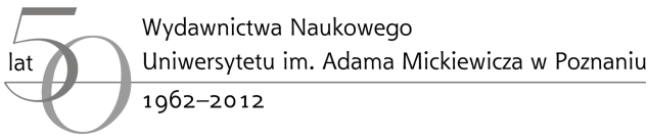
The Nature of the Contract in Reasoning of Civilian Jurists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Roman legal texts were from the end of the 11th century until the rise of national civil codes one of important foundations of the Civil Law Tradition. They introduced into the discourse of jurists of continental Europe inter alia the notion *natura contractus*. This Latin phrase has formal equivalents in modern civil codes, in particular in art. 1135 CC, § 307 BGB and art. 353^1 PolKC. This formal similarity raises the question of whether the concepts represented by these phrases are similar and if so, to what extent. The analysis of this issue allows us to identify the common and fixed linguistic intuition of jurists, according to which nature assumes the existence of a certain order. Since Antiquity the nature of the contract concept directed the attention of jurists at the economic or systematic order. The first one, I mean transactions structures covering the legitimate expectations of a party to a contract, independent from the positive law. The second one, I mean models and classifications of contracts imposed by the positive law. Of course, we cannot speak of any linear evolution. The recent developments in application of the nature of the contract clause should allow for economic purposes supporting the attainment and use of the benefit the creditor might legitimately expect upon entering into a contract. These practice leads to greater interference with the content of an agreement than is the case with the medieval understanding of the nature of the contract, which dominated legal discourse for centuries , i.e. the implication of terms implied by law (so-called *naturalia contractus)*. In a more general dimension, my research provides historical and comparative arguments for reliance contract theory.

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PREFACE

Lawyers look at law through the patterns they build. These patterns are expressed by the wording of legal texts and legal argumentation. Dogmatic patterns change with time and have various local forms. However, phrases introduced to legal language last. This observation was what first inspired me to undertake the research presented in this book. I recognised that the thorough, historical and comparative analysis of argumentation based on specific phrases may show various patterns of application and tendencies towards evolution. As the subject of my work, I have chosen the "nature of the contract" argument. The perception of role of this argument in legal reasoning is not new. For instance, just a Byzantine lawyer of the 9th century exclaimed "oh, how strong the power of the nature of the contract is"[1]. In the 20th century Helmut Coing emphasized the contribution of the notion of *natura contractus* to the dogmatic elaboration of terms implied by law in certain types of contracts.[2]

Deliberations on the argument of the nature of the contract are encouraged by the fact that in the mid 20th century, the German[3] and Polish[4] legislatures, among others, adopted it as one of the criteria of express terms of control. In Poland, a belief arose that this criterion was very unclear.[5] The interest in the nature of the contract criterion has been strengthened by the fact that the Draft

[1] Bas. 2,601.
[2] Coing 1982, 73.
[3] § 9 item 2 AGBG = § 307 BGB.
[4] Article 353[1] PolKC.
[5] Olejniczak 2011, 434.

Common Frame of Reference, the most widely discussed project of contract law harmonisation in Europe, has applied it to a larger extent than it has been in the civil codes that are currently in effect.[6]. Despite the myriad and many reasons for greater interest in the meaning of the nature of the contract in legal argumentation, I have not found any monograph on the topic. Therefore, I assumed that an analysis of the matter in the manner specified above would present the legal experience, which can be inspiring for the application of the nature of the contract argument in the rapidly changing modern world.

I started my research as a historian of law. However, at some points I went beyond the typical boundaries of such research. In setting the timeframe for the work, spanning the law of ancient Rome up to modern times, I had to choose a representative group for the research – similar to how a sociologist would structure a questionnaire. The limitation of the research to the civil law tradition is explained by the fact that the very words *natura contractus* were introduced to legal argumentation in ancient Roman law. They were further shaped, primarily, by legal discourse which was first directly, and then indirectly, linked with the Roman law heritage collected in Justinian's compilation.

The starting point for the work was a reflection on the criteria for the selection of representative works of the *ius commune* from the 13th to the 18th century[7] and modern civil codifications.[8] I have gone beyond the boundaries typical for a historian of law by also directing the research at the application of the nature of the contract argument in the modern legal science and judicial practice in France, Germany and Poland. I have included Supreme Court decisions from these countries issued up until mid-2011. Finally, I have gone beyond the typical framework for a legal historian, by addressing the results of historical and comparative research in light of signifi-

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[6] See art. II-1:107,2; II-8:102,1,e; art. II-9:101,2,a; art. IV C-5:105,3 DCFR.

[7] See below 51–56.

[8] See below 83–85.

cant dilemmas in the modern theory of contract law. Following this line of thought, I have developed answers to the following questions: What are the basic lines of evolution of the nature of the contract argument? What can this knowledge bring to deliberations on the freedom of contract principle? What is the best way to develop an effective means of interpretation using the nature of the contract argument? Is it worth introducing the nature of the contract clause to future statutory regulations and, if so, how?

I present these proposals, which are the result of interpretation of the legal experience, because I believe they support the realistic thinking about the law.[9] The history of the nature of the contract argument is an interesting test of the thesis that although there is no dogmatic truth, the actual development and effectiveness of private law encourages the belief that there are objective patterns of reasonableness that are discoverable by legislators and lawyers.[10]

Obviously, the responsibility for this choice of research methods and the ensuing results rests solely with me. However, I could not have made it this far without support. The research was financed by grants awarded by the Alexander von Humboldt Foundation in Bonn and the Polish Ministry of Science and Higher Education. My research at the Max Planck Institute for Comparative and International Private Law in Hamburg and the Faculty of Law at the Ruperto Carola University in Heidelberg played a fundamental role in my analysis of these vast legal traditions. Therefore, I would like to extend my sincere thanks for providing excellent research conditions to the Director of the Max Planck Institute in Hamburg, Prof. Dr. Dr. h.c. mult., FBA FRSE Reinhard Zimmermann and the former Dean of the Faculty of Law at the Ruperto Carola University and the Director of the Institut für geschichtliche Rechtswissenschaft in Heidelberg, Prof. Dr. Christian Baldus.

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[9] Cf. Stein 1980, 126 – 127.

[10] Cf. Baldus 2006, 6; Giaro 2007, 615.

LIST ABBREVIATIONS

ABGB – Allgemeines bürgerliches Gesetzbuch (The Austrian civil code).
AGBG – Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingugngen (The German Standard Contract Terms Act).
ALDH – E. G. Karl, Ausführliches Latein Deutsches Handwörterbuch, Hannover 1976.
BGB – Bürgeliches Gesetzbuch (The German civil code)
BGH – The Federal Court of Justice of Germany
BGHZ – The collection of decisions oft the Federal Court of Justice of Germany (Entscheidungen des Bundesgerichtshoffes in Zivilsachen)
BIA – *Bibliotheca Iuris Antiqui*. Sistema informativo integrato sui diritti dell'antichità. Direzione scientifica di Nicola Palazzollo, Catania 2002.
Bull. civ. – Bulletin des arrêts des chambres civiles de la Cour de cassation
CC – Code civil (The French civil code)
CCE – Código civil (The Spanish civil code)
CCI – Codice Civile (The Italian civil code)
Cic. *fin.* – Ciciero, *De finibus bonorum et malorum*
rep. – Cicero, *De re publica*
Civ. – judgement of the Civil Division of the Court of Cassation (France)
Coll. – *Mosaicarum et Romanarum legum collatio*
D – Justinian's Digest
DB – Der Betrieb, Würzburg
DCFR – Draft Common Frame of Reference
FIRA, Vol. III – *Fontes Iuris Romani Antejustiniani*, *Pars tertia*, *Negotia* (ed. V. Arangio-Ruiz), Florentiae 1943
G – The Institutes of Gaius
Gl. ad – gloss to (medieval gloss to the Justinian's compilation)
I – The Institutes of Justinian
KZ – The Polish code of obligations
Lex – The Polish online legal database (System informacji prawniczej LEX, Wolters Kluwer Polska)

LNR – The German online legal database (LexisNexis Datenbank, Deutschland).
Lucr. – Titus Lucretius Crasus, *de rerum natura*.
M. Aur. – Marcus Aurelius Antonius Augustus, *Τὰ εἰς ἑαυτόν*
MLLM – J. F. Niemeyer, *Mediae Latinitatis Lexicon Minus*, Vol. 2 (Leiden, 2002).
NJW – Neue Juristische Wochenschrift, München
NJW-RR – NJW Rechtsprechungs-Report Zivilrecht, München
OLD – Oxford Latin Dictionary, Oxford 1982.
OR – Obligationenrecht (The Swiss Federal code of obligations)
OSA – The collection of decisions of Polish courts of appeals (Orzecznictwo Sądów Apelacyjnych)
OSNC – The collection of decisions of the Supreme Court of Poland, Civil Division (Orzecznictwo Sądu Najwyższego Izba Cywilna)
OSP – The collection of decisions of Polish courts (Orzecznictwo Sądów Polskich)
Palandt - Palandt. Bürgerliches Gesetzbuch, 70 ed. (München, 2011)
Plin. *nat*. – C. Plinius Caecilius Secundus, n*aturalis historia*
PolKC – Kodeks cywilny (The Polish civil code)
Receil Dalloz - Jurisprudence generale. Recueil Périodique et critique de jurisprudence, de legislation et de doctrin par. M. Dalloz, Paris
RGZ – The collection of decisions of the German Imperial Court of Justice, Civil Division (Entscheidungen des Reichsgerichts in Zivilsachen)
RRD - *Rotae Romanae Decisiones coram Cossino ab anno 1600 ad annum 1640* (Romae, 1672)
RusKC – Гражданский Кодекс Российской Федерации (The civil code of the Russian Federation)
Sen. *benef*. - L. Annaeus Seneca, *de beneficiis*
epist. – epistulae ad Lucilium
otio – de otio
vita beat. – *de vita beata*
SN – The Supreme Court of Poland
sv – *sub verbo* (under the word).
Theoph. Par. – *Institutionum graeca paraphrasis Teophilo antecessori vulgo tributa*
Verg. *georg*. – P. Vergilius Maro, *georgica*
WLF – The French online legal database (West Law France)
ZEC – (1862 ed. J. G. Gredy) = *Zusammenstellung der Entscheidungen der Cassationshöfe zu Berlin, Brüssel, Darmstadt, München mit Zweibrücken, Paris und des Oberhofgerichtes zu Mannheim, Erster Theil Bürgerliches Gesetzbuch* (Mainz, 1862)
ZIP – Zeitschrift für Wirtschaftsrecht, Köln

1

THE *NATURA CONTRACTUS* CLAUSE IN THE ANCIENT ROMAN LAW

1.1. The words *natura* and *naturalis* in the Roman legal language

References to nature in the Roman legal language are relatively frequent. They can be systematised in various manners in studies on the argumentation of the Roman jurists. For instance, in the opinion of Wolfgang Waldstein, the texts of Roman jurists that included the word *natura* "may be divided into at least eight groups according to the meaning, within which further distinctions can be made".[11] It seems impossible to build a widely accepted descriptive classification of this area of Roman legal language suitable for any purpose. Hence, while adopting the pattern of Waldstein as a major point of reference, I shall draw attention to this linguistic practice to search for time and context in which the phrase *natura contractus* was introduced to legal reasoning. In this way, I noticed twelve typical areas in which the words *natura* or *naturalis* are used in the Roman legal language.[12]

[11] Waldstein 1976, 31.

[12] Taking into account all grammatical forms of said words.

1.1.1. *Natura* and *naturalis* in the description of situations regulated by the law

Most often, the jurists made references to nature as a universal order.[13] For instance, in this way, Gaius explained that "it is clear by nature" that an insane person could not make an enforceable promise or undertake a legally binding action.[14] Paulus explained that water that falls from the sky "due to a natural cause (...) considered as perpetual".[15] Ulpian stressed that the sea "is by nature open to all".[16] The second-largest area of linguistic practice[17] covers the use of the term *natura* to express an inherent character of a discussed quality (e.g., the wildness of certain animals)[18] or a fundamental quality of a discussed concept (e.g., an obligation is joint and several as its nature is indivisible).[19] Almost as often, jurists used the term *naturalis* to indicate biological kinship.[20] This practice may be illustrated by the words of Ulpian, who, while commenting

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[13] Approx. 20% of texts contained the word *natura* or *naturalis* by BIA.This group included the cases systematized by Waldstein as "natural fruit as what come from nature" (Waldstein 1976, 42) and "natural destruction of things" (Waldstein 1976, 43).

[14] D. 44,7,1,12: *Furiosus, sive stipuletur sive promittat, nihil agere, natura manifestum est.*

[15] D. 8,2,28:... *quod ex caelo cadit, etsi non adsidue fit, ex naturali tamen causa fit et ideo perpetuo fieri existimatur.*

[16] D. 8,4,13 pr.:... *Quamvis mari, quod natura omnibus patet…*

[17] Approx. 17% of texts contained the word *natura* or *naturalis* by BIA. This group included the cases systematised by Waldstein as: "a concept helping to individualise things or indicate their special qualities" (Waldstein 1976, 36) and *natura humanae condicionis* understood as references to objective qualities of human nature (Waldstein 1976, 44).

[18] E.g. D. 9,2,2,2 (Lab., Gai); jurists spoke of animals that are wild by nature, such as bears, lions, or panthers.

[19] E.g. D. 45,1,139 (Venuleius); the jurist explained that all heirs of a seller would be liable for his or her duty because the sale must be defended in its entirety, as its nature is indivisible (*quia in solidum defendenda est venditio, cuius indivisa natura est…*).

[20] Approx. 14% of texts contained the word *natura* or *naturalis* by BIA. See: Waldstein 1976, 46.

on Iulia et Papia law, explained that both the biological (*naturalis*) and adopted child of a senator should be treated as a son[21] or this jurist's explanation that the adopted child retained the inheritance rights resulting from kinship in the family of his *pater naturalis*.[22] Yet another area of the typical use of the term *natura* by jurists was to determine that which exists as being *in rerum natura*.[23] For instance, in this manner, Julian concluded that the law recognised the existence of a conceived child.[24] Gaius explained also that a thing not existing (*quae in rerum natura non est*) but expected might be disposed by a legacy imposing the duty on the heir,[25] and Paulus concluded that, in the event of the death of a promised slave, it should be recognised that the transaction pertained to a non-existing thing (*qui non sit in rerum natura*), the value of which cannot be determined.[26] The opinion that there is a link between the reasonableness of law and reality pertains to what was explicitly expressed by the term *natura rerum*, introduced to legal reasoning in the mid-2nd century. Such an argumentative practice is illustrated by the view of Celsus, generalised by the Justinian jurists, that what is prohibited by the nature of things cannot be confirmed by any law (*natura rerum*).[27] What the five uses of the term *natura* specified above had in common is the fact that they were used to stress the objective character of situations the law referred to.

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[21] D. 1,9,5: *Senatoris filium accipere debemus non tantum eum qui naturalis est, verum adoptivum quoque...*

[22] D. 38,8,1,4: *…Evenit igitur, ut is, qui in adoptionem datus est, tam in familia naturalis patris iura cognationis retineat…*

[23] Approx. 10% of texts contained the word *natura* or *naturalis* by BIA. This group included the cases systematised by Waldstein as using the phrase *in rerum natura* to indicate "actual existence" (Waldstein 1976, 31) or to express "objective reality" (Waldstein 1976, 34).

[24] D. 1,5,26: *Qui in utero sunt, in toto paene iure civili intelleguntur in rerum natura esse…*

[25] G. 2,203: *Ea quoaque res, quae in rerum natura non est, si modo futura est, per damnationem legari potest...*

[26] D. 12,2,30,1: *Si iuravero te Stichum mihi dare oportere, qui non sit in rerum natura nec aestimationem mihi praestare reus debet…*

[27] D. 50,17,188,1: *Quae rerum natura prohibetur, nulla lege confiramata sunt.*

1.1.2. The terms *natura* and *naturalis* in the wording of law

A common quality of other cases of the use of the terms *natura* or *naturalis* in the language of Roman jurists was that they constituted a part of legal terms or strategy of legal reasoning. The examples of legal terms include the terms *obligatio naturalis*[28] and *possessio naturalis*.[29] What is common for both these terms is that they were introduced to stress the independence of the described circumstances from the law. Labeo, who lived at the turn of Antiquity and the modern era, used the term *naturaliter tenere*,[30] and Proculus, Neratius,[31] and Nerva,[32] younger by a few dozen years, used the phrase *naturalis possessio* to describe the physical aspect of control over a thing.[33] While discussing obligations, Labeo made an observation that the testator can owe his slave "by nature rather than under civil law".[34] Julian, who lived a hundred years later and introduced the term *obligatio naturalis*, saw the essence of this notion in the fact that money received from a natural debtor (*naturalis debitor*) was not refundable, although there had been no legal duty to pay it.[35] Tribonian, who lived in the 2nd century, explained that the existence of natural debt (*naturale debitum*) is recognised by going beyond *ius civile*, to nature.[36] These general explanations regarding the non-legal character of a such duty accompanied the process under which dogmatically natural possession and obligation were

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[28] Approx. 10% of texts contained the word *natura* or *naturalis* by BIA.

[29] Approx. 2% of texts contained the word *natura* or *naturalis* by BIA.

[30] D. 41,2,1pr.: *Possessio appellata est, ut et Labeo ait, a pedis sedibus quasi positio, quia naturaliter tenetur ab eo qui ei isistit…*

[31] D. 41,2,3,3.

[32] D. 41,2,3,13.

[33] MacCormack 1967, 51.

[34] D. 35,1,40,3: *Ego puto, secundum mentem testatoris naturale magis, quam civile debitum spectandum esse...*

[35] D. 46,1,16,4: *Naturales obligationes non eo solo aestimantur, si actio aliqua earum nomine cometit, verum etiam quum soluta pecunia repeti non potest...*

[36] D. 12,6,64: *...ut enim libertas naturali iure continetur et dominatio ex gentium iure introducta est, ita debiti vel non debiti ratio in condictione naturaliter intellegenda est.*

distinguished from civil possession (*possessio*) and obligation (*obligatio civilis*), and the legal consequences of this distinction were specified.[37] The text of Javolenus Priscus, who lived in the second half of the 1st century A.D., opened the next area of the linguistic practice of jurists in which the concept of nature was linked to the wording of the law. These are examples of argumentation that referred to the nature of the claim (*actio*).[38] The jurists concluded that, in line with the nature of the claim of sale (*actio empti*) in the case of a legal defect, the seller will be liable for the amount of the interest of the buyer.[39] In the Roman legal language, this style of argumentation was principally related to specific remedies.[40] This practice was continued by the jurists of the imperial chancellery.[41] The highest generalisation level of the argumentation derived from the nature of the claim (*actio*) is the statement of Ulpian, who lived at the turn of the 2nd and 3rd centuries A.D. In line with the legal experience regarding the *bona fides*[42] clause, he explained that *bonae fidei* claims allowed not only the adjudication of what was agreed upon between the contracting parties but also what was inherent in the nature of the remedy (*naturaliter insunt huius iudici*), even if it was not agreed to by the parties.[43] This generalisation explicitly

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[37] See MacCormack 1967, 66; Landolt 2000, 228 – 237; Cintio 2009, 145 – 188.

[38] Approx. 3% of texts contained the word *natura* or *naturalis* by BIA W. Waldstein discussed here generally the nature of legal entities (Waldstein 1976, 61).

[39] D. 21,2,60: *...nihil venditor praestabit praeter simplam evictionis nomine, et ex natura ex empto actionis hoc, quod interest*.

[40] Thus, in G. 4,33, the jurist explained what was typical for the nature of *actio commodati*, *actio fiduciae*, *actio negotiorum gestorum*, and many more claims; in D. 4,2,12,2 (Iul., Ulp.), the jurists explained that the nature of *actio quod metus causa* required damage suffered by the creditor; D. 11,7,14,13 (Ulp.) indicates that, in line with the nature of *actio negotiorum gestorum,* the judge will not rigidly adhere to mere action based on business transacted but will construe the rules of equity more liberally.

[41] E.g. C. 4,24,11 (Diocl.); C. 7,54,3pr. (Just.); I. 4,6,17.

[42] Dajczak 1998, 129-131.

[43] D. 19,1,11,1: *…nihil magis bonae fidei congruit quam id praestari, quod inter contrahentes actum est. quod si nihil convenit, tunc ea praestabuntur, quae naturaliter insunt huius iudicii potestate.*

demonstrates the jurist's opinion that the nature of remedy was combined with the existence of objective premises, forming an interpretation of the *bona fides* clause. The conviction of jurists of the existence of typical consequences of a specific claim (*actio*) found the follow-up in the argumentation, based on the reference to the nature of the legal concept or legal institution.[44] Through the reference to the nature of an institution, the boundaries for its understanding were set. This is illustrated by the opinion of Pomponius that, in line with its nature (*ea natura est*), easement does not consist of the duty to do anything but in tolerance or agreement not to perform some act.[45] Similarly, Paulus presented the difference between the *terminus a quo* and the *terminus ad quem* and explained that the nature of the phrase "do you promise to pay on the first day of March" *as terminus ad quem* is such (*natura haec est*) that one cannot demand anything beforehand.[46] The relatively frequent references to the nature of legal institutions can be noticed in the language of Justinian compilers. They repeated the references to the nature of institutions known from the classical period to display their dogmatic boundaries.[47] The references to the nature of institutions in the Justinian texts were used most frequently to stress the innovations adopted under the then-modernisation of law. Thus, Justinian's Institutes mentioned the uniform nature of legacies, as opposed to the four types of legacies in the former Roman law.[48] Justinian's compilers indicated also that the nature of fiduciary bequest (*fideicommissum*) was acknowledged as adequate

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[44] Approx. 10% of texts contained the word *natura* or *naturalis* by BIA.

[45] D. 8,1,15,1: *Servitutium non ea natura est, ut aliquid faciat (…), sed ut aliquid patiatur aut non faciat*. See: Waldstein 1976, 55.

[46] D. 44,7,44,1: *…kalendis Martiis dare spondes? cuius natura haec est, ut ante diem non exigatur...*

[47] See, e.g. C. 6,51,1,6:*… usufructu, qui sui natura ad heredes legatarii transmitti non patitur…*; C. 5,11,7pr.: *… debitum quidem remanet in sua natura…*

[48] I. 2,20,2:*… omnibus legatis una sit natura...*

for legacies, too.[49] Justinian law resolved the earlier doubt by concluding that the easement of a place of residence (*habitiatio*) is governed by its own legal regime (*ius proprium*), a specific legal nature (*specialem naturam*) that distinguishes it from usufruct.[50] The Justinian jurists explained the reform of liability under *pecunia constituta* as the "extension of its nature".

1.1.3. Phrases *naturalis ratio* and *ius naturale* in the argumentation of Roman jurists

In light of the presented linguistic practice, the term *natura depositi*[51] and a more general one, present in a number[52] of opinions of late classical jurists[53] and Justinian's legal texts[54] – the term *natura obligationis* and *natura contractus* may be regarded as fruits of the evolution of language and legal reasoning oriented as some objective order. Since the 2nd century A.D. the jurists referred in this manner to the objective qualities of a specific remedy (*actio*) or legal institution. The remarks drawn to date may be extended by two terms used in the legal discourse: *naturalis ratio* and *ius naturale*. According to available texts, in approximately the mid-2nd century, the *naturalis ratio*[55] phrase emerged in the reasoning of Roman ju-

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[49] I. 2,20,3: *…omnia legata fidecommissis exaequare, ut nulla sit inter ea differentia, sed quod deest legatis, hoc replaeatur ex natura fidecommissorum, et si quid amplius est in legatis, per hoc crescat fideicommissorum natura…*

[50] C. 3,33,13pr.: *Cum antiquitas dubitabat usufructu habitationis legato, et primo quidem, cui similis est utrumne usui vel usuifructui, an neutri eorum, sed ius proprium et specialem naturam sortita est habitatio...*

[51] D. 16,3,24.

[52] Approx. 2% of texts contained the word *natura* or *naturalis* by BIA. W. Waldstein did not distinguish the term *natura contractus* in his systematics of references to nature as an element of reasoning of Roman jurists.

[53] D. 2,14,7,5-6 (Ulp.); D.46,1,5 (Ulp.); D. 46,5,1,4 (Ulp.); D.19,5,5,4 (Paul.); D. 45,2,9,1 (Pap.).

[54] C. 7,17,2,1; I. 3,24,3; I.3,2,5,2.

[55] Approx. 2.5% of texts contained the word *natura* or *naturalis* by BIA.

rists. It served the purpose of stressing the obviousness of the presented opinion. Thus, Gaius explained that, by the decree of the Senate, no usufruct of money could be approved, as the natural reason (*naturalis ratio*) could not be altered by the authority of the Senate.[56] This manner of reasoning was adopted by the late classical jurists of the late 2nd and early 3rd centuries. It may be supposed that it became one of the inspirations for the introduction of the concept of natural law (*ius naturale*), understood as a collection of principles compliant with *naturalis ratio* or *natura rerum*.[57]

The oldest known direct reference to *ius naturale* in the discourse of Roman jurists can be found in the text of Pomponius.[58] The jurist, who lived in the 2nd century A.D., indicated that, under natural law, it was just that nobody could be enriched at the expense of another through the commission of an injury.[59] This principle was propagated and elaborated by late-classical jurists, especially Paulus and Ulpian.[60] The first explained that natural law (*ius naturale*) was everything that was just and good.[61] An example of the application of this concept to a specific issue is the opinion of Paulus that a marriage between a father and daughter was against natural law and modesty.[62] Ulpian introduced a quasi-definition of natural law, concluding that it was "what nature has taught to all creatures".[63] This jurist's conviction of the independence of *ius naturale* understood in that manner with regard to the legislative decision-making is demonstrated by the *dictum* that natural law

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[56] D. 7,5,2,1: *… Nec enim naturalis ratio auctoritate senatus commutari potuit...*

[57] Cf. Koschdembahr – Łyskowski 1930, 40-42.

[58] Cf. Waldstein 1976, 78.

[59] D. 50,17,206: *Iure naturam aequum est, neminem cum alterius detrimento et iniuria fieri locupletiorem.*

[60] See Waldstein 1988, 706.

[61] D. 1,1,11: *… id quo semper aequum ac bonum est ius dicitur, ut est ius naturale…*

[62] D. 23,2,14,2: *Unde nec vulgo quaesitum filiam pater naturalis potest uxorem ducere, quoniam in contrahendis matrimoniis naturale ius et pudor inspiciendus est...*

[63] D. 1,1,3: *Ius naturale est, quod natura omnia animalia docuit…*; similarly, Cic., *rep.* 3,19; see Waldstein 1988, 707 (further reading therein).

regards all men as equal.[64] The manner of using the term *ius naturale* permits us to conclude that the Roman jurists believed that this notion represented universal principles.[65] In the Justinian compilation, apart from fragments of works of the classical jurists, references to *ius naturale* are included only five times and in line with the classical jurists' texts.[66] This permits us to presume that, in post-classical Roman law, the indicated belief in the existence of universal principles providing a point of reference in the legal discourse was not rejected or amended creatively. Such observations are an inspiration for a deep analysis of how the use of the nature of the contract notion in the reasoning of Roman jurists represents their belief in the existence of an objective order relevant for legal discussion.

1.2. Nature of the contract clause in the argumentation of classical jurists

1.2.1. *Natura depositi* and *natura obligationis* in the works of Emilius Papinian

The overview of the linguistic practice of the Roman jurists showed that the references to *natura*, while setting the boundaries of the legal institutions, remained in legal sources as of the 2nd century A.D. In contract law, these included the texts of jurists who lived at the turn of the 2nd and 3rd centuries A.D. The first one is the fragment of the ninth book of *Questiones* of Papinian.[67] While re-

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[64] D. 50,17,32: *… quo ad ius naturale attinet, omnes homines aequales sunt.*

[65] A. Verdross distinguished, for the sake of methodological clarity, between two meanings of natural law, some universal principles and the people's perception at a specific time and place; see Verdross 1971, 92.

[66] See Waldstein 1994, 32 – 33, 46 – 47.

[67] D. 16,3,24: *'Lucius Titius Sempronio salutem. Centum nummos, quos hac die commendasti mihi adnumerante servo Sticho actore, esse apud me ut notum haberes, hac epistula manu mea scripta tibi notum facio: quae quando voles et ubi voles confesitum tibi*

sponding to a question probably stemming from banking practice, the jurist put two issues[68] under consideration. What was the type of contract stipulated between the parties and was the claim for interest justified? The answer to the first question was based on the words used by the debtor in his letter to the creditor. The recipient of payment declared that the money "entrusted to him" will be paid to the creditor on demand "when and where you desire me to do so" (*quae quando voles et ubi voles*).[69] On these grounds, the jurists concluded that the parties made a contract of safekeeping (*depositum*). Answering the question regarding interest, he concluded that, if a debtor is not in default, the claim for interest would be contrary to good faith (*bona fides*) and the nature of safekeeping (*depositi naturam*).

The first analysed issue pertained to a special case of *depositum*, called *depositum irregulare*[70] since the Middle Ages. This case caused some controversy in the discourse of the Roman jurists.[71] Thus, one can say that this was Papinian's opinion on an issue that is regarded as one of the most controversial by modern Roman law

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numerabo'. quaeritur propter usurarum incrementum. respondi depositi actionem locum habere: quid est enim aliud commendare quam deponere? quod ita verum est, si id actum est, ut corpora nummorum eadem redderentur: nam si ut tantundem solveretur convenit, egreditur ea res depositi notissimos terminos. in qua quaestione si depositi actio non teneat, cum convenit tantundem, non idem reddi, rationem usurarum haberi non facile dicendum est. et est quidem constitutum in bonae fidei iudiciis, quod ad usuras attinet ut tantundem possit officium arbitri quantum stipulatio: sed contra bonam fidem et depositi naturam est usuras ab eo desiderare temporis ante moram, qui beneficium in suscipienda pecunia dedit. si tamen ab initio de usuris praestandis convenit, lex contractus servabitur.

[68] Bonifacio 1947, 132.

[69] The term c*ommendare* used in the document interpreted by Papinian was used in the 2nd century A.D. in natural language to confirm the handover of money; see FIRA Vol. III, no. 120. In the study of Roman law, one can encounter the idea that such a linguistic practice could pertain to money given for safekeeping (*depositum*) and borrowed (*mutuum*); see Adams 1962, 362.

[70] Adams 1962, 363.

[71] In favour of allowing safekeeping (*depositum*) in such a form: D. 19,2,31 (Alfenus, Paulus.); D. 16,3,28 (Scaevola); against: Paulus, Coll. X,7,9.

studies.[72] With regard to said controversy, Papinian spoke in favour of the solution giving the parties to a contract more freedom. He decided that, in the case of the safekeeping (*depositum*) of a generic thing, the parties might agree that the creditor would receive not the same thing but the same quantity. The essence of the question about interest claim pertained to the content of a contract of safekeeping (*depositum*) understood so broadly. The jurist first reminded the reader that, to ensure compliance with the requirements of good faith (*bona fides*), which included *actio depositi*, the judge could impose terms regarding interest, which bore the same legal force as those stipulated by the promise of the parties (*stipulatio*). Then he explained that, using this freedom, the judge could not impose the duty to pay interest for the period prior to the depositary delays (*ante moram*). Pointing out the contradiction with good faith (*bona fides*) and the nature of safekeeping (*natura depositi*) thus served the forming of a boundary to implication of a term in fact. In this reasoning, special attention was drawn to the new, in the linguistic practice of the jurists, term of *natura depositi*.[73] The jurist, by referring to *natura depositi*, excluded the possibility for the judge to imply a duty of charge for receiving a sum of money by the depositor.

Mario Talamanca drew attention to the atypical, concurrent use of two criteria, *bona fides* and *natura depositi*, in argumentation. He concluded that the reference to *bona fides* is connected with stressing such values as the faithfulness to the given word and the link between the performance of the contract and its socio-economic

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[72] Litewski 1974, 215; Zimmermann 1996, 217.

[73] The literature on the topic presented an opinion that, in his original text, Papinian fixed the boundary of the interpretation of a judge by referring solely to *bona fides*, and the *natura depositi* clause was added by Justinian compilers as an element of the *natura contractus* theory. See Klami 1969, 58 (earlier literature therein). The wide presence of the nature criterion in the argumentation of classical jurists and no positive evidence for changes of the text made by Justinian's compilers speaks in favour of adopting the originality of the text in wording retained by Justinian's Digest. Cf. Mayer-Maly 1995, 296.

function. On the other hand, the criterion of *natura depositi* served, in his opinion, the indication that the solution should be adequate to the type of contract under consideration.[74]

Further-reaching remarks on the joint application of *bona fides* and *natura depositi* criteria were made by Ricardo Cardilli. In his view, the criterion of *natura depositi* referred to the practical sense of the contract under consideration. This sense, in Cardilli's opinion, was represented by the conviction of Ancient jurists that the fundamental purpose of the contract of safekeeping (*depositum*) is always to keep the thing in safe custody. Therefore, the term *natura depositi* was used by Papinian to express an opinion that a fundamental principle for the typical case of safekeeping (*depositum*) should be applied also in an atypical case, when the depositarius gained ownership of the received money and may have made use of it. The *bona fides* criterion was, in the view of R. Cardilli,[75] to stress the competence of the judge to imply a depositary's duty to pay with interest; however, for the period before the debtor's default, this would be possible only if the parties had agreed so.[76]

The idea that Papinian's argumentation was grounded on drawing attention to the purpose,[77] the practical sense of the contract,[78] was raised earlier by other authors. The belief that the *natura depositi* criterion expressed an outlook on the discussed contract from the point of view of the legitimate expectations of the depositor may be adopted as a generalisation of what is common in the presented views of Roman law researchers. The reference to *bona fides* could strengthen such an understanding of *natura depositi* and

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[74] Talamanca 2003, 197-202.

[75] Cardilli 2008, 59-61.

[76] In the study of Roman law, a view was presented that the admissibility of such an agreement was a result of a later amendment of the text by Justinian's compilers. See Adams 1962, 369 (further reading therein). There are, however, no convincing sources for the adoption of such a position.

[77] Bonifacio 1947, 133.

[78] Adams 1962, 363; Klami 1969, 131.

make it more precise. In the argumentative practice of jurists, it was used, inter alia, to justify the fact that, in agreements, the intention of the contracting parties upon the conclusion of a contract should be considered rather than the verbatim interpretation of the promise.[79] Thus, the interpretation of an agreement from the perspective of the legitimate expectations of the creditor led to the typical economic result for the discussed contract. However, such a simple cohesion between the economic [80] and dogmatic [81] order, upon which the interpretation of a contract may be grounded, was not always present. This is illustrated by the example that one encounters further in the same work of Papinian. In the 27th book of *Quaestiones*,[82] the jurist compared two cases of giving the same thing for safekeeping (*depositum*) to two depositaries. In the first case, various grades of liability of the depositaries were determined at the contract conclusion. One of depositaries was liable for fraud (*dolus*) and the other also for negligent conduct (*culpa*). In the latter case, when concluding the contract, it was agreed that both depositaries were covered by the same grade of liability – the breach of duty of diligent conduct (*culpa)*[83] – and then, under an agreement between the depositor and one of the depositaries, his liability was limited to fraud (*dolus*). As for the first of the indicated cases, Papinian explained that the obligation of two debtors had not arisen, as differ-

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[79] Dajczak 1998, 119.

[80] I mean transactions structures covering the legitimate expectations of a party to a contract, independent from the positive law.

[81] I mean models and classifications of contracts imposed by the positive law.

