

UNDERSTANDING CONTRACT UNDER THE LAW OF LITHUANIA AND OTHER EUROPEAN COUNTRIES*

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Received 14 November, 2011, accepted 19 December, 2011

***Abstract.** Contract theories may be a useful analytical tool for understanding and explaining contract, as well as for facilitating orientation in a complex and often fragmented legal regulation. The article presents main understandings of contract in various European jurisdictions: contract as free assumption of obligation, contract as a bargain based on the idea of consideration, contract as free assumption of obligation based on sufficient causa. The article inquires as to how universal those theories are, what are the recent trends in the development of European contract law, what philosophy of contract underlies the soft law instruments, such as UNIDROIT Principles of International Commercial Contracts or Principles of European Contract Law (PECL), what is the stance of the Draft Common Frame of Reference (DCFR) in regard to the concept of contract. Under the law of Lithuania the definition of contract comprises elements found in several European countries, but it is argued that the new Lithuanian Civil Code has not received any model in its pure form. However it seems that the prevailing view understands contract as juridical act, as freely assumed obligation and meeting of parties' intentions with the aim to create legal effects. Following*

* The research for this article was funded by a grant (No. MIP-35/2010) from the Research Council of Lithuania under the project “Comparative Contract Law: Lithuania in European Context”.

the position of soft law instruments in regard to the elements of the contract, Lithuanian law (at least in its statutory form) does not have any explicit additional requirements, such as consideration or causa.

Keywords: *contract, contract theories, juridical act, will, promise, causa, consideration, European Contract Law, PECL, DCFR.*

Introduction

Definitions of theory have been changing during centuries and depending on the research field, however, in the most general sense, scholars agree that theories are analytical tools for understanding, explaining the phenomena analyzed, and also forecasting its development. Based on this concept of theory, let us formulate the purpose of the contract theory — facilitating orientation in the complex and often fragmented legal regulation. Without a doubt, such a theory would be greeted with joy by legal theoreticians and practitioners. But does this theory exist in contract law? If so, what are its contents? Can we still rely on theories of Pothier or Savigny, which had been introduced during previous centuries, as universal and applicable to this date? Does a concept of the modern contract exist, and if so, how universal it is — are the insights of common law lawyers suitable for civil law states, and vice versa? Moreover, can a theory adopted in one of the jurisdictions within the civil law system be applicable to another — for instance, the German one to France, the Lithuanian one — to Estonia, and etc.? What contract vision is offered to Europe by current academic codifications (soft law instruments) — Principles of European Contract Law (PECL), and Draft Common Frame of Reference (DCFR)? Without a doubt, these issues require thorough investigation, and it is impossible to provide a definite answer in the work of the current amount. Thus within the framework of this article, we will attempt to distinguish the main understandings of the contract under the European contract law, provide a short description of them, and compare them with the Lithuanian legal doctrine and practice in the relevant field.¹

1 This article is part of a wider research project aimed at comparative contract law aspects. The analysis undertaken by a group of experts in mid-2010 and 2011 focused on various stages of existence of the contract (pre-contractual relations, conclusion of the contract, validity, termination, contractual liability, problems of contractual representation, and other issues). This article is aimed at summarizing the results of the research and formulate insights as to the very essence of the contract and its concept under Lithuanian and other European countries' law, assessing the position of Lithuanian law in the European context and seeking to determine the framework of development of the national contract law in the nearest future.

1. The Main Issues Raised by the Modern European Contract Law

Considering the concept of a contract in European countries, first of all, we face a number of practical questions that clearly demonstrate the disparity in understanding of the contract in different jurisdictions. Some legal relations are treated as contracts in one legal system but do not have the same status in another, e.g., some gratuitous agreements, such as gift, deposit, or uncompensated use (loan for use). The question arises whether they are contracts. In England gifts are not considered as contracts, differently from France. The approaches to the institute of trust are also very different; and transfer of property to fiduciary is not treated as a contract in common law countries, although it is difficult to find another term for the activities.² International documents are also not helping to find the solutions — neither the mandatory ones, such as the Vienna Convention on Contracts for the International Sale of Goods,³ which leaves the moment of conclusion of the contract to national law,⁴ nor the documents of advisory nature, such as the UNIDROIT principles,⁵ which are in essence aimed at commercial contracts. Moreover, contracts under which rights are acquired by only one party, in case of a unilateral undertaking and the inactivity by another party are also treated differently. In all legal systems the contracts that provide for obligations of only one party are viewed with suspicion, and in particular in common law system.⁶ Thus a unilateral undertaking is considered to be a contract only provided that additional formalities are observed, which either strengthen the participation of the passive party, and (or) objectify the intention of the party undertaking the obligation. For instance, in Germany the contract of gift is considered to be concluded (provided that requirements as to the form have been met), if the person who receives a gift does not refuse it during the term set by the person presenting the gift (Article 516 of the German Civil Code). Moreover, the Brits consider a gift promise as valid and enforceable, if it was presented in a certain form (deed). The French are an exception in this context — in order to make the gift effective, the receiver of the gift must accept it (Articles 932 and 938 of the French Civil Code). Under the Lithuanian legislation⁷, gift is considered to be a real contract, the promise to present a gift in the future is not considered to be a contract of gift, and refusal to fulfil the promise results only in compensation of direct losses (Article 6.465 of the Lithuanian Civil Code).⁸

2 Hartkamp, A., *et al. Towards a European Civil Code*. Nijmegen: Kluwer Law International, 2004, p. 353

3 United Nations Convention on Contracts for the International Sale of Goods [interactive]. [accessed 2011-10-05]. <<http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>>.

4 *CISG Articles 14-24 (Formation of the contract) Article 23 – a contract is concluded at the moment when acceptance of an offer becomes effective in accordance with the provisions of this Convention*.

5 UNIDROIT Principles of International Commercial Contracts 2010 [interactive]. [accessed 2011-09-15]. <<http://www.unidroit.org/english/principles/contracts/main.htm>>.

6 Kötz, H.; Flessner, A. *European Contract Law*. Volume one. Oxford: Clarendon Press, 2002, p. 3.

7 Civil Code of the Republic of Lithuania, adopted 18 July 2000, in force since July 1, 2001. *Official Gazette*. 2000, No. 74-2262.

8 But is it not implied in the Article 6.465 of the Lithuanian Civil Code that such a promise is binding, and if so – to what extent? A person can waive his/her promise only for justifiable reasons – if promise is not implemented for unjustifiable reasons, the promisor will have to compensate the losses related to preparation

2. The Binding Effect of the Contract

Why it is important to understand the origin of the contract's binding effect in one or another legal system? First of all, any concept, however formal it seems from a first glance, e.g. the British "consideration" or the French "*cause*" reveals the ideas and principles that have formed and still influence the contract law of the country. It also allows forecasting future tendencies.⁹

The main difference between the civil and common law understanding of the contract is the nature of the mandatory obligation — in civil law system, it is recognized that an obligation can be mandatory even if it is of no benefit to the obligor. The binding effect of the contract is based on the decision made in free will by the person assuming the obligation, and is especially common for the Germanic tradition, e.g. F.C. Savigny claimed that contractual obligations are binding and must be enforced, because they are the expression of the debtor's will. Some modern theoreticians (Werner Flume, Charles Fried) base the binding effect on the "principle of the promise", i.e. a person must fulfil his/her promises, because he/she consciously initiated an agreement, which has a function to provide a moral basis for another person to expect performance.¹⁰

However, basing the binding effect on free decision of the person assuming the obligation does not correspond with the common law doctrine, which relies on the presence of abstract benefit (consideration)¹¹ in agreement as the dominating principle. The mere fact that a person had serious intention to assume an obligation and expressed this intention is not sufficient to consider the agreement a legally binding contract. For this purpose, the person should also ask something for it — something that can be seen as the "price" for the promise.¹²

2.1. The Binding Effect of Contract under Common Law — the Doctrine of Consideration

Historically the common law has been searching for the ways to distinguish between promises which are not legally binding from the legally binding contract. Besides the offer and the acceptance, this legal system requires the necessary element of consideration for conclusion of the contract. Thus, the common law will consider as legally binding such a promise, for which a certain compensation is provided.¹³ It

to accept a gift. Thus in principle it can be claimed that the situation is considered as a pre-contractual one, which in its turn implies the duty of the parties to act in good faith (Article 6.163 (1) of the Lithuanian Civil Code).

