, taking into account the social and economic realities in Lithuania. As a result, most of the provisions of the UNIDROIT Principles were incorporated into the Civil Code.”⁹

As a result, the major part of the newly created General Part of the Contract Law consists largely of the provisions that are “imported” from the UPICC and the PECL. Some of these provisions, however, have been modified to better reflect “the social and economic realities” in Lithuania. In addition, we have a number of provisions and institutes that are not to be found in either of the codification frameworks, e.g. detailed regulation of preliminary contracts, public contracts, provisions on unfair terms in consumer contracts, etc. All this has brought some truly original “Lithuanian flavour” into the new Civil Code. And, of course, one must bear in mind that all texts had to be translated into Lithuanian. This may also have led to discrepancies between the Lithuanian text and the texts of its donor systems.

In addition, the general structure of the General Part of the Contract Law of the new Civil Code follows the structures of the UPICC and the PECL, although more closely the structure of the former than that of the latter. The table below gives a general comparison of these structures:

New Civil Code of Lithuania, Book 6, Part II (Arts. 6.154-228)	UPICC (1994)	PECL (1995, 1999; consol.2000)
Chapter XI: General provisions (Arts. 6.154-161)	Chapter 1: General provisions (Arts. 1.1-1.10)	Chapter 1: General provisions (Arts. 1:101-1:305)
Chapter XII: Formation of contracts (Arts. 6.162-188)	Chapter 2: Formation (Arts. 2.1-2.22)	Chapter 2: Formation (Arts. 2.101-302)
--	--	Chapter 3: Authority of Agents (Arts. 3:101-3.304)
Chapter XIII: Validity and form of contracts (Arts. 6.189-192)	Chapter 3: Validity (Arts. 3.1-3.20)	Chapter 4: Validity (Arts. 4:101-4.119)
Chapter XIV: Interpretation of contracts (Arts. 6.193-195)	Chapter 4: Interpretation (Arts. 4.1-4.8)	Chapter 5: Interpretation (Arts. 5:101-5.107)
Chapter XV: Content of contracts (Arts. 6.196-199)	Chapter 5: Content (Arts. 5.1-5.8)	Chapter 6: Contents and Effects (Arts. 6.101-6.111)
Chapter XVI: Performance of contracts (Arts. 6.200-204)	Chapter 6: Performance (Arts. 6.1.1-6.2.3)	Chapter 7: Performance (Arts. 7:101-7.112)
Chapter XVII: Legal consequences of the non-performance of contracts (Arts. 6.205-216)	Chapter 7: Non-performance (Arts. 7.1.1-7.4.13) - Section 1: Non-performance in general	Chapter 8: Non-performance and Remedies in General (Arts. 8.101-8.109)
Chapter XVIII: Termination of contracts (Arts. 6.217-228)	- Section 2: Right to performance - Section 3: Termination - Section 4: Damages	Chapter 9: Particular Remedies for Non-Performance (Arts. 9.101-9.510)

Authority, prestige, a functional and practice-oriented approach as well as neutrality (non-state character) and origin (comparative approach) of the aforesaid codification frameworks were, in my opinion, among the most important factors of their reception, along with pure chance. The trends of economic and political globalisation have also influenced the decision of the drafters to follow those codification frameworks that most reflect this process. The fact that the UPICC and the PECL were, at that time, the most recent, the most transnational and probably the most modern, though non-state, codification projects was also of major importance. Both codification frameworks were inspired by the ideas of combining the common law and the civil law traditions. It was also one of MIKELĖNAS’ primary goals to combine the best experience of both of these systems in order to achieve the best results for Lithuania.¹⁰

Surprisingly, one does not find a single reference to the UPICC or the PECL, to international or European standards or to anything similar in the text of the new Lithuanian Civil Code itself. The only official reference to the codification frameworks is made in the Explanatory Note to Book 6 of the new Civil Code, emphasising the need to harmonize the Lithuanian law of obligations with the UPICC and other international documents, without, however directly, mentioning the PECL.

⁸ MIKELĖNAS, V., *op. cit.*, *supra* note 7, p. 191.

⁹ MIKELĖNAS, V., “Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience”, *Unif. L. Rev.*, 2/2002, p. 251.