[82] D. 45,2,9,1: *Sed si quis deponendo penes duos paciscatur, ut ab altero quoque praestaretur, verius est non esse duos reos, a quibus impar suscepta est obligatio. non idem probandum est, cum duo quoque culpam promisissent, si alteri postea pacto culpa remissa sit, quia posterior conventio, quae in alterius persona intercessit, statum et naturam obligationis, quae duos initio reos fecit, mutare non potest. quare si socii sint et communis culpa intercessit, etiam alteri pactum cum altero factum proderit.*

[83] The depositary's liability only for damage resulting from fraud (*dolus*) was typical, cf. D.13,6,5,2.

ent obligations had not been imposed upon them. As for the latter case, the jurist concluded that the obligation had arisen and was in force, as the subsequent agreement made with one of depositaries had not changed the "legal position and nature of obligation" (*statum et naturam obligtionis*). The arising and permanence of the obligation of both depositaries in the latter case is explained in Roman law studies by the fact that Papinian recognised them as a case which in the modern legal dogma was called joint and several obligation. The Roman jurist saw the essence of the liability of joint debtors in the fact that there could be one obligation with one performance, equally encumbering a number of debtors.[84] G. Rotondi expressed the opinion that the term *natura obligationis* used in Roman legal argumentation referred to the "original structure of obligation and there was no need to think about the dogmatic structure imposed by positive law".[85] Having combined the idea of this Italian Romanist with the result of deliberations on the text of Papinian discussed earlier, I think that the point of referring to the nature of the obligation dwelled in taking into account the legitimate expectations of the creditor. The reasoning based on *natura obligationis* took into account the cohesion between such expectations regarding the economic result of a contract and the adopted allocation of risk that arose at the formation of contract[86]. No more fragments of Papinian's works remained referring to nature when the validity or content of contracts was discussed. Based on the two presented texts, one can formulate a hypothesis that the economic results specified from the perspective of legitimate expectations of the creditor are of essential importance for such reasoning. This hypothesis may be verified based on the fragment of the work of Paulus and a number of Ulpian's texts.

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[84] Lucifredi Peterlongo 1941, 21.
[85] Rotondi 1911, 57.
[86] Cf. Steiner 2009, 68-69.

1.2.2. *Natura mandati* in the argumentation of Julius Paulus

In the fifth book of *Questiones*, Julius Paulus[87] explained that the relation of exchange of services, "I do that you may do" (*facio ut facias*), consisting of a mutual collection of a claim for a contracting party that might have various legal forms. Such an agreement may be regarded as a mandate (*mandatum*) extending beyond its nature (*naturam suam excedere*) or, more easily, as a case of a transaction providing a remedy called *actio prescriptis verbis*. Biondo Biondi indicated this fragment as an example of the "weakening of traditional principles" of mandate (*mandatum*).[88] The extension beyond the nature of mandate stressed by the jurist consisted of the breaking of the gratuity principle. It was expressed in the agreement of reciprocal performances, defined by the jurist as "we are each doing service for one another" (*mutuum officium prestamus*). The fact that the jurist spoke of going beyond nature and not contrary to nature may be explained with a broad admission of payment for mandate in the practice of the time.[89] The word *natura* means here, then, what is dogmatically typical and, hence, economic. In the discussed case, the legitimate expectations of the parties regarding the economic results of a contract were connected with the disruption of the dogmatic order. The jurist's explanation of how to define the type of legal structure of the transaction "more easily" helped

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[87] D. 19,5,5,4: *Sed si facio ut facias, haec species tractatus plures recipit. nam si pacti sumus, ut tu a meo debitore Carthagine exigas, ego a tuo Romae, vel ut tu in meo, ego in tuo solo aedificem, et ego aedificavi et tu cessas, in priorem speciem mandatum quodammodo intervenisse videtur, sine quo exigi pecunia alieno nomine non potest: quamvis enim et impendia sequantur, tamen mutuum officium praestamus et potest mandatum ex pacto etiam naturam suam excedere (possum enim tibi mandare, ut et custodiam mihi praestes et non plus impendas in exigendo quam decem): et si eandem quantitatem impenderemus, nulla dubitatio est. sin autem alter fecit, ut et hic mandatum intervenisse videatur, quasi refundamus invicem impensas: neque enim de re tua tibi mando. sed tutius erit et in insulis fabricandis et in debitoribus exigendis praescriptis verbis dari actionem, quae actio similis erit mandati actioni, quaemadmodum in superioribus casibus locationi et emptioni.*

[88] Biondi 1953, 87.

[89] See Dajczak, Giaro, Longchamps de Bérier 2009, 500.

remove that dissonance. Unlike in the texts of Papinian presented earlier, the word *natura* used by Paulus did not have the function of a rule of contract interpretation due to legitimate expectations of its economic results. This supplements the reflection on the hypothesis made above. It can be concluded that Papinian's use of the nature of the contract criterion taking into consideration the legitimate expectations of the creditor from the economic perspective was not something obvious in the legal language of the time. We can presume that this use of the word *natura* by Papinian resulted from his independence, originality, and innovation in the area of contract law.[90] Let us look, then, at the examples of uses of the nature of the contract phrase in the argumentation of Domitius Ulpian, about ten years younger than Paulus. He distinguished himself from his contemporaries by his theoretical approach to law, and in his legal writings, he expressed admiration for everything natural.[91]

1.2.3. *Natura obligationis* and *natura contractus* in argumentation of Domitius Ulpian

The phrase *natura obligationis*, known from the argumentation of Papinian, can be found in the fragment of Ulpian's commentary on the works of Sabinus.[92] It also presents the issue of a plurality of

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[90] Ankum 1996, 7f (earlier literature therein)

[91] Honoré 2005, 76 and 79.

[92] D. 46,1,5-6: *Generaliter Iulianus ait eum, qui heres extitit ei, pro quo intervenerat, liberari ex causa accessionis et solummodo quasi heredem rei teneri. denique scripsit, si fideiussor heres extiterit ei, pro quo fideiussit, quasi reum esse obligatum ex causa fideiussionis liberari: reum vero reo succedentem ex duabus causis esse obligatum. nec enim potest reperiri, quae obligatio quam perimat: at in fideiussore et reo repperitur, quia rei obligatio plenior est. nam ubi aliqua differentia est obligationum, potest constitui alteram per alteram perimi: cum vero duae eiusdem sint potestatis, non potest reperiri, cum altera potius quam altera consumeretur. refert autem haec ad speciem, in qua vult ostendere non esse novum, ut duae obligationes in unius persona concurrant. est autem species talis. si reus promittendi reo promittendi heres extiterit, duas obligationes sustinet:* 6. *item si reus stipulandi extiterit heres rei stipulandi, duas species obligationis sustinebit. plane si ex altera earum egerit, utramque consumet, videlicet quia natura obligationum duarum, quas haberet, ea esset, ut, cum altera earum in iudicium deduceretur, altera consumeretur.*

debtors or creditors. However, while Papinian expressed the idea that an obligation can exist with joint debtors,[93] the text of Ulpian exemplifies the view that, in such a case, there were as many obligations as there were debtors or creditors; however, only one performance was due.[94] The jurist took two cases into account. The first one pertained to the plurality of debtors. It involved the fact that one of the joint promisors became the heir of the other joint debtors. The second case involved the plurality of creditors. One of the joint creditors became the heir of another. The problem, similar in both cases, came down to the question of the legal consequences of the discussed situation. The jurist claimed that the death of one of the principal joint debtors or creditors would not change the fact that there were two distinct obligations, and by inheritance, the remaining debtor and creditor would be parties to each of these obligations. This meant that, in both cases, the creditor would have had at his disposal two claims (*actio*) regarding the same performance against one debtor. Ulpian explained that bringing one of the claims (*actio*) would result in the termination of the both obligations, as this was the "nature of both obligations" (*natura obligationum duarum*)[95]. Ulpian's recognition that both obligations remained in force despite the death of the joint creditor or joint debtor expressed the thought formulated by Roman jurists since the mid-2nd century.[96] This part of Ulpian's text was probably a recounting of Julian's[97] words. The novelty in Ulpian's reasoning pertained solely to the use of the words *natura obligatio* in justifying the fact that bringing the claim (*actio*) regarding one of the concurrent obligations resulted in the consumption of the other. The argumentation based thereon assured the economic cohesion of legitimate expectations under both obligations regarding the same performance.

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[93] E.g. Lucifredi Peterlongo 1941, 21.
[94] E.g. Lucifredi Peterlongo 1941, 23.
[95] Cf. Steiner 2009, 37.
[96] D. 46,3,93 (Julian), D. 45,2,13 (Venuleius).
[97] Johnston 1987, 67; Kieß 1995, 96.

When comparing this statement of Ulpian with the above instance of using the words *natura obligationis* by Papinian, one can see that the reference that both jurists made to them extended beyond their different dogmatic positions to the joint and several obligation. Both jurists used the term *natura obligationis* and drew attention to the economic sense of the evaluated situation, independent from dogmatic sophistication.

Yet another example enriching the image of such a linguistic practice is the fragment of the seventieth book of Ulpian's commentary on the Edict. It is devoted to praetorian stipulations. The text starts with the presentation of their division into three types: interposed on account of a judgment to procure its execution (*iudiciales*), introduced to permit a new claim (*actio*) to enable execution to be made, and for the prevention of threatened injury (*cautionales*) and entered into for the purpose of causing a party to appear in court (*communes*). Having presented this dogmatic division, Ulpian concluded that "all stipulations, by their nature (*natura sui*), are protective", as the purpose of an agreement of this kind is to make someone more secure and safe.[98] In the studies of Roman law, doubts were raised as to the clarity and usefulness of the three-element systematics of praetorian stipulations.[99] The extent to which the fragment reflected the original idea of Ulpian was controversial. A certain resolution of the dispute regarding the origin and importance of the indicated tripartite division of *stipulationes* based on the existing sources is not possible. From the perspective of these considerations, it is, however, significant to note that the sense of Ulpian's idea that "by their nature, all stipulations are protective"

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[98] D. 46,5,1pr.-4: *Praetoriarum stipulationum tres videntur esse species, iudiciales cautionales communes. 1. Iudiciales eas dicimus, quae propter iudicium interponuntur ut ratum fiat, ut iudicatum solvi et ex operis novi nuntatione. 2. Cautionales sunt autem, quae instar actionis habent et, ut sit nova actio, intercedunt, ut de legatis stipulationes et de tutela et ratam rem haberi et damni infecti. 3. Communes sunt stipulationes, quae fiunt iudicio sistendi causa. 4. Et sciendum est omnes stipulationes natura sui cautionales esse: hoc enim agitur in stipulationibus, ut quis cautior sit et securior interposita stipulatione.*

[99] Cf. Branca 1961, 35.

comes down to opposing the dogmatic diversity of praetorian stipulations with a clear opinion that they all have the same practical function.[100] The reference to *natura* in this case does not undoubtedly mean the dogmatic typicality. The indications of security and safety clearly point to economic and psychological order. They show more clearly, as did the texts discussed earlier, that, in the opinion of the jurist, the word *natura* was connected with drawing attention to the legitimate expectations of the creditor. In another fragment of Ulpian's commentary on the Edict, we can encounter the sole use of the term *natura contractus* by the late classical jurist.[101] It was used in deliberations on the content of contracts protected by *actio bonae fidei*. Quoting Papinian, Ulpian explained that he made a distinction between agreements (*pacta*) adopted at the formation of a contract and agreements that were added by the parties after the contractual obligation had arisen. The first one, called *ex continenti*, form the parts of a contract. A different approach to the latter, called *ex intervallo*, consisted of the fact that they were not considered to belong to the contract, nor did they confer a right of claim. Having presented this theory of Papinian and two illustrating examples pertaining to the agreement for the return of a dowry and the amount of interest for a custodian, he went on to state that, "if after a sale an agreement was made beyond the nature of the contract (*extra natura contractus*), then a claim growing out of the sale could not be brought due to the principle that no claim can arise under a naked agreement".

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[100] See Guarino 1962, 214.

[101] D. 2,14,7,5: *Quin immo interdum format ipsam actionem, ut in bonae fidei iudiciis: solemus enim dicere pacta conventa inesse bonae fidei iudiciis, sed hoc sic accipendum est, ut si quidem ex continenti pacta subsecuta sunt, etiam ex parte actoris insint, si ex intervallo, non inerunt, nec valebunt, si agat, ne ex pacto actio nascatur. (….) ea enim pacta insunt, quae legem contractui dant, id est quae in ingressu contractus facta sunt. idem responsum scio a Papiniano, et si post emptionem ex intervallo aliquid extra naturam contractus conveniat, ob hanc causam agi ex empto non posse propter eandem regulam, ne ex pacto actio nascatur. quod et in omnibus bonae fidei iudiciis erit dicendum….*

In the academic discussion on this fragment, two particularly significant questions were raised for these deliberations. The question regarding the originality of the text and the sense of the term *natura contractus* are included therein. As for the first question, a clear evolution of views in the 20th and early 21st centuries has been noted. Today, an opinion dominates that recognises the authorship of Ulpian but also the modifications of compilers in the closing part of the text.[102] Recently, Paola Lambrini expressed the opinion that the words *extra naturam contractus* could have been written by the Justinian jurists to replace the phrase "agreements that add something" (*pacta quae aliquid addiciunt*),[103] known from Papinian's text. The sources do not provide grounds for a direct verification of this hypothesis. One can refer to it indirectly, raising a question, fixed in academic discussions, regarding the sense of the *natura contractus* phrase in legal argumentation. The sentence it is used in permits us to recognise that it was a fragment of an independent reflection of Ulpian.[104] The jurist connected the sense of the presented theory of Papinian with two maxims used in legal discourse: based on the good faith rule that the intention of contracting parties should be considered rather than the verbatim interpretation of contract[105] and the principle that no claim can arise under a naked agreement (*ne ex pacto actio nascatur*). In the academic discussion, a view has been expressed that the connection of the term *extra naturam contractus* and the principle *ne ex pacto actio nascatur* constituted solely the reference to the principle under which only the types of contracts defined by the law could be

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[102] Rotondi (1911, 112-113) showed that both the theory presented in the text and the phrase *natura contractus* came from Justinian compilers. Similarly, Kaser 1949, 532; Knütel 1967, 141. This view has been gradually contested since the second half of the 20th century. The latest works do not raise doubts regarding the originality of the text; see Mayer-Maly 1995, 295; Cardilli 2008, 54 fn. 135 (further reading therein).

[103] Cf. D.18,1,72pr. (Pap.); Lambrini 2007, 320.

[104] Similarly, Cardilli 2008, 52-56.

[105] See Schmidlin 1970, 119; Dajczak 1998, 43-45.

sources of obligations.[106] Giovanni Rotondi connected the nature of the contract criterion with the structure of legal relationship agreed upon by the parties upon the formation of contract.[107] Riccardo Cardilli recently commented on the matter. He concluded that the "term *natura* qualified this part of contents of sale, which, though accessory, would be typical for the concluded contract".[108] Ulpian, however, did not reflect on the contents of *pactum* added upon the formation of a contract. Paola Lambrini formulated the supposition that the jurist assessed an agreement (*pactum*) that did not change the significant content of the contract but added new terms.[109] What is convincing about this way of thinking is that it concerns an agreement amending the allocation of risks and benefits in an existing contract. The general formula of *natura contractus*, however, does not provide grounds to specify the direction and scope of these changes. These remarks regarding Ulpian's reasoning also provide the grounds to disagree with W. Ernst's recent opinion that Roman jurists denoted the essential terms as *natura contractus* because, beyond the nature of the contract, only the *pactum* was implied after the formation of contract.[110] Therefore, while developing the idea of Rotondi, I find it accurate to link the nature of the contract with some order existing at the moment that a specific obligation arises. I believe that, in the search for the argumentative sense of the words *natura contractus*, one needs to take into consideration that Ulpian distinguished solely between specific agreements (*pacta)* included in a contract upon its formation and specific agreements added afterward. In this respect, his view differed from that of Papinian, who distinguished between the later agreements that added something to a specific contract and agreements added

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[106] Talamanca 2003, 73.

[107] Rotondi 1911, 111, believed that such an understanding of the contract practice was introduced by the Justinian compilers.

[108] Cardilli 2008, 55-56.

[109] Lambrini 2007, 320 and 321.

[110] Ernst 2011, 82-85. This understanding of the *natura contractus* phrase in Ulpian's text was presented in the Accursian Glosse, see below: 58.

afterward that remove some parts of the content of a specific contract.[111] Referring to sources analysed earlier, this observation supports the opinion that Ulpian compared the phrase *natura contractus* to the allocation of benefits and risks arising at a contract's conclusion. This allocation is, in fact, the basis for the legitimate expectations of the parties. Therefore, it may be concluded that the term *natura contractus*, used here for the first time, was a creative continuity of the linguistic practice in which the reference to nature expressed the view on contracts from the perspective of the legitimate expectations of parties at the moment of the formation of the contract. It can be supposed that the relatively late and limited implication of the *natura contractus* term in Roman legal argumentation was, in part, the consequence of the evolution of the legal language in which various ways of using the word *natura* were developed, and, at the same time, the result of difficulties in the "emancipation" of this criterion from reasoning based on good faith (*bona fides*). The interpretation of the good faith clause directed the attention of jurists also on the purpose of a contract. Both clauses – *natura contractus* and *bona fides* – expressed in the legal reasoning reference non-legal values.[112] The reading of texts by Papinian and Ulpian, which included various linguistic forms of references to the nature of the contract, gave grounds to formulate and strengthen the hypothesis that they drew attention to the economic sense of discussed situations. The specific nature of the presented cases lies in the fact that the jurist's reasoning went beyond the dogmatic patterns and controversies and was based on perceiving the contract as an instrument of achieving the expected purpose. References to nature in argumentation focused attention on the adequacy of the agreement of the parties to achieve the purpose. It assumed the existence of an order allowing the achievement of the indicated adequacy between the instrument and the purpose. The qualities of this order are related to fixing the boundaries of the

[111] See D. 18,1,72pr.

[112] See Talamanca 2003, 73.

legitimate expectations of the creditor. Drawing the same conclusions would be possible in the flexible, varied interpretation of the *bona fides* clause.[113] Therefore, it can be stated that the introduction of the nature of the contract clause to the Roman legal language was not related to the dogmatic systematisation of contracts according to type. It provided a more precise linking of the legal argumentation with intuition regarding the existence of principles of the economic reasonableness of contracts, independent of positive law. The examples justifying this conclusion, however, come from only a few texts of late classical jurists who distinguished themselves with a predisposition toward theoretical thinking. Such a linguistic practice did not go beyond its "embryonic" stage in the late classical period of Roman law. It was not uniform, as it was accompanied by Paulus' case of the use of the term *natura* to express what is typical in the dogmatic form of a contract. Hence, a question arises regarding the importance of this legal experience for lawyers who modernised the law in the time of Justinian and drew up the Justinian compilation.

1.3. Nature of the contract in Justinian's constitutions

References to the nature of a claim (*actio*) or the nature of a legal institution occurred relatively often in the language of Justinian's compilers. The Justinian jurists eagerly used this term to explain novelties introduced by the emperor. For instance, they employed this way to define what was typical of the "nature of an amended claim" for the return of a dowry (*et natura quidem ex stipulati actionis haec intelligatur…*),[114] presented a "uniform nature of legacies"

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[113] Cf. Dajczak 1998, 148-152. I formulated the conclusion that, in the reasoning of Roman jurists, the phrase *bona fides* was a "catalyst" for finding solutions to cases corresponding to the fundamental values of legal order indicated by Ulpian (D. 1.1,10,10): to live honestly (*honeste vivere*), to injure no one (*alterum non laedere*), and to give to everyone his due (*suum quique tribuere*).

[114] C. 5,13,1,1.

(…*omnibus legatis una sit natura*),[115] and modified liability under *pecunia constituta* as the "extension of its nature" (*necessarium nobis visum est magis pecuniae constitutae naturam ampliare*).[116] Noticing such a condition of the sources provided an assumption to formulate an idea in the early 20th century: that it was the jurists of Justinian times who built the theory of *natura actionis* pertaining to the "legal structure of claims", and with it, they connected the creating of theoretical models of legal institutions.[117] Developing this view, Rotondi thought that it was a theoretical generalisation that replaced the notion of legal relationship, absent from Ancient Roman law. Its reflection supposedly was – in line with Rotondi's theory – the term *natura contractus*.[118] By connecting the dogmatic innovation introduced by Justinian with such a theory, Rotondi believed that "Justinian's jurists and later Byzantine jurists understood the term *natura* as a definition of structure or a set of elements formed by the legal order, serving to build an autonomous legal figure".[119] In other words, the nature of the claim or nature of the contract phrases represented, in the opinion of this Italian Romanist, all the elements of legal relationship required and permitted by the law.[120] However, the idea of Rotondi regarding the equality of the terms *natura actionis* and *natura contractus* raises some doubts. First, an explicit reference to the nature of the contract can be found in Justinian's Code only three times. Hence, the sources for a decisive generalisation are very scarce. Second, the presented opinion of the Italian Romanist was based largely on arguments included in Basilica, a Byzantine paraphrase of Justinian's Code and Digest, drawn up 300 years later. In this context, it seems adequate to focus on the question of what the function was of the nature of the contract clause in the legal argumentation of Justinian's compilers.

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[115] I. 2,20,2.
[116] C. 4,18,2pr.
[117] Rotondi 1911, 5.
[118] Rotondi 1911, 5 and 48.
[119] Rotondi 1911, 18.
[120] Rotondi 1911, 73.

The first example is the Justinian constitution included in the title of the Code devoted to the abolition of the institution of the "defender of freedom" (*adsertor*). This change of law resulted in the fact that litigation concerning freedom could not be continued after the death of a person who, as the plaintiff, aimed to prove that he or she was mistakenly regarded as a slave. In consequence, doubt arose as to whether the buyer of such a person whose status was the subject of litigation could, after this person's death, make a claim against the seller referring to the fact of having bought a free person, thus concluding a void sale. The essential subject of the imperial constitution is to clear this doubt. It explained that, under new regulation, the buyer could claim against the seller. The latter would not be held liable for eviction if it could be proven that the person sold was indeed a slave. In this context, the imperial jurists added that, if the sale had pertained to a free man, the buyer could have recourse against the seller and the latter should return to him what was contained in the bill of sale or what the nature of the contract required (*natura contractus exigebat*).[121] When interpreting this text, Rotondi concluded that the words *natura contractus* were used to define the scope of a seller's liability determined by the legislator.[122] As part of his research of the *id quod interest* clause used to determine the compensation, Dieter Medicus acknow--ledged briefly that the phrase *contractus exigebat*[123] present in the constitution should be regarded as its equivalent. To assess the function of the term *natura contractus* in the discussed constitution, it is important, in my view, to draw attention to the fact that the *id quod interest* and *natura contractus* phrases constituted one of the alternatively formulated criteria for determination of the buyer's claim (*actio empti*). Let us remember that, in the Digest, Justinian repeated the opinion of classical jurists who differentiated the

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[121] C. 7,17,2: *…habeat regressum adversus venditorem, ut ei quasi liberae personae venditor reddat id, quod emptionali instrumento continebatur vel natura contractus exigebat...*

[122] Rotondi 1911, 11.

[123] Medicus 1962, 77.

scope of the seller's liability depending on whether the seller had or had not known that the purpose of the contract could have not been achieved. As for the first of these situations, in the text of classical jurist Paulus, we can find the explanation that the seller should reimburse the buyer with the amount of his interest in what was destroyed (*quod interest restituere*).[124] Therefore, the idea of Medicus that the term *natura contractus* had, in this case, the same function that the phrase *quod interest* had in the discourse of classical jurists proved to be correct. One of the two known Justinian constitutions that contain the term *quod interest*[125] provides grounds for discussing the reason for this linguistic change and the sense of the nature of the contract it stems from. It presents a declaration that, earlier, the *id quod interest* clause had caused an infinite number of doubts.[126] Justinian explained that, "in all cases in which the amount or the nature of the estate is certain (...), *id quod interest* shall not exceed double the value of the estate.[127] This image becomes clearer when this conclusion is compared with the discussed Justinian constitution, in which the term *natura contractus* determined the amount of the buyer's claim. Such a comparison permits the remark that drawing attention to the benefit that could be legitimately expected by the buyer was the grounds for using the words *natura contractus* by Justinian's jurists.

The linking of the reference to nature and the presentation of the earlier controversy can be encountered also in the fragment of Justinian's Institutes.[128] This handbook brings to mind the discus-

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[124] D. 18,1,57,1.

[125] Cf. Medicus 1962, 296.

[126] C. 7,47,1: *Cum pro eo quod interest dubitationes antiquae in infinitum producere sunt...*

[127] C. 7,47,1: *Sancimus itaque in omnibus casibus, qui certam habent quantitatem vel naturam, veluti in venditionibus et locationibus et omnibus contractibus, quod hoc interest dupli quantitatem minime excedere...*

[128] I. 3,25,2: *De illa sane conventione quaesitum est, si Titus et Seius inter se pacti sunt, ut ad Titium lucri duae partes pertineant, damni tertia, ad Seium duae partes damni, lucri tertia, an rata debet haberi conventio? Quintus Mucius contra naturam societatis talem pactionem esse existimavit, et ob id non esse ratam habendam. Servius Sulpicius,*

sion, known also from other sources, triggered by the opinion of Quintus Mucius Scaevola that "a partnership cannot be formed in such a way that a partner had a different share in loss and in profit".[129] The Justinian Institutes said that the opinion of Quintus Mucius was based on the contradiction of such a contractual term with the nature of a partnership (*contra naturam societatis talem pactionem esse existimavit*). The corresponding fragment of Gaius' Institutes of the 2nd century, which had a considerable impact on the analysed part of Justinian's handbook, does not mention the term "nature of partnership".[130] The manuscript of Gaius' work contains no gap that would allow the presumption that the mention was not preserved.[131] Having in mind such condition of the sources, it should be acknowledged that the phrase *contra naturam societatis* was introduced by Justinian jurists. It is probable that they used them to synthetically phrase the grounds underlying, in their opinion, the view of Quintus Mucius Scaevola. Drawing from the discussion of jurists, one can point out two controversies. The first one pertained to whether it was practically reasonable to privilege one partner by granting him a higher share in profit than in loss. The second was whether it was possible, in terms of accounting, to differentiate the share in profit and loss of one partner. The presented position of Quintus Mucius was probably based on the idea of economic balance between heirs, which was primary for partner-

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cuius sententia prevaluit, contra sentit, quia saepe quorundam ita pretiosa est opera in societate, ut eos iustum sit meliore condicione in societatem admitti: nam et ita coiri posse societatem non dubitatur, ut alter pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit, quia saepe opera, alicuius pro pecunia valet. et adeo contra Quinti Mucii sententiam optinuit, ut illud quoque constiterit posse convenire, ut quis lucri partem ferat, damno non teneatur, quod et ipsum Servius convenienter sibi existimavit: quod tamen ita intellegi oportet, ut, si in aliqua re lucrum, in aliqua damnum allatum sit, compensatione facta solum quod superest intellegatur lucri esse.

[129] D. 17,2,30: *Mucius libro quarto decimo scribit non posse societatem coiri, ut aliam damni, aliam lucri partem socius ferat...*

[130] G. 3,149.

[131] Horak 1969, 158.

ships.[132] The justness of breaking this idea in the name of economic efficiency was being gradually strengthened by jurists. In the 1st century B.C., Servius Sulpicius Rufus explained that it was possible, to some extent, to privilege a partner whose service was of greater advantage to the partnership than the capital invested.[133] In the mid-2nd century A.D., Gaius made a more general statement that equity justified such a possibility because "frequently the services of a person are worth as much as money".[134] Ulpian illustrated this thought with examples, pointing to the special value of services if one partner alone made a journey abroad by sea or land.[135] The authors of Justinian's handbook recognised the falsity of Quintus Mucius' position in an unconditional and general manner.[136] They explained that "the labour of certain persons is often so valuable in a partnership that it is only just that they should be admitted into it on the most favourable conditions".[137] The breaking of the principle formulated by Quintus Mucius also raised doubt from the point of view of a logical principle stipulating that one event cannot be profit and loss at the same time. The accounting model for clearing this doubt was proposed by Servius Sulpicius Rufus. He suggested that "different amounts of the profits remaining in the funds of partnership, after all loss has been deducted, can be paid to the partners".[138] The explanation of the matter included in the Justinian

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[132] Cf. Talamanca 2003, 30; Bona 1973, 27. See also Behrends 1983-1984, 205. The German Romanist presented the view that the position of Quintus Mucius was based not on a dogmatic and legal vision but on the consideration of the socio-economic reality.

[133] G. 3,149.

[134] G. 3,149.

[135] D. 17,2,29,1.

[136] Cf: Horak 1969, 158.

[137] I. 3,25,2. There was a controversy in the study of Roman law with respect to whether the purpose of such a solution was to introduce a remedy against worse treatment of a partner who did not contribute any capital (see Wieackier 1936, 261) or the privileged treatment of a partner handling the affairs of the partnership (see Talamanca 1981, 25).

[138] D. 17,2,30.

Institutes is broader. Therein, one can read that "this should be understood in such way that if profit results in one transaction and loss in another, only what remains after set–off is regarded as profit".[139] The permanence of ambiguity regarding the accounting manner of breaking the principle of Quintus Mucius is confirmed by the Paraphrase of Institutes drawn up in Greek by Theophilus in 534 A.D. The explanations it offers regarding the method of calculating various shares in the profit and loss of one partner are even more extensive. They were based on the examples of profit and loss in various industries and the end of a partnership.[140] Hence, the sources provide grounds to suppose that Justinian's jurists used the words *contra naturam societatis* to express the otherness of the view of Quintus Mucius consisting of a different understanding of the economic sense of a contract. Similarly, as in the imperial constitution presented earlier, the word *natura* was used by Justinian's jurists to express the thought that the dogmatic solution in force helped to achieve the accepted economic results of the contract.

In Justinian's Institutes, one can find yet another reference to the nature of the contract.[141] The explanations demonstrating the similarity of sale (*emptio venditio*) and lease (*locatio conductio)* mentioned that, for a long time, there were doubts as to which one covered perpetual ground lease. Justinian's compilers indicated that this doubt had been removed by the constitution of the emperor Zeno. The jurists of this emperor's rule in the second half of the 5th century isolated emphyteusis (*ius emfiteuticarium*) as an autonomous type of property right made under a contract.[142] Stressing the originality and permanence of this solution, Justinian claimed that "Zeno's constitution established the peculiar nature (*propriam naturam)* of the contract of emphyteusis, which resembled neither a lease nor a sale but was upheld by its own agreement, and if any-

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[139] I. 3,25,2: *... quod tamen ita intellegi oportet, ut, si in aliqua re lucrum, in aliqua damnum allatum sit, compensatione facta solum quod superest intelligatur lucri esse.*

[140] Theoph. Par. 3,25,2.

[141] I. 3,24,3.

[142] C. 4,66,1. See Bottgilieri 1994, 72.

one entered into it, it should be sustained just as if such was the actual nature of the contract (*natura talis esset contractus*)".[143] The two references to the nature of the contract in the fragment expressed the idea of legal autonomy of the commented contract resulting from the dogmatic finding of the specific nature of its practical purpose.

Let us compare this conclusion with the Justinian texts presented earlier. This provides grounds to more decisively express the opinion that Justinian's jurists, when speaking of the nature of the contract, stressed the adequacy of imperial law in achieving such practical objectives that the creditor may legitimately expect. Taking a broader look at the practice of using the word *natura* in reference to contracts, one may conclude that both the late classical and Justinian's jurists assumed the existence of a dogmatic and economic dimension of a contractual practice.[144] The difference consisted of the understanding of the relation between these dimensions. The intuition of independence of the so-called economic order, represented by the phrase *natura contractus*, as a non-legal criterion for the evaluation of the validity of agreements can be noticed, in this context, only in the opinions of Papinian and Ulpian.

1.4. Conclusions

Lucretius, the author of *De rerum natura*, is regarded as the founder of the Roman understanding of nature.[145] Inspired by Epicurean philosophy, he placed man in the position of an observer of nature who draws knowledge from it.[146] Stoics opened the discus-

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[143] I. 3,24,3 *…lex Zenoniana lata est, quae emphyteuseos contractui propriam statuit naturam neque ad locationem neque ad venditionem inclinantem, sed suis pactionibus fulciendam, et si quidem aliquid pactum fuerit, hoc ita optinere, ac si naturalis esset contractus…*

[144] Differently Rotondi 1911, 73.

[145] Haselton Haight 1910, 245.

[146] Haselton Haight 1910, 245.

sion on whether the correct reading of nature may improve the fortune of man.[147] Marcus T. Cicero, Lucretius' contemporary, made a prudent conclusion that nature might permit a good life, i.e. in accordance with it.[148] Horatio, who lived during the same period, pointed out the principles and rhythm of nature, stressing their closeness to what was proper for the fortune of man.[149] In the same period, Virgil taught that knowing the natural law established by Providence frees one from fear.[150] Pliny, a generation younger and author of *Historia Naturalis*, pointed out that a man is a fragment of cosmos, incapable of independent living. He saluted nature as the "giver of all things", standing above man.[151] As a result, he explained that healing human life means following the path of the "divine mother nature".[152] Seneca, who worked in the 1st century A.D. and was regarded as the exponent of the spirit of his times,[153] placed nature at the centre of Roman philosophical reflection.[154] The teachings that are repeated in his texts, to "live in line with nature" (*secundum natura vivere*),[155] meant life in accordance with universal nature because, as he said, "nature is God, it is reason itself".[156] He commended the constancy of acting in line with the individual nature of man.[157] Marcus Aurelius, emperor and philosopher, was convinced that nature made him the "leader of the herd",[158] which transferred faith in the "order of the universe" to politics. He repeatedly stressed that society was a part of nature,[159]

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[147] Lucr. V, 115; See also Cytowska, Szelest 1990, 112.
[148] Cic. *fin*., IV, 14).
[149] Haselton Haight 1910, 246.
[150] Verg. *georg*., IV, 149.
[151] Plin. *nat*. II, 2.
[152] Borst 1994, 23.
[153] Joachimowicz 2004, 85.
[154] Grimal 1994, 248.
[155] Sen. *vita beat*.VI, 2; Sen. *benef*.IV, 25; Sen. *otio* V, 1.
[156] Sen. *epist.* XIX, 117, 2.
[157] Sen. *otio*, V, 1; see also Grimal 1994, 250.
[158] Grimal 1997, 257.
[159] M. Aur., XI.

drew attention to institutions that he regarded as being in accordance with nature,[160] and connected any difficulties in shaping men by the monarch with the duality of nature, made of divine logos and fortuity.[161]

The presented views show how the idealistic, romantic, and sometimes religious approach to nature as reason that human actions should correspond to had developed since the end of the Roman republic. The use of the word *natura* in the Roman legal language, based on the conviction that it defined the objective order, was in accordance with this context. They used it to describe situations regulated by the law and the wording of law. The first group of cases is statistically predominant. The latter area of linguistic practice constitutes the independent achievements of Roman jurists. For this practice, they had to adopt some assumptions regarding the qualities of the objective order and its argumentative function. Thus, they started the deliberation on *naturalis possessio* and *naturalis obligatio* (since the end of the republic). They introduced references to the nature of the claim (*actio*) (since the 1st century A.D.) and to the nature of legal institutions (since the mid-2nd century A.D.). They introduced the terms *naturalis ratio* (since the mid-2nd century A.D.) and *ius naturale* (jurists who worked at the turn of the 2nd and 3rd centuries A.D.). Drawing attention to the nature of the contract became one of the lines of such argumentative practice. The case of Paulus' referring to the nature of mandate was in line with the earlier practice of understanding the nature of legal institutions as the designation of what was typical dogmatically.[162] The introduction, at the turn of the 2nd and 3rd centuries, by Papinian, followed by Ulpian, of the nature of the contract criterion for the evaluation of the validity of agreements was creative from the point of view of legal reasoning. The reading of the texts of these jurists provided grounds to formulate and adopt a thesis that they

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[160] Like family; see Grimal 1997, 257.

[161] Grimal 1997, 257.