- 9 See Schulze, R., *et al. New Features in Contract Law*. Munich: Sellier. European Law Publishers, 2007, p. 320.
- 10 Quoted according to: Kötz, H.; Flessner, A., *supra* note 6, p. 8. (Fried, Ch. *Contract as Promise. A Theory of Contractual Obligations* (1981)).
- 11 For the purposes of this paper the term *consideration* is used at several instances in the meaning of "abstract benefit", with regards to the content of this term. The benefit received by the parties does not have to be adequate nor proportional, but it has to factually exist.
- 12 Kötz, H.; Flessner, A., *supra* note 6, 2002, p. 9.
- 13 Turner, Ch. *Unlocking contract law*. London: Hodder Arnold, 2007, p. 61.

must be noted that the benefit here may be abstract, and in the context of commercial transactions — even symbolic, thus in certain practical situations it is almost impossible to define the existence of the criterion of consideration.¹⁴ In Europe the requirement of consideration applies in contract law of England and Ireland, but not in Scotland. The promise or the offer, even if it is seriously submitted and accepted by the other party, will not be considered as contract, if the other party does not give something or does not do something, or does not promise to do or give something in exchange.¹⁵

It is not that important whether one of the parties receives the benefit; it is more important that the other party loses something in return to the promise. For instance, the promise to the bank on guaranteeing another person's loan would be considered as a contract (once accepted by the bank), since the bank also suffers a certain detriment while lending money to that person. However, if the loan is already granted, such a guarantee would not be considered as a contract, because the bank does not lose anything in exchange for it. Certain actions or promises to act do not correspond with the criterion of consideration, because the promising person does not suffer any detriment. For instance, a promise to pay a person to perform an act, which that person is already obliged to do under the general law, would not be considered as a contract.¹⁶

The doctrine of consideration does not limit the discretion of courts in recognizing certain contracts that they consider as such, because the consideration does not have to be proportionate, thus even a nominal benefit may sometimes be admitted as sufficient by the courts. If each of the parties had an opportunity to come to a thoughtful and responsible decision, the contract cannot be treated as invalid purely due to inadequacy of consideration. Furthermore, the contract will be binding on the parties even if one party's obligation is as small as a „peppercorn“ in comparison with the other party's counter-obligation¹⁷. Nevertheless, in court decisions and doctrine, the adequacy of consideration is treated as the requirement of general commutative justice (*iustitia commutativa*) and it is aimed to comply with it¹⁸. Interpretation of contracts is the most suitable instrument for verifying the adequacy of consideration of the contract parties. If contract clauses lack clarity and thoroughness, the court has to interpret them with relying on the principle of “mutual trust” and good faith in civil circulation: the more obvious is the inadequacy of consideration, the more weight should the court place on the claim of the disadvantaged party that it was misled, pressured or deceived by the opposite party.¹⁹

The occurrence of the requirement of consideration was caused by the historical development of the contract's concept. Common law recognized as valid only those

14 Turner, Ch., *supra* note 13, p. 61.

15 Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*. Full Edition. Vol. 1. Munich: Sellier. European Law Publishers, 2009, p. 268.

16 *Ibid.*

17 Zweigert, K.; Kötz, H. *An Introduction to Comparative Law*. 3rd edition. Oxford: Clarendon Press, 1998, p. 391.

18 *Ibid.*, p. 328.

19 *Ibid.*, p. 328–329.

contracts, which have been confirmed in a special form (deed). The deed was taken as evidence that a contract, and not only a gratuitous promise, has been made.²⁰ This rule could be justified in cases of the transfer of immovable property but its use for other contracts had not proved as convenient. Thus courts needed a doctrine which would allow distinguishing valid agreements from invalid based on other criteria than form. The development of the doctrine of consideration has been spontaneous — thus even in XIX century it was not precisely defined what the consideration stands for. Pragmatic approach simply treated it as the reason for considering the promise legally binding. In most cases, it is regarded as the rule on evidence submission. For instance, the wording on the concept of consideration, submitted in the case from XIX century, *Thomas v Thomas* [1842]2QB 851 is the following: „Consideration exists if there is some detriment to the plaintiff and some benefit to the defendant.“²¹ The precedent case of *Dunlop v. Selfridge* (1915) was the most significant case for the consideration doctrine, and the case defined consideration in the following way: „an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.“²² Thus the promise submitted in exchange for a certain consideration is a contract.

The consideration must meet certain criteria. It does not have to be proportionate to obligation but it has to be sufficient. The sufficiency has clear legal criteria — it has to be real, defined, and it has to possess a certain value. It means that courts do not evaluate whether rights and duties of the parties have been bargained proportionally, in such a way that one party receives an adequate compensation for the undertaken obligations (except for the discussed cases when defects in formation of will may result in conclusion of a contract that is especially one-sided), it is important whether the party receives a certain benefit in exchange.

For instance, a dying husband expressed the desire for his wife to have his house used as her residence but did not include this in his will. After his death the executors of the estate allowed the woman to continue residing in the house for a symbolic rent pay of one pound per year. Later eviction was not successful. The moral respect for the testator's wishes was not considered as consideration by the court, but payment of the rent (although symbolic and not corresponding to the real price) was.²³ Consideration must arise from the plaintiff to the defendant, thus the respect for the testator's will cannot be seen as consideration, because this circumstance arises from the defendants and not from the plaintiff.

In the same way, peace settlement in a dispute with no clear results is recognized as consideration — it is sufficient for the parties at the time of the conclusion to believe in good faith that such a dispute exists, even if it is not factually confirmed in the future.

20 Turner, Ch., *supra* note 13, p. 60.

21 *Ibid.*, p. 61.

22 Kadner Graziano, Th. *Comparative Contract Law. Cases, Materials and Exercises*. Palgrave Macmillan, 2009, p. 121.

23 *Thomas v. Thomas* [1842] 2 QB 851.

However, dropping a claim which was in essence originating from abuse of the right to court cannot be seen as the relevant consideration.

Consideration may not be received in the past — courts do not consider that actions that follow promises show consideration. For instance, one party's promise to compensate the costs incurred to another party, at the time when costs had factually occurred, would not be considered as enforceable, because the consideration is already in the past.²⁴

Certain problems in the contract law of England have been traditionally experienced in the field of modification of contract clauses, for instance, where one party promises to release the other party from part of contractual obligation or to increase the price. Courts limit the right of the parties to change their promise by using the doctrine of promissory estoppel or considering that a promisor has received an essential benefit, thus his/her promise is valid.²⁵ Under this doctrine it is claimed that if one party substantially changes its position on the basis of the other party's gratuitous promise, it may demand the implementation of the promise, although it lacks some essential elements of the contract. This is the doctrine of equity, because if one party gave up its requirement for the benefit of the other party, and that party acted on the basis of this waiver, it would be unjust to allow the demand of execution of the initial contract. Without a doubt, the promise itself must comply with strict requirements: the party must proportionally trust the promise, subsequently act on it and suffer economic losses. Thus the party that waives its rights can be precluded from claiming that it did not intend to make the waiver legally binding.²⁶

Charles Fred also notices that modern courts sometimes do not apply the doctrine of consideration anymore. Hein Kötz and Axel Flessner recognize that in fact this statement is supported with evidence — under certain circumstances, and in particular in the USA, the promise is considered as binding even without consideration.²⁷ However, it is more an exception rather than the rule — the requirement of consideration remains as substantial element for the validity of the contract both in doctrine and court practice.

To summarize it can be claimed that consideration is the common law criterion for contract validity, which helps to distinguish legally binding promises from non-binding. According to the general rule, courts do not recognize the promise to give a gift or gratuitously do something as a valid contract, but a promise based on consideration will be recognized as a contract. The consideration can also include an action, i.e. making something that the party is not legally bound to do, or refraining from an action that the party has the right to do.

24 There are some exceptions, see Kadner Graziano, Th., *supra* note 22, p. 122.

25 Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *supra* note 15, p. 269.

26 Kadner Graziano, Th., *supra* note 22, p. 125.

27 Kötz, H.; Flessner, A., *supra* note 6, p. 9.

2.2. The Binding Effect of the Contract under the French Law — the Doctrine of *Cause*

Although traditionally the French law is presented as the opposite of the British law, in the context of establishing a binding effect of the contract these systems have more similarities than differences. The requirement of the French *cause* (from the Latin *causa*) is criticized for the lack of clarity and non-uniform contents²⁸ but despite the negative prognoses for the future, it is still widely applied in the national law.