¹⁰ As a result, he qualifies today’s Lithuanian legal system as a mixed system. *Cf.* MIKELĖNAS, V., *op. cit.*, *supra* note 9, p. 250.

Given that, for example, when implementing the EU law, references to a relevant legal instrument are a regular practice and serve as a valuable aid to practitioners in the application process of such “imported” provisions, the absence of such a reference to the UPICC and/or the PECL in the new CC is a serious risk factor for development of the new Lithuanian general contract law. I will briefly return to this issue later in this paper.

IV. The Role of the UPICC and the PECL in the Interpretation of the Imported National Law Provisions

A. The Vision of the Drafters and the Realities of the Lithuanian Practice

The vision of the drafters of the new Lithuanian Civil Code concerning the role of the UPICC and the PECL in the process of interpretation of the new general contract law finds its only clear expression in the commentary on the General Part of Contract Law by MIKELĖNAS (published in 2003, three years after the adoption of the new CC). It states that “in the process of application and interpretation of the provisions of the general part of the new contract law, one must follow the interpretation of the aforementioned international documents [UPICC and PECL] in foreign doctrine, as well as their application by the foreign courts and international commercial arbitral tribunals.”¹¹

This statement appears to be very progressive and innovative (at least in the Lithuanian context), however one might ask whether the commentary was an appropriate place for such an important statement. In order to evaluate the possible answers to this question one should consider the broader Lithuanian context. It is important to understand that legal doctrine is generally not seen as a source of law in Lithuania. The best illustration is that it is unusual for Lithuanian courts to refer to doctrine in their judgements. Nonetheless, in the rare cases where a reference to doctrine is made, the works of MIKELĖNAS are by far the most popular authority.

An analysis of the cases in the official database¹² of the Supreme Court of Lithuania shows that the Supreme Court (with MIKELĖNAS “on board”) and the participating parties referred to the UPICC only in 4 cases¹³ and did not refer to the PECL at all in the five years since the Code has been in force. Thus, one should not be overly optimistic about the future developments in this field, especially since MIKELĖNAS left the Supreme Court in early 2006.

Would the situation be better if the text of the code itself referred to the UPICC and/or the PECL? I would probably answer this question in the affirmative. The existence of such a reference would at least have increased the study of the UPICC and the PECL and, would have led to a more intensive use of the UPICC and the PECL in Lithuanian judicial practice.

¹¹ MIKELĖNAS, V., *op. cit.*, *supra* note 7, p. 191.

¹² <http://www.lat.lt> (last visited 17 September 2006).

¹³ 3K-3-281/2002; 3K-3-612/2003, 3K-3-1068/2003, and 3K-3-38/2005; in two of them V. MIKELĖNAS was a member of the Panel, in another two AMBRASIENĖ. A short overview of these cases is provided in subpart B.

Notwithstanding the aforementioned situation within the Supreme Court of Lithuania, the UPICC and the PECL are referred to more and more often in Lithuanian doctrine. It is not easy to understand why the number of references to the UPICC in Lithuanian legal doctrine exceeds by far the references to the PECL. The aforementioned commentary of the new CC by MIKELĖNAS and the most recent textbook on the Law of Obligations by AMBRASIENĖ (Professor and Judge of the Supreme Court of Lithuania), BARANAUSKAS (Professor and Attorney-at-Law) et al.¹⁴ are the two standard works in which references to the UPICC have become almost a norm. This is also the case with recent journal articles on contract law. However, the function that these references serve is not entirely clear. Are they for comparison purposes only – in order to see that the same regulation is also found in the UPICC? Is there an intention to identify those provisions of Lithuanian law that are borrowed from the UPICC or the PECL and an attempt to interpret and apply them in accordance with the text and commentaries on the UPICC and/or the PECL? At the moment, it appears that reference to the UPICC and the PECL is being made in a rather haphazard manner. Moreover, I am neither aware of any jurisprudential or academic criticism concerning the quality of the “incorporation” of the UPICC and the PECL in the new Lithuanian Civil Code nor of any actions undertaken by the Lithuanian government to promote the implementation of the UPICC and the PECL in practice. Nor is there a strategy concerning how to react to the changes in the texts of the UPICC and the PECL.