[162] D. 19,5,5,4.

draw attention to the objective order I defined as economic[163]. Such an understanding of the nature of the contract assumed a look at it from the perspective of the legitimate expectations of the creditor at the moment they arose. The manner of using the nature of the contract criterion noticed in the works of Papinian and Ulpian did not go beyond the "embryonic" stage until the end of the 3rd century. This may be explained by the difficulty of the "emancipation" of the assessment using these criteria for reasoning based on *bona fides*. The sources do not permit an extended and decisive reconstruction of the qualities of the order underlying the nature of the contract. We can suppose that the introduction of the nature of the contract clause in Roman legal language permitted more precise, as was the case with *bona fides*, connected legal reasoning with intuition regarding the existence of principles of the economic reasonableness of contracts, independent of positive law. A small number of references to the nature of the contract in post-classical sources show that, in Antiquity, this criterion did not achieve either theoretical or practical "maturity". However, the observation that one can also notice in the reasoning of Justinian's jurists the connection of the term nature of the contract with the economic dimension of the contract is valuable. On the other hand, this is where the similarities end. The statements of jurists of the 6th century do not demonstrate, which is noticeable in the reasoning of late classical jurists, the ideas of the independence of the economic order from positive law. When taking a broader look at this difference, it can be regarded as one of the signs of difference between the discourse of late classical jurists, inspired mainly by stoicism and the style of Justinian jurists, typical of the chancellery of the emperor enjoying the full extent of power and having the vision to restore the empire. Therefore, when analysing the beginnings of the nature of the contract argument, three issues need to be stressed. The first is the difficulty of capturing the argumentative autonomy and specificity of the nature of the contract criterion. The second consists of the fact

[163] See fn. 80.

that, in the Roman legal language, we can find examples of the word *natura* being used to stress both what belongs to the dogmatic order of a contract of a specific type[164] and what serves the economic reasonableness of contractual obligation. The third issue pertains to determining that the connection of the nature of the contract with the economic sense of a contract was clearly stronger in the argumentation of Roman jurists. As we shall see, this is how the permanent axes of discussion on the nature of the contract argument were established in the civil law tradition.

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[164] T. Mayer-Maly 1995, 296-297. This was developed by the introduction by medieval jurists of the term *naturalia contractus* as a part of the content of contracts implied in law.

2

THEORETICAL ELABORATION ON THE NATURE OF THE CONTRACT CLAUSE IN THE LEADING WORKS OF THE SCIENCE OF ROMAN LAW IN EUROPE (*IUS COMMUNE*, *GEMEINES RECHT*)

2.1. Selection of sources

In the 11th century, jurists who were in possession of Justinian texts crossed the border between drawing up legal expertise and genuine legal science. Legal expertise provided practical explanations of specific cases. Legal science, the beginnings of which date back to medieval jurists in Pavia, aims at capturing and presenting something more. The last step on the road to legal science was made by two Bologna-based lawyers of the late 11th century, Pepo and Irnerius[165]. An important element of this breakthrough was the establishment, in the end of 11th century, of the practice of reproducing the Justinian's compilation without any changes to the content[166]. The adoption of the "stability of text"[167] principle resulted in

[165] See Radding 1988, 179. There are, however, no grounds for evaluation if and how the activities of the Bologna jurists were influenced by the Pavia jurists, see Lange 1997, 28.

[166] Conte 2009, 37–40; 67–70.

[167] This principle means that the manuscript and printed reproduction of a text did not modify it. The stability of text principle does not mean full uniformity.

the fact that the same Roman law texts, ordered and quoted in line with an established canon, became, until the 19th century, one of the bases for legal science in Europe. Thus, a certain European community of legal thought was built, which is now referred to as the civil law tradition[168]. Obviously, local differences and considerable changes in the philosophical, economic, religious, and cultural context from the 12th to the 19th century resulted in many differences in the European legal discourse related to the Roman sources. Since the 17th century, these differences have become clearer. The Roman legal texts were still the point of reference for legal science developed over these centuries. This made the explanations of the Roman texts, printed since the late 15th century[169], commentaries, and works they inspired known and quoted in Roman law science until the early 19th century[170]. Thus, a chain of legal statements was created, which, as a result of a lasting and geographically extensive impact, went beyond the historical contexts they were developed in. From the point of view of the studies on the nature of the contract clause, this chain of legal works may be regarded as *sui generis* experience of searching for a useful sense of phrases, in legal discourse, such as *natura contractus*, *natura obligatio*, or *natura depositi*, which were present in Roman texts.

The analysis of this legal tradition offers three essential benefits to today's understanding of the argument from nature of the contract[171]. First of all, it helps to answer the question of whether the

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There were some differences between manuscripts (see Lange 1997, 64). One of the fruits of European legal science is the gradual development of a critical, generally accepted edition of *Corpus Iuris Civilis* (see Lange 1997, 67).

[168] See e.g., Glenn 2000, 121–124.

[169] The first printed, and seventh total, legal book was probably Justinian's Institutes with commentary, published in 1468 in Mainz by Peter Schöffer. See Spangenberg 1811, 651.

[170] See Bellomo 2005, 221 ff.

[171] In today's academic discussion, there is no generally accepted position regarding the purpose and method of studying *ius commune*, see Conte 2009, 27-29. The supporters of various methodological positions declare, however, that the study of *ius commune* helps in the understanding of private law issues dating back

functions of *natura contractus*[172], *natura obligationis*[173], *natura stipulationis*[174], *natura depositi*[175], *natura mandati*[176] or *natura societatis*[177] in the Roman law texts drew any interest from the *ius commune* jurists. Second of all, it shows the direction of development of linguistic intuitions that formed the grounds for the application of the nature of the contract concept in legal discourse. Thirdly, it shows what the presence of this concept in the *ius commune* science brought to private law and how it shaped legal thinking, which directly gave rise to the European civil codes.

The grounds for answers to these questions will be the works of jurists chosen on the basis of their relevance and renown in the pre-codification European civil law (*ius commune*, gemeines Recht)[178]. The first link in the chain of printed *ius commune* works is *Glossa ordinaria*. Drawn up by Accursius (1182–c. 1262), it is the crowning of achievements for glossators and was the first methodological current of *ius commune* developed from the late 11th to the 13th century, the primary objective of which was to explain the sense of wording of the Roman text[179]. The Accursian Gloss basically accompanied the text of *Corpus Iuris Civilis* from its first edition after the discovery of print, until the 1620s[180]. F. Calasso described it

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to the early 21st century and in searching for its new order; see Bellomo 2005, 31; Zimmermann 2008, 3; Conte 2009, 42.

[172] D.2,14,7,5; C.7,17,2,1.

[173] D.45,2,9,1; D.46,1,5.

[174] D.46,5,1,4.

[175] D.16,3,24.

[176] D.19,5,5,4.

[177] I.3,25,2.

[178] This impact is measured by the number of editions.

[179] Calasso 1954, 543.

[180] See Lange 1997, 351. The last edition dates back to 1627. I adopted this edition as the basis. The literature presents various views as to which editions are closest to the medieval thought of Accursius; see Spangenberg 1811, 882; Horn 1973, 154; Lange 1997, 351.This dispute cannot be resolved, as the manuscripts of *Glossa Ordinaria* differ in details. Among some 1200 manuscripts, there is not one which can be explicitly regarded as leading, see Lange 1997, 349.

vividly by saying that for centuries, this gloss was a "faithful shadow" of the Justinian text[181].

The next element of these deliberations is the Commentary on Digests by Bartolus de Saxoferato (1313–1357). His impact on a number of generations of jurists was symbolically expressed in the widely used maxim of *nemo iurista nisi bartolista,* or the fact that Thomas Diplovatatius, a 17th century researcher of the history of legal literature, called him *iuris monarcha*[182]. The views of Bartolus were as authoritative as the Accursian Gloss[183]. I shall take into consideration the commentary on Digest made by a disciple of Bartolus, Baludus de Ubaldis (1327–1400), printed from the late 15th to the early 17th century[184]. These jurists found their methodological inspiration in the realism typical of the philosophy of Aristotle and Saint Thomas[185]. Their basic purpose was to use the Roman texts to solve their contemporary legal issues[186]. The cultural breakthrough of the Renaissance, Reformation, and geographical discoveries of the 17th century also brought about significant changes in the method of researching the Roman legal texts. It marked the beginning of the gradual twilight of the *ius commune* system built in the late Middle Ages, i.e. the universal model of researching and practical coordination of concepts and norms introduced from Roman law texts, canon law and local laws[187].

The reading of the earlier *ius commune* was supplemented by the innovative works, in terms of methodology, based largely still on researching the Roman legal texts. In the 17th century, France became the leading centre of this type of legal science. Hence, later foundations of this reconstruction will be based on the works of the then French jurists. The deliberations on contracts by the precur-

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[181] See Calasso 1954, 543.
[182] Maiolo 2007, 226.
[183] See Kamp 1936, 155, Garcia Garrido 2004, 526.
[184] Horn 1973, 327.
[185] Calasso 1954, 568; Lange, Kriechbaum 2007, 332 -335.
[186] Lange, Kriechbaum 2007, 689-692 and 758-765.
[187] See Bellomo 2005, 155.

sors of legal humanism, Jacobus Cujacius (1522–1590) and Hugo Donellus (1527–1591) are of primary importance in this respect. They were very famous among their contemporaries. In the two following centuries, they gained authority similar to that Bartolus de Saxoferrato and Baldus de Ubaldis[188] had earlier. From this methodological trend, the work of Antoine Favre's (1557–1624) *Rationalia ad Pandectas* will also be taken into consideration. This is the most extensive French commentary on the Digest and was used until the 19th century as an explanation of the application of legal practice in Roman law[189]. J. Cujacius and A. Favre (lat. Faber) played a vital role in introducing to legal science the thought that the Roman law texts are a product of history and, from that perspective, they may be researched and criticised[190]. At the same time, paradoxically, they contributed to the revival of the idea that Roman texts may provide grounds for discussion on what the "legal truth" is[191]. On the other hand, the essential impact of Hugo Donellus was that, using the Roman sources, he developed original notions and structures of the systematics of private law[192]. All these ideas played a vital role for centuries to come.

This manner of applying the Roman text, increasingly linked with the local development of law, was used primarily in the 16th century in the Netherlands and in the German *usus modernus* in the 18th century. Thus, the next links in the reconstruction of the development of the nature of the contract concept will be the commentary of Arnold Vinnius (1588–1657) on Justinian's Institutes, distinguished by the period and area of impact, and commentary by Johannes Voet on the Digest. The first of the above works was published at least 42 times between 1642 and 1825[193]; it was widely known in 17th and 18th century Europe. J. Voet's work was pub-

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188 Holthöfer 1977, 149.
189 Holthöfer 1977, 151.
190 Kelley 1969, 119.
191 Giaro 2007, 66.
192 Stein 1998, 123.
193 Söllner 1977, 535.

lished at least 26 times between 1698 and 1829[194]; this commentary on civil law was widely used in 18th century Europe and its colonies[195]. In the 18th century, the centre of gravity in legal science, strongly connected to the Roman texts, shifted to German countries, as it was there that Roman law had the highest practical importance. Some achievements of jurisprudence were referred to as the German *usus modernus* gained European significance. It included, primarily, *Elementa iuris civili secundum ordinem Institutionum* by Johann Gottlieb Heineccius. His work, in its initial wording or modifications introduced by other authors, was published in 175 editions in the 18th and 19th century[196] and was also widely used beyond Germanic countries in the teachings of law and in discussions of legal reform[197]. Also, *Elementa iuris civilis secundum ordinem pandectarum* by Johann Heinneccius, which had 46 editions in the 18th and 19th century, had a Pan-European impact[198]. Apart from that, under the German *usus modernus*, other works were developed that strongly influenced the form of the Roman law in the legal practices of various German countries. They included the works of Georg Adam Struve (1619–1692), Samuel Stryk (1640–1710), Justus Hening Böhmer (1674–1749) and an extensive commentary by Christian Glück (1775–1831), summarising all achievements of *usus modernus*. From the perspective of the evolution of law, these works developed into a significant point of reference for private legal science, which was restored in 19th century Germany. These are the last links in the chain comprised of the leading literature in the study of Roman law (*gemeines Recht*). Moreover, I shall also take into account the works of these times which, already in their titles, mentioned the nature of the contract or nature of the obligation.

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[194] Söllner 1977, 540.
[195] Núńez Iglesias 2004, 466.
[196] See Wardemann 2007, 102-119.
[197] Wardemann 2007, 33.
[198] List: Wardemann 2007, 120–124.

2.2. Nature of the contract and determination of its contents using the notion of *naturalia contractus*

2.2.1. Theoretical outline of elements of contents of a contract

The arguments based on the nature of the contract were encountered in eight texts preserved in Justinian's compilation. In the printed Accursian Gloss, such arguments were explained only once. It was the notion of *extra naturam contractus.* Ulpian used this phrase in his text in which he discussed the legal effectiveness of additional agreement added to a contract protected with *actio bonae fidei*. Let us remind the reader that the jurist explained that such terms, when added to the contract upon its conclusion (*ex continenti)*, form a part of its content and their execution may be demanded by a relevant claim (*actio*). Any terms introduced later (*ex intervallo*), Ulpian, referring to Papinian, described as being outside the scope of the nature of the contract (*extra naturam contractus*). Justinian's compilers located the text in the title on agreements (*De pactis*) of Justinian's Digest. The printed[199] Accursian Gloss, regarding this fragment, explains that the word *natura* has the same meaning as *substantia*[200]. Further, in the gloss, one can read that there are some who describe as *naturale* what the author of the gloss calls *substantiale*[201] . In glosses regarding the words *adeo*[202] and *ex eadem*[203], used in the next fragment of the *De pactis* title of the Digest[204], the glossator consistently uses the phrase of *substantia contractus*. The manner of use shows that it was applied to describe

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[199] I use the edition*: Corpus Iuris Civilis Iustinianiei cum commentariis Accursii Scholiis Contii et Gothofredi lucublationibus ad Accursium In quibus Glosae ecplicantur similes et contrariae afferuntur, vitiosae notantur*, Lugduni 1627.

[200] Gl. ad D.2,14,7,5: *id est substantiam...*

[201] Gl. ad D.2,14,7,5: :.. *Alij dicunt id naturale, quod nos substantiale...*

[202] Gl. ad D.2,14,5,6: *pacta ex intervallo facta non valent extra substantiam contractus: sed de substantia sic...*

[203] Gl. ad D.2,14,5,6: *id est de substantia.*

[204] D.2,14,7,6.

what makes a contract legally binding. The medieval author of the gloss actually made a linguistic correction of Papinian's text. The gloss was inclined towards replacing the notion of *natura contractus* with *substantia contractus*. The reason for this modification may be explained based on glosses in other fragments of Papinian's text[205]. It also pertained to an agreement concluded by the parties following the conclusion and before the performance of a sales contract[206]. The Roman jurists concluded that if such agreements constituted "additional support" for the contract (*quae adminicula sunt emptionis*), they did not provide grounds for contractual claims. The explanation of this wording by the gloss gave grounds for the trisection of a contractual obligation. It helped to precisely distinguish the meanings of *substantia* and *natura.* The first one referred to elements with which the parties had to agree to make the agreement enforceable [207]. On the other hand, the gloss defined "supporting" terms (*admicula*) as *accidentalia* or *naturalia*[208]. A clear introduction of this pattern was accompanied by explanations coincident to the gloss referring to the word *natura* presented earlier. The gloss stressed that what some called *natura* should be defined as *substantia*. The implied terms, e.g. liability for physical defects of a thing sold, were defined as *pactum de natura* or *naturalia contractus*[209]. In contrast, agreements regarding elements not inherent in the con-

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[205] D.18,1,72.

[206] In the gloss, they were referred to *as in continenti*, as Ulpian described then in the aforementioned text; see Gl. ad D.18,1,72: *'quo postea' - scilicet ex intervallo.*

[207] See OLD, sv s*ubstantia* item 2 (underlying or essential nature, make-up; constitution, that which makes a thing what it is); ALDH, sv *substantia*: der Bestand, die Wesenheit, das Wesen. On the other hand, according to MLLM , sv *substantia*: 1) alimentation, catering, Versorgung; 2) Stock de marchandises, cargaison – Stock, cargo – Lager, Fracht; 3) Fortune savoir, property, Besitz, Wohlstand; 4) tenure domaniale – manorial holding, Pachtgut, dass zu einem Fronhof gehaery.

[208] Gl. ad D.18,1,72: *'admicula' - id est accidentalia, sive naturalia contractus, no autem substantialia, ut subiicit.*

[209] Gl. ad D.18,1,72 *: 'nova emptio' - … Quae de substantia contractus dicimus esse, eadem quidam vocant de natura… Sed nos pactum de natura dicimus esse, quod sit super id quo est naturale; ut de evictione praestanda… ; 'pactum de natura' - seu naturalia contractus.*

tract were defined as *accidentalia*[210]. The trisection of contract contents was adopted, with reference to the gloss, by Bartolus de Saxoferrato[211]. The concept of *naturalia contractus* was connected to the notion of *natura contractus* included in the Papinian's text merely by a belief that each contractual obligation has a specific nature. A novelty, going beyond the argumentative intuition of ancient jurists, was the idea that the nature of the contract was expressed, inter alia, by these terms (*naturalia contractus*), which are binding when the parties did not waive or amend them[212]. This did not explain clearly the relations between *natura contractus* and *naturalia contractus*.

2.2.2. The nature of the contract and *naturalia contractus*

A step towards capturing and explaining this issue was made by Baldus de Ubaldis, inspired probably by the theological dispute concerning the relationship beteen the divine and human natures of Christ[213] and philosophy of Thomas Aquinas[214]. The jurist explained that *substantialia* were the "original root" (*radix originalis*) of the contract and that *naturalia* its "extension"[215]. He concluded that *naturalia* was in conformity with the nature of the contract[216]. The next step on this path was made by the 16th century French jurists.

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[210] Gl. ad D.18,1,72: '*nova emptio*' -... *Quod autem in accidentalibus dixero, idem, in his, quae siunt super naturalibus contractibus intelligas…*

[211] Bartolus de Saxoferato 1516-1529, Vol. 2, 114 (ad D.18,1,72): *… Pacum super accidentalibus contractibus seu super naturalibus ex intervallo oppositum ad exceptionem tantum prodest sed si apponatur super substantialibus potest et ad actionem hoc dicit et habes hic unam gl. magnam…*

[212] See Grossi 1986, 610-611.

[213] Grossi 1986, 614-618.

[214] Gordley 1991, 64.

[215] Baldus de Ubaldis 1577, ad C.4,38,13: ... *extensio illiud radicis ex mera qualitate producta...*

[216] Baldus de Ubaldis 1586, ad D.18,1,72,1: ... *conclude ergo quod accidentalia sunt praeter naturam: naturalia sunt secundum naturam...*

A pattern was developed in the area of legal humanism, which harmonised the possibility for the parties to modify *naturalia contractus*, with opinions of Papinian and Ulpian claiming that going beyond the nature of the contract (*extra naturam contractus*) impaired the enforceability of the agreement aimed at such modification.

In the commentary on the text of Papinian on charging interest on deposited funds as contrary to *natura depositi*, J. Cujacius explained that the nature of the contract comprised *substantialia* and *naturalia contractus*[217]. More extensive deliberations on the matter can be found in an elaborate commentary on Justinian's Digest by Antoine Favre, who was 35 years younger than J. Cujacius. In *ratio decidendi* of the commentary on *De pactis*, the French jurist pointed out that distinguishing the three sorts of contents in a contract was typical for the contemporary jurisprudence. These sorts included: essential (*substantia*), natural (*natura*) and terms implicated additionally by parties, like condition or *terminus* (*accidentalia*)[218]. In connection to this trisection, Favre reminded readers of the idea, taken from the gloss, that the concept of *natura* present in the Roman text was identical with what was defined as *substantia*[219]. The essence of these deliberations consisted in theoretical connection of the nature with the type of contract. Assuming such a relation between the nature of the contract and its enforceability, the jurist made a distinction between contracts which fully correspond to their nature and contracts whose nature was modified. The first group included those contracts in which the parties reached an agreement on the elements described as *substantia* and did not settle matters that were regarded as resulting from the nature of the specific type of contract (*naturalia contractus*). The nature of the

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[217] Cujacius 1658, Vol. 4, 215: *haec sunt contra naturam depositi…nec sunt autinti, qui differentiam constituunt inter ea, quae sunt contractus naturalia et substantialia...*

[218] Faber 1659, 171: … *Cumque interpretes nostri soleant distinguere substantiam, naturam et accidentia contractus...*

[219] Faber 1659, 171: … *videtur Papinianus substantiam et naturam pro eodem usurpasse*.

given type of contract was, on the other hand, modified if the agreement of the parties amended or waived what was regarded as *naturalia contractus*. The nature of the contract was also modified as a result of implication of additional terms (*accidentalia*) by the parties. Then, he explained that the type of the concluded contract was decided by the agreement of the parties with regard to these elements of its contents, which are considered as *substantia*. However, within the same type of contract, the parties may introduce significant modifications, amending what is specified by *naturalia* or by incorporating *accidentalia*[220]. Thus, in this theoretical model, *naturalia contractus* constituted the part of nature of the contract which could be modified without affecting the type[221].

The spread of such a manner of thinking is exemplified by the words of Johannes Voet, who lived at the turn of the 17th and 18th centuries; he was a representative of the Dutch jurisprudence who distinguished contracts "of routine nature" and "deviating from routine nature"[222]. Such a manner of making a theoretical connection between the nature and type of contract was based on the belief that only certain types of contracts may be sources of obligations. In the science of *ius commune*, this idea was accepted, still uniformly, by the 16th century representatives of legal humanism[223].

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[220] Faber 1659, 170: … *Quilibet contractus duplice formam habere potest, unam substantialem sine qua esse non poterit : alteram accidentalem, quae potest adesse et abesse, sine contractus peremptione aut mutatione, id est, quae accedit ex pacto aliquo facto super naturalibus aut accidentalibus contractus...*

[221] Such a model is a theoretical extension of deliberations of eminent representatives of the commentators. In the commentaries on the same fragment of Justinian's Digest, they focused on the *ne ex pacto actio nascatur* principle included therein. They analysed the difference between contracts and agreements (Bartolus de Saxoferato 1516-1529, Vol. 1, 86v), typical and innominate contracts (Albericus de Rosciate 1585, 158 (ad D.2,14,7); Bartolus de Saxoferrato 1516-1529, Vol. 1, 87 (ad D.2,14,7,5); Baldus de Ubaldis 1585, 137 (ad D. 2,14,7).

[222] Voet 1698, II, 14, 5.

[223] Nanz 1985, 71.

2.2.3. *Naturalia contractus* and the freedom of contract principle

This unanimity of *ius commune* jurists was broken in the 16th century by Mettheus Wesenbeck, professor of law from Nuremberg. In his study of *De pactis* (D.2,14) and (C.2,3), he assumed that each agreement concluded in a decisive manner results in an obligation "in accordance with the contemporary Roman law"[224]. This idea was quickly adopted by the Dutch and German lawyers who researched Roman law applied in the 17th and 18th century practices (so-called *usus modernus pandectarum*). Allowing the freedom of contract principle in the Roman legal science did not, however, mean the deviation from the view that the nature of the contract is connected to its type, which was fundamental to an understanding of *naturalia contractus*. The trisection of the elements of contract contents developed in the Middle Ages was repeated by the 17th and 18th century German authors of *usus modernus* in their commentaries on *De pactis* of the Digest. In *Syntagma juris civilis*, which made a strong impact on academic discussion and practice in the second half of the 17th and early 18th century, Georg Adam Struve deemed it obvious that one needed to distinguish *substantialia*, *naturalia* and *accidentalia* in the contents of a contract[225]. He explained that *substantalia* was comprised of elements that decided whether a contract belonged to a specific kind (*genus*), i.e. type of contract. He argued that their contractual modification, be it upon conclusion or later, resulted in the change of the nature, i.e. type of contract[226]. In this area, *naturalia* are also connected with the nature

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[224] Nanz 1985, 90 (with sources and literature).

[225] Struve 1678, 185 (VI, 23): *...Notandum autem hic est quod alia dicantur substantialia contractus; alia naturalia; alia accidentalia.....*

[226] Struve 1678, 185 (VI, 23):*.. genus et differentia essetniam constituunt; proprium necessario essentiam consequitur; atque haec duo (...) vocantur substantialia…*; Struve 1678, 187 (VI, 26): *… Aut iuri non contrarium pactum de essentialibus et tunc vel est in continenti vel ex intervallo adjectum. Illud itidem triplicis est generis: aliud enim est contra*

of contract[227]. However, unlike *substantalia*, they could be modified without affecting the type of contract. As opposed to the above, Struve defined *accidentalia*, also referred to as *conventionalia*, as elements of the agreement between the parties, which can be independent from, or even contradictory to the typical nature of the contract and may strengthen or weaken it[228]. The reference to the work of Ludwig J. F. Höpfner, indicated as the model 18th century *usus modernus* compendium of law[229], introduced some minor, although practical additions to this pattern. The author of the handbook, written in German, defined *naturalia* as statutory provisions (*gesetzliche Bestmimmungen*)[230]. He explained that they could be presumed, as they are usually implied in the contents of a contract. The examples that *naturalia* referred to, e.g., the seller's liability for defects of goods or the buyer's duty to pay interest if he failed to pay the price at the proper time, show that they were connected with a specific type of contract. The constancy of the presented opinion regarding *naturalia contractus* is finally illustrated by the explanations included in the monumental work of Christian Glück, who meticulously collected and systematised the achievements of *ius commune* of the 17th and 18th century. The connection of *naturalia* with a specific type of contract, appropriate for this debate, was developed further, with precise setting of the borders that allowed amendments of contract types. The jurist explained that they should not be of a kind that may lead to breach of the fundamental purpose of the concluded contract. For example, he indicated that

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substantiam seu essentiam quod ita transformat contractum, ut alius plane contractus inducatur...

[227] Struve 1678), 185 (VI, 23): *... aliter tamen de iis salva essentia ipsa possit conveniri…et haec naturalia vocantur…*

[228] Struve 1678, 186 (VI, 24): *... Accidentalia seu conventionalia denique sunt, quae praeter essentiam contractus aut contra eius naturam regularem conventione singulari adjiciuntur (...) et quibus illius natura vel augetur vel minuitur…*

[229] Landsberg 1898, 443.

[230] Höpfner 1803, 791 (§732).

the provision of a sales contract, stipulating that the object of sale can never be disposed of[231], was null and void. Thus, the dogmatic vision of *naturalia contractus* was connected with the boundaries on the freedom of contract. Discussion on this principle also enriches the explanation of Glück that the agreement of parties made after the formation of contract, and pertaining only to *naturalia* or *accidentalia*, does not provide grounds for a claim, but results in an exception.

The reading of leading *ius commune* works shows that the concept of *naturalia contractus* was developed as a dogmatic instrument to justify the implication of terms not agreed upon by the parties, but typical of the specific contract in its contents. Such an understanding of *naturalia*, probably inspired by the theological debate[232] and philosophy of Thomas Aquinas[233], was common for *ius commune* before and after the adoption of the freedom of contract principle. It was possible because of the transformation of the former contracts into typical contractual obligations. Such an understanding of *naturalia*, which was also propagated by the practice of canon law[234], was brought by the Roman law tradition into the contemporary continental theory of contract law. This, however, does not exhaust the experience of *ius commune* in using the concept of nature of the contract. The reading of leading *ius commune* works showed clearly that the nature of contract was something broader than *naturalia*. In their deliberations on *naturalia*, the *ius commune* jurists touched upon the enforceability of the contract and freedom thereof.

Let us then consider whether, and how, the concept of nature of the contract known from the Roman texts was present in the *ius commune* approach to those fundamental issues.

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[231] Glück 1867, 216–218 (§305).
[232] Grossi 1986, 614-618.
[233] Gordley 1991, 61.
[234] Bussi 1937, 17.

2.3. Nature of the contract and what makes an agreement enforceable

The connection of the nature of the contract with required contents of agreement of parties (*substantalia*), visible in *ius commune*, was developed by stressing the link between the nature and function of a specific type of contract. Thus, the words of Papinian, who declared that charging interest for money deposits was contradictory to *depositi naturam*[235], were for centuries commented on, in that the sense of safekeeping (*depositum*) consisted in the return of the entrusted thing and its protection[236]. In the canon law practice, this was more broadly expressed by an interpretation directive, according to which the words of the contract should be interpreted not contrary to, but in line with, its nature[237]. The theoretical development of such an understanding of nature of the contract was the introduction of this concept to discourse on what makes an agreement enforceable.

Hugo Donellus, an eminent representative of the systematic trend in 16th century legal humanism, having stated that Justinian's definition of obligation was true[238], indicated that nature was one of the basic issues in the description of law of obligations[239]. Nature of the contract, understood in such a manner, was used by the

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[235] D.16,3,24

[236] Gl. ad. D.16,3,24; Faber 1663, 367*: 'contra bonam fidem' - prosequitur quado idem et idem etiam quando non idem debet reddi...; 'qui beneficium' - custodiae*; Bartolus de Saxoferato 1516-1529, Vol. 2, 101 (ad D. 16,3,31pr.): *bona fides exigitur ut res deposita deponenti restituat nisi extri seca…*; Cujacius 1658, Vol. 4, 215:*....depositum consistit ex custodia, non ex usu, Quae lex sive pactio depositae pecuniam susm permittit, aberrat a natura depositi....* ; Faber 1663, 367:*...Commendare nihil aliud est quam deponere...*

[237] RRD, n. 23: *verba sunt interpretanda eo modo quo non sint contra sed secundum naturam contractus*; see: Bussi 1937, 18.

[238] Donellus 1763, XII,I,3.

[239] Donellus 1763, XII,II,1*: … id ut praestet obligatio, tribus in rebus positum est. Primum ut sit constituta aliqua obligatio (...) Postremo ne longius producamus obligationem quam eius natura patitur (....), Tertium ad interitum et dissolutione eius pertinet....*

French jurist in the systematic description of achievements of the ancient and medieval legal dogma. The starting point was the belief that "nature is not one and common for all contracts but is characteristic of all types and distinguishes one from the other"[240]. Donellus connected the concept of nature of the contract with a closed catalogue of contracts established in law. In consequence, he used this key to present individual types of contracts and their possible modifications in books XIII[241], XIV[242] and XV[243] of his commentary. The premises of enforceability of an agreement, underlying the concept of the nature of the contract, were clearly rooted in *causae*[244], defined in the dogmatic sense. In other words, the nature of the contract was not *per se* the basis for its enforceability of the *consensus ad idem*. A contract had its nature, as it was considered in law to be a basis of a specific type of claim (*actio*).

An example of the propagation of such an understanding of the nature of the contract concept as an instrument of a clear and systematic description of the law of obligations is the 17th century tractate of Petro de Ognate Vallisoletano. The Jesuit, applying the late scholasticism method[245], started the first *disputatio*, entitled *De Natura et Essentia contractus*, with a declaration that to "know the nature of things was of particular importance". This developed, scholastic approach covered a reflection on the idea, definition and nature of contract. As a source of the idea, he indicated natural law, in line with which a contract is to serve commutative justice, i.e.,

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[240] Donellus 1763, XIII,I,2: *Ac primu hoc staturatur, quo modo indicavi, naturam contractuum non omnium unam esse et communem. Propriam cuiusque; contractus hanc esse. Ideo pro specie cuiusque; distingui....*

[241] *De singulorum contractus natura, vi et potestat quae hic singulorum obligatio propria, quae praestationes, quae ad eas obtinendas actiones, Atque hae hoc libro de his contractibus, qui consensu solo perficiuntur.*

[242] *De contractibus qui re fiunt, deque singulorum tum natura, tum obligatione propria pro natura cuiusque.*

[243]*De prestationibus iis, quasi extra naturam contractus conventio ipsa inducat.*

[244] Donellus 1763, XII,VI,2.

[245] See Gordley 1991, 10: The late scholastics built their contract doctrines around three of its virtues (…): promise-keeping, commutative justice and liberality.

lead to the performance of concluded contracts and fairness of transactions[246]. He defined positive law as an instrument of supplementing and changing the natural law idea[247]. In this respect, he went beyond the view, characteristic of *ius commune* until the 16th century and expressed by Donellus, that "*consensus in idem* does not always result in an obligation, as for that purpose a proper *causa* is required"[248]. In his *De Natura et Essentia contractus*, Petro de Ognate Vallisoletano defined contract as an agreement which is binding under commutative justice[249]. From that perspective, all contracts were divided, according to the pattern devised by the glossators[250], into two basic groups: those that yield benefits (*contractus lucrativus*) and those that result in duties (*contractus onerosus*)[251]. Such a generalisation of the essence and definition of contract did not, however, lead to a general reflection on the nature of contract. The connection of the nature and type of contract, known from Donellus, is also a quality of the systematic tractate of Petro de Ognate. He explained the nature of individual types of contract through building their "true definitions" (*germana definitio*). The method applied, to that end, may be exemplified by the contracts of safekeeping (*depositum*) and partnership (*societas*)[252]. The "true

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[246] Ognate Vallisoletano 1668, Vol. 1, 2: *... contractus (...) tamen absolute esse de iure naturali. Quia supposita rerum divisione subintravit protinus naturale ius, in his commutationibus naturalem aequitatem servandem esse praecipiens non solum ut quod tibi non vis, alteri ne feceris; sed etiam ut it his sevetur aequalitas rei ad rem, quam iustitia commutativa prescribit, et ut si violata fuerit per restitutionem refarciatus et pacta conventa servari magna fide praecipiens et violatores congruis esse poaenis cohibendos.*

[247] Ognate Vallisoletano 1668, Vol. 1, 2: *... quavis multa ius positivo circa contractus addiderit et immutaverit, ipsos tamen absolute esse de iure naturali...*

[248] Donellus 1763, XII,VI,5.

[249] Ognate Vallisoletano 1668, Vol. 1, 7: *... Contractus est pactum obligans ex iustitia commutativa.*

[250] See Bussi 1937, 9 (includes sources).

[251] Ognate Vallisoletano 1668, Vol. 1, 7: *... Quia haec deifinitio tollit defectus aliarum, datur per verum genus et diferentiam, competit contractibus onerosis et lucrativis et non datur per effectus, sed per essentialia contractus.*

[252] The nature of these contracts has already been argued by ancient Roman jurists. In the general systematic adopted by P. de Ognate Vallisoletano, the contract

definition" included in *De natura et causis contractus depositi* explains that it is a contract consisting in gratuitous keeping of a thing, upon the issue of which gratuity should be stressed[253]. The deliberations on partnership (*De natura contractus societatis*) are opened by a declaration that it is not easy to distinguish the nature of this contract and expose its essence.[254]. The deliberations are crowned with a definition in line with which the formation of a partnership results in three duties: to merge contributions, act to gain profit and divide profit, which, in principle, should be proportional among the partners[255]. The fragments of Petro de Ognate's work show that he constructed definitions of the nature of the contract by indicating the fundamental, in his opinion and in line with the experience of his contemporary *ius commune*, dogmatic qualities of specific types of contract. One can thus conclude that allowing the freedom of contract principle did not change the manner of combining the nature of the contract with what makes it legally effective, which was developed in the Romanistic legal science.

Such an approach is flexibly continued by doctoral dissertations of the 17th and early 18th century, which, in their titles, included the words *natura obligatio* or *natura contractus*. In 1662, Hermann Hoffmeister published his *Disputatio juridica de cognoscenda obligationum natura earundemque tam circa contractus quam delicta operatione*. The third thesis of the work indicates that the author intuitively identi-

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of safekeeping (*depositum*) is regarded as *contractus lucrativus* and the partnership (*societas*) as *contractus onerosus*.

[253] Ognate Vallisoletano 1668, Vol. 1, 872*: ... Depositum est contractus quo res traditur ad custodiendum gratis, Neque est necesse addere, principaliter ; quia satis intelligitur: neque ut eadem numero reddatur, quia satis exponitur dicendo, ad custodiendum.*

[254] Ognate Vallisoletano 1668, Vol. 4, *3: ... Non est facile naturam huius contractus distinguere et essentiam aperire ab essentia aliorum valide recedit....*

[255] Ognate Vallisoletano 1668, Vol. 4, 5: *... essentialis definitio: quia dum contractum dixi, genus explicui triplicem obligationem in societate requiri primam conferendi aliquid in unum: secundum cum collatis lucrum procurandi: tertiam lucrum dividendi et haec tres obligationes, aut conventio ad illas sunt essentialis differentia huius contractus. Illud autem verbum proprtionale necessario addendum duxi quia ut verus contractus societatis sit, requiritur, ut socii obligentur ad proportionalem divisionem....*

fied the nature of obligation[256] with its Justinian's definition[257]. He linked the legal effectiveness of a contract with its nature[258]. The exposition on the notion of contracts based on such assumptions (theses 8–25) was, however, limited to the presentation of basic dogmatic qualities of individual types of contract[259]. The concept of *natura contractus* is mentioned only once and is related to the analysis of the specificity of one of the presented types[260].