In Belgium, France, and Luxembourg the requirements for the contract have been formulated by court practice, which was inspired by the author Robert Joseph Pothier (XVIII century).²⁹ Civil Codes of these countries contain a special article on conclusion of a contract. It provides that the necessary conditions for validity of the contract are: consent and contractual capacity of the party undertaking the obligation, the object of the contract³⁰, and the lawful *causa* in the obligation (*cause*).

The French *cause*, same as the British consideration, is a substantial element which renders the contract binding. Under Article 1108 of the French Civil Code the validity of the contract depends *inter alia* on the existence of the *cause* of an obligation (*cause licite dans l'obligation*). Article 1131 of the French Civil Code provides that an obligation without *cause* or with a false *cause*, or with an unlawful *cause*, may not have any effect.³¹ Thus the *cause* must exist and be lawful. Nevertheless, the French Civil Code does not define what should be considered the *cause* of the contract or the *cause* of the obligation.³²

According to the classical interpretation of the essence of the contract's *cause*, the *cause* is something that answers to the question why the parties have concluded this contract.³³ Thus contract *cause* is the final purpose that the parties are aiming to reach,

28 Schulze, R., *et al.*, *supra* note 9, p. 317.

29 Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *supra* note 15, p. 266.

30 Or according to definition provided in Cases, Materials and Text on Contract Law: "a definite object which forms the subject matter of the undertaking" (Beale, H., *et al.* *Cases, Materials and Text on Contract Law*. 2nd edition. Oxford and Portland, Oregon: Hart Publishing, 2010, p. 170).

31 *L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.*

32 It is interesting to note that the statutory definition of *causa* is provided, e.g. in the law of Quebec, which for a long time was under the influence of the French Civil Code. Article 1410 (1) of the Civil Code of Quebec provides that „*The cause of a contract is the reason that determines each of the parties to enter into the contract. The cause need not be express*“. According to Article 1411 of the Civil Code of Quebec, „*A contract whose cause is prohibited by law or contrary to public policy is null*“.

33 Looking from a historical perspective, already at the time of Roman law, one of the necessary conditions for contract validity was the adequate basis of the contract (*causa*), i.e. the closest immediate purpose for which the contract was concluded, for instance, in case of sale-purchase, it was the transfer of the title. According to the classical Roman law, provided that the contract basis was considered inadequate or remained unexercised, the obligation was considered void. The contracts, which were valid depending on the adequacy of their basis, were called causal contracts (Nekrošius, I.; Nekrošius, V.; Vėlyvis, S. *Romėnų teisė* [Roman Law]. Kaunas: Vijausta, 1996, p. 241). *Causa* has to be distinguished from a simple motive, which for the basis (*causa*) is as "the reason for the reason." According to cannon law, the contract was valid if one party's *prestatio* was a valid reason for another party to conclude a contract. In other words, if the party in return for its *prestatio* could expect fair counterperformance. If from the beginning this *cause* was illusory,

or the reason for conclusion of the contract.³⁴ It is common to say that the *cause* of an obligation is something that answers to the question *why* the debtor has undertaken the obligations (while the subject-matter of the obligation answers to the question *what* is the debtor supposed to perform).³⁵ The *cause* can be described as a certain standard reason for which the contract party undertakes a contractual obligation: the counter-performance in case of synallagmatic (or onerous) contracts, and the liberal intention in case of gratuitous contracts (abstract intention to supply or provide something without demanding anything in return).³⁶

The contract *cause* is a dualist concept that carries both objective and subjective meaning.³⁷ In the matters of existence or non-existence of the contract *cause*, we are dealing with its objective or abstract meaning (*cause objective, cause abstraite*). For instance, in a bilateral contract the contract *cause* in the objective sense (or the closest reasons) is the aim of the buyer to acquire the title to the thing (become the owner) in exchange of money and the aim of the seller – to receive the money in exchange for transferring the property to the buyer. In this case it does not matter for which reasons or purposes the seller needs the money and the buyer needs the thing. The contract *cause* as the direct aim of the contract that provides the motive for both parties to conclude a contract, is identical in all contracts of the same type, i.e. the reasons are identical every time when, e.g., a contract of sale is concluded. The theory distinguishes the objective *cause*, which is somewhat similar to consideration, and the subjective *cause*, which is the decisive motive for the party to oblige itself. Analysis of remote reasons (or purposes) shows that they are different in every specific case, and in this sense, the *cause* is analyzed in a subjective form (*cause subjective, cause concrète*). The subjective or the specific aspect of the contract *cause* is implied in Article 1133 of the French Civil Code, which establishes that a *cause* is unlawful where it is prohibited by legislation, where it is contrary to public morals or to public policy. In order to determine the contract *cause* in a subjective sense, the true, subjective intentions of the parties and the specific reasons for concluding the contract have to be established.

Debate has been going on as to which of these meanings is the most accurate. For instance, there are modern authors who recognize only subjective *cause*, because it also includes the objective one (the main purpose of concluding the contract is the aim of a certain benefit).³⁸ However, recently in France a compromise seems to have been reached, according to which in cases of analysis of an unlawful *causa* it is understood

the contract was void (Mackaay, E. The civil law of contract. In: *Contract Law and Economics*. De Geest, G. (ed.). Cheltenham: Edwards Elgar, 2011, p. 442–443 [interactive]. [accessed 30-05-2011]. <http://www.facedroit.univecezanne.fr/fileadmin/FDSP/Documents/Agenda/Mackaay_2011CivilLawContract.pdf>.

34 Mikelėnas, V. *Sutarčių teisė* [Contract Law]. Vilnius: Justitia, 1996, p. 109.

35 Bell, J.; Boyron, S.; Whittaker, S. *Principles of French Law*. Oxford: Oxford University Press, 2008, p. 317.

36 Beale, H., *et al.*, *supra* note 30, p. 171.

37 Terré, F.; Simler, Ph.; Lequette, Y. *Droit civil. Les obligations*. Paris: Dalloz, 2005, p. 344–345; Mazeaud, H. L.; Mazeaud, J.; Chabas, F. *Leçons de droit civil. Obligations. Théorie générale*. Paris: Montchrestien, 1998, T. 2, p. 262.

38 Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *supra* note 15, p. 270.

in the subjective sense, and in cases of eventual inexistence of *causa* it is understood in the objective sense. Nevertheless, there are also such other authors who instead of the terms objective and subjective *causa* suggest using the terms of the contract *causa* and obligation *causa*.³⁹ The contract *causa* would be *causa* in the subjective sense, and the obligation *causa* would be *causa* in the objective sense.

French theoreticians themselves claim that the *cause* is not only the justification of the parties' free will, its guarantee and its limits: it also performs the function of contract value control — it is not only a technical requirement but also the measure to monitor the respect of social and economic policies by the contract parties.⁴⁰ Every person aims at a certain purpose while concluding a contract. Thus in order to consider the contract concluded, the wish (or the will) to conclude a contract is not sufficient, it is also necessary that this wish had the purpose, or in other words, the *cause*. Thus in essence Article 1131 of the French Civil Code provides for an opportunity for the person, who created a legal obligation by concluding the contract, to be freed from it, when it appears that the purpose for which the obligation had been undertaken cannot be reached.⁴¹ Thus *cause* is necessary to protect persons from undertaking unreasonable obligations. For instance, in a so called “video rental case” (1996)⁴² a contract concluded between a company renting video tapes, on one side, and shop owners aiming at establishing video tape rental business in a small town, on the other side, was disputed. French courts invalidated this contract for the lack of *causa*, by arguing that the possibility to distribute (rent out) video tapes (this was recognized as *causa*) was the main motive for which the shop owners undertook their obligations, but this activity (i.e. video tapes rental) was from the start destined to fail in an area with only 1314 inhabitants. Without a doubt, this decision was followed with contradictory evaluations in the doctrine. It raised some fears that this could facilitate annulment of contracts that are financially detrimental, but this fear was not realized. In its decision of 27 March 2007, the French Court of Cassation narrowed down the limits of the decision of 1996: the party seeking to invalidate a contract must prove that real counter-performance did not exist, and this circumstance is not going to be easy to prove for the party which at the time of the conclusion had an opportunity to evaluate the risks of concluding such a contract.⁴³

In the analysis of the subjective and objective understandings of the *cause* under the French legal doctrine, gratuitous and onerous agreements are distinguished. In onerous agreements, a counter-performance is the *cause* of the other party's obligation. Also in synallagmatic contracts, the benefit offered by each of the contracting parties serves as the *cause* for the obligation of the other party.⁴⁴

39 Terré, F.; Simler, Ph.; Lequette, Y., *supra* note 37, p. 345.

40 Kadner Graziano, Th., *supra* note 22, p. 108.

41 *Ibid.*, p. 111.