In summary, then, there is no indication that the judges feel that they are “bound” to interpret even the imported provisions of the new CC in conformity with the texts of the UPICC and the PECL as well as the basic underlying ideas of these non-state codification frameworks, or at least to take them into account, in a transparent and systematic manner. It would not be an easy task to give a definite answer to the question of whether this position held by the courts has anything to do with the current situation in the legal doctrine. Nonetheless, I would probably answer this question in the affirmative. The inactivity of legal doctrine in providing specific solutions is at least one of the reasons why the UPICC and the PECL still play only a minuscule role in today’s Lithuanian legal practice. The possible future strategies to improve this situation will be addressed in part V of this paper. First let us look briefly at the cases decided by the Supreme Court of Lithuania that refer to the UPICC to illustrate the style in which such rare references are made.

¹⁴ AMBRASIENĖ, D./BARANAUSKAS, E. et al. (ed.), *Civilinė teisė: prievolių teisė*, Vilnius, Law University of Lithuania, 2004.

B. Case Law of the Supreme Court of Lithuania

1. UAB "Telšių keliai" v. Telšių savivaldybės butų ūkio remonto eksploatacijos įmonė (11 February 2002)¹⁵

This case concerned the payment for services rendered and involved the following issues: content and form of the transaction, the course of its conclusion, legal registration of the transaction, consequences of non-fulfilment of an obligation, form and validity of contracts, general conditions of a construction contract; burden of proof and its allocation between the parties, object of proof.

The Supreme Court held that, when qualifying the contractual relationship between the parties one must, first, establish the true intentions of the parties. In the event that this is not possible, the "reasonable person"-test applies to determine which meaning such a person would attribute to the contract in analogous circumstances. In this context, the Court referred to Art. 6.123 CC¹⁶ and Art. 4.1 UPICC.

2. G. Brencius v. "Ūkio investicinė grupė" (19 May 2003)¹⁷

The case examined the termination of a contract for the sale of shares and the obligation to return the money paid, and dealt with issues pertaining to shares and share certificates as well as public and private limited liability companies.

In interpreting par. 2 of Art. 177 of the old Civil Code of 1964, the Court referred to Arts. 6.2.1 - 6.2.3 UPICC. The Court held that these Articles of the UPICC are "repeated" in Art. 6.204 of the CC which "establishes regulation similar" to the former provision of the CC of 1964.

3. UAB "Revis" v. UAB "Garantas" (8 December 2003)¹⁸

In this case, the Supreme Court dealt with a transaction entered into by mistake, as well as the sale of real estate. The subject matter of the case was the declaration that a contract for the sale of a part of a building was void.

One of the parties referred to par. 2 of Art. 3.5 UPICC to support her interpretation of Art. 1.90 CC¹⁹. The Court however did not refer to the UPICC in its decision.

4. UAB "Vingio kino teatras" v. UAB "Eika" (19 January 2005)²⁰

In this civil case, the Supreme Court of Lithuania dealt with the issues of the conclusion of contracts (offer, acceptance); content of contract (terms of contract); and

construction contract. The subject matter of the case was the conclusion of a contract and pre-contractual relationships.

One of the parties referred to Art. 2.5 UPICC (black letter rule and commentary) to support her version of interpretation of Art. 6.170 CC²¹. The UPICC, according to that party, "must be followed when interpreting the respective provisions of the CC".

The same party also referred to Art. 2.14 UPICC (black letter rule and commentary) in order to prove that the lower court's interpretation of par. 1 of Art. 6.182 of the CC²² was incorrect. The party argued that Art. 2.14 UPICC is repeated in Art. 6.182 CC and stated that, according to the UPICC commentary, Art. 2.14 UPICC is not designed for situations where the parties have not discussed non-essential contract provisions that can be determined according to Art. 4.8 UPICC or Art. 5.2 UPICC. The party also argued that Art. 4.8 UPICC corresponds to Art. 6.195 CC; and that Art. 5.2 UPICC corresponds to par. 2 of Art. 6.196 CC.