More flexibility in using the nature of the contract notion in the deliberations on the binding power of a contract is displayed in the dissertation of Carl Henrik Reibertopf, under the title of *De contractibus censualis natura*. Referring to a 17th century theologian, Francis de Oviedo, the author, indicates the ambiguity of the word *natura*. He found it relevant for his deliberations to construct a definition explaining the nature of the contract, i.e., what constitutes its essence[261]. Using this method, he explained that *contractus censualis* was an obligation adopted in German law, which created a duty to hand over a thing in exchange for a pecuniary annuity of a specific amount[262]. The thesis of Hoffemeister shows that the essence of

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[256] Hoffmeister 1662, 6: Th. *5. Explicata obligationum natura et diversitate earum efficaciam, nunc earum efficaciam pleniori aliquantulum stylo inquirentibus conveniens…*

[257] Hoffmeister 1662, 5: Th. 3. *Definitur obligatio juris vinculum. (…) ibi in jure consist. Inst. de R. Corp. l. 46ff. de acquir. velamitt.poss. l. 54. ff. de condict. Indeb.quo cecessitate astringimur l.13. C. de contrah. empt. 99. de V. O. l. 67 ff. De procur., alicujus rei solvendae secundum nostrsae civitatis iura princ. Inst. De oblig.*

[258] Hoffmeister 1662, 8: *… Si vero pactum vestitur intrinsece seu sua natura; contractus assumit naturam…*

[259] Hoffmeister 1662, 9–30.

[260] Hoffmeister 1662, 26–27*: Ex contractu locationis conductionis duae oriuntur actiones aeque directae, civiles et bonae fidei. Una locati, (...) Hinc non tenetur de incendio etamsi exortum culpa inhabitantium, presumatur (...) quia culpa haec esse levissima praesumitur, ad quam ex natura contractus hujus non tenetur, multo minus de casu fortuito....*

[261] Reibertopf 1720, 5: *… Nomen natura varias habet significationes, quas recenset Frantz. de Oviedo L. II Phys. Cont. VI. Punct. 1. Hic significat aliud nihil quam essentiam contractus consensusalis, uti definito est oratio naturam alicujus explicans...*

[262] Reibertopf 1720, 5-6*: … Contractus cesualis est contractus consensualis de jure recipiendae annuae pensionis, ex re vel obligatione aliena pro certo pretio contituenta … Non quidem generali, qualis consensus est in omnibus reliquis contractibus, sed ad certam rem restricto, scil. ad jus constituendae annuae pensionis et revera nihil aliud est, quam*

flexibility in connecting the contract with what makes it enforceable consisted in the fact that reflection on a contract unknown in Roman law could consist of explaining its nature through a definition. Similarly, as in the period before the recognition of the freedom of contract, such an explanation of the nature of the contract consisted in indicating fundamental dogmatic elements, the agreement on which was a precondition for an obligation.

Such a way of thinking can be seen in the work of Glück, summarising the evolution of *usus modernus*. When discussing the Roman law-specific distinction between contracts (*contractus*) and agreements (*pacta*), the jurists explained that the enforceability of *conventio* results from the agreements itself and its nature (*an sich und ihrer Natur*). Of the latter of the elements, he understood that the agreement displays qualities of some "principal act" (*Hauptgeschäft*)[263]. Further, in *De pactis*, the jurist explained that in German law, in contrast to Roman law, it is undoubted that any agreement not resulting from fraud (*dolus*) or unconscionable coercion (*metus*) and concluded with the intention to create a legal duty is legally binding. He proved that there were controversies among the 18th century lawyers as to the base of the freedom of contracts. However, none of the views of Glück demonstrated in this context connected the enforceability of a contract with its nature[264]. Such a form of the lecture lets one conclude that, in the discourse of *usus modernus* lawyers on the enforceability of a contract, the link between understanding of its nature and its dogmatic typisation has been preserved. Similar to the case of *naturalia contractus*, the dogmatic pattern built before the adoption of the freedom of contract in *ius commune* remained up-to-date after the adoption of the said principle. In this case, its duration was supported not only by the

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emtio et venditio juris annuae pensionis, hic germanice nuncupatur der Gülden Kauf. The text uses the broad understanding of a consensual contract typical for the 17th and 18th century legal debate (which adopted the freedom of contract principle), see Coing 1985, 401.

[263] Glück (1867) 228 (§306).

[264] Glück (1867)279-284 (§312).

fact that Roman contracts became typical, but also by the practice of using the freedom of contract to build and define new types of contracts. Examples of such use of the nature of the contract clause can also be seen in the later continental private law[265]. Defining the qualities of a given type of contract and the elements comprising its *naturalia* leads to a question regarding the boundaries of the development and modification of this type of contract. Let us then go on to see how the *ius commune* jurists used the concept of the nature of the contract in relevant passages.

2.4. Nature of the contract and setting the boundaries of the freedom of contract

Cases specified in Roman texts as exceeding the nature of the mandate (*mandatum*)[266] or contradictory to the nature of safekeeping (*depositum*)[267] became an inspiration for deliberations of *ius commune* jurists on the consequences of concluding an agreement extending beyond the defined boundary. Let us remind the reader that the first of these situations consisted in defining, under the contract of mandate, the mutual services, as a result of which the contract may deviate from its nature (*extra suam naturam*). As the ancient jurist Paulus noted, when the incurred mutual expenses are different, then *actio praescriptis verbis* is more certain for claiming them than a claim under the contract of mandate (*actio mandati*). The Accursian Gloss does not explain the words *extra naturam* used by the Roman jurist. It does not discuss the boundaries to the contract of mandate; it just explains that the Roman solution clears the doubt[268].

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[265] See Reuscher 1890, 5.

[266] D.19,5,5,4.

[267] D.16,3,24.

[268] Gl. ad D.19,5,5,*4: 'sed tutis erit' – Cur tutius est agere praescriptis verbis? Quoniam res est in dubio posita. Tollendae dubitationis causa saepe agitur praescriptis verbis, non tantum cum constat, non esse aliam actionem...*

The 14th century jurists, Bartolus de Saxoferato and Baldus de Ubaldis, in their commentaries on the said text, showed explicitly that the fee for such a relation excluded regarding it as a contract of mandate, but as it met the term of validity of an innominate contract similar to the contract of mandate, a relevant claim (*actio*) might be granted[269]. This fragment was commented on in a similar manner by J. Cujacius. He concluded that an agreement of the parties may not go beyond the nature of the contract and hence Paulus, clearing the doubt, admitted *actio praescriptis verbis*[270]. This reading of Cujacius' works also shows the new manner of connecting the concept *natura contractus* with the boundaries of the freedom of contract. The fragment of Papinian's work, in which he deemed it contradictory to *depositi naturam* to claim interest on money given for safekeeping (*depositum*), became an inspiration to J. Cujacius for a more general reflection. The French jurist explained that a *pactum* contradictory to the nature of safekeeping (*depositum*) was null and void[271]. He saw this contradiction in the fundamental breach of *essentialia contractus*[272].

Hugo Donellus, J. Cujacius's contemporary, made a step further in such legal argumentation. Under general deliberations on the

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[269] Bartolus de Saxoferrato 1516–1529, Vol. 2, 131–132 (ad. D.19,5,5,4): …. *Quid mandatu non sit gratuitu ita non pariat actione mandati inter mandante et procuratorem ut mandatus respectu illius qui agit et contra quem agitur (...) Contractus innominatus et actio quae ex eo oritur datur ad similitudine contractum noiatorum quibus assimilnt....*; Baldus de Ubaldis (1585), 174 (ad. D.19,5,5,4)*:... non tamen est proprie mandatum quia non gratuitum, cum officium hincinde prestetur. Ex hoc habes quod salarium adiectum mandato non impedit agi procuratorio nomine, sed facit quod inter mandantem et mandatarium non resultat actio mandati, sed alia actio licet...*

[270] J. Cujacius 1658, Vol. 5, 1016*:… mandatum, ex pacto naturam suam nonnihil excedere potest,(...) Tandem concludit Paulus, melius esse et tutuis disputationis et ambigutitatis tollendae causa, ut etiam ait in l. 1 sup. De aest. omissa actione mandati, agere praescritpis verbis proxima et simili mandati actione.....*

[271] Cujacius 1658, Opera, Vol. 4, col 215: :... *si hae pactiones sunt contra naturam depositi, ergo non servabuntur..*

[272] Cujacius 1658, Vol. 4, 215: …*Propterea contra naturam contractus est pactio, quae manifeste adversatur contractui…*

enforceability of obligations[273], he explained that the valid obligation produces only results allowed by its nature[274]. The general indication of the nature of the contract as the boundary to the enforceability of *obligatio* was, however, only a formal innovation in the works of Donellus. He believed that there was no general nature of contract[275]. He did not believe in the freedom of contract principle.

The works of jurists at the turn of the 16th and 17th centuries, i.e., a period when the freedom of contract principle was being recognised in *ius commune* and discussed, show various possibilities of using the nature of the contract clause as a boundary to its enforceability. One may encounter the approach that may be defined as traditional in the commentary of Arnold Vinnius on Justinian's Institutes. In the title on the notion of obligation (*De obligationibus*)[276], he considered, in particular, the effectiveness of implication of an informal additional agreement to loan for consumption (*mutuum*), which under the Roman law was a *stricti iuris* obligation, coming into force as a consequence of handing over a thing from creditor to debtor. The Dutch jurist justified the unenforceability of such *pactum* with the fact that "it would extend beyond the nature of the contract" (*esse extra naturam contractus*). Such argumentation, based on the conviction that a duty in this case may not extend beyond the transfer of a thing[277], repeated the idea, known from the

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[273] Donellus 1763, XII,II, *Summa argumenti de obligationibus. Obligationum genera et de naturali obligatione; quae sit: quibus ex causis oriatur et inter quas personas: quos habeat effectus: quomodo disolvatur.*

[274] Donellus 1763, (XII,II,1):... *Id ut praestet obligatio, tribus in rebus positum est. Primum ut sit constituta aliqua obligatio. Tum ut norimus, quid constituta contineat, quamve necessitatem praestationis in se habeat. Postremo ne longius producamus obligationem, quam eius natura patitur, videamus finaturne quandoque obligatio et si finitur, quibus modis finantur. An sit aliqua obligatio, ex suis causis dignoscitur. Quid contineat quamque; praestationem habeat, et qaestio est de potestate et effectu obligationis....*

[275] Donellus 1763, XIII,1,2.

[276] Vinnius 1642, III, 14; *De obligationibus*.

[277] Vinnius 1642, III, 14*: Divisio posterior* 8:... *Pacta mutuo adjecta ad obligandum et agendum non prodesse, propterea quod re obligatio contrahi non potest ultra id quod datum*

statements of *ius commune* jurists, that each type of contract has its own specific nature[278].

A German jurist, Johannes Althusius presented a novelty in the application of the nature criterion as a boundary to the enforceability of obligation[279]. The works of this Calvinistic lawyer, aimed at building legal dogma based on the foundation of religion and political knowledge[280], led, in particular, to defining the general notion of contract (*conventio*). He understood it as an act of creating an obligation, in line with the general duty to respect agreements[281]. Upon this basis, he declared the freedom of contract principle and defined its boundaries as the conflict with the nature of the contract or the act of law (*nisi conventionis natura, vel lex obstet*)[282]. This statement shows that the adoption of a general, dogmatic notion of contract as a source of obligation opened up a possibility to use the nature of the contract criterion to set the boundary of the freedom of contract.

Progress in the 18th century *usus modernus* was, however, very slow and limited. This is illustrated by the works of J. G. Heineccius: *Elementa iuris civilis secundum ordinem institutionum*[283] and

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est (...) adhaec nullas in mutuo esse praestationes doli aut culpae et si qua de his pactio fiat, eam esse extra naturam contractus:...

[278] The commentaries of Favre and Stryk fit this approach. The fragment of Papinian, in which he concluded that charging interest on deposited money was contradictory with *depositi naturam*, inspired them to deliberate on the dogmatic dissimilarities between a safekeeping (*depositum*) and a loan for consumption (*mutuum*); see Faber 1663, 367; Stryk 1712, 191 (XVI, 3, §3).

[279] He is indicated as one of the pioneers of the natural law school, see: Nanz 1985, 135.

[280] See Nanz 1985, 135; Abellán 2004, 306.

[281] Althusius 1649, I,64,5*: …conventio est, qua ex duorum pluriumve in idem negotium seu placitum, consensu obligatio ad dandum quid vel faciendum contrahitur…*

[282] Althusius 1649, I, 64,30*: Porro res in conventionem deducuntur ab alterutro contrahentium, vel ab utroque. Et quot sunt res, tot etiam obligationes et conventiones dicuntur, (...) nisi conventionis natura, vel lex obstet...*

[283] The work had 175 editions in the 18th and 19th centuries, see: Wardemann 2007, 102–119. However, some of them contain major modifications of the original work of Heineccius.

Elementa iuris civilis secundum ordinem pandectarum[284]. In the latter, in the commentary on the amendments of *bonae fidei* and *stricti iuris* contracts, the jurist, developing the Roman law[285], explained that the contracts of good faith could be drafted to the boundary with the contradiction to their nature[286]. Rationale provided in this context, stipulating that the agreement contradicting the nature of the contract does not have legal effects[287], permits us to conclude that, similar to A. Vinnius, J. Heineccius connected the boundary of a contract's enforceability defined by its nature with its type. Such a way of thinking confirms the explanation presented in lecture on *ius civile*, based on the systematics adopted in Institutes, that a contract, due to its name (*nomen*) and cause (*causa*), has a nature in which the legally binding obligation is rooted[288].

However, the edition of *Institutiones iuris civilis Heineccianae*[289], published in 1800 and edited by Peter Waldeck, shows that the criterion of nature as the boundary to the freedom of contract, introduced by J. Althusius, was also repeated and slightly developed in the *usus modernus* study of contract. In the indicated "amended and revised" edition of *Institutiones*, we read that the boundaries of the objects of contractual obligation (*conventio*)[290] are imposed by nature and law. Similarly, an individual's capacity to conclude a contract may be excluded by nature or law. The nature criterion

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[284] The work had 46 editions in the 18th and 19th centuries, see: Wardemann 2007, 120–124.

[285] D.2,14,7,5.

[286] Heinnecius 1728, 119 (II, 14, §356):…*Contractui b. f. adiectum, pro eius parte habetur, si in continenti adiectum sit (...) nec naturae contractus adversetur....*

[287] Heineccius 1728, 119, (II, 14, §356).

[288] Heineccius 1770, 355 (III, 14, §776):*.. Pactum ergo est conventio destituta nomine et causa, (id est, datione vel facto,) quae obligationem civilem sua natura producere posit; vel est nuda rei vel facti in futurum promissio.*

[289] P. Waldeck was a professor of law in Göttingen. In 1828, the work was already used for lectures at the local university, see: Wardemann 2007, 114.

[290] Waldeck 1800, 377(III, 14, §583); provides a general definition of contract as a source of obligation: *Constat omnis conventio legitima rei promissione ex parte unius et acceptatione promissi ex parte alterius....*

was detached from the type of contract, in this case. The promise of an impossible performance, pertaining to a thing excluded from trading or immorality[291], was indicated as contradictory to its nature. In the same manner, nature was indicated as an obstacle to perform what one must perform anyway, a contract concluded by "minors or insane persons and conclusion of a contract by the deaf and mute using speech"[292]. Breaking the link between the nature of the contract clause with its type was therefore based on identifying nature with the fundamental premises of validity for *ex contractu* obligation. Compliance with nature, in this case, results in the fundamental reasonableness of the contract. This conclusion inspires the question regarding the productiveness of such an understanding of nature in the argumentation concerning the enforceability of agreements.

2.5. Search for the general nature of contract as what makes the agreement enforceable

The sources indicate that the German *gemeines Recht* jurists of the second half of the 18th century, remaining under the influence of natural law, introduced a new area of application of the nature of contract concept in the systematic description of law. They combined the notion of the nature of contract with the fundamental qualities of its reasonableness, specified in legal dogma since the Antiquity. In the commentary on Justinian's Digest by Justus Henning Böhmer[293] published by his son, Georg Ludwig Böhmer, the

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[291] Waldeck 1800, 378 (III, 14, § 584)*: In obiecto desideratur I. ut tum natura tum iure in potstate contrahentium positum sit a) Unde nullius momenti est, promissio rei quae nec est, nec esse potest b) rei commercio exemtae c) rei turpis...*

[292] Waldeck 1800, 379 (III, 14, §585): *In personis similiter necesse est, ut nec natura, nec iure conventionem inire impediantur. Natura impdiuntur qui eo quo necesse est modo, consensum declarare nequeunt, veluti sunt infantes et dementes in omni conventione a) surdi et muti in his, quae contrahuntur per verba solennia ore nuncupata ....*

[293] A student of Stryk, influenced by Thomasius; see: Landau 2004, 506.

deliberations on *De pactis* are opened by the chapter entitled *De natura conventionum*. After the presentation of the definition of contract[294] as a unanimous declaration of real intent[295], it discusses such issues as apparent contract[296], conclusion of a contract as a result of fraud[297], use of violence[298], unconscionable coercion[299], and error as to *substantialia*[300]. Next, the same chapter identified as suspicious such contracts that were concluded in fraud of the law[301], gained an unlawful effect[302], or breached the right of a third party[303]. Hence, the structure and contents of the chapter permit the conclusion that J. H. Böhmer identified the nature of contract with the contract's reasonableness as consisting in the fact that it must lead to the realisation of the true and unanimous intent of the parties, which is not in breach of the law.

A similar way of thinking can be encountered in the paraphrasing of J. Heineccius' Institutes by Ludwig Julius Friedrich Höpfner, who, in the second half of the 18th century, was regarded as the greatest German civil lawyer at that time[304]. In one of the paragraphs of *De obligationibus*, he distinguished the principles resulting from the nature of contract. In this fragment, he indicated that the contract is based on the agreement of the parties and cannot have consequences that the parties would not want. He explained that

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[294] Boehmer 1797, XXVII, 1, §2: *Hae promissiones ut valeat, utaque pars in illas consentire debet, quo vulgo acceptationem vocant: Promissiones utrinque acceptae dicuntur pacta seu conventiones.*

[295] Boehmer 1797, XXVII, 1, §6: *Consensus est declaratio voluntatis. Voluntatem autem praecedere debent repraesentationes intelectus; nihil enim in voluntate est, quod non antea fuit in intelectu. Paciscentes igitur intellectus nec non voluntatis usu gaudeant oportet.*

[296] Boehmer 1797, XXVII,1, §11.

[297] Boehmer 1797, XXVII, 1, §12.

[298] Boehmer 1797, XVII, 1, §14.

[299] Boehmer 1797, XXVII, 1, §15.

[300] Boehmer 1797, XXVII, 1, §16.

[301] Boehmer 1797, XXVII, 1, §17.

[302] Boehmer 1797, XXVII,1, §18.

[303] Boehmer 1797, XXVII,1, §19.

[304] Landsberg 1898, 442.

contractual obligations had been introduced for the people to assure that the benefits they expected were guaranteed[305]. Therefore, compared to the work of Böhmer, this is a more synthetic identification of the nature of contract, with the reasonableness inherent in the fact that the contractual obligation arises when the parties want and objectively can establish it. Such an understanding of the essence of the nature of contract expressed, in line with the position of the natural law school, the freedom of contract principle. However, it did not bring new elements that set boundaries to the use of said freedom.

Such general deliberations on the nature of contract are not present in the work of Christian Glück that summarised the dogmatic accomplishments of *usus modernus*. When analysing this theme in the evolution of Romanistic legal science, it is worth noticing that the premises for the validity of the contract were connected, by Böhmer and Höpfner, with the nature of contract, that Glück collected and discussed in detail in paragraphs 287 through 305 of *De pactis*[306]. From today's perspective, this fragment of his work is regarded as the crowning accomplishment of *usus modernus* in the development of general theory of contracts[307].

2.6. Conclusions

The connection of the nature of the contract with what is dogmatically typical of it, clearly noticeable only in one Roman text[308], later became an idea shaping this concept in the Romanistic legal

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[305] Höpfner 1803, 792 (III, 14, §733).

[306] Glück 1867. The jurist distinguished the following as the elements which impact the arising of a contractual obligation: capacity to conclude a contract (§288), declaration of intent (§289–291), existence of at least two parties (§292), fraud (§ 293– 296), error (§297–299, pp. 141–166), unconscionable coercion (§301–301), sham contract (§302), certainty of terms (§303) and the possibility of performance (§304).

[307] Nanz 1985, 130.

[308] D.19,5,5,4 (Paul.).

science, from the Accursian Gloss to the extensive work of Glück. It brought about an original and permanent dogmatic heritage. The first element was the concept of *naturalia contractus*, already incorporated by the gloss. It was generally used to express the idea that the contents of a contract include what the parties agreed on, as well as the elements they did not cover but which are typical for the given type of contract. The jurists repeated for centuries, unanimously, that the parties may contractually modify the elements that qualified as *naturalia*. Since the 16th century, legal science has been systematically distinguishing contracts as either fully corresponding to their nature or contracts that "deviate from their routine nature", as a result of an agreement regarding *naturalia*. The gradual adoption of the freedom of contract principle in the *ius commune* did not change this way of understanding *naturalia contractus*. In the 16th century, these elements started to be referred to as contractual provisions by implication. The approval of the freedom of contract principle gave, in this context, grounds to express a thought that the boundary of enforceability of agreements pertaining to *naturalia contractus* is not to waive the principal purpose of the contract. The idea of Cujacius that the nature of the contract is comprised of *substantialia* and *naturalia contractus* synthetically expressed the second area of dogmatic accomplishments based on the connection of the nature of the contract with the contract's type. The methodological implications of this idea are elaborated by the belief of Donellus that "nature is not one and common for all contracts but is characteristic of all types and distinguished one from the other"[309].

The sources help to illustrate the impact that these ideas had on the new, systematic model of describing the law of contracts which was applied since the 16th century. It was based on the conviction that explaining the nature of the contract consists primarily of de-

[309] Donellus 1763, XIII,I,2.

fining its individual types[310]. The permanence of such a method of elaborating on the nature of the contract in the tradition of *ius commune* is illustrated by the comparison of Donellus' commentary, which did not allow the freedom of contract, with the 17th century treatise of *De Contractibus in genere* by Petro de Ognate Vallisoletano, who, in line with the late scholasticism, recognised the freedom of contract and based it on the principle of commutative justice. Linking the nature of contract with the "qualities of a principal act", noticed in the works of Glück summarising the accomplishments of *usus modernus*, shows that such an understanding was also continued by the *ius commune* jurists who, in the description of contracts, followed the systematic process of the Justinian's Institutes or the Digest. The analysed 18th century monograph of Reibertopf's *De contractibus censualis natura* shows that in the period of freedom of contract, the identification of the nature of the contract with its type provided a possibility to start research on the nature of the contract, which consisted in the description of fundamental dogmatic qualities of new contracts that were unknown to ancient Roman law.

In the discourse of *ius commune* jurists, one can also encounter an idea, already noticeable in the Antiquity, that the nature of the contract may be understood as a criterion providing the boundaries to enforceability of atypical agreements incorporated into a contract. Let us remind the reader that in such statements of Papinian and then Ulpian, I have identified the "embryonic" form of the nature of the contract argument which drew attention to the objective order which I defined as economic[311]. In the works of *ius commune* jurists, this criterion was understood differently. Connecting the nature of contract with its type, significant for the development of *ius commune* dogma, resulted in the fact that, from medieval works to the 18th century, one can encounter examples of this criterion

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[310] For weaknesses of the method that medieval jurists used to explain notions by defining them, see: Otte 1971, 117.

[311] See fn. 80.

being used to distinguish between individual types of contracts. The 16th century works of J. Cujacius and H. Donellus contain statements generalising the criterion of the nature of the contract as the boundary to the enforceability of contract. However, the actual possibility to disconnect this criterion from the type of contract can be seen in the work of the 16th century pioneer of the freedom of contract principle, Althusius. He defined these boundaries as the conflict with the nature of the contract or with the law. In spite of the fact that the freedom of contract principle was generally accepted in the 17th and 18th centuries' *usus modernus*, the leading works did not propagate the use of the nature of the contract criterion for setting the boundaries to this freedom. I have found the example of such a general application of the criterion of nature in the freedom of contract in the paraphrasing of Heineccius' Institutes, published at the end of the 18th century and edited by Waldeck. It brings to mind the linguistic practice noticeable in the statements of some 18th century, *usus modernus* jurists who were under the influence of the natural law idea. They identified the sense of the nature of contract with the contract's reasonableness. It was seen in the fact that a contract can, and must, lead only to the realisation of a true and unanimous intent of the parties, one which is not in breach of the law. The detailed principles of reasonableness thus indicated were, in further evolution of law, systematically distinguished as objective and subjective premises of the validity of contract or a legal transaction. Thus, one can generally conclude that the nature of the contract concept directed the attention of *ius commune* jurists at various aspects of the systematic order[312] of the contract law. In such a manner of legal thinking, one can search for inspirations for distinguishing a general part of the law of obligations and building the specific part as a systematic description of individual types of contracts. To this description, *naturalia* were incorporated as elements of contents of specific types of contracts which are valid unless the parties excluded them. Just a casual

[312] See fn. 81.

reading of the systematics of the 19th and 20th century civil codes shows the impact of the *ius commune* tradition on the adopted description of the law of obligations. Hence, a question arises regarding the meaning of nature of the contract or nature of the obligation in the discussion which directly preceded the modern codifications of the civil law in Europe. The question about the further productivity of the nature of the contract criterion requires the consideration of the purpose and the manner of incorporation to codes. The next chapter is an attempt to provide the answer.

3

THE NATURE OF THE CONTRACT CLAUSE IN EUROPEAN CIVIL CODES. ITS ORIGIN AND FUNCTION IN LEGAL TEXTS

3.1. Choice of civil codes analysed

The connection of the nature of the contract clause with the system reasonableness of contract law description, which is typical for *ius commune* jurists, is reflected in the development of the civil law tradition. Its development since the 17th century has consisted of the construction of the private law theory based on the idea of rationalism[313]. The next step on this evolutionary track was the emergence of national civil codes which started at the end of the 18th century and lasted until the 20th century. Today they have a significant influence on the legal landscape of countries that adhere to the civil law tradition. The evolution of private law presented in prior chapters provokes the following questions: To what extent and in what manner does the presence of the nature of the contract clause in legal argumentation impact codified contract law? Has the nature of the contract criterion been incorporated into the code of contract law and to what end? These questions will be examined in

[313] See Glenn 2000, 132-135.

the context of the selected European civil codes. Historical and comparative arguments show that two of these codes, the French Code Civil of 1804 and the German civil code of 1896, are marked by two specific qualities. They include the innovative character of these codes and the impact of these legal texts on the codification processes in other countries. The first of these codes is a product of rationalist natural law. The starting point for this stream of jurisprudence was the conviction that, exercising reason, one can recognise universal principles of law, adherence to which is beneficial for humanity.[314] The impact of the Code Civil was a phenomenon of practical significance similar to that of the "reception" of Roman law.[315] The French Code Civil was adopted in Belgium and Luxembourg. It had been in force for almost one hundred years in the German lands of Rheinland and Badenia before BGB was adopted. In 1808 this law was also enacted by a legislature of the Duchy of Warsaw and remained in force in some parts of the Polish territories till 1946. The French Code Civil had a significant impact on the civil codes of Netherlands (1838)[316], Italy (1865 and 1942), Romania (1865), Portugal (1867)[317], Spain (1889) and Albania (1928).[318] Code Civil influenced considerably many civil codes outside Europe.[319]

The original form of the German civil code was influenced significantly by Savigny's opposition to the idea of the prompt codification of civil law in Germany. In his famous polemics with Anton Friedrich Thibaut in 1814, he claimed that the swift adoption of the code would not give the Germans legal unity as it would mean the adoption of a solution that was accepted in only some German states. He saw the right path as being the "organic development" of

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[314] Grotius 1625, *Prolengomena*, 8.

[315] Koschaker 1947, 135-137; Zweigert, Kötz 1996, 98.

[316] In 1992 it was replaced with a new civil code.

[317] In 1867 it was replaced with a new civil code.

[318] After World War II it was gradually repealed by specific acts. For contract law it was in 1956.

[319] Zweigert, Kötz 1996, 108-117.

legal science common throughout the entire German nation.[320] The concept that the "entire science of law is nothing else but the history of law"[321] reflected the essence of the new outlook on Roman law. The ancient Roman legal texts were interpreted and systemised by the 19th century German pandectics and led to the emergence of an original theory of private law. The achievements of the pandectistic school served as the basis for preparatory works for the German civil code which was adopted in 1896.

The impact of the pandectistic dogmatics, and its main result, i.e. the German civil code of 1896, extended beyond Germany's borders. It had an important impact on the science of private law in Austria, Switzerland, Italy, Greece, Russia and Poland. Its consequences included changes in interpretation and amendments to the ABGB. Achievements of the pandectists and BGB were, aside from Code Civil, the important points of reference in the works on the Swiss law of obligations (1881); the Polish code of obligations of 1933, which was largely incorporated in the civil code of 1964; the Greek civil code (1940); the Italian civil code of 1942 and the Portuguese civil code of 1966.[322] The dogmatic solutions adopted in the Polish code of obligations were largely incorporated in the Polish civil code of 1964, which remains in force today. The pandectistic school and BGB had a direct impact on the 20th century codification efforts in all Central and Eastern European countries.[323] BGB also had considerable influence in the Far East.[324]

In addition to deliberations on the French and German civil codes, I will present new and little known examples of the incorporation of the nature of the contract clause into the Polish and Russian civil codes in the late 20th century.

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[320] Savigny 1814, 161.
[321] Savigny 1850, 2.
[322] See Zweigert, Kötz 1996, 107 and 146.
[323] Hamza 2002, 149-188.
[324] Zweigert, Kötz 1996, 153-155.

3.2. The nature of the contract clause in the French Code Civil

3.2.1. The nature of the contract in the deliberations of Jean Domat and Robert J. Pothier

The legal method that provided the basis for the French code was the so-called rationalist natural law. This breakthrough in thinking about law, typical of this stream of jurisprudence, was triggered primarily by lawyers who were not French: Hugo Grotius (1583 – 1645) and Samuel Pufendorf (1632 – 1694). *De iure belli ac pacis* by H. Grotius provides grounds for the conclusion that his understanding of the nature of the contract was different from that of the *ius commune* jurists. In discarding the division into nominate and innominate contracts, the jurist explained that the Romans singled out some contracts by naming the predominating types of transactions.[325] He recognised the balance of the relationship between contracting parties that resulted from their conscious and voluntary will as a representation of the nature of the contract.[326] This style of reasoning suggests the link between the nature of the contract and the support of the legitimate expectations of the contracting parties, which was noted as early as the argumentation of Ulpian and Papinian. This idea, however, was not elaborated.

The seminal work of the 17th century French theory of the law of nature is the work of Jean Domat (1625 – 1696), *Les loix civiles dans leur ordre naturel*. The word nature is relatively frequently encountered in his description of contract law as one of the linguistic keys used for systemic presentation. Jean Domat, however, went beyond the catalogue of *causae* repeatedly referred to in the *ius commune* until the 16th century, which made a contract enforceable. He adopted the principle of freedom of contract and explained that the number of *causae* that correspond to various exchanges of

[325] Grotius 1625, II,12,3.
[326] Grotius 1625, II,12,9 and II,12,26.

goods and services is infinite.[327] However, like the *ius commune* jurists, he linked the nature of the contract with the types of contracts[328] Like Donellus and Petro de Ognate Vallisoletano before him,[329] Domat also adopted an outline consisting of the presentation of typical agreements starting with an explanation of their nature as a basis for the title "On contracts".[330] Consistently and in a manner reminiscent of mathematical algorithms, the presentation commences with definitions.[331] They indicate the essential elements of a legally binding agreement and sometimes the function of the contract. The definitions are in French and Latin and are corroborated by Roman legal texts.[332]

In the work of Domat, the nature of the contract is also understood, as is the case in the *ius commune*, as a source of the elements

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[327] Domat 1777, , 27 (L. I, tit. I, sec. 1) and 48 (L I, tit. II, sec. 1,3 and 5.

[328] Domat 1777, 27 (L. I, tit. I, sec. 1, 1) : *Ce mot de convention est un nom géneral, qui comprend toute sorte de contracts, traités et pactes de toute nature.*

[329] See above: 65-68.

[330] Domat 1777, 27-47 (L. I., tit. I): *De conventiones en general.*

[331] Domat 1777, 48 (L. I, tit. II, sec. 1): *De la nature du Contrat de vente, et comment il s'accomplit, 1 Definition de la vente*; 87 (L. I, tit. IV, sec. 1): *De la nature de louage, 1 Définition du louage en général*; 107 (L. I, tit. V, sec. 1): *De la nature du prêt à usage, et du précaire, 1 Définition du prét à usage* ; 120 (L. I, tit. VI, sec. 1): *De la nature du Prét, 1 Définition du prét* ; 126 (L. I, tit. VII, sec. 1): *De la nature du Dépôt, 1, Définition du dépôt* ; 135 (L. I, tit. VIII, sec. 1): *De la nature du Société, 1 Définition de la société*; 153 (L. I, tit. IX , sec. 1): *De la nature des Dots, 1 Définition de la dot* ; 172 (L. I, tit. X, sec. 1): *De la nature des donations entre-vifs, 1 Définition de la donation* ; 183 (L. I, tit. XI, sec. 1): *De la nature de l'usufruit, et droits de l'usufruitier, 1 Définition de l'usufruit* ; 197 (L. I, tit. XII, sec. 1): *De la nature des servitudes, de leurs especes, et comment elles s'acquierent, 1 Définition* ; 212 (L. I, tit. XIII, sec. 1): *De la nature et de l'effet des Transactions, 1 Définition* ; 217 (L. I, tit. XIV, sec. 1): *De la nature des compromis et de leurs effets, 1 Définition du compromis* ; 222 (L. I, tit. XV, sec. 1): *De la nature des Procurations, Mandemens, et Commissions, 1 Définition de la procuration* . Only the last three titles of the book which do not pertain to typical agreements (L. I, tit. XVII): *Des Personnes qui exercent quelques commerce publics;* (L. I, tit. XVII): *Des Proxenetes, ou Entremetteurs*; (L. I, tit. XVIII): *Des Vices des Conventions*

[332] E.g. Domat 1777, 48 (L. I, tit. II, sec. 1, 1):... *Si pecuniam dem, ut rem accipiam, emptio et venditio est* (D.19,5,5,1); *Sine pretio nulla venditio est* (D.18,1,2,1); *Pretium in numerata pecunia consistere debet* (I. 3,23,2); *Nec merx utrumque, sed alterum pretium vocatur* (D.18,1,1).

of the contents of a contract which are not covered by express terms but are characteristic of a given type of contract.[333] Domat justified this understanding of the contents of a contract with the opinion of Gaius, a Roman jurist, that in consensual contracts the duties of the parties also cover implied terms resulting from *ex bono et aequo*.[334] For example, in his description of a sales contract he juxtaposed the principles related to the risk of losing the thing sold before its transfer; the time, manner and place of transfer of a thing; implied warranties; and time and place of payment derived from the Roman law as such "natural consequences" (*suites naturelles*).[335]

In addition to Domat, another French lawyer, Robert Joseph Pothier (1699 – 1772), constructed a theory used when drawing up Code Civil.[336] It was he who was dubbed the "father of the Napoleonic Code".[337] In treatises on selected types of contracts, Pothier used an outline according to which each type of contract has its own nature. Like Domat, he started to explain nature based on the definition and proceeded to detailed rules typical of the specific contract, which could supplement the expressed terms.[338] The treatises on selected types of contracts were preceded by the issue of *Traité de obligationes*, which contributed the systematic presentation of the general theory of contracts to legal science. In his definition of contract, R. J. Pothier rejected the limitation of enforceable agreements to the types of contracts specified by law, which was typical of Roman law. Based on the natural law, he defined a con-

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[333] Domat 1777, 49 (L. I, tit. II, sec. 1, 7):... *des engagemens qui suivent de la nature du contrat.*

[334] Domat 1777, 49 (L. I, tit. II, sec. 1, 7): ...*Ces engagements obligent comme le contract même, dont ils sont les suites – De eo quod alterum alteri, ex bono et aequo praestare oportet* (D.44,7,2,3)...