42 Civ. 1re, 3 juillet 1996, D. 1997.500 note Reigné.

43 Buy, F. *L'essentiel de la Jurisprudence civile. Obligations. 83 grands arrêts commentés*. Paris: Lextenso éditions, 2009, p. 67.

44 Kadner Graziano, Th., *op. cit.*, p. 112.

The necessity of subjective *cause* is obvious through analysis of the validity of unilateral gratuitous agreements. When one person undertakes an obligation to pay a specific amount of money on a set date and without a counter-performance of another party, the validity of such obligation depends on the *cause* for undertaking this obligation — if he/she undertakes the obligation purely in free will, such an obligation is a gratuitous promise which is not valid. For instance, maintenance obligation of a child when a man wrongfully assumes he is the biological father.⁴⁵ However, if such an obligation is subsequent to the aim of covering a previous debt to the person, it will have the *cause* and will be valid.

Gratuitous agreements in essence are described by the lack of counter-performance. However, an abstract *cause* exists, e.g. in the aim of giving. For instance, in the contract of gift of a house it is within the free will of the donor to give. The *cause* “does not prevent the enforcement of gratuitous agreements: indeed, it provides a “gift-promise” with its own *cause* in the promisor’s *intention libérale*, thereby confirming that such promises (once accepted) are in principle contractually binding.”⁴⁶ With the view that this rule should not infringe the principle of legal certainty, the *cause* must be narrowly construed. Thus courts interpret the *cause* objectively: whether there was an obvious reason to conclude a contract, the direct goal that each party was aiming at, although the French contract law specialists notice a tendency to subjectify the obligation’s *cause*.⁴⁷ Changes of *causa* doctrine that took place in French case law since 1990 show that next to contractual counter-performances, which can be objectively defined, the *causa* concept also integrated the interest, described as the purpose aimed by each contract party — thus *causa* has become more specific (including the real interest which is the purpose of the contract), but at the same time more subjective and possibly including individual purposes aimed by individual contract parties.⁴⁸

A question arises whether *causa* under French law is only needed as an instrument to compensate for the lack of special mechanism in French Civil Code, which would allow reaching contractual fairness and balance.⁴⁹ Meanwhile, for example, Article 3.2.7 of UNIDROIT principles on “Gross disparity“ provides for a possibility to avoid the contract if it unjustifiably gives the other party an excessive advantage, and this possibility can be seen as an adequate measure with the view of minimal contractual fairness. Lithuanian law also includes a mechanism for remedying substantial non-equality of the parties (Article 6.228 of the Lithuanian Civil Code), and it could be claimed that in this respect it is reasonable not to include *causa* as the necessary contract element under

45 Kadner Graziano, Th., *supra* note 22, p. 113.

46 Bell, J.; Boyron, S.; Whittaker, S., *supra* note 35, p. 321.

47 Kadner Graziano, Th., *op. cit.*, p. 111.

48 Rochfeld, J. A Future for the cause? Observations of a French Jurist. In: *Reforming the French Law of Obligations. Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')*. Cartwright, J.; Vogenauer, S.; Whittaker, S. (eds.). Oxford: Hart Publishing, 2009, p. 77; Terré, F.; Simler, Ph.; Lequette, Y., *supra* note 37, p. 351–354.

49 Chappuis Ch. Le renoncement à la cause et à la consideration dans l'avant projet de l'Acte uniforme OHADA sur le droit des contrats. *Revue de droit uniforme*. 2008, 253-91 (quoted according to: Kadner Graziano, Th., *supra* note 22, p. 147).

Lithuanian law. The authors, among other things, indicate that specific problems solved under French law while verifying existence of *causa* are closely related to provisions on prohibition of *lésion* or mistake, problems related to lawfulness or morality of *causa* are linked with the restrictions set on party autonomy by the legal system.⁵⁰

Recently discussions are ongoing in France whether it would be purposeful to withdraw from the concept of *causa*, rooted in the French tradition. While discussing *causa* in the objective sense, it is considered that it helps protecting private interests of contract parties from infringement of structural balance and substantiates invalidity of the contract in cases when the party undertakes an obligation without counter-performance or the counter-performance is illusory or negligible. Thus on the one hand, the existence of *causa* is controlled under French law, and on the other hand, with the help of *causa*, the lawfulness and morality of the contract is verified. J. Rochfeld claims that French courts have developed an instrument that is “useful in the fight for the protection of the interests of each party in a contract, through the defence of interest that each of the parties pursues in exchange for the sacrifice to which he consents”.⁵¹ This author thinks that *causa* certainly has the future because it solves the issues arising under contract law and reflects the modern ideas of proportionality, coherence, control of one-sided bargains, reconstructing contractual balance, and etc.⁵²

In cases when bilateral contracts are invalidated in France due to the lack of *causa*, it may seem that *causa* becomes similar (at least on its functional approach) with the doctrine of consideration under common law, because then *causa* ensures the minimal level of reciprocity between the parties. Nevertheless, S. Whittaker⁵³ claims that this similarity is only superficial, because the English doctrine of consideration precludes gratuitous contracts, while the doctrine of *causa* does not preclude enforcement of gratuitous contracts. Moreover, French courts may recognize bilateral contracts void if one of the parties obligations counterpart is derisory, while the English law, although requiring that consideration was real, does not demand it to be adequate and it can in fact be nominal.⁵⁴

Causa is the necessary element of contract validity in many civil law countries. Besides the afore-mentioned France, Belgium and Luxembourg, this requirement is mentioned under Austrian law, and also in Spain, Italy, Slovenia and Bulgaria.⁵⁵ Under the Austrian law, *causa* means an economic aim of the contract, which has to be clear from the contract itself or the relevant circumstances.⁵⁶ Experts of Italian contract law doctrine have varying opinions in trying to define *causa* — in the subjective sense, *causa* is the purpose of the contract, which is aimed at by parties concluding the contract, and in the

50 Quoted according to: Kadner Graziano, Th., *supra* note 22, p. 148.

51 Rochfeld, J., *supra* note 48, p. 73–74.

52 *Ibid.*, p. 99.

53 Bell, J.; Boyron, S.; Whittaker, S., *supra* note 35, p. 321.

54 *Ibid.*, p. 322.

55 Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *supra* note 15, p. 269.

56 *Ibid.*, p. 270.

objective sense — *causa* is a social-economic function of the contract. This approach is upheld also by court practice.⁵⁷ Germany⁵⁸ and Switzerland⁵⁹ do not have the doctrine of *cause* but they solve analogous problems (e.g. whether one party's obligation would be reasonable if it is not supplemented by counter-performance) with the help of the institute of unjust enrichment. Article 780 (promise to fulfil an obligation) and Article 781 (acknowledgement of debt) of German Civil Code show that *causa* is not necessary for the (formally) binding effect of such promises, however these promises may be set aside by virtue of a claim for unjustified enrichment⁶⁰. The doctrine of unjust enrichment deals in Germany law with matters which would be classified in French law as a failure of *cause* or a false *cause*.⁶¹ In other words, without having the concept of the *cause* under their contract law, these jurisdictions solve the problems of contract validity through non-contractual liability (“that is to say that the exclusion of the *cause* from contractual obligations requires it to be found instead in extra-contractual obligations”).⁶² The new Dutch Civil Code no longer mentions the *cause* as a condition for the validity of the legal transaction, however authors note the existence of underlying *causa*⁶³.

3. The Concept of the Contract under Soft Law Instruments

The question arises which philosophy or concept of the contract lies at the foundation of, e.g. Principles of European Contract Law (PECL), Draft Common Frame of Reference (DCFR), and UNIDROIT principles. Article 3.1.2. of UNIDROIT principles establishes that a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement. Commentaries of the UNIDROIT principles⁶⁴ note there is no need for consideration, and also no need for *causa*, existing in certain civil law states and in certain respects functionally similar to the common law “consideration.” Nevertheless, with the view of preciseness, it is stressed that the aforementioned article

57 Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *supra* note 15, p. 270.