When analysing the questions raised in this case, the Supreme Court of Lithuania referred to the "Unidroit Principles of International Commercial Contracts, Rome, 1994, pp. 50-52" [=Art. 2.15 UPICC, black letter rule and commentary] when interpreting par. 3 of Art. 6.163 of the CC²³. The Court held that the party which acted in bad faith must compensate damages caused to the other party, and those damages shall consist of expenses incurred during the negotiations and the monetary value of the lost opportunity.

V. Strategies for Increasing the Use of the UPICC and the PECL for the Interpretation of National Law

As one can see, despite the fact that the UPICC and the PECL were used as a model for contract law in Lithuania, they do not play an important role and are not clearly visible in the interpretation and application process of the new contract law provisions.

Keeping this in mind, possible strategies to improve the described situation shall be discussed. In the following part, two strategies for increasing the use of the UPICC and the PECL in Lithuanian legal practice will be proposed: a "soft" one and a "hard" one. Then the likely consequences of a currently most prevalent "no strategy" option shall be examined. If this option is further pursued, the current state of affairs in Lithuanian law will remain locked in the status quo, meaning that the process of unification and harmonisation of Lithuanian contract law is likely to be "frozen in time" and will not be debated beyond the textual level of the new CC.

Before taking the discussion of the possible strategies to the next level, another important aspect of the reception process must be mentioned: until now there has been no Lithuanian translation of the UPICC and the PECL including their commentaries! Nor are there any standard works on contract law written by foreign

¹⁵ Private Limited Liability Company "Telšių keliai" v. The Household Maintenance and Exploitation Company of the Municipality of Telšiai; Civil Case No. 3K-3-281.

¹⁶ Probably meaning Art. 6.193 CC, which, according to the CC Commentary by MIKELĖNAS (note 7), repeats, *inter alia*, Art. 4.1 UPICC. – T.Ž.

¹⁷ Civil Case No. 3K-3-612.

¹⁸ Civil Case No. 3K-3-1068.

¹⁹ According to the Commentary of Art. 1.90 CC by MIKELĖNAS V., part 5 of this Article repeats the UPICC Art. 3.5 par. 2, p. 200. MIKELĖNAS, V./VILEITA, A. *et al.* (ed.), *Lietuvos Respublikos civilinio kodekso komentaras. – Kn. 1: Bendrosios nuostatos*, Vilnius, Justitia, 2001.

²⁰ Civil Case No. 3K-3-38.

²¹ According to the Commentary of Art. 6.170 CC by MIKELĖNAS, V., this Article repeats Arts. 2.5 and 2.7 UPICC, p. 216.

²² According to the Commentary by MIKELĖNAS, V., Art. 6.182 CC repeats Art. 2.14 UPICC, p. 228.

²³ According to the Commentary by MIKELĖNAS, V., Art. 6.163 CC repeats Art. 2.15 UPICC, p. 207.

authors translated into the Lithuanian language. The assortment of Lithuanian literature on this issue is scarce at best, and most probably this is one of the reasons why the influence and presence of the Russian legal mind is still so strong in Lithuania. In addition, books on contract law in English, German or French are much more expensive and not as readily available in Lithuania as are Russian textbooks. Needless to say, the majority of older generation lawyers still feel more comfortable using the Russian language. Regardless of how this situation is portrayed, the problem requires immediate attention and should be resolved as soon as possible. The business community and the general public should also become more aware of the UPICC and the PECL.

An instrument or model offered to systematically coordinate the interaction of the new Lithuanian contract law system with the UPICC and the PECL should, first of all, satisfy the criteria of feasibility and practicability. Since Lithuanian lawyers are becoming more and more familiar with the model of EC-consistent interpretation (*EG-Rechtskonforme Auslegung*) of national law provisions created to implement EC law, this model could serve as a good starting point in inventing this new instrument. In this context the Swiss experience with “autonomous adaptation” of the EC law and EC-consistent interpretation of national provisions “implementing” the EC law could also be of great interest for Lithuania.