[335] Domat 1777, 49-55 (L. I, tit. II, sec. 2) and 55-57 (L. I, tit. II, sec. 3.

[336] Frèmont 1859, 147.

[337] Arnaud 1969, 112.

[338] E.g. Pothier 1772, 4 (II, sec. 1): *De la nature du Contrat de Vente*; Pothier 1831, 173: *De la nature du contrat de constitution de rente*; 293: *Ce que c'est que le contrat de louage; ce que c'est que le contrat de louage des choses, et quelle est sa nature*; 375: *De la nature du contrat de louage d'ouvrage et des trois choses nécessaires pour le former*.

tract as an agreement through which one or more parties promise to transfer a thing, or to perform a certain act or to abstain from performing the same act.[339] In the commentary on the contract thus defined, one encounters the notion of a nature of the contract. Pothier included it as one of the principles of interpretation.[340] It indicates that expressions that are susceptible to having two meanings must be construed in a manner which "suits best the nature of the contract".[341] In explaining this principle, Pothier used the example: if the payment to lessor is 300, then it should be assumed that this amount is to be paid annually as it is in line with the "nature of a lease contract" in which the rent is paid every year.[342] Using this style of argumentation, Pothier, differently from Domat, continued a more formalistic approach to the nature of contract. He narrowed the evaluation according to the nature of the contract down to the conformity with dogmatic structure of certain types of contracts.

3.2.2. Inclusion of the nature of the contract clause as a criterion for interpretation in article 1135 of Code Civil

The significance of the work of Domat and Pothier, was frequently, and often in an exalted manner, emphasised over the course of the work on this part of Code Civil.[343] The use of the

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[339] Pothier 1764, 8 (I, I, §1):..*De là il suit que dans notre droit on ne doit point définir le contrat comme le définissent les interprétes du droit romain: conventio nomen habens a jure civili, vel causam ; mais on le doit définir: une convention par laquelle les deux parties réciproquement, ou seulement l'une des deux, promettent et s'engagent envers l'autre à lui donner quelque chose, ou à faire ou à ne pas faire quelque chose*.

[340] Wording in line with the linguistic practice, according to which the explanation of a nature of obligation is based on building definitions covering the essential dogmatic qualities which were included in the first volume of *Traité des obligations*: *De la nature et des effets des obligations divisibles* (IV,II,II), *De la nature et des effets des obligations individuelles* (IV,II,III) or *De la nature des obligations pénales* (V,I).

[341] Pothier 1764, 113 (I,I,VII): *Lorsque, dans un contrat, des termes sont susceptibles de deux sens, on doit les entendre dans le sens qui convient le plus à la nature du contrat*.

[342] Pothier 1764, 113 (I,I,VII).

[343] See e.g. Fenet 1836, 215 ff.; p. 313ff.; 414ff.

word nature in the preparatory works for the code is an example of the actual impact these jurists had on codification. It should be remembered that Domat and Pothier similarly transferred the model of systematic description of contract from *ius commune*, which consisted of distinguishing the nature of individual types of contracts, constructing their definitions and contrasting them with the so-called *naturalia contractus*. This model was formally continued in the systematics of description for some typical contracts in book three of the Code Civil.[344] However, J. Domat's and R. Pothier's views differed as to how to "translate" the relationship between the type and nature of the contract into general principles of contract law. In the initial period of work on the French civil code, the fundamental role of such criteria as nature, equity and custom was set forth in article 11 of the draft, the so-called *livre préliminaire*. The draft was presented on 13 August 1800 by Portalis[345] and was based on the derivative and limited character of the positive law.[346] The Preliminary Book (*livre préliminaire*) became the subject of many, at times critical, opinions of the Court of Cassation and courts of appeals, and was the subject of debate in the course of legislative process. For instance, the court of appeals in Lyon reported that the "metaphysical and legal" maxims included in the draft might be useful in journalism or legislative discourse, but would prove dangerous in the text of the code.[347] As a consequence, the *livre préliminaire* draft was replaced by the short *Titre préliminaire*.

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[344] Cf. Book III, title VI, section 1. *De la nature et de la forme de la vente*; title XIII, section 1 *De la nature et de la forme du mandat*; title XIV chapter 1 *De la nature et de l'étendue du cautionnement*.

[345] See Wołodkiewicz 2009, 222 fn. 242: tit. V, art. 11 *livre prèliminaire*: *Dans les matières civiles, le juge, a défaut de loi précise, est un ministre de d'équité. L' équité est le retour à la loi naturelle, ou aux usages reçus dans le silence de la loi positive.*

[346] Wołodkiewicz 2009, 222 – 223.

[347] Fenet 1827, 36.

The principle allowing judges to include natural law and custom into reasoning was, however, "smuggled" into regulations pertaining to the effects of obligations.[348] Article 32 of the draft Title on contracts and conventional obligations was phrased as follows: "Agreements are binding not only as to what is therein expressed, but further as regards all the consequences which equity, usage or law attribute to an obligation by its nature"[349]. In the discussion before the Council of State, this provision was also criticised in a manner similar to the criticism of *Livre préliminaire*. Opinions were expressed that it created considerable uncertainty as to the contents of an obligation which might result in "grave inconvenience" (*graves inconvéniens*). In response to the criticism, the chair of the commission which prepared the draft used the example of *naturalia contractus*, which was well known from *ius commune* and the work of Domat. François-Denis Tronchet noted that a warranty was an example of a duty of a seller that may exist in the absence of an express term since it resulted from the nature of sales.[350] Article 32 of the draft was adopted by the Council of State without any modifications.[351] In reference to the draft itself, it was noted during the discussion of the draft before the Tribunal that everything in contracts is not explicitly expressed. Therefore, in the application of this rule judges are aided by separate codified principles of interpretation[352]. This provision was included without any changes as article 1135 of the adopted Code Civil. The principles of interpretation of contract adopted by the members of the commission were taken, almost verbatim, from Pothier's *Traité des obligations*.

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[348] See Deroussin 2007, 443.

[349] Fenet 1836, 8: *Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnet à l'obligation d'après sa nature*.

[350] Fenet 1836, 54.

[351] Fenet 1836, 55.

[352] Fenet 1836, 320.

A change was made in the case of the above principle regarding expressions that are susceptible to having two meanings consisting of replacing *nature du contrat* with *matiére du contrat* in article 54.[353] Further legislative efforts reveal no doubts with respect to this modification.[354] The provision has been included in Code Civil as article 1158 and in wording suggested by the commission.

The work on the French civil code outlined above allow us to conclude that its authors did not recognise a linguistic difference between Domat and Pothier in the use of the nature of the contract clause as a basis for a more comprehensive discussion of the topic. We can suppose that, from the point of view of legislators, the decisive element was that both "fathers" of the code were convinced that each type of contract had its own nature. The drafting of the general provisions of contract law was governed by the conviction, fixed in *ius commune* and noticeable in the discussion surrounding the code, that such an understanding of nature was the source of contract terms (*naturalia contractus*) that were not expressed in words but also not excluded by the parties. Article 1135 CC may thus be regarded, historically, as a continuation of the work of *ius commune* jurists. However, this article was included, following the views of J. Domat, in a general principle declaring the freedom of interpretation based on equity and custom.[355] What is more, the wording adopted in article 1158 CC allows us to assume that, according to the authors of Code Civil, this was to be the sole argumentative function of the nature of the contract clause.

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[353] Fenet 1836, 23: *Les termes susceptibles de deux sens doivent ètre pris dans le sens qui convient le plus à la matière du contrat.*

[354] Fenet 1836, 67;422.

[355] See Deroussin 2007, 442–443. What draws attention is the fact that this provision contains a surviving and very general principle, which, in line with the original assumptions was to be included in the rejected *Livre preliminaire*.

3.3. Nature of the obligation and nature of the contract in the German civil code

3.3.1. Nature of the contract in the pandectistic revolution of the private law system

The methods and concepts developed by the pandectists gained fundamental significance for the drafting of the German civil code. It emerged and developed in Germanic countries during the 19th century as the creative renewal of private law theory based on Roman law. The first element which distinguished it from the *ius commune* was the new, systematic approach to Roman law texts. This change was initiated in 1807 by publishing the work of Georg Arnold Heise, *Grundniss eines Systems des gemeinen Civilrechts zum Behelf von Pandekten-Vorlesungen*. The Roman legal texts became the basis for the new general private law theory. Friedrich Savigny made the next step, which turned out to be a breakthrough. He rejected the study of Roman law applied in judicial practice of some Germanic countries[356] and introduced a vision that Roman legal texts should be the foundation for building a general theory of private law typical for the German nation.[357] The ideological foundation of this programme was the concept that law must express the spirit of the nation. For Savigny, the historical source from which the German theory of private law should be derived was ancient Roman law. This resulted in yet another difference from *ius commune*. It consisted of a decisive separation of ancient Roman law from the achievements of the medieval and early modern legal studies. As a consequence, the development of private law theory in 19th century Germany was based fundamentally, on ancient law texts. Savigny regarded *ius commune* primarily as a chain of jurists and their work that passed on the knowledge of Roman law to modern times. The dogmatic tradition of the medieval and early

[356] Koschaker 1947, 268.
[357] Koschaker 1947, 263.

modern study of law was used in 19th century Germany, mostly in the area of public law. The idea that the pan-German private law theory must be built on a foundation of ancient Roman law was Savigny's argument against its swift codification. Thus, the pandectistic school also opposed the theory of rationalist natural law on which the modern codes of that period were based, for example, Code Civil. The essence of the changes brought about by the pandectists is well illustrated by the notion of contract and its place in the legal system. Arnold Heise separated the so-called "general part" (*Allgemeine Lehren*), and in it he defined the notion of a legal transaction (*Rechtsgeschäft*). The pandectists adopted the definition that legal transactions were lawful acts covering the expression of will intended to establish, amend or repeal legal consequences in a permitted manner and form.[358] A contract became a type of a legal transaction. Following Heise, the law of obligations was distinguished (*Obligationen, Schuldverhältnisse*) as one of the areas of private law. It was further divided into a general part on obligations and parts covering specific obligations. The general part on obligations discussed contract as one of the sources of obligations. As part of the presentation on individual obligations, typical contracts were described. The concepts and legal principles appropriate for this dogmatic structure were substantiated, at times arbitrarily, by Roman legal texts. Savigny rejected the idea that the theory of contract developed in the legal science of the 17th and 18th centuries referred solely to the source of obligations. He introduced the idea that the concept of contract belonged also to other areas of private and public law.[359] In the creation a new systematic position of contract in the private law, the pandectists brought into play the notion of *naturalia contractus* coined in *ius commune.* They used argumentation based on the nature of contract. It should be noted that in the language of *ius commune* jurists, this notion was the starting point

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[358] See e.g.: Mühlenbruch 1835, 197 (§ 101); Böcking 1852, 24 (§ 85); Arndt 1868, 73 (§ 63); Windscheid 1875, 174 (§ 69); Regelsberger 1893, 478 (§ 135).

[359] Savigny 1840, 314 (§141); Savigny 1853, 7 (§52).

for the thinking that led to the systematic description of contract law. This scientific tradition was continued and further developed in the creation of the new system of private law started by 19th century German legal theorists. Apart from that, the works of the pandectists clearly demonstrate the application of the nature of the contract as an argument connecting the discussion of contract law with the economic purpose of transactions.

3.3.1.1. *Naturalia negotii* and the content of contract

Recognising a legal transaction as a central element of the 19th century German theory of private law gave rise to the generalisation of the pattern of the contents of contracts comprised of three elements, introduced in the Middle Ages. The notions of *substantialia*, *naturalia* and *accidentalia contractus* were transformed into *substantialia*, *naturalia* and *accidentalia* of a legal transaction[360] This model was adopted by Georg Friedrich Puchta,[361] a jurist who played the key role in the development of a method consisting of building a formal system of legal notions (*Begriffsjurisprudenz*), which was fundamental for 19th century German legal science[362]. His contemporary, Christian Mühlenbruch raised the issue of the relation between e*ssentialia*, *naturalia* and *accidentalia* and nature taking into consideration the contents of a legal transaction. He limited the nature of a legal transaction to what was required for its validity. This idea was repeated in later pandectistic discussion by Karl Georg von Wächter.[363] Christian Mühlenbruch explained *naturalia negotii* in a more innovative and flexible manner than the *ius commune* jurists. He indicated that these were the elements of

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[360] Wening-Ingenheim 1831, 208 (§131).
[361] Puchta 1838, 41 (§45).
[362] Larenz 1991, 20.
[363] Similarly Wächter 1880, Vol. 1, 362 (§74).

a legal transaction which resulted from law or the nature of things.[364] The argument with respect to the nature of things would permit, according to the then current understanding, the implication of the term in a legal transaction in a manner supplementing positive law, taking into account the practical rationality of the case under review.[365] Pandectistic literature, however, predominantly regarded *naturalia negotii* as terms derived from law, which was similar to the thinking of *ius commune* jurists on *naturalia contractus*. This was expressed by the explanation that *naturalia negotii* were the elements of the content of legal transactions implied by custom[366] or an act of law.[367] Bernard Windscheid even juxtaposed *naturalia negotii* derived from the law itself with *essentialia* and *accidentalia negotii* intended by the parties.[368] In the pandectistic discussion of the contents of a legal transaction, two aspects of understanding nature in contract law clashed. On one hand, this discussion confirmed the permanence of the link between the nature of the contract and its type, the link existing from *ius commune,* in legal reasoning. On the other hand, they made *naturalia negotii* an instrument for the implication of terms, which goes beyond the characteristic interpretation of a contract. In the system built by the pandectists, *naturalia negotii* could mean terms derived from regulations related to a specific type of contract and provisions included in the general part. The assumption that various types of contract may have some *naturalia negotii* in common was connected with the creation of new systematics typical of the pandectistic school.

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[364] Mühlenbruch 1835, 201 (§104).

[365] Cf. Radbruch 1960, 6.

[366] Keller 1861, 96 (§50).

[367] Wächter 1880, Vol. 1, 363 (§74); Bekker, 1886, 141 (§99); Regelsberger 1893, 601 (§165).

[368] Windscheid 1875, ,231 (§85).

3.3.1.2. The nature of contract and the contract law outline

Soon after its publication, the new systematics of law by A. Heise proved to be influential in the modification of a Roman law handbook by Anton Friedrich Justus Thibaut, which was important at that time[369]. He put the argumentation used by some *usus modernus* jurists in a new context, which consisted of deriving the elements of the systematic description of contract law from the nature of contract[370]. Three levels of such description may be seen in the work of Thibaut. The first level was the so-called "general nature of contract", which was a source of an obligation based on the freedom of contract principle. The structure of the section on contracts (*Ueber Verträge insbesondere*) included in the general part (*Allgemeiner Theil*) was a result of the declaration that "the general nature of contract" reveals itself upon answering three questions: who can enter into a contract? How must an agreement be made? What are the objects and effects of contracts?[371] The second level consisted of combining contracts of different types according to their nature, taking into consideration the dogmatic or functional similarities. This is the basis for Thibaut's claim that consensual contract comprised the "full nature of contract".[372] He argued that "by nature of contract" both parties to a bilateral contract are obliged the moment the obligation arises.[373] The third, most detailed level of description of contract law pertained to the "individual nature" of typical contracts.[374] A distinct link between the nature of the contract and its functional qualities was a novelty in relation to the language adopted by *usus modernus* jurists. This led to supplementing, and at times breaking, the traditional dogmatic schema.

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[369] Coderch, Sánchez-Ostiz 2004, 880.
[370] See above 87.
[371] Thibaut 1809, Vol. 1, 108 (§141).
[372] Thibaut 1809, Vol. 2, 267 (§854).
[373] Thibaut 1809, Vol. 1, 130 (§170).
[374] Thibaut 1809, Vol. 2, 266 (§853).

Let us turn to some examples from the works of the pandectists. In the works of Friedrich Karl Savigny, the link between the nature of the contract and its functional qualities can be seen in the deliberations on the simplicity of formation of some contracts. He defined the absence of formal requirements when concluding sales and lease contracts as a consequence of their "special nature" adequate to daily and customary trade.[375] In another group of consensual contracts of a "completely different nature", he included mandate and *societas* (partnership) contracts. In relation to these, he explained the ease of establishing a legal duty by the fact that the law limited any related risk by right of the mandator or partner to withdraw from the contract.[376] Among synallagmatic contracts, Ludwig Pforden separated those which, in line with their nature, require the previous performance of one of the parties, e.g. a lease or an emphyteusis.[377] Friedrich Ludwig von Keller explained that the theory developed in Roman law regarding the nature of a sale was partly relevant for the entire scope of bilateral obligations.[378]In his comments on the performance of contract, Karl Georg von Wächter argued that the duty of parties to perform concurrently, unless otherwise agreed, was inherent in the "nature of non-gratuitous contractual dispositions".[379] Edward Hölder distinguished contracts, in line with their nature, with two opposing parties from contracts without this kind of variance between parties.[380] Such use of the nature of the contract was not common in pandectistic discourse. The examples presented show, however, that in their language, some pandectists returned to the connection of the nature of the contract with the qualities of its economic reasonableness, which was a connection based on a number of ancient texts. However, as opposed to ancient times, such linguistic practice was

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[375] Savigny 1853, 226 (§75).
[376] Savigny 1853, 225-226 (§75).
[377] Pforden 1840, 326.
[378] Keller 1861, 606 (§323).
[379] Wächter 1880, Vol. 2, 387 (§189).
[380] Hölder 1891, 220 (§42).

not limited to the argumentation in the hard cases. In the context of the pandectists' discourse, it became one of the factors in the development of the systematic order[381] of contract law. This was expressed by various outlines of the presentation of contracts in the handbooks of the pandectists,[382] and primarily in their distinction between a number of principles pertaining to contractual obligations. In the pandectists' systematic description of obligations, the argumentation from the nature of things can also be seen.

3.3.1.3. The nature of the contract and the nature of things in legal reasoning

The reasoning based on the nature of things has been known since antiquity. In Rome, the formula of *natura rerum* was introduced by Lucretius.[383] Analysis of ancient Roman law has shown how this reasoning was adopted and developed by Roman jurists. The introduction of the nature of the contract clause into legal argumentation is rooted in this practice.[384] The notion of the nature of things (*Natur der Sache*), which belongs to the humanities, was applied in academic discussion in the Middle Ages and modern times. This formula was also adopted in the German theory of private law in the 18th century[385]. Burkard Wilhelm Leist presented the broadest in the 19th century studies on this reasoning[386]. He criticised the fact that lawyers perceived reality through the patterns of Roman legal texts. Leist promoted the return of legal science to the Roman form, the essence of which he understood as focusing on issues related to life and economics.[387] On the other hand, Savigny and Jhering emphasized the creative qualities of argumentation based

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[381] See fn. 81.

[382] See e.g. Pforden 1840, 302; Keller 1861, 431 (§220).

[384] See above 25.

[385] Marx 1967, 4.

[386] Radbruch 1960, 28.

[387] Leist 1854, 28 – 32; Radbruch 1960, 29.

on the nature of things in 19th century opinions which indicated them as a basis for building a systematic vision of law.[388] Eventually, the pandectists were faced with a controversy as to the application of the nature of things criterion in the interpretation of law.[389] The views of Derburg are an example of the recognition of the usefulness of the nature of thing test within the area. He believed that any relationship in real life had an inherent "internal order" which could be referred to as the nature of things. He concluded that, in the absence or ambiguity of a legal provision, a jurist should refer to the nature of things and thus fill any gap in the law.[390] In the doctrine of the law of obligations as constructed by the pandectists, this argumentation is observed when defining the place of performance, if the parties had not defined it. Roman law did not contain any general principles that specified such a place. Thus, defining it was one of the challenges faced by pandectists. Friedrich Karl Savigny accepted this challenge when discussing the territorial jurisdiction of courts in cases regarding the performance of an obligation. He shared a belief that jurisdiction should lie with the court that had territorial jurisdiction over the place of performance.[391] In his detailed explanation of the matter, he stated that some actions are "by virtue of their nature related to a specific place" (e.g. the construction of a house or its lease) and this nature indicates the place of performance of the obligation.[392] Christian F. Mühlenbruch made a general declaration that if the place of performance was not specified, it would be determined based on the "nature of the legal relationship" (*Natur des Rechtsverhältnisses*). He explained that this formula meant either the place where the obligation could be performed or a place in which the performance would not cause unintended and unexpected inconveniences or

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[388] See Radbruch 1960, 7 .
[389] Windscheid 1875, 61 fn. 1a (§23).
[390] Dernburg 1892, 87 (§38).
[391] Savigny 1849, 209 (§370).
[392] Savigny 1849, 213 (§370).

burdens for the other party.[393] Bernard Windscheid, like Savigny, indicated that the place of performance could be determined by its nature (*Natur der Leistung*) only when the performance of the obligation in a different place was not possible.[394] Thus the pandectics failed to develop a uniform understanding of nature as a criterion indicating the place where the obligation must be performed. In a narrow sense, it was identified with a practical obviousness. In a broader sense pandectists linked the nature of the obligation with the evaluation of economic reasonableness. From the point of view of the study of the nature of the contract argument, it is relevant that references to the nature of things resulted in the presence of the word nature' in the rules indicating the place of performance of the obligation.

3.3.2. Inclusion of the nature of the legal relationship as a criterion for interpretation with respect to the German civil code

The pandectistic school had significant influence on the Committee that prepared the German civil code commencing in 1881. The pandectistic approach to contract in the German system of private law proved to be decisive for the systematics of the code (BGB) adopted by the Reichstag in 1896. The notions of *naturalia negotii* or nature of the contract, which were present during the development of the system, were not, however, included in the statute which formed the basis for the interpretation of contracts or set the boundaries of the freedom of contract. These functions are performed by the good faith (*Treu und Glauben*)[395] and good customs clauses (*gute Sitten*).[396] The notion of *naturalia negotii* as an instrument of interpreting the contents of a contract remained significant in the German theory of private law.[397] In the text of the code

[393] Mühlenbruch 1838, 489 (§466).
[394] Windscheid 1891, 89 (§282).
[395] See § 157 and 242 BGB.
[396] See § 138 BGB.
[397] E.g. Flume 1992, 80; Bork 2006, Schellhammer 2008, 959.

adopted in 1896, the nature of the legal relationship (*Natur des Schuldverhältnisses*) clause is found only once. It is included in the provision determining the place where the obligation is to be performed.[398] Such a limited transfer of the notion of nature to the text of the code probably resulted from the growing importance of legal positivism. The legal positivism reluctantly permitted argumentation based on the nature of things in statutory interpretation and filling legal gaps[399]. This positivistic approach considerably limited the possibility of developing a tendency, noticeable in the work of the pandectistics, to apply the nature of the contract as an instrument that facilitated the inclusion of ideas concerning the economic reasonableness of a contract in legal argumentation. In this context, a question arises: Why was the nature of the legal relationship adopted in article 269 BGB?

In September 1882, the Committee drafting the German civil code went on to work on a draft provision pertaining to the place of performance of an obligation. The first paragraph of this work opened with a principle in line with which a debtor should perform the obligation in the place implied by the nature and manner of performance (*Natur und Beschaffenheit der Leistung*) or which is determined in the content of a legal transaction.[400] Further, part of this paragraph related to cases in which the obligation could be performed in a number of places and where the parties did not specify the place of performance. In such cases the performance must be made in the place set by the nature of obligation (*Natur des Schuldverhältnisses*) or by the presumed intention of the parties.[401] If none of the criteria provided a clear answer, the next paragraph of the draft set the place of performance as the debtor's place of residence at the moment of performance of the obligation and, in the case of payment, as the creditor's residence.[402] In the rationale for this ex-

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[398] § 269 BGB.
[399] Radbruch 1960, 8.
[400] Schubert 1990, 815.
[401] Jackobs, Schubert 1978, 181.
[402] Jacobs, Schubert 1978m 182.

tensive regulation, the absence of general principles of Roman law regarding the place of performance was stressed, as were the variety of solutions adopted in "new legislation".[403] The eclecticism typical of this draft was also expressed by the manner in which the nature clause was introduced. The notion of the nature of the performance (*Natur der Leistung*) included in the first part of the proposed paragraph was adopted from Savigny and Windscheid. In the draft, as in the works of said lawyers, this meant the attribute of a performance due to which a duty may be performed in one place only (e.g. conveyance of real property may only be carried out where the property is located).[404] The nature of the obligation criterion adopted later in the paragraph was connected, in the rationale, with solutions adopted in certain statutes, e.g. the Prussian Landrecht, the Austrian civil code, and the German commercial code.[405] In the discussion of the draft, doubts were raised regarding the editorial correctness of the nature clause included in the provision.[406] As a consequence, article 229 of the draft code adopted by the first committee omitted the concept of the nature of the performance. What remained was the nature of the obligation criterion (*Natur des Schuldverhältnisses*), applied jointly with the premise of presumed intention in cases in which the place of performance of the obligation was not prescribed by the statute, legal transaction or the manner of the performance (*Beschaffung*).[407] It was emphasised that the justification of such a model was based on its concurrence with the "latest legislation", as well that this is the better solution than the rule adopted in article 1247 of the Code Civil. This dominance was demonstrated by the flexibility resulting from the nature of the obligation clause, which permitted the taking into consideration of the practical sense of individual obligations.[408] This position

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[403] See Schubert 1990, 818.
[404] Schubert 1990, 817.
[405] Schubert 1990, 823.
[406] Jacobs, Schubert 1978, 182.
[407] Jacobs, Schubert 1978, 187.
[408] Schubert 1990, 824.

was not challenged in the course of the legislative process in which the linguistic definition of the place of performance of the obligation was being refined.[409] As a consequence, article 269 BGB as adopted by the Reichstag places the flexible nature of the obligation criterion over the arbitrary criterion of the place of the debtor's residence as the place of non-pecuniary performance. Thus, the only instance of the inclusion of the nature of the obligation clause in the German civil code broke with the typical linguistic and argumentative practice of *ius commune*. It preserved in the code the reasoning that connected the nature of the obligation with its practical sense; reasoning which was being revived in the 19th century. In the text of the code it was, obviously, limited to the rule specifying the place of performing the obligation. It gained broader meaning in the deliberations regarding the notion of the nature of things surrounding the German science of law dating back to the first half of the 20th century.[410] This is illustrated by a thesis of Coing, who concluded that the nature of things, with regard to typical transactions such as a lease or sale, was independent from statutory law. It had an economic structure covering the interests and expectations typical of a party to a contract.[411] This approach to the nature of the contract clause turned out to be significant for the development of German law in the second half of the 20th century and the amendment to BGB in 2001.

3.3.3. The inclusion of the nature of the contract clause by amendment of the German civil code of 2001

The March 1956 judgment of the Supreme Court of the Federal Republic of Germany served as the precedent that inspired the introduction of the nature of the contract as one of the criteria for the

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[409] Jacobs, Schubert 1978, 187.
[410] Stratenwerth 1957, 21.
[411] Coing 1950, 121.

control of standard terms in the Act of 9 December 1976.[412] The starting point for the judges' rationale in the case was the observation that a contract for towing a ship may be formatted as a contract to perform a particular piece of work, a freight contract or a service contract. The decision was grounded on the principle that regardless of the type of contract chosen by the parties, the debtor always has the "cardinal obligation" to provide a ship that is seaworthy. We can see the *ratio decidendi* of this solution in the principle that the economic reasonableness of a contract may influence the freedom of the parties to formulate the contents of a contract.[413] Such reasoning, based initially on the good customs and good faith clauses of the German civil code proved useful in controlling the increasingly popular practice of using standard form contracts.[414]

Paragraph 9 of the Act of 1976, which is rooted in this tradition, stipulates that provisions in standard business terms are invalid if, contrary to the requirement of good faith, they unreasonably prejudice the other party to the contract. Section 2 (2) of this paragraph specifies that such unreasonableness is deemed to exist when the essential rights or duties inherent in the nature of the contract are limited to such an extent that the attainment of the purpose of the contract is jeopardised.[415] This application of the nature of the contract clause was also a novelty in the area of the control of standard form contracts.[416] The entry of this provision into force triggered an academic discussion regarding its interpretation. In line with the Act, nature of the contract was the criterion based on which judges controlled standard terms. Hence, the question of what a judge should use as the basis for applying the clause became significant in practice. The views demonstrated at that time can be divided into two groups.

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[412] Wolf, Horn, Lindacher 1994, 360; Hoyningen-Heune 1991, 135.

[413] NJW 1956, 1065.

[414] See e.g. NJW 1971, 1036; NJW 1973, 1878.

[415] *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* of 9 December 1976.

[416] See Schubert, Schmidt, Regge 1992, XXVIII.

The centre of gravity of the first group was an emphasis on the economic reasonableness of a judge's assessment. The justification for such reasoning was seen in the origin of the provision.[417] This idea animated by the notion that "the nature of the contract is defined by the interests that were reasonably included in the contract and should be protected".[418] This line of thought was crowned by a study of AGBG paragraph 9, section (2)(2) based on the law and economics approach. The research of Beimowski confirmed that control based on paragraph 9 AGBG was in fact reduced to the economic core of the contract as this control covered the assessment of the reasonableness of the allocation of risks and interests. On these grounds he criticised the editing of said provision.[419] He claimed that the nature of the contract clause was as ambiguous as good faith or significant detriment. For the sake of legal certainty, he suggested that this provision of the Act be replaced with specific economic implications one should consider when assessing contractual terms.[420]

The quality that linked the second group of views was the understanding of the nature of the contract as a normative model guiding the judge's assessment. The methods of constructing said model were different. The method of reasoning closest to the legal practice, known already from *ius commune*, was to use the leading type of contract as a standard for control.[421] In cases when such an approach yielded no solution, it was recommended that the judge should consider the hypothetical intention of the parties and make an assessment from the point of view of justice.[422] An original attempt to link the *ius commune* tradition with the economic reasonableness of contract was made by Jürgen Oechsler. He suggested that judges adopt the purpose of a contract as intended by the par-

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[417] Stein 1982, 115.
[418] Wolf, Horn, Lindacher 1994, 361.
[419] Beimowski 1989, 35.
[420] Beimowski 1989, 36.
[421] Hoyningen-Heune 1991,138.
[422] Hoyningen-Heune 1991,138; Becker 1986, 317.

ties as a starting point for building a normative model covering *naturalia contractus* relevant for the purpose.[423]

Despite these methodological discrepancies, the views indicated have one significant thing in common. In line with the jurisprudence on which the provisions are based, they adopt a view that a judge may be guided by principles that are not expressed in the content of a contract or statute in argumentation based on the nature of the contract. Obviously, it remained unclear as to what grounds the judge was to construe these principles and what method was to be used. However, such a level of ambiguity was satisfactory for the German legislature.

As part of efforts undertaken in 2002 to modernise the German law of obligations, the linguistic formula used in paragraph 9 (2)(2) AGBG was copied into the Civil Code as paragraph 307 (2)(2). The vulnerability of this equilibrium is illustrated by the view expressed after the amendment of the Code that the adoption of the nature of the contract clause was a relic of the focus of attention on the typical contracts period, something which lost importance with the increase in the number of mixed contracts.[424] Shortly after the amendment of BGB, a controversy arose as to whether and to what extent the adoption of the linguistic formula of paragraph 9 (2)(2) AGBG resulted in a change of meaning.[425] Doubts about the utility of nature of the contract clause expressed an opinion that a difference between items 1 and 2 of section 2 of paragraph 307 BGB is hard to find as both stipulate a significant limitation of rights and duties which is not compatible with the essential principles of the

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[423] Oechsler 1997, 319 – 320. In my view, this is not correct historically. The notion of *naturalia contractus* was introduced to indicate elements of contracts resulting from the law and not built by interpretation of a judge, as was assumed by Oeschler.

[424] Kothe, Micklitz, Rott, Tonner, Willingmann 2002,216.

[425] Kothe, Micklitz, Rott, Tonner, Willingmann 2002,216; they believe that by being incorporated in the code, the provision gained new meaning; Lorenz, Riehm 2002, 56; believes that the amendment of the law of obligations did not basically alter the general clause from article 9 AGBG.

statutory provision.[426] These first opinions on the inclusion of the nature of the contract clause in the BGB provide yet further confirmation of the difficulties in making a practical connection between the nature of the contract notion and the non-legal objective criteria for contract assessment. This difficulty had been apparent throughout the centuries-long discussions of *ius commune* jurists. The question of what conclusions may be drawn in this respect from the German jurisprudence and current academic discussion still needs to be elaborated.[427] At this point, let us turn to the application of the notion of nature in the drafting of provisions on contract law in other civil codes.

3.4. Typical uses of the term nature in the linguistic formulation of contract law in 19th and 20th centuries codes

Study of the Code Civil and BGB reveal two uses of the term nature in the drafting of the statutes that govern obligations. The term was used as a criterion for interpreting the contents of a contract in France (art. 1135 CC) and resolving doubts as to the place of performance of the obligation in Germany (§ 269 BGB). The German theory of private law shows, moreover, that the absence of the term nature from the BGB as the criterion for interpretation of contents of contract does not prohibit the fixed use of the term *naturalia negotii* in interpretation of the BGB.

A reading of a number of other European civil codes from the late 19th and early 20th centuries permits one to state that there was no linguistic rigorism in the use of the word nature when drafting the law of obligations in the codification process. However, one can see some regularity in this linguistic practice. Historically, the source of the first regularity is the tradition of *ius commune*. This

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[426] Basedow 2003, 1177 – 1178.

[427] See below 132-140.

regularity consists in the connection of nature with the type of contract and in the use of the notion of *naturalia contractus* in the interpretation of the contents of certain types of contracts. Articles 1135 CC, 1258 CCE and article 2, section 2 of the OR allow the addition of implied terms based on the nature of an act. In the interpretation of article 1374 CCI, which is the basis for the implication of implied terms in line with the law, customs and equity, one can encounter the view that this provision is based on the *naturalia contractus* principle, in line with which the contract has consequences typical of the type regulated in law, as well as a specific type highlighted during interpretation.[428] The direct source of the second of the isolated tendencies to use the notion of nature, is the theory of contract interpretation developed by Pothier. Under this theory, he formulated a principle according to which an ambiguous term will be construed in the manner which best suits the nature of the contract. This was the foundation of article 1158 CC. Through the application of the nature of contract clause, it is clearly continued in article 1286 CCE and article 1369 CCI. The third distinguishable tendency results from the introduction of reasoning based on the nature of things into the legal language. The modern discussion of the principles of performance introduced the criteria of nature of the transaction (*Natur des Geschäftes*) and nature of the obligation (*Natur des Schuldverhältnisses*). The first instances can be found in article 905 ABGB, which was one of the inspirations for article 269 BGB as specified above. Similar phrasing can be found in article 316 of the Code of the Russian Federation of 1994. Reasoning based on the nature of things is also included in some codes in the context of specifying the time for performance of an obligation[429] or impediments to the transfer of debts.[430] This limited presentation already shows that the idea recurring in statements regarding the interpretation of the term of nature is to stress the objective character of the

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[428] Rescigno 2003, 1637.
[429] See § 1418 ABGB.
[430] Art. 164, sec. 1 OR.

assessment criteria it represents.[431] Some connected this objectivity with the dogmatic structure of contract types.[432] Others linked it to seeking "the economic logic behind the agreement of parties",[433] or to the "reconstruction of the risks and benefits pattern determined by the parties to the contract".[434] This suggests that the alternative, which is visible from a broad historical perspective, between linking the nature of the contract to its economic[435] or systematic[436] reasonableness returned in the interpretation of modern codes. With the aim of providing a more thorough assessment of linguistic intuition, it is worth including two instances of the use of the nature of the contract clause introduced to the Polish and Russian codes in the late 20th century. These changes stem from the dogmatic formulation of the freedom of contract principle by lawyers educated under communist regimes, who adjusted the civil law to a market economy.[437]

3.5. The feature (nature) of the legal relationship as a limitation on the freedom of contract pursuant to the amendment of the Polish civil code of 1990

The criterion of nature was adopted in the Polish unification and codification of the law of obligations in 1933. As in the Austrian and German civil code, article 190 § 1 of the KZ served to define the place of performance by reasoning based on the nature of things.[438] The Civil Code of 1964, which superseded this codifica-

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[431] Cf. Bydlinski 1973, 286; Cendon 1991, 600; Galgano 2007, 433; Rodriguez Marin 2000, art.1286.