58 *Ibid.*, p. 271.

59 Under Swiss law *causa* is not met in the same form as understood in France (although the term *enrichissement sans cause* is used – but in this case, it is the *cause* of transfer of property and not the *causa* of the contract. Another example is *cause* of obligation under Article 17 of the Code on Obligations of Switzerland, which refers to a very specific case – acknowledgement of debt is valid whether or not a *cause* of obligation is mentioned (Chappuis Ch. Le renoncement à la cause et à la consideration dans l'avant projet de l'Acte uniforme OHADA sur le droit des contrats. *Revue de droit uniforme*. 2008, 253-91 (quoted according to: Kadner Graziano, Th., *supra* note 22, p. 147). It should be noted, however, that a certain disguised continuance in force of the doctrine of *cause* may be detected in Swiss law, which according to some authors (A. Simonius) is “causalist in principle but anticausalist in technique” (Beale, H., *et al.*, *supra* note 30, p. 215).

60 *Op. cit.*, p. 270.

61 Beale, H., *et al.*, *supra* note 30, p. 214.

62 Kadner Graziano, Th., *supra* note 22, p. 113.

63 Beale, H., *et al.*, *op. cit.*, p. 215.

64 UNIDROIT Principles of International Commercial Contracts (2010) Official Comments [interactive]. [accessed 2011-06-27]. <<http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1>>.

of UNIDROIT principles does not apply to other *cause* results, which may stem from such aspects, as unlawfulness of *cause*. It is interesting to note that Article 29(1) of the Vienna Convention on Contracts for the International Sale of Goods (CISG) dispenses with the requirement of consideration in relation to the modification and termination by the parties of contracts for the international sale of goods. Meanwhile, UNIDROIT principles extend the application of this requirement to all commercial contracts, and not only their modification and termination, but also the conclusion. In the opinion of the commentators of UNIDROIT principles, this should bring about greater certainty and reduce litigation.⁶⁵

PECL do not provide for a concept of the contract, but article 2:107 provides for the possibility of binding promise without an acceptance. DCFR Article II-4:101 enlists the following requirements for the conclusion of a contract: (a) intention to enter into a binding legal relationship or bring about some other legal effect⁶⁶; and (b) reaching a sufficient agreement.

The DCFR's concept of the contract includes not only the cases where both parties have reciprocal rights and obligations, but also the cases where only one of the parties has obligations in respect of the other party. Two elements necessary for validity of the contract are distinguished — the intention to conclude a contract and sufficient agreement. The element of the intention to conclude a contract distinguishes legally binding contracts from social agreements and interim negotiation stages, where no agreement on legally binding effect is reached yet. The party's intention to conclude the transaction is assessed according to its statements or conduct, as reasonably understood by the other party.⁶⁷

DCFR stresses that besides the intention to conclude a contract and sufficient agreement, there are no other requirements for the conclusion of the contract. In exceptional cases, the requirement as to the form has to be clearly expressed. DCFR does not require consideration nor *cause*, it also does not require transfer of a specific property — the requirement still applicable to the conclusion of real contracts in Lithuania. The authors of DCFR note that additional requirements, provided for in legal systems of member states, are no longer relevant and continue to decrease, thus they do not seem to fulfil a sufficiently important function to be desirable elements of a modern model for contract law.⁶⁸

The function of consideration and *cause*, which could be summarized as prohibition to pressure into very one-sided obligations, is undertaken by other DCFR norms (e.g. Article II - 7:207 on unfair exploitation).

65 UNIDROIT Principles of International Commercial Contracts (2010) Official Comments [interactive]. [accessed 2011-06-27]. <<http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1>>.

66 I.e. modification of the existing rights, termination of these rights and duties, transfer of claim, waiver of right. Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *supra* note 15, p. 264.

67 *Ibid.*, p. 265.

68 *Ibid.*

4. Three Concepts of the Contract

4.1. The Contract as Free Assumption of an Obligation

The most apparent examples of such concept are found under German and Scottish law.⁶⁹ Both jurisdictions pay a particular attention to the person's will. There are no requirements of *causa* nor consideration but stricter requirements apply to the contract's form, and certain types of contracts have to meet special form requirements in order for a contract to be valid.

An analogous concept of the contract has been upheld by the Court of Justice of the European Union (CJEU). The CJEU analyzed this issue while having to distinguish between contractual and non-contractual relations under Article 5 of the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Cases.⁷⁰ The CJEU said that the concept of the contract should not apply to obligations, which had not been freely assumed in respect of other persons.⁷¹ In 2002 the CJEU also considered the question whether a claim arising from pre-contractual relations (unlawful termination of negotiations) is of contractual or pre-contractual nature (resulting adequately in *forum delicti* or *forum contractus*).⁷² The CJEU has repeated its position, claiming that such an obligation has not been freely assumed. The same concept of the contract is found in DCFR and PECL. The same principle is employed in the Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980⁷³, and also in the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).⁷⁴ The Convention does not provide for the concept of contractual obligations, but CJEU considers only freely assumed obligations as contractual ones.⁷⁵

4.2. The Contract as a Bargain

The opposite concept to the one discussed above is the concept of the contract as a bargain, found in English law. The idea common to Germany that free assumption of an obligation is sufficient for the conclusion of the contract is rejected in England.⁷⁶ Moreover, consideration for both parties needs to be agreed upon. Thus gratuitous

69 Schulze, R., *et al.*, *supra* note 9, p. 314.

70 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. OL C 27, 1998 I 26, p. 1–27.

71 Case C-26/91, *Jakob Handte & Co. GmbH v. Traitments Mécano-chimiques des surfaces SA* [1992] ECR I-3967.

72 Case C-334/00, *Fonderie Officiene Meccaniche Tacconi and HWS* [2002] ECR I-7353, para. 19.

73 OJ L 266, 9.10.1980.

74 OJ L 177, 4.7.2008.

75 Case C-26/91, *Jakob Handte & Co. GmbH v. Traitments Mécano-chimiques des surfaces SA* [1992] ECR I-3967; Schulze, R., *et al.*, *supra* note 9, p. 315.

76 Schulze, R., *et al.*, *supra* note 9, p. 315.

mandate, or gratuitous deposit, is not considered as a contract under the English law. Gift is not a contract either, unless it is made in a special written form (deed).

The main idea behind the concept of consideration is a personal interest — contracts are binding because every party realizes its own personal interest through contract conclusion.⁷⁷ From the point of view of English law, contracts are not altruistic actions; it is an utilitarian method for aiming at certain benefits, which features reciprocity.⁷⁸

4.3. The Contract as Free Assumption of Obligation Based on Sufficient Causa

Besides the contract as free assumption of obligations and the contract as a bargain based on reciprocal bargain, an intermediary model exists, common for France and Italy. According to this model, besides free assumption of obligation, the contract also needs *causa* — the reason for which the contract is concluded, although the contract can be both onerous or gratuitous.⁷⁹ Thus gratuitous agreements are also recognized as contracts (gift and promise to present a gift, as confirmed by notary). *Causa* is necessary to prevent recognition of abstract promises as contracts, contrary to Scottish and German law.

To summarize the analysis of the main and most widely spread contract theories in Europe, it is also necessary to state the non-negligible changes that have taken place in the development of contract law. What could be observed is the shift from absolute freedom of autonomy towards some degree of contractual morality, search for fairness and justice, and understanding that the absolute freedom of autonomy may lead to vulnerability, dependency of contract parties, and infringe the contractual balance.

In Europe (e.g. France, Germany), certain tendencies take shape to rely more on the subjective side of the contract, described by such features as trust, expectations and inter-dependency of the parties. The contract is no longer evaluated as a cold and automatic instrument (payment of price in exchange of an agreed performance), it is aimed at consideration of the social reality created by the contract.⁸⁰ This shift from objectivism to subjectivism, seen in the laws of European countries, is also very visible in USA, where Ian R. Macneil and Stewart Macaulay, professors of XX century seventh decade, formulated and empirically based the relational contract theory⁸¹. Ian R. Macneil distinguishes one-time performance and continuous performance contracts, and claims that the latter type features strong connections between the parties, who get

77 Schulze, R., *et al.*, *supra* note 9, p. 320.

78 *Ibid.*

79 *Ibid.*, p. 317.