A. The “Soft Strategy” Option

The main feature of this option would be that no action at the legislative level should be undertaken. Consequently, the main spheres of action under this option would be a more strategic use of the instruments and resources that are already in place: e.g. par. 3 of Art. 1.9 CC (which emphasises the importance of the teleological method of interpretation), more extensive use of the historic and comparative method of interpretation (references to the UPICC in the Explanatory Note, pre- and post-codification works of MIKELĖNAS may serve as good starting points to this end).

For this strategy to succeed, scholars should engage themselves in more practice-oriented activity, e.g. promoting the UPICC and the PECL in conferences, roundtables involving practitioners and academics, initiating research projects, developing practical models for the interpretation and application of the imported rules. Legal scholars could play a major role in this strategy by introducing, promoting and actively using a “consistent interpretation rule” according to which preference should be given to that reading of the provision of the CC that makes it consistent with the UPICC and/or the PECL.

I would recommend to the government of Lithuania, and the members of the legal community in general, to present substantial initiatives, such as the introduction of a regular evaluation (including the analysis of developments in the case law) and a reporting system dealing with developments in contract law. The example of the recent Estonian Entrepreneurial Law Action Plan²⁴ could serve as an

²⁴ See VARUL, P./KÄERDI, M./VOLENS, U./RAIDLA, J./LANG, R., “Entrepreneurial Law. Action Plan for Improving the International Competitiveness of the Corporate Legal Environment”, in: *Juridica*

interesting comparative illustration and a starting point for possible action under this option.

Also the Swiss discussion and case law of the *Bundesgericht* (Federal Supreme Court) regarding the doctrine of “autonomous adoption of EC law” and introduction of the *in dubio pro interpretatio Europea* interpretation principle for the Swiss private law provisions that are “imported” from EC law under the framework of the so called “Swisslex-Initiative” could serve as an interesting illustration and perhaps even as a starting point for the discussion in Lithuania²⁵.

This option is likely to produce positive long term benefits; however, the hottest issue remains the treatment of the future developments of the “donor systems”: the UPICC and the PECL. The 2003 edition of the PECL as well as the 2004 edition of the UPICC have already been published. In addition, there are plans to further develop these codification frameworks. Consequently, if there is going to be a political decision, and will, to keep Lithuanian contract law in line with these developments, then action at the legislative level will become inevitable.

B. The “Hard Strategy” Option

The main feature of this option would be to take action at the legislative level. This would require revision of the text of the new CC by taking into account the developments of case law and practical problems of application which have arisen in Lithuania during the five year period since the new CC became effective. The possible actions under this option would be to include a general reference to the UPICC and/or the PECL at the beginning of the CC chapter on general contract law and/or to include special references next to provisions which are modelled after the UPICC or/and the PECL. I also suggest that the entrenchment in the CC of the above mentioned “consistent interpretation rule” (with necessary exceptions to be developed) would increase awareness and use of principles more considerably than the mere embedding of the rule in doctrine as suggested in “soft strategy” option.

In addition to this, most of the actions from the “soft option”, with modifications (if, and where, needed), would also come into discussion under this option.

VI/2006. pp. 227-233 (summary also available at http://www.juridica.ee/juridica_en.php?document=en/articles/2006/4/105476.SUM.php, last visited 14 September 2006).

²⁵ Cf., e.g., PROBST, TH., “Die Rechtssprechung des Europäischen Gerichtshofes als neue Herausforderung für die Praxis und die Wissenschaft im schweizerischen Privatrecht”, *Basler Juristische Mitteilungen (BJM)*, 2004, pp. 225-260; PROBST, TH., “Der Einfluss des europäischen Gemeinschaftsrechts auf das schweizerische Privatrecht”, in: WERRO, F./PROBST, TH., (ed.): *Le droit privé suisse face au droit communautaire européen: Questions actuelles en droit de la responsabilité civile et en droit des contrats/Das schweizerische Privatrecht im Lichte des europäischen Gemeinschaftsrechts: Aktuelle Fragen aus dem Haftpflicht- und Vertragsrecht*, Bern, Stämpfli, 2004, pp. 13-44; WIEGAND, W., “Zur Anwendung von autonom nachvollzogenem EU-Recht”, in: *Festschrift R. Zäch*, Zürich, Schulthess, 1999, pp. 171-189; AMSTUTZ, M., “Evolutorische Rechtsmethodik im europäischen Privatrecht: Zur richtlinienkonformen Auslegung und ihren Folgen für den autonomen Nachvollzug des Gemeinschaftsprivatrechts in der Schweiz”, in: WERRO, F./PROBST, TH., (ed.), *op. cit. supra*, pp. 105-144; AMSTUTZ, M., „Interpretatio multiplex: Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335”, in: *Privatrecht und Methode: Festschrift E. A. Kramer*, Basel, Genf, München, Helbing & Lichtenhahn, 2004, pp. 67-91.