[432] Puig Brutau 1978, 246.

[433] Honsell, Vogt, Wiegand 2003, 68.

[434] Cendon 1991, 600.

[435] See fn. 80.

[436] See fn. 81.

[437] See Dajczak 2011,. 50-52.

[438] Article 190 §1 KZ: The debtor must perform an obligation in the place specified in the contract or implied in the nature of obligation.

tion, repeated this principle of defining the place of performance of an obligation. However, the word nature was replaced by feature.[439] The nature clause was introduced to the Code by a provision that was added in September 1990, shortly after the change in political regimes. "Parties forming a contract may arrange their legal relationship at their discretion so long as the content or purpose of the contract is not contrary to the (features) nature of the relationship, the law and the principles of social coexistence"[440].

The introduction of the nature of the legal relationship as of one of the boundaries to the freedom of contract was not preceded by any discussion in the literature or public knows discussion in the Codification Committee which drafted the provision.[441] The assumption that the legislature included this criterion in anticipation of the need to protect against the abuse of the freedom of contract[442] brings to mind the beginnings of the principle of the freedom of contract in the private law. It should be remembered that Johannes Althusius, one of the pioneers who introduced this principle to *usus modernus* at the turn of the 17th century, marked its boundary by any contradiction with the nature of the contract or law.[443] In the case of *usus modernus*, the law of nature school, the pandectistics and the interpretation of article 353^1 PolKC, this did not result in a uniform understanding of the nature of the contract. The controversies that arose regarded the purpose and method of the use of this clause. In the opinions presented in the first years following the entry of this provision into force, the two patterns of understanding the nature of the contract, known from the *ius commune*, returned without any references to the civilian tradition. The first pattern consists of the link between the nature and type of contract, known from the Middle Ages. The second represents the view, apparent in legal reasoning since the 18th century, which

[439] Article 454 § 1 PolKC.
[440] Article 353^1 PolKC.
[441] Trzaskowski 2005, 247; Machnikowski 2005, 313.
[442] Trzaskowski 2005, 314.
[443] See above 74.

connects nature with what makes an agreement enforceable. Joining these two positions resulted in distinguishing two levels of generality in the application of the nature of the contract clause.[444] Linking nature to the type of contract was permitted as a narrower meaning of the nature of the contract as specified in article 353[1] PolKC. It was ascribed the function of a distinguishing criterion to specify whether the rules related to a specific type of contract were compulsory (*ius cogens)*[445] or to determine precisely the specific allocation of risks and benefits.[446] Moreover, inspired by the characteristic German law usage of the nature of the contract clause as a criterion for control of standard form contracts, another position was developed. This inspiration led to a proposal to regard the nature of the legal relationship in article 353[1] PolKC as a general clause that permits an assessment of the validity of contracts from the point of view of the principle of justice.[447] The protagonists of such an understanding of the nature of the contract clause link it primarily to consumer contracts.[448] This way of thinking was brought about by the view that the nature of the legal relationship clause may, in civil law, have a protective function similar to that of the rule of law principle in the Constitution of Poland.[449] In the 21st century the issue of whether and to what extent the nature of the legal relationship may limit the freedom of contract based on argumentation detached from positive law became the centre of gravity in the academic discussion of the "nature of the legal relationship" criterion as specified in 353[1] PolKc.[450] This Polish academic discourse is yet another example of the difficulties the

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[444] Safjan 1993, 15-16.

[445] Safjan 1993, 16.

[446] Trzaskowski 2005, 372.

[447] See above 106.

[448] Łętowska 1999, 368; Traple 1997, 237: postulates that the solution adopted by the Polish legislator is too far-fetched and may pose a threat to the principle of the freedom of contract.

[449] Guść 1997, 20.

[450] Radwański 2002, 235; Machnikowski 2005, 324; Trzaskowski 2005, 349.

dogma of private law has in disconnecting from the linking of the nature of the contract with its type, which was fixed in the *ius commune*. These difficulties are confirmed by the widely accepted meaning of non-legal grounds for argumentation based on this criterion.

3.6. Nature of mixed contract clause (*существо смешанного договора*) in the 1994 civil code of the Russian Federation

The introduction of the freedom of contract principle after the change of the political regime in Russia has been named as one of the greatest democratic achievements in the process of political transformation.[451] The Russian Civil Code of 1994 separately regulates the freedom to enter into a contract, and freedom to make up its express terms[452] The regulation pertaining to the other aspect of contractual freedom indicates a possibility of concluding a contract which is not a type of contract defined by law.[453] The Russian legislature has decided that if the contract concluded by the parties covers the elements of a number of contractual types, then these elements are governed by the provisions pertaining to specific types. Pursuant to article 421, section 3 of the RusKC, such an application of provisions may be difficult due to a contradiction with the intention of the parties or the nature of a mixed contract. As a boundary to the freedom of contract, Russian theory of private law relies on peremptory norms (*ius cogens*).[454] This is accompanied by an openness to a relatively far-fetched statutory limitation of this freedom, justified by the opinions of 19th century Russian jurists.[455] This con-

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[451] Танага 2003, 10.
[452] Cf. Танага 2003,53.
[453] Art. 421 sec. 2. RusKC.
[454] Танага 2003, 170.
[455] Танага 2003, 120.

text shows even more clearly that the nature of the contract clause included in article 421, section 3 of the RusKC serves only as a means to evaluate the permissibility of the application of provisions pertaining to typical contracts to atypical contracts. In practice, they may be applied to the removal of doubts regarding the contents of a contract.[456] The Russian academic debate presents no deeper reflection on the meaning of the nature of mixed contract. From a broader historical and comparative perspective, one may regard the introduction of this criterion to the Russian Civil Code as yet another "embryonic" expression of linguistic intuition connecting the nature of the contract with some image of its economic reasonableness.

3.7. Conclusions

The connection of nature with the type of contract, known from the *ius commune,* was continued in the systematic description of types of contracts by Domat and Pothier. On the other hand, the academic discussion which the Code Civil and the German Civil Code stemmed directly from brought some innovations to the use of the nature of the contract argument. There were statements that led to making the understanding of *naturalia contractus*, as it has been known from *ius commune*, more flexible. Such statements were illustrated by the ideas of Domat, who connected the "natural consequences" (*suites naturelles*) with what results from *ex bono et aequo*,[457] and the view of Mühlenbruch, who included the elements of a legal transaction resulting from the law or the nature of things in *naturalia negotii*.[458]

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[456] Танага 2003, 170.

[457] Domat 1777, 49 (L. I, tit. II, sec. 1, 7):...*Ces engagements obligent comme le contract même, dont ils sont les suites – De eo quod alterum alteri, ex bono et aequo praestare oportet* (D.44,7,2,3)...

[458]Mühlenbruch 1835, 201 (§104).

In the 19th century German theory of private law, references to the nature of contract also brought about creative development of the practice of the systematisation of factors that can determine the validity of contracts. One good example is the handbook of Anton Friedrich Justus Thibaut of 1809. He separated three levels of generality of the nature of contract. The most general level covered the issues which were included in the general part of civil law. The second level was aimed at capturing the fact that contracts, "due to their nature", may be similar. The last level specified by Thibaut covered the "individual nature" of typical contracts. In the German pandectics, one may also find statements in which the use of the nature of the contract notion was explicitly independent from the type of contract and reflected the practical purpose of transactions. An example of such linguistic practice would be the words of Karl Georg von Wächter, who argued that in the "nature of non-gratuitous contractual dispositions" dwelled a principle which stipulated that in the absence of a different agreement of the parties, performances should be made simultaneously.[459]

The results of discussions in which the nature of the contract was related to a systematic order[460] of law were broadly reflected in civil codes. In the original text of the French and German civil codifications, the criterion of the nature of the contract itself was mentioned only once. It was included in article 1135 of the CC, which stipulated the incorporation of the natural consequences of a contract into its content and paragraph 269 of the BGB, which determined the place of performance of an obligation in accordance with its nature. The limited inclusion of the criterion in the respective codes was therefore a change from the linguistic practice of *ius commune* jurists. In France, this created the possibility of going beyond the terms implied in law (*naturalia contractus*), towards the implication of terms in fact based on the economic reasonableness test. In paragraph 269 of the German Civil Code , the nature of the

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[459] Wächter 1880, Vol. 2, 387 (§189).

[460] See fn. 81.

obligation criterion indicates the only practically reasonable place of performing an obligation. The connection of the nature of the contract with its economic meaning, noted in the discussion of ancient jurists and known from the views of 19th century pandectists, was used as a criterion to control standard terms in the German Act of 1976.[461] Since the amendment of the German Civil Code in 2001, it has been included in paragraph 307(2)(2) of the BGB. In the 1990s, potentially new argumentative possibilities were created by the introduction of the nature of the relationship clause as one of the boundaries to the freedom of contract in article 353[1] PolKC and the inclusion of the notion of the nature of mixed contract in Russian law as a criterion for the application of statutory rules to innominate contracts (article 421, section 3 of the RusKC). These changes in law may be regarded as an expression of a conviction or an intuition that the nature of the contract argument may be productive regardless of the contractual type standard. This does not mean that the *ius commune* achievements have been contested. Their durability is confirmed by the presence of *naturalia contractus* or a more general phrasing of *naturalia negotii* in the today's theory of private law. The changes in law show that we are dealing with attempts to find new productivity in the nature of the contract criterion. This search is connected with the question of how to understand this criterion in isolation from the type of contract. To date, historical and comparative deliberations draw attention to economic reasonableness, but also reveal how difficult it is to introduce such a template in practice. It remains to be seen, then, what the interpretation of the nature of the contract criteria by academics and judges brought, in this respect, to the French, German and Polish Codes.

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[461] See § 9 sec. 2 (2) AGBG.

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THE INTERPRETATION OF THE NATURE OF THE CONTRACT STATUTORY CLAUSE. EXAMPLES FROM THE CIVIL CODES OF FRANCE, GERMANY AND POLAND

4.1. Introduction

The codification of civil law was supposed to exclude the possibility of judge-made law. However, experience shows that the interpretation of codes leads to the implication of terms which were not expressly set out in the contract and were not incorporated under the law. Interpretation may also lead to abrogation of contractual provisions. The notion of the nature of the contract has become one of the legal arguments used to that end. This experience is, however, much less extensive than is the case with good faith or good customs clauses. It reveals ambiguities and concerns. To a certain extent this may be explained by the limited or late incorporation of the nature of the contract clause (presented above) in the codifications discussed. However, in some part this results from doubts as to the root of the meaning of the nature of the contact argument. In light of the historical and comparative background presented, this is related to the choice between the reference to economic reasonableness or reasonableness inherent in the systematised description of the law of contract. Bear in mind that the es-

sence of the first meaning was rooted, in line with the ancient Roman tradition, in the adequacy of the contract's contents in light of the legitimate expectations of the parties. On the other hand, the nature of the contract argument based on the reasonableness of the systematic description of the particular types of contracts leads to supplementation or modification of the agreement, in accordance with the statutory regulations of contract law. Let us see, then, what the interpretation of article 1135 CC and article 9 AGBG and art. 307 BGB in Germany and article 353[1] PolKC in Poland would be in the light of said doubts. This will provide the next link in the reconstruction of the conditions for a productive application of the nature of the contract clause in legal reasoning.

4.2. Interpretation of article 1135 Code Civil

According to article 1135 CC "Agreements bind not only as to what is expressed therein, but further as regards all the consequences which equity, usage or law attribute to an obligation by its nature". The nature of the obligation clause is one of the criteria used as a test for the implication of terms which were not expressly set out in the contract. It should be noted that this provision is included in the section pertaining to the legal effects of obligations (*De l'effet des obligations*). It forms a part of the regulations governing this issue. It may also be regarded as a principle, "smuggled" from *Livre préliminaire*, allowing the judge to build on natural law and customs[462]. The question regarding the grounds for and the boundaries of freedom of interpretation of article 1135 CC has become an axis of a slowly crystallising argumentative sense of the notion of nature inherent in this provision. The basic elements of the crystallisation process include: pinpointing the relation of article 1135 CC to the pre-codification law, determination of the auton-

[462] See Deroussin 2007, 443.

omy of article 1135 CC as grounds for implied terms and defining the relationship between the three criteria included in the provision.

4.2.1. Views on the relationship between article 1135 CC and the pre-codification law

In 19th century French legal theory and practice, attention is drawn to the relationship between article 1135 and previous laws. The examples this kind of thinking consisted of highlighting similarities between the phrasing of the provision and the Latin maxims rooted in Roman law texts. Olivier Le Clerq, in a broad comparison of Code civil with the Roman law, combined three Roman principles with article 1135: "…one person is bound to another with respect to that which one person is due to perform for another in accordance with what is fair and equitable"[463]; "…for those matters which exist by practice and custom come within actions based on good faith"[464] and "…if nothing was agreed on, they are held responsible for the duties naturally inhering in this action"[465]. Pursuant to these out-of-context principles pertaining to the application of the good faith clause (*ex fide bona*), Le Clerq declared full conformity of article 1135 with Roman law[466]. This method of superficially, basically ahistorically, combining the phrasing of a provision with Roman law maxims was repeated a number of times in the 19th century. The first example is one of the few applications of article 1135 CC in the 19th century French law reports. The dispute between Mr. Pery and Mr. Patural pertained to whether the sale of "everything the company holds" results in the prohibition for the seller to pursue a business that competes with that of his/her former partner[467]. The Seine Tribunal recognised the existence of such

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[463] D.44,7,2,3(Gai.).
[464] D.21,1,31,20(Ulp.).
[465] D.19,1,11,1(Ulp.).
[466] Le Clerq 1811, 265–266.
[467] Recueil Daloz 1860, 219.

a prohibition. In the appeal procedure, a dispute between the parties arose as to whether such a judgment was in line with article 1135 CC. Patural, who defended the prohibition against competition, based his defence on article 1135 CC. Like Le Clerq, he reasoned that the provision is a mere repetition of the Roman principles in line with which the contract also covers customs[468] and hence the implication of the non-competition clause as a term implied by custom was legitimate. He argued that "when interpreting an agreement in the light of its nature", one must note that this is the sale of a goodwill (*fonds de commerce*). Therefore, in his opinion, it was necessary to take into account the custom, in line with which the seller is prohibited from carrying out the same type of business in the same area[469]. The court of appeals, in the judgment of 2 May 1860, rejected the existence of the absolute prohibition against competition. The court also ruled that such a duty did not result from the textual meaning of the contract or the mutual intention of the parties[470]. Another example is the comment of Huc to the Code civil dating back to late 19th century. Huc, like Le Clerq, identified article 1135 CC with the Roman law maxim which required the performance of the obligation in line with what was good and just (*ex bono et aequo*)[471].

These two examples demonstrate the tendency to schematically connect article 1135 with the Roman good faith maxim[472] that was emphasised in the 19th century theory of private law. This resulted in two considerable limitations to the autonomy and the practical meaning of the nature of the contract clause. The first was expressed by combining, in legal argumentation, article 1135 KC with article 1134 CC and ordering the performance of obligations in accordance with good faith[473]. The latter consisted of concentrating on equity and custom in the interpretation of article 1135 CC.

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[468] D.21,1,31,20(Ulp.).
[469] Recueil Dalloz, 1860, 220.
[470] Recueil Dalloz 1860, 220.
[471] Huc 1894, 134.
[472] Marcadé, Mourlon 1865, 14; Marcadé 1867, 404; Aubry, Rau 1902, 563 fn. 3.
[473] See Marcadé 1867, 404; Deroussin 2007, 443.

4.2.2. Forming the creative role of article 1135 CC in legal reasoning

As early as in the first published judgment in which the court applied article 1135 CC, it was connected in argumentation with article 1134 CC. In the judgment of the Court in Trier of May 1807, this provision of the Code Civil served as grounds for an opinion that the breach of the statute made a contract void [474]. Examples of combining these provisions are present in the argumentation of French courts to this day. Since the second half of the 19th century, the combination of articles 1134 and 1135 CC has also served the purpose of providing the rationale for the courts, in some cases, to modify or make contracts more precise[475]. This demonstrates the continuation of the idea of a connection of article 1135 CC to the performance of obligations in accordance with good faith[476]. This reasoning is not, however, strictly adhered to. In the second half of the 19th century and in the early 20th century, the courts discovered implied terms that went beyond the scope of what was at least the presumed intention of the parties – this was understood as a consequence of custom or equity.[477]. As early as in judgments of the mid 19th century, article 1135 CC provided grounds for the inclusion of the customary institution of an open account between mer-

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[474] Bull. civ. 1807, I, 80. In this case the court considered the link between legal effects of an agreement and the statutory regulation of the priority of mortgages.

[475] E.g. as for the duty to inform, WLF A9375DZA (28.11.2006); as for the duty to provide guarantee in the assistance contract (*assistance bénévole*),Bull. civ., 1996,I, 463 (17.12.1996); as for the duty to vacate a construction site, WLF A8751CKC (2.02.1994); as for the duty to take the technical competence into consideration, Bull. civ.1995, I, 7 (1.12.1995), *assemblée plénière*; as for duty to determinate a reasonable delivery date, WLF A7890CUR (17.05.1995); as for right to modification of the object of lease, WLF A6497AYB (13.01.1999); as for the scope of copyright transfer, WLF A6721AYL (15.05.2002); as for excluding liability in an insurance contract, WLF A8382DKN (13.10.2005).

[476] Bergel 1989, 251.

[477] See Deroussin 2007, 444.

chants[478] and for recognising the obligation to pay a bonus, apart from the price, in line with the custom known and accepted by the parties[479]. Clearly, the references to custom are a small, but permanent consequence of finding implied terms based on article 1135 CC[480]. Huc, the author of the 19th century commentary mentioned above, saw equity as the source of the service provider's duties to guarantee security (*garantir la sécurité*) adopted by courts in the 1880s[481], or the source of prohibition to criticise the mandator by the manager handling his business[482]. The first judgment was developed by the famous and cited until this day decision of the Court of Cassation of 21.11.1911. The Court ruled that the conclusion of a carriage contract imposed on the carrier a special duty consisting of transporting the passenger safe and sound to the passenger's destination[483]. The Court based the decision on article 1134 CC. In the theory of law, this decision is presented by some authors as an apt example illustrating that the so-called *obligation de sécurité*[484] is derived from equity. However, other than carriage contracts, since the second half of the 20th century the courts have not been making any equity-related considerations when recognising this duty in contracts. They consistently confirm typical cases where it is implied and treat its breach as a breach of contract. When justifying such a view, the courts most often refer to article 1147[485] or articles 1135 and 1147 CC jointly[486]. The briefness *(lacon-*

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[478] See ZEC 1862, 405 (26.06.1858).

[479] See ZEC 1862, 405 (15.02.60).

[480] See WLF A6365CQS (11.01.1996); WLF A3996CNC (1.06.2000);WLF A6091CNW (6.02.2001); WLF A8231BSN (6.05.2003); WLF A5489DW9 (4.06.2007).

[481] Huc 1894, 134 (14.11.1885).

[482] Huc 1894, 134 (06.12.88).

[483] Bull. civ., 1911, I, 134.

[484] Terré, Simler, Lequette 2002, 449; Lamoureux 2006, 500; Henry 2007, 1396.

[485] Art. 1147 CC: A debtor shall be ordered to pay damages, if there is occasion, either by reason on non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part.

isme) of reasons for the judgment, typical of French courts, leaves, however, the details of such deliberations unknown[487]. The *obligation de sécurité* is probably rooted in the judges' sense of equity. However, its use in legal practice over the last few decades confirms that it has been recognised as an objectively existing legal duty and inspires to link the nature of the contract clause with a test of the existence of this duty[488]. This will be done following discussion of the beginnings of another duty of considerable practical significance introduced to judicial reasoning[489], i.e. the duty to inform.

In the judgment of January 1894, the Court of Cassation noted that, in line with article 1135 CC, an agreement is binding not only as to what is expressed therein, but further as regards all the consequences which equity, usage or law attribute to an obligation by its nature. On these grounds, the court recognised the existence of an "implied in the contract" duty of a water consumer to inform the second party of the agreement of any and all circumstances in his/her house related to water supply. As a consequence, the court ruled that the breach of this duty provided grounds for liability for damage caused by a change in water pressure to neighbouring real estate[490]. Article 1135 CC was the earliest indicated legal basis for the deliberations of the Court of Cassation regarding the duty to inform, which have been intensive since the 1980s[491]. In a number

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[486] E.g. the duty to assure security of a person whose trust has been induced, WLF A6344AHG (17.01.1995); the duty to assure the security of blood products, WLF A7812CS7 (13.11.1996); the duty to assure security of karate course participants: Bull. civ., 1999, I, 330 (01.12.1999).

[487] Mimin 1951, 253; Duxbury 2001, 47.

[488] Ripert 1952, 169; Lamoureux 2006, 514.

[489] Fabre-Magnan 2004, 420 –421.

[490] Recueil Dalloz, 1894, 207 – 208.

[491] E.g. the duty of a manufacturer to provide instructions necessary to use a hazardous product, WLF A6888A31 (14.12.1982); the duty to inform about medicines and medical procedures, WLF A2983AAQ (8.04.1986); the duty of an installation contractor to inform about any modifications affecting its use, WLF A7715AAY

of cases this is supported by the duty to provide instructions or advice[492]. French courts, with their characteristic laconism, do not explain the source of this implied term in more detail. What is more, in judicial practice one can encounter the same solutions sometimes justified by 1135 CC and other times by a different legal basis[493]. The introduction of the duty to inform in the 1980s was accompanied by the idea that its basis was not clear in legal theory[494]. In the 1990s, courts stressed the basic importance of article 1135 CC as grounds of informative duties[495]. The specific source of the duty to inform is not, however, clear. Some authors, as was the case with the *obligation de sécurité*, point to equity.[496] However, in the jurisprudence and theory of law, one finds attempts to indicate an objective source of the duty, which was most developed primarily based on article 1135 CC. Such thinking in jurisprudence is illustrated by the opinion of the Court of Cassation that "the duty to inform shall be effectively based on the fact that it affects the performance of the obligation itself".[497] In academic debate, this is expressed in the view of Fabre-Magnan that a judge should apply article 1135 CC to justify the duty to inform when he or she concludes that "it belongs to the nature of the contract and should be implied in all similar contracts"[498].

(15.03.1988); the duty of a gas supplier about any favourable changes of tariffs, WLF A 8600AB7 (11.06.1996).

[492] E.g. the duty to provide advice and instructions by a professional seller as for the quality of material and its use, Bull. civ. 1985, I, 211 (3.07.1985); the duty of a real estate agent to provide instructions and advice to the principal: Bull. civ. 1985, I, 227 (30.10.1985); the duty of entities providing laundry services to provide an information and advice, WLF A1342CZQ (23.05.1995); the duty of the water supplier to provide information and advice regarding price tariffs: WLF A2142AXM (20.11.2001).

[493] Fabre-Magnan 1992, 360.

[494] Christianos 1987, 31.

[495] Fabre-Magnan 1992, 356-357.

[496] Terré, Simler, Lequette 2002, 450; Henry 2007, 1397.

[497] See Fabre-Magnan 1992,362.

[498] Fabre-Magnan 1992, 360.

The overview presented shows the basic stages and qualities of the process of discovery and the strengthening of the role of article 1135 CC as an autonomous basis for the introduction of implied terms. In the argumentation of judges, one can easily find the terms resulting from custom. On the other hand, finding a precise distinction as to which implications are rooted in equity and which are imposed by law in line with the nature of the contract is not easy. The indicated attempts to objectify the *obligation de sécurité* and the duty to inform draw our attention, however, to the nature of the contract. They aspire to pose a question concerning the relationship between the widely accepted implication of these duties and the meaning of the nature of contract in the French theory of private law.

4.2.3. Towards the nature of the contract as an autonomous basis for implication of implied terms under article 1135 CC

4.2.3.1. The issue of the scope of the freedom of interpretation based on the concept of the nature of the contract

The negligible practical significance of article 1135 CC until the 1880s is reflected in the then leading commentaries on civil law. In the seminal work of Aubry and Rau, the notion of the nature of the contract was given no explanation.[499] In the extensive *Explication du Code civil* by Marcadé, one finds only a mention that the implication of implied terms may be based on general principles of law.[500] The concept known as the *ius commune*, which states that each type of contract has its own nature clearly returned in 20th century French legal theory. The explanations of Planiol and Ripert, dating back to the first half of the century, presented two possible consequences of such reasoning in the absence of a different intention of the parties.

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[499] Marcadé 1897, 404; Aubry, Rau 1902, 564.
[500] Marcadé 1897,404.

The first is based on the interpretation of the nature of the contract so as to find the terms implied in law adequate to particular types of contracts. The second consisted of the fact that the judge, "under the pretext of the interpretation of the supposed intention of the parties, creates legal duties by the power of his or her authority" by generalising the statutory provisions or the analysis of the practical consequences of a contract.[501] The latter signifies the recognition of the presence of objective duties which are discovered and implicated by the judge depending on how the judge understands the nature of the contract. Initially, the first method of reasoning gained dominance. A number of authors of the second half of the 20th century supported the idea that the phrasing of article 1135 CC: "*...la loi donnent à l'obligation d'après sa nature*" gave grounds for the judge to imply terms based on the mandatory rules and, in the absence of a different intention of the parties, optional provisions adequate to the particular type of contract as well.[502] In the scope of such reasoning, the implication of implied terms that do not result from custom or statutory provisions may only be justified by equity.[503] A change was brought about by the practice of implication of implied terms by the courts, which has been growing significantly since the 1980s. Generally, it is regarded as an indication of a process consisting of deviating from the classical theory of contract based solely on the intention of the parties towards an objective interpretation aiming at strong subordination of the contents of a contract to values and functions which are deemed objectively useful to society.[504] In the context of the interpretation of article 1135 CC, this drew the attention of some judges and academics to an opinion that the nature of the contract may include an "objective

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[501] Ripert 1952, 167-168.

[502] Colin, Capitant 1959, 459–460; Mazeaud and Mazeaud 1978, 316; Terré, Simler, Lequette 2002, 448.

[503]; Mazeaud and Mazeaud 1978, 317-318; Terré, Simler, Lequette 2002, 440 – 441; Fabre-Magnan 2004, 420.

[504] Starck, Roland, Boyer 1995, 67-68; Larroumet 1996, 123-126 and 130; Bergel 1989, 251; Pellé 2007,58–59.

nature of duties" which is not provided for in statutory provisions.[505] Such reasoning can be found in the reasons for judgments based on article 1135 CC: the duty to inform may be "effectively based" on the fact that it affects the performance of the principal duty;[506] the judge should accept the existence of the duty of "economic diligence" (*diligence de l'économie*) in a mortgage agreement;[507] "due to the nature of the obligation" the prohibition against the use of a photographic film for a purpose other than to create the cover of a magazine does not extend to the use of the photographic film to promote the magazine.[508] This way of thinking is exemplified in academic discourse by linking the nature of the contract in article 1135 CC with the "objective economy of the contract" (*l'économie objective du contrat*) as a necessary element of further interpretation of its content"[509] or an explanation that the duties to assure security and to inform established in the judicial practice "may be treated as implied in law and, to a lesser extent, as a result of law-making authority of the judge".[510] These statements illustrate the slow, in part intuitive, admission of the nature of the contract clause into article 1135 CC as a basis for implied terms discovered by the judge. Presented in 2005, the study of Frédéric Rouvière includes a theoretical reflection on the function of the nature of the contract concept in the French judicial practice[511]. Perceiving it as the next link in the process of emancipation of the nature of the contract clause in article 1135 CC complements the French experience regarding the relevance of the notion in legal argumentation.

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[505] Ripert 1952, 168. It seems that this position was presented by Planiol and Ripet who claimed that "in fact the judge corroborates the existence of specific duties".

[506] Judgment of 23.04.1985, as cited in Fabre-Magnan 1992, 362.

[507] WLF A5577CY9 (22.03.1995).

[508] WLF A8382DKN (15.05.2002).

[509] Larroumet 1996, 132.

[510] Lamoureux 2006, 514.

[511] Rouvière 2005, 165-190.

4.2.3.2. Basic qualities of judge-made-law built upon article 1135 CC and the concept of the nature of the contract

It is typical, and in line with the history of interpretation of article 1135 CC, that for Rouvière the basic point of reference for theoretical reflection on the nature of the contract is the *Traité des obligations* of Pothier, published over 200 years earlier. Thus he came back to the connection of the particular type of contract and its nature.[512] The French academic discussion also recalled the distinction between the elements of the nature of the contract in this sense – those terms which make the agreement legally binding – and those terms which are implied in the contents of a contract in the absence of a different intention of the parties.[513] This, however, did not mean a simple return to the medieval theory recognising the *essentialia* and *naturalia contractus* proper solely with respect to particular types of contract. In line with jurisprudence and the theory of private law at the turn of the 20th and 21st centuries presented above, Rouvière declared that the meaning of the nature of the contract clause is independent from statutory provisions.[514] Thus expressed, the objective character of the nature of the contract was combined with its practical, economic dimension in a clearer manner than that of Planiol and Ripert. Rouvière saw the essence of the practical sense of the analysed clause as assisting in the implication of implied terms in a manner which guaranteed and retained the benefit gained from the agreement.[515] Rouvière noticed that such an understanding of the analysed clause served to remove excessive uncertainty as to its application in legal argumentation.[516] Such an explanation, however, raises questions regarding the principles applied to achieve specific goals. The comparison of the courts decisions based on article 1135 CC with the presented view of Rou-

[512] Rouvière 2005, 176, fn. 695.
[513] Rouvière 2005, 178, fn. 700.
[514] Rouvière 2005, 177.
[515] Rouvière 2005, 177.
[516] Rouvière 2005, 176.

vière allows the drawing of two groups of conclusions. Firstly, it is true that the part of these decisions which do not result from custom may be systematised based on the two indicated goals. The first purpose consists of assuring the benefits of a contract legitimately expected by a party.[517] The second aim is to assure a balance between the parties, such as is required to take full advantage of the contract.[518] The first of the above goals may be implemented by further specification and correction of allocation of risk taking into consideration the legitimate expectations of the creditor. In interpretation of article 1135 CC, this is expressed by the implication of the duty to assure security (*obligation de sécurité*) for a person whose life or health has been entrusted to the contractor executing the contract [519] or the duty to exercise supervision over things entrusted to a contracting party (*obligation de surveillance*) as implied terms.[520] Assuring the the expected contractual benefit is also supported, according to article 1135 CC, by the duty of commitment to perform the contract by the contracting party[521]. The latter of the two goals may be realised through: the duty of a professional to provide information or advice regarding factual or legal circumstances which are not usually known for a layperson and which are required to fully take advantage of the contract[522]; implication of

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[517] Cf. Rouvière 2005, 166 and 170.

[518] Cf. Rouvière 2005, 174.

[519] E.g. in a passenger transport contract, Bull. civ., 1911, I, 134 (21.11.1911); medical services contract, WLF A7812CS7 (13.11.1996); contract for organisation of sport exercises, Bull. civ., 1999, I, 330 (1.12.1999).

[520] E.g. regarding things left in a hall by participants in a meeting held in a room leased by a hotel, Bull. civ., 1987, I, 262 (13.10.1987)); regarding things left in a school cloakroom (judgment of the Court of Appeals in Paris of 10.04.1991; Juris-Data, 021433).

[521] E.g. the duty to vacate a construction site, WLF A8751CKC (2.02.1994).

[522] E.g. the duty of a professional seller to inform a layman customer of the properties and purpose of the purchased material, Bull. civ., 1985, I, 211 (3.07.1985); the duty of a real estate agent to inform the principal of any explicit, in the agent's view, excessive price, Bull. civ., 1985, I, 277 (30.10.1985); the duty of a contractor to inform of any major modification to an installation, WLF A7715AAY (15.03.1988).

a debtor's warranty not provided in express terms but adequate to the purpose of the contract;[523] and the duty to take into consideration the capacity of the contracting party to use any performance rendered[524]. Hence, one finds principles serving the implementation of values fundamental to the proposed sense of the nature of the contract clause. Obviously, these principles are generalisations based on court rulings. This reasoning brings one to second group of conclusions inspired by Rouvière. The assumption that there are principles of productive reasoning based on the nature of the contract clause cannot rule out the creative role of judges in their application. This is expressed not only in the discovery of the indicated principles, but also in specifying the scope of its application. This is illustrated by decisions in which judges explained that a professional seller's duty to inform does not cover the indication of legal restrictions on the use of the purchased things[525] or rejected a notary's duty to inform of publicly known facts[526].

Finally, let us look at the conclusion from the point of view of Domat according to which "the natural consequences of a contract result from equity"[527]. The French legal experience shows that it was not easy to comprehend an independent, productive sense of the nature of the contract clause included in the statutory provision. The difficulty consisted of capturing it as grounds for legal argumentation independent from equity but flexible, i.e. extending beyond the statutory provisions of contract law. This distinction from

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[523] With regard to the assistance contract (*assistance bénévole*). E.g.: Bull. civ., 1996, I, 463 (17.12.1996); WLF A6755CUQ (17.03.1993); the judgment of the Court of Appeals in Douai of 7.01.1999, Juris-Data, 042087.

[524] E.g. the duty of a website designer to take into account whether the contracting party will be capable of managing it, the judgment of the Court of Appeals in Agen of 4.10.2004, Juris-Data, 275157).

[525] E.g. The Court of Cassation ruled that a seller was not obliged to obtain an administrative consent to install an alarm system, WLF A 2410CKH (27.10.1981), or of legal restrictions related to the installation of cameras in an enterprise's cafeteria, WLF A9971AYX (25.06.2002).

[526] Bull. Civ., 1996, I, 423 (26.11.1996).

[527] See above 88.

equity is based on the objectivity of criteria underlying the argumentation. The judge's sense of equity may be subjective. In light of the presented legal experience, this argues for restriction of the equity-based argumentation to cases unique due to facts or properties of the parties. The trend towards the gradual "objectification" of duties based on article 1135 CC observed in the argumentation of judges and the theory of private law confirms the independence and productivity of the nature of the contract clause in legal reasoning. The aspiration to assure and maintain the benefit a party could legitimately expect upon entering into a contract may be regarded as an objective basis of that argumentation. This idea of using the nature of the contract as an argument referring to the economic order[528] of the relationship built by the parties is not new. Its initial form can be seen in the reasoning of ancient Roman lawyers.[529] The argumentation based on article 1135 CC is still, however, the first important practical test of the idea. It helped pinpoint specific principles of reasonableness which are reflected in contractual duties discovered by courts and widely recognised in academic debate. We have seen that said discovery is an ongoing process. It was a breakthrough in both its progress and intensity in the early 1980s. This overlapped with the end of the era of the purely individualistic concept of contract in the French theory of private law.[530] In 1976, the nature of the contract clause was incorporated into German private law. In 1990, it was included in the Polish civil code. Let us note that German law makers made the nature of the contract the criterion for judicial controls of standard form contracts and Polish legislators made it one of the boundaries to the freedom of contract. Despite this dogmatic difference, in both Germany and Poland the nature of the contract clause serves to control the contents of contracts and as basis for the reasoning

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[528] See fn. 80.
[529] See above 38-39.
[530] S. Pellé 2007, 207.

which may lead to its modification. Let us then compare the results of the French test with the German and Polish argumentation based on the analysed clause.

4.3. Interpretation of the "conflict with the nature of the contract" in line with § 307 BGB

4.3.1. Basic qualities of German judge-made-law developed through interpretation of the nature of the contract

It should be noted that the inspiration to introduce the provision which included the nature of the contract clause in 1976 was the jurisprudence pertaining to the so-called "cardinal duties". The nature of the contract criterion can be encountered in the argumentation of German judges before the establishment of these leading cases. Reading the jurisprudence of the Court of the German Empire dating back to the drafting of the BGB, the jurisprudence of the Court of the German Empire and the Supreme Court of the Federal Republic of Germany prior to the entry into force of the Standard Contract Terms Act of 1976, one can distinguish three basic forms of this argumentative practice.