80 *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*. Munich: Sellier. European Law Publishers, 2008, p. 32.

81 G. Busseuil presents and justifies a thesis that the origins of *relational contract theory* stem from XIX century German doctrine (works of Jhering, Von Gierke, *Interessenjurisprudenz* theory) and that the U.S. doctrine systemizes and develops this theory (Busseuil, G. *Contribution à l'étude de la notion de contrat en droit privé européen*. Paris: Dalloz, 2009, p. 153–161).

involved and cooperate during the existence of the contract.⁸² Other authors claim that in general every contract (inasmuch as it creates an obligation, i.e. certain relations between the parties) can be seen as relational contract and thus demand at least minimal mutual cooperation between the parties.⁸³ The relational contract theory is opposed against the classical contract theory, claiming that legal stability and security under the classical contract theory is based on two main pillars: fixation and non-changeability of the contracts (*fixation et l'immutabilité des contrats*), while the other theory relies more on communication and flexibility; individualism gives place for interdependency, domination — for cooperation, and antagonism — for solidarity.⁸⁴

To summarize the thoughts on the concept of the contract expressed in this part of the paper, it is clearly not sufficient to define a contract as an agreement or the meeting of intentions of the parties, or a written document containing contract clauses, or even the body of conditions agreed by the parties (the Lithuanian civil law doctrine often being restricted to that⁸⁵). It should be kept in mind, as noted by P. Tercier, that the contract is not a purely legally concept; it also has other dimensions — economic, social and sociologic reality⁸⁶. In an economic sense, the contract is the basis for any exchange, an instrument which helps to develop economy, creates added value and property goods, from the sociologic point of view, the contract is one of the main elements of any community, and finally in the general social sense it may be said that based on a contract, and thanks to it and for the purpose of it, the property and deprivations are created and disappear.⁸⁷ The contract, understood in all of these senses, is not a static phenomenon which results in the need to constantly review contract theories.

The search for a common concept of the contract, which is mentioned in the introduction of this paper, will most probably keep the intensity in the nearest future, in consideration of the context of the European integration, and the large volume of the academic codifications in the field of contract law. Scholars researching the European contract law (H. Muir-Watt, P. Lokiec) currently have raised the idea that the transnational and trans-systemic concept of the contract is needed and have been asking whether the relational contract theory could comply with the role of this concept as an alternative to the concept of classical contract as an concordance of intentions of parties.⁸⁸

82 *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, supra note 80, p. 33.

83 *Ibid.*, p. 35.

84 Rolland, L. Les principes d'Unidroit et le Code civil du Québec: Variations et Mutations. *Revue Juridique Themis*. 2002, p. 587–608 [interactive]. [accessed 10-06-2011]. <<http://international.westlaw.com>>.

85 Mikelėnas, V. *Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė* [Commentary on the Civil Code of the Republic of Lithuania. Sixth Book. Law of Obligations]. Vilnius: Justitia, 2003, p. 192; Ambrasienė, D., et al. *Civilinė teisė. Prievolių teisė* [Civil Law. Law of Obligations]. Vilnius: Lietuvos teisės universiteto Leidybos centras, 2004, T. 2, p. 116.

86 Tercier, P. Quels fondements pour le contrat au XXIe siècle? *Le contrat dans tous ses états*. Sous la direction de F. Bellanger, F. Chaix. Berne: Stämpfli Editions, 2004, p. 219.

87 *Ibid.*

88 Quoted according to: Busseuil, G., supra note 81, p. 147 (Muir-Watt, H. Analyse économique et perspective solidariste. *La nouvelle crise du contrat*. Paris: Dalloz, 2003, p. 185; Lokiec, P. *Le droit des contrats et la protection des attentes*, D., 2007 n°5, p. 321).

5. The Understanding of the Contract under Lithuanian Law

Article 6.159 of the Lithuanian Civil Code provides that sufficient elements to render a contract valid are the following: an agreement of legally capable parties, and, when prescribed by laws, a form of a contract. Thus, the Lithuanian legislation does not establish any additional conditions for conclusion of contract.⁸⁹ The said provision is very close to Article 3.2. of UNIDROIT principles of 1994 (version applicable at the time the Lithuanian Civil Code was drafted), and to Article 3.1.2 of version of 2010, which provides that a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement. In fact, and in Civil Code's commentary it is noted that Part II of the Book Six (which *inter alia* establishes the concept of the contract and its elements) is drafted in accordance with UNIDROIT principles (1994) and PECL.⁹⁰

Article 6.154 (1) of the Lithuanian Civil Code defines the contract as an agreement of two or more persons to establish, modify or extinguish legal relationships by which one or several persons obligate themselves to one or several other persons to perform certain actions (or to refrain from performing certain actions) while the latter obtain the right of claim. In the modern Lithuanian civil law doctrine, the contract is explained as an expression of the parties' will,⁹¹ as meeting of the free will of persons, aimed at creation of reciprocal rights and duties, and conclusion is made that the parties' agreement is sufficient for the existence of the contract.⁹² The Lithuanian Civil Code of 1964⁹³ did not establish the concept of the contract but the doctrine defined the contract as an agreement of two or more persons regarding creation, modification or termination of civil relations, also indicating the parties' agreement as the main feature of the contract.⁹⁴

The current Civil Code of Lithuania provides for the definition of contract which is very close to the definition formulated by *Pothier* and included in Article 1101 of the French Civil Code: contract is an agreement by which one or several persons bind themselves, in respect to one or several other persons, to transfer, to do, or not to do something (*"Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose"*). According to the French law, contractual obligations arise out of concordance of parties will.⁹⁵ It may be noted that another provision has been transposed from the

89 Except for the form requirements and (in case of real contracts) transfer of property (Article 6.181 (4) and (5) of the Lithuanian Civil Code.

90 Mikelėnas, V., *et al. Lietuvos Respublikos civilinio kodekso komentaras*. Pirmoji knyga. Bendrosios nuostatos. [Commentary on the Civil Code of the Republic of Lithuania. First Book. General Provisions]. Vilnius: Justitia, 2001, p. 191.

91 Ambrasienė, D., *et al.*, *supra* note 85, p. 116.

92 Mikelėnas, V., *et al.*, *op. cit.*, p. 192.

93 Civil Code of 1964. *Official Gazette*. 1964, No. 19-138.

94 Žeruolis, J., *et al. Lietuvos TSR civilinio kodekso komentaras* [Commentary on the Civil Code of the Lithuanian SSR]. Vilnius: Mintis, 1976, p. 123.

95 Moreover, the peculiarity of the French system resides in the fact that the contract (i.e. meeting of parties' intentions) results not only in obligatory legal relations, but is also sufficient for the transfer of property

French law into Lithuanian law. Article 6.189 (1) of Lithuanian Civil Code establishes the famous provision of the article 1134 of the *Code Napoléon*, according to which agreements lawfully entered into take the place of the law for those who have made them (“*les conventions légalement formées tiennent lieu de la loi à ceux qui les ont faites*”).⁹⁶

Despite the obvious external similarities, it would be erroneous to think that the Lithuanian Civil Code reflects the French concept of the contract in its pure form. The analysis of the Codes of both countries reveals clear differences between those two legal systems. The French law includes explicit statement that *causa* is necessary for the validity of the contract (Article 1108 of the French Civil Code), meanwhile the Lithuanian law does not have such a requirement (at least statutory), although the doctrine⁹⁷ and case practice⁹⁸ mention (on some rare occasions) the *cause* as the necessary element of the contract (juridical act). Another difference is that in Lithuania a contract is considered as a specific type of juridical act whereas the French Civil Code does not establish the concept of juridical act and that of expression of will. The general theory of juridical acts is a feature of the German system, which found its way into the Lithuanian Civil Code. According to Article 6.154 (2) of the Lithuanian Civil Code, contracts are subject to the norms of the Code that regulate bilateral and multilateral juridical acts, and the section on juridical acts does not mention any of the additional conditions (e.g. *cause* or consideration) either. This is due to the fact that the provisions on juridical acts, entrenched in the general part of the Lithuanian Civil Code, were received from the German Civil Code (admittedly, some of the provisions reached the new Code via the Civil Code of 1964), and in German law, as mentioned above, no additional requirement applies for the formation of contract – it is sufficient that parties agree and express wilful intention to create legal effects. As in Germanic contract law tradition, quite a

rights (without requirement of *traditio*) (Mazeaud, H., L.; Mazeaud, J.; Chabas, F., *supra* note 37, p. 50); Verstijlen, M.J.F. General Aspects of Transfer and Creation of Property Rights including Security Rights. *Divergences of Property Law, an Obstacle to the Internal Market?* Drobnig, U.; Snijders, H. J.; Zippo, E.-J. (eds.). München: Sellier. European Law Publishers, 2006, p. 18).