C. The “No Strategy” Option

If no strategic action plan is chosen, then the briefly described *status quo* will remain. This means that the questions and the problems, with their unwanted consequences, will be not analysed in a systematic fashion. In this case, the real situation, the real trends and the problems of the “law in action” will not be realised, and, accordingly, the process will continue to not be shaped in a controlled and systematic way.

Therefore, there appears to be a risk that, if the current trend continues, the goal of Lithuania to harmonise its contract law with international and European standards, and – even more important – to allow the “incorporation” of the UPICC into the new CC to function in practice as well, will most probably not be achieved in its entirety or, at a minimum, the result will remain unmanageable and, accordingly, unpredictable. This is something Lithuanian society certainly does not want to happen. Yet, unfortunately, wrongful and misleading perceptions concerning the real state of affairs in the law reform process in Lithuania, as completed, still sometimes prevail. Furthermore, there is also the risk that the Lithuanian legal system will become less open to the developments taking place outside of the national system as soon as it reaches a higher level of development and becomes more mature. This risk will become especially relevant if the status quo continues. Recalling the words of MARKESINIS and FEDTKE²⁶ in a similar context, I would like to take this opportunity to call my colleagues “of the different areas of the legal profession” to collaborate for the benefit of the newly created Lithuanian contract law system, and, having identified the current trends taking place in this field, “to work with one other to shape the described processes in a controlled and systematic way”. It is my fervent belief that now is the best time to begin this.

VI. Concluding Observations

It appears that the invocation of the UPICC and the PECL in the interpretation and development of Lithuanian general contract law is largely a “one-man-project” (of MIKELĖNAS) and the practical application of these frameworks in Lithuanian courtrooms is still far from a regular and systematic practice. Knowing the principles of how the local courts operate, it is however to be presumed, that if the courts do not refer to the UPICC and the PECL directly and systematically, they do not intend to methodically interpret and apply Lithuanian contract law in conformity with those codification frameworks and their underlying ideas. As a result, the risk that the development of the new Lithuanian general contract law may veer off the course that is consistent with the UPICC and/or the PECL is relatively high. Such a development would seriously threaten the achievement of the goals of the law reform process. At the moment, my impression is that neither Lithuanian scholars, nor practitioners, nor the legislator are overly concerned with better understanding

these processes. The 5th year anniversary of the code is a good time to start calling for empirical research studies and other initiatives in this field.

It is very interesting to observe the influence exerted by one person – MIKELĖNAS – on the reception process of the UPICC and the PECL at all levels (doctrine, text of the new CC, Supreme Court practice) and to try to predict the direction that the process will take now that MIKELĖNAS has resigned from the Supreme Court. I sincerely believe that the return of MIKELĖNAS to academia will encourage the development of Lithuanian contract law at the doctrinal level where more action is certainly needed.

Although some of these thoughts may sound somewhat pessimistic, I nonetheless believe that the relative openness of the Lithuanian legal profession to the trends of internationalization and Europeanization will advance the reception of the UPICC and the PECL and their underlying ideas beyond the formal text-level of the new Lithuanian contract law. The moment at which the system will begin to deal with these issues systematically is, accordingly, the crucial question. However, as MARKESINIS and FEDTKE aptly put it, “a purely national interpretation of the law will not be sustainable for long”²⁷.

²⁶ MARKESINIS, B./ FEDTKE, J., “The Judge as Comparatist”, *Tul. L. Rev.*, Vol. 80, 11 (2005), pp. 158-159.

²⁷ MARKESINIS, B./ FEDTKE, J., *op. cit.*, *supra* note 26, p. 19.