The first is comprised of cases in which the nature of the contract covered what resulted from the statutory regulation of particular types of contracts.[531] The second is comprised of judgments in which judges refer to the nature of the contract as a normative model, which is not regulated by an act of law but which is a product of legal reasoning.[532] Finally, there are judgments in which the nature of the contract was a linguistic formula drawing attention to the benefits expected from a contract. This is illustrated by recognising the unauthorised excess copies of an edition as contrary to

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[531] E.g. RGZ 1, 391–393 (24.03.1880); RGZ 11, 263– 266 (7.04.1884); RGZ 12, 301–304 (10.11.1884); RGZ 13, 2-4 (20.02.1885); BHGZ 47, 202-206 (22.03.1967).

[532] E.g. RGZ 91, 243 – 248 (19.11.1917); LNR 1972, 11722; (23.03.1972).

the "nature of a publishing contract";[533] an opinion that a withdrawal from an inheritance contract must be made in a certain form, as the nature of this contract is the same as a testamentary disposition,[534] or the argumentation that in the event of a breach of reliance under a sea freight contract one cannot presume its continuation due to its nature.[535]

The second and third groups of cases provide yet further confirmation that the detachment of the nature of the contract clause from terms implied by law leaves a variety of opportunities to use it in legal discourse. Taking this practice into consideration, one may presume that the criterion of "cardinal duties" was introduced into the argumentation of judges as a linguistic formula alternative to the nature of the contract, a formula which draws attention to the benefits expected upon entering into a contract.[536] The links between the jurisprudence that formed the basis for article 9(2)(2) AGBG, jurisprudence resulting from the application of this provision and jurisprudence based on article 307(2)(2) BGB, therefore created grounds for the recovery and development of argumentation combining the nature of the contract with the benefits expected upon entering into a contract.[537] For practical purposes extensive and detailed collections of said case law have been compiled. The obvious disclaimer that this is not an exhaustive collection[538] is merely a formal confirmation that using the nature of the contract clause is connected with judicial discretion. Conventionally, one speaks of a breach of cardinal duties in terms of various instances of excluding or limiting liability.[539]

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[533] RGZ 12, 108 – 118 (24.03.1884).

[534] RZG 10, 250 – 251 (7.12.1883).

[535] LNR 1960, 10999 (20.06.1960).

[536] After the incorporation of the nature of contract clause in the act, the "cardinal rights" idea was regarded as redundant, see: Coester 2006, 345.

[537] E.g. NJW 1992, 2016 – 2018 (5.05.1992); NJW 2005, 1774 – 1776 (1.02.2005). See also: Lorenz, Riehm (2002), 56.

[538] Palandt, 438.

[539] Prütting, Wegen, Weinreich 2011, 508.

Let us analyse the achievements of the German practice as the next part of the history of the nature of the contract clause in practical legal argumentation. The pattern established for the purpose of the systemisation of the French jurisprudence based on article 1135 CC reveals a basic similarity as well as differences in details. Fundamental similarities include the fact that the nature of the contract clause in Germany became the basis for argumentation supporting the benefit which the creditor may legitimately expect and supporting the possibility of using this benefit. In France, the expected contractual benefit is achieved by the implication of terms to the specification of risk allocation,[540] and in Germany, judges revise the contractual risk allocation in line with the nature of the contract.

Examples of such practice include the recognition of the invalidity of the complete exclusion of liability for damage caused by an object of lease in the event of ordinary negligence on the part of the lessor;[541] the impossibility of holding a credit card holder liable for its unfair use by a third party,[542] or the invalidity of a provision under which a general contractor is held to have subsidiary liability vis-à-vis the ordering party, i.e. in the event of a subcontractor's failure to perform.[543] The French courts, in support of using the contractual benefit, implicated the duty to inform of any factual or legal circumstances which are not usually known for a layman based on article 1135 CC, whereas German judges deemed information which was misleading for a layman as contrary to the nature of the contract. This is illustrated by the judgment in which the Supreme Court of the Federal Republic of Germany ruled that it is impermissible to apply a contractual provision which may lead a "legally uneducated client" to understand that he or she is not entitled to reimbursement of the amount that has not been used

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[540] *Obligation de securité* and *obilgation de surveillance*.
[541] DB 2002, 1441 (24.10.2001).
[542] BGHZ 150, 286–299 (16.04.2002).
[543] BGHZ 150, 226–237 (21.03.2002).

under a prepaid phone services contract[544]. Another concern that stems from the interpretation of article 1135 CC with respect to the use of a contractual benefit was expressed in recognising the duty to take into account the objective capacity of the creditor to use it. Similarly, the contractual benefit is protected in Germany by interpretation of the nature of the contract which supports insurance law. On this basis, the court ruled that a clause excluding health insurance coverage for a person who was disabled at birth or as a result of an illnesses that surfaced in the first year of life was invalid[545].

The dogmatic distinction between articles 1135 CC and § 9(2)(2) AGBG and article 307(2)(2) BGB causes, however that the same values are implemented in both countries in different ways. This distinction is also offered as a reason for the difference in the different intensity and scope of their detailed specifications. The argumentation that supports keeping and using the contractual benefit has been expressed in the interpretation of article 1135 CC primarily through the extensive implication of the duty to inform. The implementation of this argumentation strategy based on the nature of the contract clause in Germany also includes, as has been shown, proper information for the creditor. The mainstream argumentation based on article 9(2)(2) AGBG and article 307(2)(2) BGB is, however, the protection of freedom necessary to make use of the contractual benefit.

This approach in jurisprudence is illustrated by deeming the following clauses invalid: prohibiting the issue of a duplicate personal bus ticket and, consequently, excluding the possibility of using a means of transport or the refund of a fare if a passenger lost the original ticket[546]; conditioning the duration of health insurance on the duration of a specific employment relationship;[547] or prohi-

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[544] Judgment of 9.06.2011 (III ZR 157/10).
[545] NJW-RR 2008, 189 – 192 (26.09.2007).
[546] BGHZ 162, 1774 –1776(01.02.2005).
[547] Judgment of 27.02.2008 (IV ZR 219/06).

biting, on an unlimited basis, a lessor from keeping pets[548]. This way of applying the nature of the contract clause to develop the protection of contractual benefits may be explained by the fact that in Germany this criterion is one of the premises of judicial control of standard form contracts. Similarly, one can justify the application of the clause discussed to prevent excessive disproportion of performances[549]. The reference to the nature of the contract clause also excluded the risk of unilateral change of contractual terms if the change factors are not clearly and precisely expressed in the contract[550].

The differences presented above demonstrate that the protection of the indicated values using the nature of the contract clause is as much an issue of the sensitivity of judges to the said value as it is of the absence of clear grounds for their protection in legislation. Consideration of the grounds for the implementation of these values, other than the nature of the contract, lies outside the scope of this study. Let us simply state that the development of consumer protection by legal means led, in particular, to the provision of precise limits and duties, some of which were implicated earlier by reasoning based on article 1135 CC or article 9(2)(2) 2 AGBG[551]. It is important for the consideration of the nature of the contract clause that the German jurisprudence confirms the conclusions made based on French judicial practice. We can see clearly that there are values which are fundamental to the economic sense of the nature of the contract and the law-making role of the courts consists of the

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[548] NJW 2008, 218.

[549] E.g. it is invalid to apply a clause limiting the liability of a dry-cleaner's to 15 times the value of remuneration if this is significant disproportion to the value of damage; see ZIP 81, 1104; Palandt, 442.

[550] E.g. it is invalid to apply a clause which makes the performance of a travel agency's dependent on the customs of the destination country and resulting recommendations; see BGHZ 100, pp. 157 – 185 (12.03.1987).

[551] See e.g. as for duty to inform in France see article L 111-1 through L 111-3 *Code de la consommation*; as for prohibited clauses § 308 and 309 BGB.

discovery of principles serving said values and determining their scope.

The BGH judgment is an example of the doubts concerning the scope of protection of said fundamental values. The BGH court ruled that the duty to pay extra remuneration for the transfer of software to a more powerful computer is not a significant limitation of the rights resulting from the nature of a licence agreement for a definite period[552]. A reading of the French and German judgments illustrates the fact that the objectivisation of the argumentation related to the nature of the contract results from the consolidation of precedential authority. However, the theory of law may describe and stimulate the practice in many ways. It should be noted that in France there are already authors who confirm the objective nature of contractual duties implicated under article 1135 CC. The French theory of private law captured the fact that the nature of the contract clause is something more than a mere reference to the terms implied by statute in the absence a different intention of the parties. It accurately expressed the values fundamental to the application of the nature of the contract clause. Thus, this legal experience can be generally accepted as the legitimisation of the usefulness of the discussed clause. The French theory, however, did not present detailed proposals as to how to use it. It left it to the intuition of judges with respect to the values underlying the legal reasoning. The German theory, on the other hand, introduced more doubts in this respect, but also more detailed proposals.

4.3.2. Between scepticism and moderate conservatism of the German theory of private law with regard to the nature of the contract clause

The doubts recorded shortly after the introduction of the nature of the contract clause to the BGB still remain. Almost a decade after the amendment, still presented the view that it is very difficult to

[552] BGHZ 152, 233 – 246 (24.10.2002).

separate this criterion from the criterion incorporated in the next sentence of the same paragraph,[553] i.e. the clause on conformity with the "essential principles of the statutory provision".[554] The scepticism regarding the nature of the contract clause has been expressed in the opinion that "its practical sense can hardly be identified".[555] However, the very presence of the clause in the statutory provision and its application by the courts has had an impact on the academic discussion. Today, the belief that the analysed clause can be useful is predominant in the German theory of private law[556]. The main grounds for this opinion is the idea that it is not possible to exhaustively catalogue or systematise the normative criteria for the assessment of the contracting parties' legitimate expectations with respect to performance and the scope of legal protection.[557]

The usefulness of the nature of the contract clause as a link between the law and the diversity and unpredictability of life was aptly expressed by Thomas Lapp. He concluded that an interpretation based on this clause recalled the judgment made in accordance with the "spirit of times", just as Johann W. Goethe did in Faust.[558] By recognising the law-making role of courts[559], the German theory of law concentrated on building tools to objectify the reasoning based on the nature of the contract. Despite earlier controversies[560], the view that the nature of the contract clause required any dispute as to an agreement between parties to be in line with an external normative pattern started to dominate. The starting point in building this normative model are the expectations of parties, the result of which was the entering into of a specific contract. The authors

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[553] § 307 (2)(2) 1 BGB.
[554] Prütting, Wegen, Weinreich 2011, 507.
[555] Coester 2006, 341.
[556] Cf. Lorenz, Riehm 2002, 52; Coester 2006, 341.
[557] Lorenz, Riehm 2002, 52; Fuchs 2006, 710.
[558] Lapp 2010, n.65.
[559] Cf. Fuchs 2006, 706.
[560] See above 105-106.

reiterate that the constructed normative pattern should be primarily based on typical methods of statutory interpretation. It is common ground that when this is not sufficient, this pattern may also be based on "justice considerations"[561]. This reasoning is defined as a special case of "supplementary interpretation" of contract that is functionally similar to the formulation of statutory provisions[562]. Among the detailed hints as to how to construct the pattern of a dispute in line with the nature of the contract clause, the key fact that many German authors stress the significance of the "legitimate horizon of customers' expectations" in the application of article 307(2)(2) BGB[563].

This view confirms and further specifies the idea formulated earlier, i.e. that one of the values underlying the argumentation based on the nature of the contract is the desire to realise the benefits a creditor legitimately expects. Obviously, any change in the presumed scope of expectations is bound to change the results of reasoning based on the nature of the contract. That this interrelationship has been noticed is best shown through the relationship between the noted evolution of judicial practice mostly in France, and the poetic statement of Lapp, that through the nature of the contract, "the spirit of time becomes the interpreter". The task of the academic is to propose the method of specific interpretation. In Germany, we encounter the opinion that the quality of the commutative justice model which derives from the nature of the contract should consist of providing a proper balance of interests[564]. When there is no basis in legislation for building such a model, then the task of interpretation is to build the dogmatic structures of new

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[561] Coester 2006, 341; Lapp 2010, n. 65; Ballo 2010, 389; Fuchs 2006, 707; Palandt, 435; Prütting, Wegen, Weinreich 2011, 507.

[562] Fuchs 2006, 711-712.

[563] See Coester 2006, 343; Fuchs 2006, 706; Stoffels 2009, 204; Prütting, Wegen, Weinreich 2011, 507.

[564] Fuchs 2006, 707.

types of contracts [565]. The predominant opinion is that the reasoning based on the nature of the contract clause "is not an empirical task, but a normative process" [566]. From a broad historical perspective, this recalls the alternative between referring to the dogmatic and economic orders[567]. The fact that one cannot exhaustively catalogue detailed instances of the application of the nature of the contract clause is made clear in the German theory of private law by a limited reflection on the values underlying the criterion and principles supporting their implementation. Among the principles formulated above based on French and German jurisprudence, two are emphasized in the German "justice considerations": "making equal the risks and benefits the disproportion of which results from unilateral use of the freedom of contract"[568] and "removal of considerable asymmetry in information"[569]. Therefore, the results of the academic discussion in Germany inspires to draw conclusions. Firstly, it leads to a suggestion that in the interpretation of the nature of the contract clause, the replacement of the "justice considerations" formula by the criterion of legitimate expectations and principles discovered in legal practice that support the realisation of said expectations and retention of contractual benefits would be closer to actual practice. Secondly, highlighting the fundamental values apparent in the jurisprudence and principles that serve to implement them as a framework of economically rational argumentation speaks in favour of further analysis of the test due to the nature of the contract. Taking into consideration the French and German experience, we will similarly examine the interpretation of the nature of the contract clause in article 353^1 of the Polish civil code.

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[565] Coester 2006, 342; Fuchs 2006, 706; Stoffels 2009, 207; Palandt, 435.
[566] See Fuchs 2006, 712.
[567] See fn. 80 and 81.
[568] Fuchs 2006, 506.
[569] Fuchs 2006, 512.

4.4. Interpretation of article 353[1] of the Polish civil code

4.4.1. The dispute regarding the freedom of interpretation based on the nature of the legal relationship clause

It should be noted that the nature of the legal relationship clause is one of the boundaries to the freedom of contract under Polish law. It was introduced in article 353[1] PolKC and incorporated into the civil code in September 1990. This provision declares the freedom of contract, which was considerably limited during nearly 50 years of communist rule. The first academic opinions showed that the clear restoration of the freedom of contract gave no clarity as to the method of interpretation of the nature of the legal relationship clause[570]. In contemporary discussion about the nature of the legal relationship under article 353[1] PolKc, broad consent is limited to the belief that it may be regarded as a referral to the set of parameters fundamental for the validity of contract.

The essential controversy pertains to whether non-legal factors may affect their construction. Restraint or opposition with regard to the admissibility of these factors in judge's reasoning is combined with a focus on the rule of literal interpretation of the notion of the nature of the legal relationship[571]. As a consequence, the basis of reasoning is limited to the text of legal regulations, presumptions about the codified law of obligations or implications of the statutory regulation[572]. A decisive rejection of the use of non-legal factors [573] has been supported by a proposal to use the nature of the legal relationship clause as a basis for recognising these statutory provisions, which are common for all obligations or obligations of the same genus, as one of the boundaries of the freedom of contract[574]. However, the views that combine the nature of the legal

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[570] See above 111-112.
[571] Radwański 2002, 234; Machnikowski 2005, 324.
[572] Radwański 2002, 235.
[573] Machnikowski 2005, 326.
[574] Machnikowski 2005, 339-346.

relationship clause with the effects limited to the immediate implications of statutory provisions relate to doubts as to the practical sense of such reasoning.[575]

It should be noted that shortly after the introduction of article 353[1] PolKc, the German theory of private law inspired some Polish authors to include "justice considerations" in the argumentation based on the nature of the legal relationship[576]. The ensuing extended academic discussion allowed the formulation of the proposal to move beyond Polish statutory regulations by taking into consideration the principles and values reconstructed based on the comparative analysis of the law of obligations. Instances of breaching the "general nature of obligation" were identified as follows: excessive restriction of the freedom of a party to contract;[577] the imposition of conditions that cause a contracting party to be profoundly uncertain or dependent;[578] the absence of minimum usefulness and reasonableness of an obligation;[579] and the breach of the doctrine of privity of contract, excluding exceptions to the doctrine allowed by law[580]. These principles were formulated taking into consideration the achievements of the German, French and Swiss theory of private law.[581] The proposal to adopt the clause of "minimum reasonableness and usefulness of obligation" in the interpretation of nature of the legal relationship as a premise for the validity of contract, however, met with strong criticism.[582].

The Polish academic debate on the nature of the legal relationship has only been taking place for about 20 years. Its course confirms the difficulty in separating the reasoning based on the nature of the contract clause from the dogmatic order of statutory regula-

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[575] See Machnikowski 2004, 775; Machnikowski 2005, 345.
[576] See Łętowska 1999, 368 ff.
[577] Trzaskowski 2005, 318 ff.
[578] Trzaskowski 2005, 333 ff.
[579] Trzaskowski 2005, 347 ff.
[580] Trzaskowski 2005, 352 ff.
[581] See Trzaskowski 2005, 318 - 352.
[582] Machnikowski 2005, 327.

tions, which has been seen in the French and German experience. The Polish theory of private law demonstrates also that breaking the limitation itself does not result in a clear structure of argumentation grounded on the nature of the contract clause. However, some of the qualities of reasoning based on the nature of the legal relationship and rooted in non-legal factors have been noticed in the Polish academic debate as well.[583] In this respect, the Polish theory of private law confirms some of the achievements of the French and German academic debate. However, the references to judicial practice in each of the analysed legal systems discussed earlier provided the final grounds for conclusions as to whether and what objective values and principles underlie the productive reasoning based on the nature of the contract clause. It remains to be seen how this analysis will impact the relatively new Polish jurisprudence.

4.4.2. Controversies with respect to the Polish theory of private law and the nature of the legal relationship clause in the argumentation of judges

Clearly, the controversies in legal academic debate have not become part of judicial argumentation. The combination, in the reasoning of some judges, of the nature of the contract clause with the neighbouring criteria of the principles of social coexistence[584] or conformity with law[585] in article 353^1 PolKC may be regarded as a weak echo of a controversy, clearly visible in the theory of law, as to whether the argumentation based on the nature of the contract permits the taking into account of non-legal factors in any dispute about the boundaries of the freedom of contract. In the academic

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[583] The similarity pertains to the recognising the following as contrary to the nature of legal relationship: excessive limitation of the freedom of a party or imposing conditions leading to the profound uncertainty or dependence.

[584] E.g. OSNCP 1992, 1, 1 (22.05.1991); Lex 188549 (8.12.2005).

[585] E.g. OSP 1996, 10, 174 (15.02.1996).

reports of judicial decisions, however, this fact was heavily emphasised.[586] This is an element of the general state of play of the academic debate which indicates the absence of any clear ideas and the minor significance of the nature of the contract clause in legal practice[587].

Given that its 20 year history in the Polish civil code, it may, however, be concluded that it is gradually becoming an independent element of the argumentation of judges. The description of the principles underlying this practice will not be found in the rationale for judgments. A reading of judicial decisions shows us that what the reasoning based on the nature of the contract has in common is the attention drawn to the economic sense of an obligation. Judges refer in this way to the "nature of a business contract"[588] or "nature of a long term contract"[589].

The similarity of values underlying the argumentation of Polish, French and German judges may become even clearer if we systematise the Polish jurisprudence in accordance with the same manner of presentation applied to judicial decisions made based on article 1135 CC and § 307(2)(2) BGB.

Furthermore, in Poland the nature of the legal relationship clause has become the basis for argumentation in favour of gaining benefits which a creditor may legitimately expect and argumentation supporting the use of said benefit. As is the case in Germany, the change of the distribution of risk adopted by the parties based on the nature of the risk served to facilitate the procurement of any legitimately expected contractual benefit. An example of this practice is a determination, in the context of a preliminary contract, that an advance payment to a seller in an amount equal to the price to be paid under a future sales contract is contrary to the "nature of the preliminary contract". In making such determination, the court

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[586] Machnikowski 2005, 319; Trzaskowski 2005, 296 and 298.
[587] Machnikowski 2005, 319; Trzaskowski 2005, 300.
[588] E.g. OSNC 2007, 7-8, 122 (9.11.2006).
[589] E.g. Lex 274159 (15.02.2007).

precluded the possibility of the seller being paid the whole price without having entered into a sales contract or the buyer receiving the multiple of the price in the event the promised contract was not entered into through the fault of the seller[590]. Another example that demonstrates support of the benefit legitimately expected by the creditor is the reasoning that despite the absence of a statutory prohibition, it is impermissible to make the performance of a contract to produce a work dependent on payment by a third party. The Court of Appeals in Warsaw ruled that such a provision was in conflict with the "nature of the contract to produce a work" and the "principle of parity of performances". In ruling in this way, the Court rejected the possibility of allocating the risk of unlimited postponement of the payment date onto the creditor[591]. The jurisprudence of the Polish Supreme Court is an example of the argumentation based on the nature of the contract clause justified by the belief of a required relationship between the legitimate expectations of a creditor and the allocation of risk. The judgment pertaining to the guarantee contract, unregulated in the Polish civil code. Here the Supreme Court questioned the possibility of an effective guarantee of payment of the amount specified in a management contract should the creditor be unable to gain this amount from the profit of the company[592]. Shortly after the incorporation of article 353^1 PolKC into the Polish civil code, it provided grounds for argumentation rejecting the clauses which entitled one party to unilaterally vary contract terms. This is demonstrated by the decisions of the Supreme Court relevant to the practice of contract law. The Supreme Court declared that unilateral variation of credit or deposit interest rates in the absence of express contractual conditions regarding such variation was "contrary to the nature of a business

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[590] Lex 189073 (21.05.2005); judgment of the Court of Appeals in Poznań of 5.05.2010 (I ACa 316/10).

[591] OSA 2008, 10, 32 (Court of Appeals in Warsaw, 17.07.2007).

[592] OSNC 2007, 7-8, 122 (9.11.2006).

contract". In that context, the Supreme Court added that it led to a breach of contractual justice.[593]

The nature of the contract clause has also provided Polish judicial practice grounds for argumentation in favour of using the benefit gained by the creditor. The duty to take into account the objective capacity of the creditor to enjoy contractual benefits, observed in French and German judicial decisions, is somewhat reflected in decision of the Polish Supreme Court regarding the duties of a leaseholder imposed by contract terms. The Supreme Court ruled that a contractual term obliging the leaseholder to make outlays on the leased object may be regarded as "contrary to the nature of the contract" only if the aim was to deprive the leaseholder of economic freedom.[594] Finding that the purpose of article 353[1] PolKC is to provide boundaries to the freedom of contract results in the protection of benefits gained from a contract, as is the case in the interpretation of article 307(2)(2) BGB. This protection consists most often in the application of the nature of the contract clause to the establishment of the boundaries of freedom required to enjoy the contractual benefit. In the first years following the adoption of article 353[1] PolKc, this function of the clause was fulfilled by *ratio decidendi* which resulted in a contractual clause allowing the termination of a contract for a specific period was contrary to the nature of a lease contract[595] or contract of tenancy[596]. Hence, this served as an absolute guarantee of freedom to enjoy the contractual benefit on the part of the rent-paying leaseholder or tenant. However, a concern arose quickly as to such determination of boundaries to the freedom of contracting parties[597]. This concern was alleviated by an amendment to the civil code. It weakened the protection, construed from the nature of the contract, surrounding the freedom

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[593] OSNC 1992, 1, 1(22.05.1991); OSNC 1992, 6, 90 6.03.1992; OSP 1993, 6, 90 (19.05.1993).

[594] Lex 303365 (27.10.2004).

[595] OSP 1996, 10, 174 (15.02.1996); OSP 1997, 6-7, 71 (03.03.1997).

[596] OSNC 1998, 3, 36 (27.10.1997).

[597] See OSNC, 9, 144 (22.01.1998).

to enjoy any contractual benefits attained.[598] In the argumentation of Supreme Court judges based on the nature of the contract clause and supporting the freedom to enjoy any contractual benefits, the issue of a retroactive cancellation clause in contracts entailing long-term non-pecuniary benefits in exchange for periodical pecuniary benefits gained importance. Contracts of lease[599] and franchise[600] were deemed to be so-called long-term contracts. This resulted in judicial decisions based on the argument that the retroactive termination of a long-term obligation is not possible as it is in "conflict with its nature"[601]. The economic effect of such a decision is that the party offering the non-pecuniary benefit is able to keep any payment until the termination of the contract. The examples of argumentation based on the nature of the contract, which lead to the protection of the freedom to use a contractual benefit also include invalidity of contractual terms such as: waiver of the right to terminate a real estate agency contract for important reasons;[602] imposition of a duty to keep a fixed term deposit as credit collateral until repayment;[603] repeal of the lessor's duty to issue the object of lease to the lessee in due time;[604] and adoption of a contractual clause entitling the supervised body to terminate a contract of supervision service at any time[605].

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[598] In line with article 673 § 3 PolKC valid as of 10.07.2001, in a tenancy contract for a definite period, the parties may indicate instances in which the contract may be terminated.

[599] OSP 2003, 11, 144 (15.11.2002); OSNC 2010, 10, 142 (17.03.2010) .

[600] OSNC 2005,9,162 (08.10.2004); Lex 311313 (5.10.2005); Lex 274159 (15.02.2007).

[601] The courts stressed that in the event of retroactive (*ex tunc*) termination of such a contract, only the return of a pecuniary benefit would be possible which, despite the concluded mutual contract, would result in a donation.

[602] Lex 303359 (20.12.2005).

[603] Lex 179743 (15.12.2005).

[604] Lex 188549 (8.12.2005). The court justified the invalidity of such a clause with both the conflict with the nature of leasing and the principles of social coexist.

[605] Lex 560018 (3.11.2009). In this case, by referring to article 353^1 PolKC, the court related to the conflict with the "essence of obligation".

The outline of the Polish judicial decisions confirms that the sensitivity of judges to the practical effect of any judgment is of fundamental importance for reasoning based on the nature of the contract clause. The form and results of the judges' argumentation support the position, which is developing in Poland, that interpretation based on the nature of the contract should take into consideration the economics of a contract, i.e. non-legal factors of decision. What is more, the possibility of aligning Polish jurisprudence based on the nature of the contract in accordance with the same presentation outline cited above to French and German judicial decisions confirms its universal character. This all permits the assumption that there is a model describing the essential qualities of an economic order which may lead to productive interpretation based on the nature of the contract clause. The most precise form of this model, reconstructed based on the analysed judicial decisions of the three continental European countries will be presented in the conclusions below.

4.5. Conclusions

The academic discourse and judicial decisions demonstrate that the introduction of the nature of the contract clause to civil codes has raised similar concerns in France, Germany and Poland. In my view, the reason for this lies in the difficulty of defining the relationship between the objectivity and flexibility of this criterion. Omitting or questioning the independence of this criterion is an attempt to avoid a clear solution to the problem. An example of such an evasion in the French theory of private law was the identification of article 1135 CC with a maxim ordering the performance of an obligation in line with what is good and just, and the limitation of disputes regarding article 1135 CC to custom and equity. Another example is the practice of jointly or interchangeably referring to article 1135 CC and article 1134 CC as grounds for a deci-

sion in a judgment that orders the performance of a contract in good faith. In Germany, this is expressed by stressing the great difficulty in distinguishing between the conflict with the nature of the contract and the conflict with the "essential principles of the statutory provision". In Poland, this is expressed by invoking the nature of the contract clause in the rationale for judgments combined with other clauses included in article 353^1 PolKC as well as emphasizing such argumentation style in academic debate.

In the course of the evolution of the theory of private law and judicial practice, such an approach did not disappear, but it lost significance. The first, in chronological terms, attempt to define the objective and independent character of the statutory nature of the contract clause was its combination with other provisions of statutory law. French legal theorists developed an explanation that the analysed clause provided grounds to apply the general rules of law or introduction of terms implied in law for particular types of contracts.[606] This way of thinking was expressed in German legal theory as well. German legal theorists indicated that control in accordance with the nature of the contract was control in accordance with a normative pattern external to a disputed contract, which should primarily be based on conclusions drawn from statutory law.

The link between the nature of the contract clause and statutory law is heavily emphasized in Polish academic debate. Some authors, based on a verbatim interpretation, draw the conclusion from article 353^1 PolKC, which mentions the nature of the legal relationship, that the use of this criterion entails control of compliance with statutory requirements, and assumptions underlying statutory law with respect to the law of obligations and the resulting implications. Such limited reasoning based on the nature the of contract clause was, however, rejected by the French theory of private law. It has never been expressly adopted in Germany. In Poland, the limitation has been violated by some authors. The evolu-

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[606] This is a repetition of the *naturalia contractus* doctrine known since the Middle Ages.

tion of the legal theory in each of these countries led to the idea that control in accordance with the nature of the contract may consist of control in accordance with objective non-legal factors.

An example of such reasoning in France is the statement that the duties implicated under article 1135 CC and established in judicial decisions "may be perceived as implied in the law and are to an increasingly lesser extent regarded as results of law-making authority of a judge"[607]. In Germany, this position is illustrated by the explanation according to which the construction of a standard assessment in accordance with the nature of the contract is a normative process that may cover "justice considerations" and "is functionally similar to the drafting statutory provisions" applied in the absence of diverse intention of contracting parties. In the Polish academic debate, this is expressed by a suggestion that control based on the nature of the contract clause may, in particular, assume the requirement of minimum practical usefulness of an obligation.

From the point of view of the evolution of academic debate and jurisprudence, one can see a trend in the strengthening of this position. However, neither said legal theory nor the jurisprudence of any of the above countries proposed a universal test, which is detailed and useful in practice, and based on the nature of the contract criterion. On the other hand, one can see certain similarities between the results that the reasoning of judges based on the nature of the contract clause leads to. Rouvière sought to capture these in the form of a model that is as precise and universal as possible. He pointed out the link between the nature of the contract criterion and the implementation of two values. The first value is the assurance that the purpose of the contract will be achieved, i.e. the contractual benefits legitimately expected by the parties.[608] The second value is the assurance of such a balance in the allocation of risks, which is required for the full enjoyment of contractual benefits.[609]

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[607] Lamoureux 2006, 514.

[608] Cf. Rouvière 2005, 166 and 170.

[609] Cf. Rouvière 2005, 174.

nature of the contract

Value 1 –procuring a legitimately expected benefit	Value 2 – protection of benefit procured and permitting its actual use
principle 1.1. elimination of disproportion in risk allocation conflicting with the legitimate expectations of the creditor[610]	principle 2.1. assurance of the proper information required by a layperson[611]
principle 1.2. introduction of a duty of the parties to commit to performing, when necessary, to achieve the purpose of the contract[612]	principle 2.2. recognition of a debtor's guarantee, not expressed in the contract and adequate to its purpose[613]
principle 1.3. exclusion of the unilateral variation of contract terms in the absence of an express condition concerning such variation [614]	principle 2.3. taking into consideration the objective capacity of a party to enjoy contractual benefits[615]
	principle.2.4. opposition to the exclusion or undue limitation of a party's freedom to enjoy contractual benefits[616]

[610] E.g. Bull. civ., 1911, I, 134 (21.11.1911)); WLF A7812CS7 (13.11.1996); Bull. civ., 1999, I, 330 (1.12.1999); Bull. civ., 1987, I, 262 (13.10.1987); judgment of the Court of Appeals in Paris of 10.04.1991, Juris-Data, 021433; WLF A6344AHG (17.01.1995); WLF A7812CS7 (13.11.1996); Bull. civ., 1999, I,330 (1.12.1999); DB 2002, 1441 (24.10.2001); BGHZ 150,286 –299 (16.04.2002); BGHZ 150,226 –237 (21.03.2002); Lex 189073 (21.05.2005); judgment of the Court of Appeals in Poznań of 5.05.2010, I ACa 316/10, OSA 2008, 10, 32 (Court of Appeals in Warsaw,17.07.2007); OSNC 2007, 7-8, 122 (9.11.2006).

[611] E.g. Bull. civ. 1985, I, 211 (3.07.1985);Bull. civ.1985, I, 277 (30.10.1985); WLF A7715AAY (15.03.1988); WLF A6888A31 (14.12.1982); WLF A2983AAQ (8.04.1986); WLF A7715AAY (15.03.1988); WLF A1342CZQ (23.05.1995); WLF A 8600AB7 (11.06.1996); WLF A2142AXM (20.11.2001); judgment of BGH of 9.06.2011 (III ZR 157/10).

[612] WLF A8751CKC (2.02.1994).

[613] E.g. Bull. civ., 1996, I, 463 (17.12.1996); WLF A6755CUQ (17.03.1993); Judgment of the Court of Appeals in Douai of 7.01.1999, Juris-Data, 042087.

[614] E.g. BGHZ 100, 157-185 (12.03.1987); OSNC 1992, 1, 1 (22.05.1991); OSNC 1992, 6, 90 (6.03.1992); OSP 1993, 6, 90 (19.05.1993).

[615] E.g. judgment of the Court of Appeals in Agen of 4.10.2004, Juris-Data, 275157; NJR-RR 2008, 189–192 (26.09.2007); Lex 303365 (27.10.2004).

[616] E.g. NJW 2005, 1774–1776 (1.02.2005); NJW 2008, 218 (27.02.2008); OSP 1996, 10, 174 (15.02.1996); OSP 1997, 6-7, 71 (03.03.1997); OSNC 1998, 3, 36 (27.10.1997);

From a broad historical perspective, this is an independent development of the "embryonic" idea of the nature of the contract argument made by Roman jurists who did not link it to the dogmatic structure of particular types of contracts. This is the break from the argumentative practice to link the nature of the contract with its particular types and the dogmatic order of contract law which has dominated the European theory of private law since the Middle Ages. The adoption of the two values indicated above as a foundation of the order upon which the reasoning based on the nature of the contract can rest provides grounds for building a model presenting the similarities in the results of the reasoning of French, German and Polish judges based on the criterion under discussion. These two values constitute the foundation for principles leading to their implementation. These principles may be formulated by the generalisation of the results of specific decisions.

The analysis of the judicial decisions underlying the model shows not only the principles, but also some differences. The differences pertain to the levels of implementation of the values which constitute grounds for reasoning. These differences result primarily from the differing functions of provisions that include the nature of the contract clause in individual codes. When looking at the dates of the cited judicial decisions, one sees yet another aspect of the dynamics of the argumentative practice presented here. Article 1135 CC became the foundation for the construction of the aforementioned order in the late 1970s, i.e. 170 years after the adoption of the Code Civil. The possibility of a similar application of the nature of the contract clause was introduced in Germany due to article 9(2)(1) of the Standard Contract Terms Act adopted in 1976, and continued since 2002 by article 307(2)(2) BGB. In Poland, it was the result of the 1990 implementation of article 353^1 PolKC, which defined the boundaries of the freedom of contract.

OSP 2003, 11, 144 (15.11.2002); OSNC 2010, 10, 142 (17.03.2010); OSNC 2005, 9, 162 (08.10.2004); Lex 311313 (5.10.2005); Lex 274159 (15.02.2007); Lex 303359 (20.12.2005); Lex 179743 (15.12.2005); Lex 188549 (8.12.2005); Lex 560018 (3.11.2009).

Note that the clear development of flexible argumentation based on the nature of the contract clause overlapped with so-called decodification in the civil law tradition countries.[617] This leads to a presumption that the new argumentative productivity of the nature of the contract clause has not simply been a consequence of this clause's presence in the text of statutory law. The reasons for the development of this interpretative practice should instead be sought in the crisis of the 19th century vision of civil law codification. It should be remembered that during its construction the systematic order of contract law, which was also developed in argumentation based on the nature of contract, established the framework for codification.

From the point of view of historical and comparative analyses, these conclusions raise further questions. Does the resurfacing and significant development of reasoning based on the nature of the contract criterion and rooted in the values set forth above confirm the intuition of Roman jurists that such argumentation must take into consideration the existence of the order I defined as economic?[618] Can the application of the nature of the contract argument, which has been predominant for centuries, to building a systemic order of contract law be regarded as merely the result of inspiration from medieval philosophy and the conservatism of legal thinking which was rooted in *ius commune*? The answers to these questions will help assess the argumentative potential of the nature of the contract criterion in times of decodification. With the aim of formulating these answers, in the next chapter, I will compare the results of the historical and comparative analyses with some dilemmas in contemporary academic debate on contract law.