96 Article 6.189 (1) of the Lithuanian Civil Code widens this provision, by entrenching that a contract which is formed in accordance with the provisions of laws and *is valid* has the force of law between its parties.

97 For instance, a Civil Law textbook provides that “the direct purpose of the juridical act (e.g. car lease) is the *cause* of the concluded juridical act, and its motive is fulfilment of various needs and interests of the parties. Both motive and purpose differ from the *cause* of juridical act, i.e. the legal result, which must be reached (e.g. acquiring the right of ownership will be the *cause* of the contract of sale). <...> The *cause* of the juridical act is its direct legal purpose, the legal result that the parties aim at while concluding the contract. It is precisely the *cause* of the juridical act that may help in deciding which legal result, purpose, a party (parties) is seeking while paying money, providing services or transferring property. The *cause* of juridical act is often comprised of some constant and in a sense, typical purposes, which are common for specific types of juridical acts (lease, loan, and etc.). It is important that the *cause* of the juridical act would be possible to perform and lawful.” (Baranauskas, E., *et al. Civilinė teisė*. Bendroji dalis: vadovėlis [Civil Law. General Part: Textbook]. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2005, T. 2, p. 14). Earlier legal literature on contracts also distinguished the *cause* of the juridical act as direct legal purpose that parties are aiming at while concluding the juridical act (Vitkevičius, P., *et al. Civilinė teisė: vadovėlis* [Civil Law: Textbook]. Kaunas: Vijusta, 1997, p. 182).

98 See Subsection 6 of this paper.

number of requirements as to the form need to be met for certain types of contracts under Lithuanian law (e.g. sale of immovable property, insurance contracts, arbitration clauses, etc.).

6. *Causa* in Lithuanian Court Practice

Sometimes the Lithuanian courts use the term “*cause* of the contract”⁹⁹ in a completely different sense, than the one understood in French law. For instance, while deciding the question on the fact of conclusion of the contract of sale of the land plot belonging to the state, it was noted that the *cause* of this contract shall be an order of the Head of the District (administrative act), and since no such order was adopted, the consequence follows that the contract regarding the sale of the disputed piece of land has not been concluded.¹⁰⁰ In another case regarding insurance contract the contract clauses provided for in the Rules on the voluntary insurance of property are qualified as the *cause* of contract.¹⁰¹ It is obvious that in the said cases, the *cause* of the contract is understood as an independent legal fact, which is necessary, alongside with the contract, in order to create civil rights and duties.

One of the few cases in which the Lithuanian Supreme Court does say something about the *cause* of the contract in the sense of *causa*, is the case decided on 11 October 1999 regarding invalidity of an agreement signed by the parties with a view to privatize a plot of land.¹⁰² While assessing the legal nature of this agreement (whether it may be seen as a juridical act), the judges noted that “the main feature of the contract as an agreement is the intention of the parties to create mutual rights and duties. This criterion allows to distinguish the contract from other agreements that are not legally binding. The prerequisite contract elements are: agreement of the parties, *cause* of the contract, subject-matter of the contract, and the form required by law. The contract *cause* means the reasons for concluding the contract.” It was established in the case that the parties concluded the disputed agreement with a view to exercise the right provided for in the Law on Land Reform to buy-out a plot of land next to a multi-apartment building. With the view of implementation of this right, the laws¹⁰³ provided for the prerequisite condition – agreement of the co-owners of the living house on part of the land plot, which they intended to purchase (acquire the title of joint community property). On the basis of the disputed agreement, the parties acquired the subjective right established by

99 In Lithuanian – “*sutarties pagrindas*”.

100 The Supreme Court of Lithuania, Civil division, 16 May 2008, decision in civil case *A. T., B. T. ir P. T. v. Kauno apskrities viršininko administracija* (Case No. 3K-3-283/2008).

101 The Supreme Court of Lithuania, Civil division, 11 December 2002, decision in civil case *UAB „Bivakas” v. UAB „Industrijos garantas”* (Case No. 3K-3-1540/2002).

102 The Supreme Court of Lithuania, Civil division, 11 October 1999, decision in civil case *A. B. v. R. J., J. A., D. N., G. K., S. K., third parties Vilniaus apskrities viršininko administracijos Vilniaus m. žemėtvarkos ir geodezijos tarnyba, Vilniaus m. 2-ojo notarų biuro notarė* (Case No. 3K-3-582/1999).

103 Law on the Land of the Republic of Lithuania and the Resolution No 987 of the Government of the Republic of Lithuania of 17 July 1997.

the laws to use the plot of land and acquire the title to it. For these reasons, the Court of cassation upheld the conclusions of the first instance court that the disputed agreement is the contract that creates rights and duties for the parties and is legally binding. To our knowledge, this case of 1999 is probably the only case in the practice of the Supreme Court of Lithuania, where it is stated explicitly that contract *cause* is the necessary element of the contract.

The Court of cassation in its later practice also mentioned the contract's *cause*, although not qualifying it as the necessary contract element. For instance, in the case where a contract of sale was challenged as a sham transaction (claiming that it was concluded not with the real party to the contract, but with a so called “man-of-straw”) the Cassation court stated that “the dispute arose not as to the cause of the contract, i.e. its legal result that both of the parties were pursuing – both parties agree this was sale-purchase legal relation – but as to the party to the contract, i.e. whether the person, indicated in the contract as the buyer, corresponds to the real subject of that legal relation.”¹⁰⁴

Another example is the case¹⁰⁵ on contract of division of matrimonial property, according to which the defendant received immovable property valued by 130 606 LTL, while the plaintiff received 1000 LTL compensation. The plaintiff disputed the contract, claiming that it was concluded due to a number of difficult circumstances. One of the arguments of the defendant consisted in claiming that the purpose of the juridical act (*causa*) should normally be determined according to the external expression of the parties' will whereas the internal motives of the parties are not usually considered, although they may differ from the factual actions. The defendant claimed that his purpose while concluding the contract on dividing property was to acquire the title of the property being divided, part of which belonged to the plaintiff, and the plaintiff aimed to receive compensation for the part of property transferred, therefore the aims of the bargain were lawful. The Court of cassation agreed with the decision of the first instance court, which recognized the contract on property division void under Article 1.91 of the Lithuanian Civil Code because it was concluded at very unfavourable conditions to the plaintiff due to a number of difficult circumstances. It can be only considered, whether in another similar situation, where additional circumstances were proved, as, by the way, was also mentioned in this case (e.g. that not all property of the spouses was divided by the disputed contract, or that property was acquired, at large, by funds of the defendant's mother) or if there were other circumstances, due to which one of the parties found acceptable this (non-equal from the first glance) division of property, court decision could have been different. Although in the said case the Court of cassation did not say anything explicit about the *causa* of juridical act, it can be claimed that indirectly the courts searched for some adequate *causa* which could have justified the conclusion of this agreement. When no other reasons could be found, for which the plaintiff could

104 The Supreme Court of Lithuania, Civil division, 15 June 2009, decision in civil case *V. R. v. M. B.* (Case No. 3K-3-228/2009).

105 The Supreme Court of Lithuania, Civil division, 21 January 2004, decision in civil case *B.B. v. A.B., J.B.* (Case No. 3K-3-47/2004).

have accepted conclusion of such an agreement, and having established defects of the formation of the plaintiff's intention due to complex difficult circumstances (family-life and health related), the contract could be rendered void under Article 1.91 of the Civil Code.