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[617] See Merryman 1985, 151; Irti 1979, 22.

[618] See fn. 80.

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THE NATURE OF THE CONTRACT ARGUMENT AND SOME DILEMMAS IN CONTEMPORARY CONTRACT LAW

5.1. The nature of the contract and the intention of contracting parties

The notion of the nature of the contract, introduced to legal language in ancient Rome has become a fixed element of legal argumentation. The Latin phrase *natura contractus* has formal equivalents in national legal languages. In France, it is referred to as *nature de la convention*; in Germany, it is *Natur des Vertrages*; and in Poland, *natura stosunku zobowiązaniowo-prawnego*. This formal similarity raises the question of whether the concepts represented by these phrases are similar and if so, to what extent. Research of the civil law tradition spanning the period from Antiquity to modern times has shown that one cannot speak of any linear evolution. However, in the diversity of this area of legal discourse, certain common and fixed elements can be identified. These common and fixed elements are founded on the linguistic intuition, according to which nature assumes the existence of a certain order. With respect to a contract, this means going beyond any result arising from the intention expressed by the parties. This translates into focusing attention on the contract as an element or an instrument of an order that exists in-

dependently from the intention of the parties. We have concluded that such a linguistic practice may consist of expressing the practical sense of a contract. It may also serve the purpose of argumentation aimed at changing or supplementing the intention of the parties as represented by express terms. The practical sense of a contract was already expressed in this manner by Roman jurists. They combined the common nature of obligations with their purpose, despite the fact that the actions of the parties evoked dogmatic doubts[619] and discrepancies,[620] or resulted in diverse qualifications.[621] Examples of such an application of the notion of the nature of the contract can also be found in modern legal discourse.[622] This kind of linguistic practice is an example of a broader phenomenon of affecting the legal reasoning by the philosophical notion of the nature of things. The practical significance of the presence of the notion of the nature of the contract in legal argumentation and its impact on the development of legal dogma, should, primarily, be connected to the implication of implied terms or amendment of express terms. In both cases one is confronted with doubts or a conflict with the principle of the fundamental significance of the common intention of the parties, which has been repeated since Antiquity, as well as the respect for the intention of the parties who have entered into a contract permitted by law.[623]

The fundamental role of the intention of the parties is expressed in the typical Western law concept that the specificity of contract law consists of the fact that "it does not tell you what you may or may not make contracts about but simply how to proceed if you

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[619] D.16,3,24(Pap.).

[620] D.45,2,9,1(Pap.) and D.46,1,5(Ulp.).

[621] D.46,5,1pr.–4 (Ulp.).

[622] E.g. Pforden 1840, 326; Wächter 1880, 387 (§189).

[623] Cf. D.50,16,219 (Pap.): *In conventionibus contrahentium voluntatem potius quam verba spectari placuit* (It has been established, that, in agreements, the intention of the contracting parties should rather be considered than the terms of the stipulation); art. 1156 CC; § 133 BGB; art. 65, § 2 PolKC.

want to make a legal agreement".[624] Such an approach to the freedom of contracting parties makes it is easier to agree on the supplementation of their intention through the implication of implied terms. However, such an application of the notion of the nature of the contract results from medieval *ius commune* jurists' combination of the nature of the contract with the type of the contract. This was inspired by the ancient law concept that a contract of a specific type may have a different scope with respect to content[625] as well as the idea, based on scholastic philosophy, and in particular St. Thomas, of the systematic presentation of said possibilities.[626] Thus, the legal theory of *naturalia contractus* came into being as an instrument that allowed the implication of implied terms to the expressed intention of the parties which, so as to have legal effect, may only cover the *substantialia contractus*. The analysis of works of European jurists from medieval times to the 18th century showed that, when gathering *naturalia* for a systematic description of certain types of contracts, they were inspired mainly by the ancient Roman case law preserved in *Corpus Iuris Civilis*. The extension of such an understanding of *naturalia contractus* is found their definition of legislative provisions (terms implied in law) which are incorporated in a contract unless the intention of the parties is different.[627] In the European legal discourse during the pre-codification period, further possibilities of the implication of implied terms under *naturalia contractus* were noticed. This is illustrated by the view of Domat who sought the source of natural consequences (*suites naturelles*) in equity.[628] The introduction of the concept of a legal transaction by 19th century German pandectists resulted in the continuation of the use of *ius commune* as it related to *natura contractus* in the notion of *naturalia negotii*. It served the purpose of a systematic description of

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[624] Smith 1993, 293.
[625] Gl. ad. D.18,1,72 '*admicula*'.
[626] Cf. Gordley 1991, 64.
[627] See e.g. L. J. F. Höpfner 1803, § 732.
[628] Domat 1777, 49–55 (L. I tit. II, sec. 2) and 55–57 (L. I tit. II sec. 3).

the content of a legal transaction.[629] The pandectists also introduced the idea that while the terms implied in law may occur under *naturalia negotii,* terms discovered by judges, based on the nature of things may also occur.[630] The implication of terms implied by law, which is rooted in *naturalia contractus*, is widely recognised in the modern private law in continental Europe. My research showed explicitly how it gave rise to article 1135 CC, which became a template for some other civil codifications.[631] In contract law theory, which continues the pandectist tradition, the use of the *naturalia negotii* notion has become a permanent indicator of terms not agreed by the parties.[632] Windschied's juxtaposition of *naturalia negotii* with expressed terms[633] was a signal of doubts in 20th century science of law as to the scope and justification of such implied terms in contracts. Basically, the results of the legal regulation of a particular type of contract were recognised as the natural consequences of such a contract without much dispute. Practice allowed the possibility of further implied terms. In the German science of law, this caused a controversy regarding the permissibility and grounds for such an interpretation.[634] In recent years it has led to the reinterpretation of the medieval concept of the *natura contractus*. Jürgen Oeschler deemed it a historical confirmation of the correctness of modern concepts allowing the implication of implied terms for the purpose of securing reliance.[635] The development of implied terms, which have been employed extensively by French courts since the 1980s under article 1135 CC resulted in the gradual extension and clarification of the notion of the nature of the contract. This illustrates the concept of Rouvière, which is similar in its es-

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[629] Cf. e.g. Puchta 1838, 41 (§ 45).

[630] E.g. Mühlenbruch, 1835, 201 (§104).

[631] E.g. 1258 CCE; art. 2, sec. 2 OR.

[632] Flume 1992, 80ff; Bork 2006, 272; Schellhammer 2008, 959; Radwański, Olejniczak 2011, 288.

[633] Windscheid 1875, 231 (§85).

[634] Oechsler 1997, 209-213.

[635] Oechsler 1997, 254.

sence to that of Oeschler. Frédéric Rouvière explained that the nature of the contract served the purpose of argumentation that supports the achievement and preservation of the legitimately expected benefits of a contract.[636] The implication of implied terms based on the nature of the contract clause will thus be the first element of comparison of the reconstructed legal experience with the dilemmas of the modern contract law theory.

Yet another and further reaching impact of legal reasoning rooted in this clause on the intention of contracting parties is its change. From the historical perspective, one may conclude, that this manner of applying the nature of the contract criterion to legal argumentation was developing more slowly and with greater difficulty than the *naturalia contractus* concept. This kind of reasoning stems from the Antiquity. Among the "embryonic" forms of application of the notion of the nature of the contract in the argumentation of Roman jurists one encounters an instance of indicating *natura contractus* as an obstacle to the validity of an agreement in which the parties intended to modify a contract of sale.[637] It may be supposed that such an inclusion of the nature of the contract in the argumentation was supported by the fact that the Roman jurists did not recognise the full freedom of the parties to modify a contract *ex post facto*. Thus, Ulpian's use of an argument based on *natura contractus* was not in obvious contradiction with the then current understanding of respect for the intention of the contracting parties.

Such argumentation was not developed in ancient Rome. The medieval commentary identified the term *natura contractus* in Ulpian's texts with *substantia contractus*, i.e. with what makes an agreement binding in law. Thus, the text was combined with the scholastic schema equating the nature of the contract with the type of contract. The medieval and early modern *ius commune* jurists who, not unlike their ancient predecessors, did not know the principle of

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[636] Rouvière 2005, 166–174.

[637] D.2,14,7,5 (Ulp.).

freedom of contract, applied and propagated the criterion of "contradiction to the nature" as grounds for the invalidity of terms which were not in compliance with the required qualities of the specific type of contract.[638] The idea of applying the nature of the contract to a change in the intention of the contracting parties, not limited explicitly to the control of compatibility of this intention with the requirements of the type of contract, was introduced by Althusius, one of the precursors of the principle of freedom of contract in modern times. His proposals to adopt *conventionis natura* as one of the boundaries of said principle[639] were not part of the 18th and 19th century discussions in which it was given its modern form. In the legal tradition researched here, such an application of the nature of the contract criterion was encountered as late as in the legal regulations of the late 20th century. In Germany, this can be seen in the regulation which allowed such standards terms that are in breach of the nature of the contract[640] to be found invalid. In Poland, this was brought about by the amendment of the civil code by which the notion of the nature of the legal relationship was adopted as one of the boundaries to the freedom of contract.[641] The interpretation of said regulations explicitly rejected the identification of the criterion of the nature of the contract with its type. The academic discussion surrounding said regulations gave rise to a question, which was already known from the French deliberations about the natural consequences of a contract, as to whether, and to what extent, an interpretation based on the nature criterion may exceed the direct consequences of legislative regulation. The view that by applying the nature of the contract criterion to amend the content of an obligation, a court may exceed the provisions of law and the direct consequences thereof, has been expressed distinctly in Germany, and increasingly so in Poland. A judge may

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[638] See Cujacius 1658, Vol. 4 col. 215; Donellus 1763, XII,II,1.

[639] Althusius 1649, Lib. I, cap. 64, n. 30.

[640] § 9 section 2 item 2 AGBG of 1976, superseded in 2002 by § 307 section 2 item 2 BGB.

[641] Art. 353[1] PolKC.

make an assessment based on a model built on "justice considerations" [642] or aimed at "usefulness and reasonableness". [643] The analysis of German and Polish practice corroborated the effectiveness of such a view. It showed new opportunities for using the nature criterion for the interpretation of contract in a manner supporting the legitimate expectations of a creditor. The changes in the intentions of contracting parties based on the nature of the contract clause will thus be the second element in the comparison of the reconstructed legal experience with the modern dilemmas of the theory of contract law. The universality of this kind of legal reasoning is not, however, tantamount to a uniform idea of the order represented by the notion of the nature of the contract. Wide-scale historical and comparative research provides grounds to two separate forms of such an order. I have defined the first as systematic and the second as economic. These are two different points of reference, according to which contract law, going beyond the express terms, prescribes what the parties must do. In the first case, we refer to the system described by lawyers, in which the parties' contract exists. In the second case, we assume that there are grounds, independent from the law, for the contract to result in the benefit expected at its conclusion.

Thus, the vast experience of applying the notion of the nature of the contract meets with two vital issues in the modern discourse on contract law. The first is the question of the relevance and utility of the notion of the type of contract. The second question is whether, and how, the economic theory of contract may affect contract law. Answers to these two inquiries should provide an inspiration for using the nature of the contract argument. They should also provide grounds to forecast the role it may play in the rapidly changing laws.

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[642] Cf. Coester 2006, 341; Lapp 2010, n. 65; Ballo 2010, 389; Fuchs 2006, 707;
[643] Trzaskowski 2005, 347 ff.

5.2. Nature of the contract and the usefulness of the notion of the type of contract

The term "type of contract" is a historical product of the civil law tradition. It was developed in the Middle Ages when the idea of freedom of contract was not known. Since that time, it has been the core element of the systemic vision of law which allowed the implication of terms implied in the dogmatic description of certain types of contracts (so called *naturalia contractus)*, in the absence of a different intention of the parties. This is the dominant, but not unanimous, view of contract law in the continental legal tradition.[644] For instance, as early as late 19th century, Ernst I. Bekker, a German pandectist, believed that the development of the legal system would consist of establishing general rules, up to the moment when the rules pertaining to certain types of legal transactions lost their significance[645]. This idea was not corroborated by civil codifications. Even today one can indicate authors who emphasize the importance of types of contracts as an optimal solution for reconstructing reality in accordance with the needs of business or the expectations of the legislator[646]. On the other hand, many texts note certain doubts, and criticise the fundamental relevance of type in the systematics of contract law. In the 1970s, Gorgio de Nova pointed out that the introduction of a provision to the Italian civil code, which explicitly permitted parties to conclude contracts which do not belong to the types specified by law,[647] was a dramatic change in the legal description of the freedom of contract which, however, did not change the thinking of lawyers. The typical contract-oriented legal reasoning remained[648]. The reasons for this, according to de Nova, were the conservative mentality of law-

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[644] For the different position of the common law tradition see Samuel 2011, 117 ff.

[645] Bekker 1889, 126 (§97).

[646] Andrés Santos 2011, 3-4.

[647] Art. 1322 CCI.

[648] Nova 1974, 4-5.

yers and their aspirations to achieve certainty[649]. He believed that this would result in restraint in the use of general clauses,[650] in judges forbearing from using the possibility to base the interpretation of an atypical contract on general rules of contract law and intention of the parties[651].

The research of methods through which legal practitioners connect contracts with a specific type, performed by de Nova, demonstrated that they have benefits. This research also disclosed certain doubts as to the results obtained in this manner. The basic benefit, in the opinion of de Nova, is the reduction of the risk of arbitrary decisions based on unclear rationale.[652] What is also beneficial is the application of a formula for reasoning that supports the reasonable inclination to compare an assessed situation with a model.[653] He also expressed some doubts. He pointed out that the reference to certain types of contracts itself does not guarantee a higher certainty of a result of interpretation as the application of a general clause does[654]. He indicated that such a style of reasoning resulted from respect for tradition and not from the requirements of legislative drafting techniques[655]. He showed that it was not possible to establish definitive criteria to determine whether a contract belongs to a type or not[656] and that the system of contract types changes, with some delay, in relation to historical and economic evolution.[657] Pointing out that contracts which do not fit any type defined by law play a key role in modern legal practice [658] is the starting point for Felix Dasser's recently formulated proposal for comprehensive

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[649] Nova 1974, 3.
[650] Nova 1974, 7.
[651] Nova 1974, 12.
[652] Nova 1974, 159.
[653] Nova 1974, 172.
[654] Nova 1974, 57.
[655] Nova 1974, 166.
[656] Nova 1974, 169.
[657] Nova 1974, 173.
[658] Dasser 2000, 3-5 and 109-110.

changes to the systematic vision of contract law.[659] It encompasses a clear criticism of the extent and traditional understanding of the legislative regulation of contract types. The Swiss lawyer acknowledged that treating types of contracts as classification categories leads to conflicts with the freedom of contract principle[660]; may lead to wilfulness in assigning a contract a certain type;[661] and that establishing new legislative types does not always result in the elimination of doubts.[662] The essence of the resulting proposal for change is the adoption of the *topos* of an infinite number of contract models (*Vertragstypenkontinuum*). In Dasser's view, this should make contract law more flexible, thus allowing the practical purpose of a specific contract to be better reflected.[663] With respect to contract law dogma, this means joining the proposals to develop a general contract law and to limit the regulation of types only to those cases where the general rules prove insufficient.[664] In respect of the application of the notion of nature of the contract, this was reflected in two issues. Firstly, in recognising the usefulness of the regulation of contract types *naturalia* when it reduces transaction costs.[665] Secondly, in the view that the criterion of the nature of the contract which is present in the general rules of contract law should not be combined with its systematisation by types.[666] Historical experience confirms both these opinions. With regard to doubts as to the role of types of contract in modern law, I find the historical arguments in favour of weakening their relevance in the determination of the legal effects of a contract particularly valuable.

The first one goes beyond *naturalia contractus* in argumentation based on the nature of the contract. It should be noted that consid-

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[659] Dasser 2000, 5.
[660] Dasser 2000, 111.
[661] Dasser 2000, 2.
[662] Dasser 2000, 3.
[663] Dasser 2000, 110 and 281-283.
[664] Dasser 2000, 276.
[665] Dasser 2000, 283.
[666] Dasser 2000, 287-288.

erations of the nature of contract in the work product of some lawyers in the 18th century *usus modernus* and 19th century pandectists gave grounds for the systematic comparison of principles pertaining to all contracts or to a number of different types of contracts. This, however, was not a generalisation of *naturalia* of individual types, because it consisted of comparing universal premises of contract validity[667] and establishing groups of different types of contracts based on their common qualities. Taking into consideration the contractual practice this led to the singling out of contracts due to the ease of their conclusion[668]. Mutual contracts were combined due to their simultaneity in performance [669] or the specific order of performance[670]. The combination of the nature of the contract with its economic purpose, clearly visible in academic writing, is continued in modern court interpretations of the notion of the nature of the contract which, *inter alia*, encompasses the "nature of a long term contract"[671] or the "nature of a business contract".[672] Legal practice raises, however, some doubts as to whether the development of the general rules of contract law could fully eliminate the usefulness of systematisation according to type. On the other hand, the development of common rules for various types of contracts may be regarded as a historical result of the diminished role of contract types in legal argumentation.

The second historical argument in favour of reducing the importance of types in the interpretation of contracts is that of going beyond the terms implied in law when defining the natural consequences of a contract. This is illustrated by the French jurisprudence based on article 1135 CC. Over the last few decades, the courts have introduced and gradually recognised the objective

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[667] Boehmer 1797, Ex. 27, cap. 1 §§ 2; 6; 11; 12; 14; 15; 16; Höpfner 1803, 792, (Lib. III, 14, §733) ; Thibaut 1809, 108 (§141).

[668] Savigny 1853, 226 (§75).

[669] Wächter 1880, 387(§189).

[670] Pforden 1840, 326.

[671] E.g. SN (15.02.2007), II CSK 484/06, LEX n. 274159.

[672] E.g. SN (9.11.2006), OSNC 2007, Vol. 7-8, item 122.

character of duties not regulated by the code, i.e. the obligation of security (*obligation de sécurité*)[673] or the obligation of information and counsel.[674]

In the context of the evolution of the systematics of contract law, this speaks in favour of including the nature of the contract clause in the general rules of contract law. The legal practice that I researched permits taking a step further than de Nova and Dasser. One does not have to stop at a general declaration of the utility of the general clause, which may reduce the importance of the notion of type in the interpretation of contracts.[675] One does not have to limit the presumption of a flexible contract law to the idea that any referral to the nature of the contract itself raises doubts and "means nothing more" than a consideration of all case-related circumstances in accordance with law and good faith[676]. The analysis of argumentation based on the notion of the nature of the contract has led to the observation that the order I defined as economic[677] is a supplemental and, to some extent, an alternative to the systematic order expressed in the dogmatic description of the types of contracts. Hence, a question arises as to whether there are any similarities between my conclusions and the postulates of economic theory of contract.

5.3. The nature of the contract and the basic purposes of the economic theory of contract

The method of considering contract law through the systematic description of the nature of types of contracts introduced in the medieval science of *ius commune* was, using the terminology of law

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[673] Cf. Ripert 1952, 169; Lamoureux 2006, 514.
[674] Lamoureux 2006, 514.
[675] Nova 1974, 6 and 57.
[676] Dasser 2000, 288.
[677] See fn. 80.

and economics, a considerable contribution of jurists in the reduction of transaction costs. This achievement of jurists has saved parties the effort of determining and negotiating many terms governing the allocation of risks and benefits.[678] These terms have been implemented or developed chiefly based on the texts of ancient Roman law, canon law and current philosophical trends. The basis for law and economics analysis is, however, the belief that there is an allocative efficiency, which is economically optimal for both parties to the contract and its social context.[679]

One cannot find a parallel to the efficiency models of allocation in line with the so-called Pareto efficiency in the traditional science of law. The economic theory of contract established in the 1970s, did not result in a breakthrough in the theory and practice of contract law.[680] In traditional legal discourse, however, there are two types of situations that are functionally similar to the deliberations on the efficiency of the allocation of risks and benefits in a contract. The first one is the assessment of the validity of contractual terms. The second one consists of supplementing the contract with terms not contemplated by the intention of the parties. My research has proved that one of the grounds for argumentation in such cases was the nature of the contract.[681] In the scope of said argumentation, functional similarities to two purposes of the economic theory of contract can be found[682]. The predominant one is the purpose of securing optimal reliance[683]. The combination of the notion of the nature of the contract with the agreed allocation of risks and bene-

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[678] Cf. Schäfer, Ott 2000, 394; Cooter, Ulen 2008, 217-219.

[679] See Cooter, Ulen 2008, 17-18; Lando 2010, 121 ff.

[680] Posner 2002-2003, 863-868.

[681] In such context lawyers tend to refer to justice, equity, good faith, cf: Schäfer, Ott 2000, 393.

[682] Cooter, Ulen 2008, 232; indicates 6 purposes of the economic theory of contracts.

[683] Cooter, Ulen 2008, 212-217.

fits noted by Roman jurists[684] was used in the rigorous defence of this model. When defending *natura contractus*, Ulpian recognised that an agreement that modified a previously concluded contract[685] was invalid. Such a method of protecting reliance in the initial allocation of interests in a contract did not, however, become a subject of reflection and was not continued in the medieval *ius commune*. The deliberations on specific terms added upon the entering into a contract (*pacta ex continenti*) or later (*ex intervallo*) have become a part of the discussion on the issue whether accessory terms (*pacta adiecta*) incidental to a transaction belong to the contents of recognised types of contracts[686]. The deliberations on the nature of the contract have been connected with *substantialia* and *naturalia* of the respective types. The formula of "natural consequences", stemming from the medieval category of *naturalia contractus*, was included in article 1135 CC which, in the 20th century, played a vital role in the protection of the creditor's reliance by the implication of implied terms by courts. A similar role was played by the introduction of the nature of the contract criterion to a provision setting out the instrument of control of standard terms[687] or a provision establishing the boundary of the freedom of contract[688]. In jurisprudence based on these provisions, the protection of the creditor's reliance is more flexible than it was when first established in Roman law. To summarize the judicial practice, it can be stated that said protection consisted of: the inadmissibility of agreements allowing an unclear modification of the initial model of risk and benefits allocation[689];

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[684] D.16,3,24 (Pap.); D.45,2,91, (Pap.); D.19,5,5,4 (Paul.); D.46,1,5 (Ulp.); D.46,5,1pr.-4 (Ulp.).

[685] D.2,14,7,5 (Ulp.).

[686] Volante 2001, 476-477. This occurred under a doctrine assuming that a contract is concluded the moment the *substantialia* of a specific type are agreed upon and that, apart from that agreement, the parties may introduce special provisions (*pacta adiecta*) at once or allow their introduction in future.

[687] § 9 section 2 item AGBG; § 307 section 2, item BGB.

[688] Article 353[1] PolKC.

[689] See above 151 fn. 610.

the correction of the model if it proved contradictory to the legitimate expectations of the creditor, justified by the practical purpose of the contract[690]; the recognition of the ineffectiveness of terms excluding, or unduly restricting the creditor's freedom to use the contract performance[691]; the amendment of a contract if it did not allow for the typical capacity of the creditor to use the result of performance; and, in French practice, the adoption of a guarantee, adequate for the purpose of the contract, for the debtor, despite the fact that such did not result from the express terms or legal regulations.[692]

An example of implied terms identified by the French Court of Cassation under article 1135 CC is also the duty to provide required information to a creditor who is a layman. At this point, the legal practice, which was the subject of the research, is consistent with the purpose of economic theory to encourage the efficient disclosure of information within the contractual relationship.[693]

The comparison of the results of my research with the two law and economics postulates confirms that, together, they form a certain economic order. The beginning of this order can be traced back to ancient jurists' understanding of the nature of the contract criterion. However, basic qualities of this order were captured as late as in the 20th century interpretation of provisions including the considered criterion. In light of the historical and legal deliberations, the reason for such a development was a clear emergence, in modern practice, of the fact that the dogmatic construction of the type of contract does not solve many doubts that arise from the use of the freedom of contract. In the judicial practice of the 20th century, the nature of the contract clause became grounds for the interpretation of contracts from the point of view of the legitimate expectations of the creditor and the growth of level the flexibility in legal reasoning.

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[690] See above 151 fn. 612.
[691] See above 151 fn. 616.
[692] See above 151 fn. 613.
[693] Cooter, Ulen 2008, 208.

In comparing the principles built upon this jurisprudence with the catalogue of six purposes of the economic theory of contract developed by Cooter and Ulen, the matter of cooperation draws attention.[694] In the jurisprudence analysed, I have encountered instances of the obligation to cooperate being included in implied terms only when it is necessary for contract performance.[695] The law and economics doctrine, on the other hand, strongly emphasises the postulate of converting games with non-cooperative solutions into games with cooperative solutions. It is one of the assumptions of reasonableness that leads to the maximum efficiency of contract.[696] The legal practice analysed here provided grounds for the assumption that its common axis is the support for achieving a benefit that a creditor, quite legitimately, may expect the moment the obligation arises, as well as protection of the possibility to actually use the benefit. The economic reasonableness, discernable in the reconstructed legal practice, leads to support of not only formal, but also true equality of contracting parties. This is a *ratio* that justifies the limits and methods of supplementing or modifying the express terms. When comparing this conclusion with the German dogmatic discourse about terms implied in fact, I have noticed that the results of interpreting the nature of the contract provide confirmation of the doctrine that seeks grounds for supplementing or modifying express terms based on the theory of reliance (*Vertrauenschutz*).[697] While comparing the same conclusions with the law and economics position, we will see conformity with Posner's diagnosis. He justified the poor practical response of the economic theory of contract by, in particular, the inaccuracy of assumptions regarding the full rationality of the parties[698]. On the other hand, he pointed out that some notions developed by economics, e.g. transaction costs or symmetry of information, have

[694] Cooter, Ulen 2008, 232.
[695] Civ. (2.02.1994), WLF A8751CKC.
[696] Cooter, Ulen 2008, 203-207.
[697] Oechsler 1997, 219 – 223 and 242-245 (and further reading there).
[698] Posner 2002-2003, 863.

entered into and raised the level of legal discourse.[699] However, one should not forget that Beimowski's proposal to replace the nature of the contract criterion with law and economics concepts has not been accepted.[700]

When looking at the so-called economic order reconstructed in this research, I have concluded, that economics can still support the application of the nature of the contract argument. I view this support as providing parameters which help determine when and how express terms should be supplemented or amended so as to avoid non-compliance with the legitimate expectations of the creditor from the moment of entering into the contract.

5.4. The role of the nature of the contract argument in the rapidly changing laws

One can see a recurring opinion in the philosophy of law that to introduce the notion of the nature of things to legal discourse means to look for an order of some sort.[701] My research has confirmed the notion of *natura contractus* originates in the ancient Roman law. It has corroborated the purpose of using this notion in legal argumentation from Antiquity, through the science of Roman law in the late 11th century to the end of 19th century, up to the modern interpretation of provisions encompassing the nature of the contract criterion. Looking at the results of this historical and comparative research, we can formulate two principal conclusions. Firstly, the chances of the effective use of the nature of the contract argument should be seen in the inclusion of this phrase in the general rules of contract law, the purpose of which is to supplement or amend express terms. Secondly, the order underlying the application of the nature of the contract argument should allow for economic purposes supporting the attainment and use of the benefit

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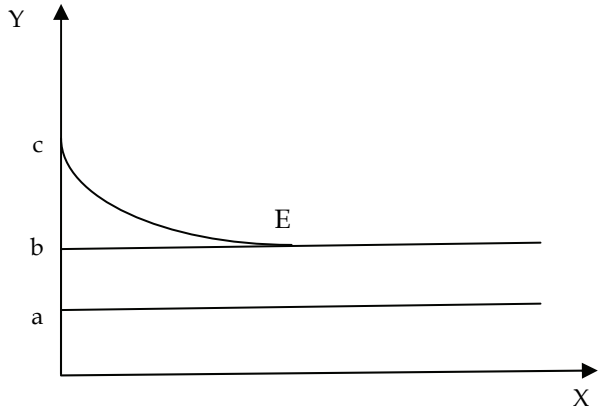
[699] Posner 2002-2003, 879-880.
[700] Beimowski 1989, 36.
[701] Cf. Coing 1976, 173.

the creditor might legitimately expect upon entering into a contract.These conclusions lead to greater interference with the content of an agreement than is the case with the medieval understanding of the nature of the contract, which dominated legal discourse for centuries, i.e. the implication of terms implied by law (so-called *naturalia contractus)*. The novelty of such conclusions consists not in assuming the nature of the contract as a criterion for a modification of express terms [702] or separation between the nature and type of contract.[703] It stems from the pursuit of the flexible connection of such interference with the content of a contract with the creditor's capacity to recognise and resolve justified contract risks, permitted since the mid-20th century. The research conducted here helps distinguish three historical forms of dependence between the interference with the content of contract, based on the nature of the contract criterion and the level of the creditor's capacity to recognise and resolve justified contract risks. They can be presented graphically as functions, in which y represents the permitted interference with the content of a contract and x is the creditor's capacity to recognise benefits that might be legitimately expected upon entering into a contract.



[702] See D.2,14,7,5 (Ulp.).
[703] See Althusius 1649, Lib. I, cap. 64, n. 30.

The diagram helps capture the continuation and changes in the application of the nature of the contract argument. It clearly shows that the nature of the contract argument has always served to determine the content of contract through opinions regarding the enforceability of contractual agreements and implication of terms implied in law or in fact (y is always higher than 0). The first manifestation of changeability is the interference level (the value on the y axis), which is different for each model of process of determining the contents of a contract. In the oldest model, the interference was in fact limited to the "freezing" of the allocation of risks and benefits (*natura contractus*) assumed upon entering into a contract (model a). A wider scope of interference was established in *ius commune* by the implication of terms implied in the dogmatic description of certain types of contracts (*naturalia contractus)*, (model b). What both these models share is that the interference with the content of contract was not associated with the true capacity of the creditor to recognise the benefits and risks resulting from the contract (in models a and b the value on the y axis is constant).

Further interference was manifested by interpretations that considered the level of legitimate expectations of the creditor (model c). The diagram which illustrates this was developed based on the jurisprudence of late 20th and early 21st centuries in line with article 1135 CC, § 9, section 2, item 2 BGB and article 353^1 PolKC, which include the criterion of the nature of the contract. This model presents the qualitative and quantitative change (the curve from the y axis to point E). The diagram shows that below some level of the creditor's capacity to recognise the benefits that might be legitimately expected upon entering into a contract (left of point E), the nature of the contract allows greater interference with the content of contract. It supports attaining and using the benefits the creditor might legitimately expect.

The scope of this flexible application of the nature of the contract argument is confirmed by the legal practice presented here. In Germany, the nature of the contract functions as the criterion that

controls standard terms. In the interpretation of article 1135 CC and article 353[1] PolKc, it can serve as a basis for supplementing or modifying the express terms in favour of a creditor who had less information than his or her counterparty and may have been in a weaker economic position. A stronger economic position creates favourable conditions for using standard terms, and in the case of negotiating contracts, it creates favourable conditions for detailed indication of expected benefits and possible risks. A weaker economic position, on the other hand, creates favourable conditions for using standard terms and the use of proposed contractual templates. The economically weaker contracting party cannot afford to compensate for the asymmetry of information by negotiating contracts so as to assure that they provide the most precise description of benefits and risks related. The qualitative and quantitative changes identified in the application of the nature of the contract argument remedies these disproportions.These changes can be regarded as an expression of a belief, recurring in modern legal science, that it in order to protect the fairness of their results it is necessary to restrict the freedom of contracts.[704] The observed change in the application of the nature of the contract argument may thus evoke some concerns as to whether or not it poses a threat to enjoy the freedom to choose the terms of agreements by contracting parties. I believe that the application of the nature of the contract criterion, as in the regulations analysed above, to amend or supplement a duly executed contract does not preclude this freedom (line c crosses the y axis below 100%).[705] The concern as to whether or not such argumentation will result in undue restriction of the freedom of contract and certainty of law remains legitimate. Legal practice teaches us that the protection against such risk requires precise definition by the legislator when the status of a creditor justifies the flexible amendment or supplement of express terms in line with the nature of the contract criterion

[704] Alpa, Andenas 2010, 236.
[705] Similarly to the DCFR art. II - 8:102(1) (e) and II – 9:101 (2) (a).

(setting point E). An example of such a solution, albeit, in my view, too narrow a solution, is limiting the nature of the contract argument in § 307, section 2 item 2 BGB to the function of standard terms control criterion[706]. However, one should not identify the application of the nature of the contract argument limited to creditors of a specific status with the exclusion of the possibility of implication of the terms in fact in the interest of creditors who do not have such status (right of point E). With regard to the latter, the idea of interference with the content of contract based not on the nature of the contract criterion but on equity or good faith remains valid.[707] In making this distinction the uniqueness of interference with the content of contract based on equity should be emphasised. This would clearly confirm the independence and specific character of the nature of the contract argument with regard to such equity or good faith clauses.[708] This specific character of the analysed clause is the last issue one needs to discuss here. The acceptance and development of a flexible application of the nature of the contract argument by courts (model c) is a result of the specific character underlying this argumentation of order. Judges should be reminded that this model of the application of the nature of the contract has been made possible by departing from linking the nature of the contract with its type. This is a result of the victory of intuition linking the nature of the contract with the existence of an order I have referred to as economic[709]. One may hope that the predictability of the results of such argumentation will support the understanding of qualities inherent in such an order. The results of his-

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[706] The purpose of argumentation justifies its limitation to instances of considerable asymmetry of information and disproportion of economic power, i.e. protection of creditors, consumers and small entrepreneurs. Such a restriction is not imposed in art. II - 8:102(1) (e) and II – 9:101 (2) (a) DCFR.

[707] No one can predict and regulate any and all risks and benefits in the contract.

[708] This issue is presented already in the text of Ulpian D.2,14,7,5 and article 1135 CC. See also Dajczak 2009, 65.

[709] See fn. 80.

torical and comparative research may be of some help, as to when and how to remove incompatibility between express terms and legitimate expectations of a creditor.

In conclusion, the changes identified in the application of the nature of the contract argument help demonstrate the resulting threats to the freedom of contract. They also inspire answers to questions as to how to combine the argumentative practice analysed in this book with the freedom of contracting parties to choose the terms of agreements. If we recognise the objective character of the fall of the 19th century paradigm of the freedom of contract,[710] the history of the nature of the contract argument in the civilian tradition will lead to the prognosis for the future of contract law. If legislators and judges take into consideration the direction and character of changes in the legal reasoning reconstructed in my research, said changes may gain importance. The history of the nature of the contract clause confirms that modern law needs a specific and flexible instrument to reduce the inequality in contracting parties' true freedom to design agreements. Whether the nature of the contract clause may become this instrument in future legal texts is an open question. The historical study of the use of this phrase in legal argumentation shows us, however, that the effectiveness of the protection against inequality requires changes in the civilian systematic vision of contract law. The opinion that "it is implicit in the nature of reality that there are more types of transactions than names for them" [711] is not new. Recent interpretation of the nature of the contract clause more clearly reveals the tension between the formalistic classification of contracts by type and the practical diversity of creditors' expectations. Any significant asymmetry of information exchanged between the parties or any significant difference in their economic positions has, in recent decades, resulted in the growth of inequalities with respect to the abil-

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[710] See Scherrer 1948, 42; Atiyah 1979, 693-715; Zweigert, Kötz 1996, 323–325.

[711] D. 19, 5, 4 (Ulp.). Engl. transl. by A. Watson, The Digest of Justinian, Vol. 1, Philadelphia 1985.

ity to understand the practical sense of the words of contracts and to shape the contents of legitimate contractual expectations. Thinking realistically about the conclusions drawn in this book, I propose that the nature of contract consists of the flexible protection of the legitimate expectations of the parties.[712]

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[712] The so-called economic order reflected in the interpretation of the nature of the contract clause is not focused on the maximization of welfare but on the realization of the legitimate expectations of the creditor. Thus, my research on the civilian tradition provides historical and comparative arguments for reliance contract theory. For the development and essence of the reliance theory in the common law, see Fuller, Eiesenberg 1981, 20 – 47; Chen-Wishart 2007, 23 – 25.

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