Another case¹⁰⁶ focused on validity of a contract over property rights, related to a part of a living house's attic, those rights being alienated for 1 LTL and later the alienation disputed on the basis of a mistake. Chamber of judges of the cassation Court stated that the party which acquired rights under disputed contract also undertook the obligation of the other party to participate in maintenance of the joint property, i.e. to pay an adequate share of roof maintenance and renovation costs. The court considered that the clear disproportion between the benefit of the parties, when property rights are transferred for 1 LTL, could be assessed as a circumstance revealing mistake, but while deciding whether the mistake was made regarding the transaction's price, in the context of this case all the benefit received by the party alienating its rights under the disputed contract must be assessed. The Cassation court's judge chamber refuted arguments of the party alienating the rights regarding conclusion the contract by mistake, because "they were based solely on the price of 1 LTL formally provided in the contract, while denying all the other benefit received under the contract."

To summarize the analysis of the concept of the contract under the Lithuanian law, it can be claimed that the contract under the law of Lithuania comprises elements recognized under a few legal systems, but has not received any model in its pure form. Elements of both French and German models are interconnected and the influence of international documents (UNIDROIT principles and PECL) is clearly seen. The definition of the contract as a juridical act, freely assumed obligation, and concordance of parties' intentions aimed at legal effects is prevailing. There is no explicit requirement of any additional element of the contract — neither consideration nor *causa*. However, in practice the same (or very close) functions as *causa* and consideration are undertaken by other measures provided for in the Lithuanian Civil Code, such as remedy mechanism for gross disparity, possibility to avoid contracts concluded under mistake or due to difficult circumstances, when defects of intention have a particular effect on assumption of particularly one-sided undertakings.

Conclusions

1. Contract theories are a useful analytical tool for understanding contract and explaining practical questions, such as whether gratuitous agreements (gift, deposit) are considered to be contracts, how to differentiate between legally binding promises from those that are not, when a contract is deemed to have come into existence, what

106 The Supreme Court of Lithuania, Civil division, 30 June 2009, decision in civil case *B. R. v. A. J. ir A. S.* (Case No. 3K-3-266/2009).

formalities need to be observed, whether unilateral undertaking is capable of producing legal effects, and etc.

2. The main difference between the civil and common law understanding of the contract is the nature of the mandatory obligation. In civil law system the binding effect of the contract is based on the decision made in free will by the person assuming the obligation. This understanding is common for German, Swiss and Dutch law. Notwithstanding the fact that this starting point is common to most of the countries of continental law tradition, the positions diverge as to whether the will to undertake an obligation is sufficient for a contract to bring legal effects (as in Germany), or some additional elements, e.g. the *cause*, need to be present (as in France or Italy). In common law tradition it is the idea of consideration that allows to distinguish between promises which are not legally binding from the legally binding contract. The mere fact that a person seriously intends to assume an obligation and expresses this intention is not sufficient to consider the agreement a legally binding contract. Besides the offer and the acceptance, this legal system requires the necessary element of consideration for conclusion of the contract. Consideration does not have to be proportionate to obligation but it has to be sufficient, i.e. it has to be real, defined, and possess a certain value.

3. Under the model offered by the soft law instruments in the field of contract law (e.g. UNIDROIT principles, PECL, DCFR) a contract comes into existence once the intention to enter into a binding legal relationship is ascertained and a sufficient agreement is reached. No *causa* or consideration is required. Having in mind the context of European integration and the large volume of the academic codifications in the field of contract law, the search for transnational and trans-systemic concept of the contract in the nearest future is going to continue.

4. Despite the obvious external similarities between the definition of contract in the Lithuanian Civil Code and the French Civil Code, there are clear differences between those two legal systems. French law explicitly requires the *cause* as a necessary element for the validity of the contract, meanwhile Lithuanian law does not have such a requirement (at least statutory) even though there is some mention of the *cause* in the doctrine and case law. The concept of contract under the law of Lithuania comprises elements recognized in several legal systems, but has not received any model in its pure form. Elements of both French and German models are interconnected and the influence of international documents (UNIDROIT principles and PECL) is clearly seen. The definition of the contract as a juridical act, freely assumed obligation, and meeting of parties' will aimed at legal effects is prevailing. There is no explicit requirement under Lithuanian law of any additional element of the contract — neither consideration nor *causa*. However, in practice the same (or very close) functions as *causa* and consideration are undertaken by other measures provided for in the Lithuanian Civil Code, such as remedy mechanism for gross disparity, possibility to avoid contracts concluded under mistake or due to difficult circumstances, when defects of intention have a particular effect on assumption of particularly one-sided undertakings.

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SUTARTIES SAMPRATA LIETUVOS IR KITŲ EUROPOS ŠALIŲ TEISĖJE*

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Santrauka. Straipsnyje keliamas klausimas, ar šiuolaikinėje sutarčių teisėje egzistuoja universali teorija, kuri padėtų suprasti ir paaiškinti sutarties esmę, leistų orientuotis sudėtingame ir dažnai fragmentiškame teisiniame reguliavime bei sudarytų prielaidas tolesnės sutarčių teisės raidos prognozei. Sutarčių teorijos nėra savitiksles. Jos padeda išspręsti nemažai svarbių praktinių klausimų: kokie susitarimai laikomi privalomais, kaip atriboti teisiškai įpareigojančius pažadus nuo teisiškai neįpareigojančių, kada sutartis laikoma sudaryta, yra galiojanti ir pan.

Straipsnyje pristatomos pagrindinės Europos sutarčių teisei būdingos sutarties sampratos. Sutarties, kaip laisvanoriško prievolės prisiėmimo, supratimas vyrauja Vokietijoje ir Škotijoje. Sutarties kaip sandėrio (*bargain*), paremto abstrakčios naudos (*consideration*) reikalavimu, aiškinimas paplitęs bendrosios teisės (*common law*) tradicijos šalyse. Sutartis, kaip laisvanoriškas prievolės prisiėmimas, paremtas pakankamu tikslu (*causa*), suprantama Prancūzijoje ir Italijoje. UNIDROIT tarptautinių komercinių sutarčių principuose, taip pat pastaraisiais metais sutarčių teisės srityje Europos mokslininkų parengtų „akademinių kodifikacijų“ tekstuose, pavyzdžiui, Europos sutarčių teisės principuose (PECL), Bendros pagrindų sistemos projekte (*Draft Common Frame of Reference (DCFR)*), ir apibrėžiant sutartį atsisakoma papildomų reikalavimų, tokių kaip *consideration* ar *causa*, konstatuojant, kad šie sutarties elementai yra iš dalies praradę aktualumą ir tolydžio nyksta, todėl abejojama, ar jie galėtų atlikti pakankamai reikšmingas funkcijas modernaus sutarčių teisės modelio kontekste.

Ryškesnės Europoje vyraujančios sutarties sampratos palyginamos su Lietuvos teisės doktrina ir praktika šioje srityje. Straipsnyje daroma išvada, kad Lietuvos teisėje suformuluota sutarties samprata vienija keletos teisiųjų sistemų pripažįstamus elementus, tačiau nėra perėmusi grynuoju pavidalu nė vieno modelio. Čia susipina tiek vokiškojo, tiek prancūziškojo modelio elementai, taip pat ryški tarptautinių dokumentų – UNIDROIT tarptautinių komercinių sutarčių principų ir Europos sutarčių teisės principų (PECL) įtaka. Vyrauja germaniškoje sistemoje pripažįstamas sutarties kaip sandorio, kaip laisvanoriško prievolės prisiėmimo, kaip šalių valios suderinimo siekiant teisiųjų pasekmių apibrėžimas. Tiesiogiai nėra reikalaujama jokių papildomų sutarties elementų – nei *consideration*, nei *causa*. Tačiau praktikoje tas pačias (arba labai artimas) funkcijas *causa* ir *consideration* funkcijoms atlieka kitos Civiliniame kodekse įtvirtintos priemonės, tokios kaip esminės nelygybės ištaisymo mechanizmas, galimybė pripažinti negaliojančiomis sutartis, sudarytas suklydus ar dėl sunkių

* Straipsnis parengtas pagal projektą „Lyginamoji sutarčių teisė: Lietuva europiniame kontekste“, kurį finansuoja Lietuvos mokslo taryba (projekto sutarties Nr. MIP-35/2010).

aplinkybių, kai šie ar kiti valios formavimosi trūkumai turi įtakos ypatingai vienpusišku išipareigojimų priėmimui.

Reikšminiai žodžiai: *sutartis, sutarčių teorijos, sandoris, valia, pažadas, causa, consideration, Europos sutarčių teisė, PECL, DCFR.*

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