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PhD thesis abstract

Title: Impact of the foreign exchange rate on the level of consideration resulting from a bank contract

The unequal negotiation and information position of the parties to a bank contract justifies focusing on the circumstances of its conclusion. Questions about the source and scope of bank fiduciary and information duties require an updated and in-depth approach. Only making sure that no breach of autonomy of the will of the weaker party occurred at the time of contract conclusion would allow examination of its performance. Hence, the limiting of the study to the circumstances of the conclusion of the contract and the consequences of irregularities occurring in this field.

Relating of level of consideration upon future exchange rates means that the performing party is exposed to a currency risk. The concept of risk as such does not belong to a civil law instruments and remains out of scope of mainstream of civil law literature and case law. The concept of a market risk (the risk of changes in market quotations) is a convenient starting point for a civil law analysis of motivations of the parties to a bank contract as well as the legal consequences of both currency derivatives and loan agreements with foreign exchange provisions.

The subject matter of the study determines the applied methodology. The basis for general analysis of the position of the parties to the bank contract assuming the creation and transfer of the currency risk between the parties were specific phenomena occurring in the practice of contracting. Thence, the starting point is a description of these phenomena in economic terms. This means, to a certain degree, a interdisciplinary nature of the work.

As regards the legal assessment of these phenomena, a reference is made primarily to the findings of the German literature and case law. In view of saturation of national regulations with the universal element, primarily due to the impact of EU directives, as well

as the great reliance on general clauses and non-specific phrases, legal comparative comments are present throughout the study. The importance of the *acquis communautaire* and the jurisprudence in particular legal orders, as well as the general nature of legal standards applicable in the studied area, entail convergence of construction methods concerning standards of conduct in both continental and common law systems. Thence, reference to the United States of America legal system has been made.

The first chapter describes the key concepts being the grid of the main analysis. It appeared necessary not only to define the concept of both derivative and loan instruments, but also to refer to the practical relations between them. Their description took place against the background of the bank contracts catalogue as provided for in the banking law. Next, the legal regulation of the discussed contracts is presented, which does not constitute a coherent system of standards.

The second chapter is an attempt to characterize the role of the bank in the contemporary economy as the background of the examined legal phenomena. The different economic characteristics of the traditional bank and the investment bank justifies the assumption of different expected fidelity of the bank in both these areas. Particularly interesting findings was that the examined bank contracts referring to the market quotations are typical for investment banking, while offering banks belong to traditional banking domain.

The third chapter deals with the legal relevance of the purpose of the examined contracts and the related therewith contractual mechanism based on the condition precedent. References were made to the insurance contract as well as to collateral agreements, such as a the bank guarantee.

The fourth chapter focuses on the bank's duties resulting from its role in legal relations, legitimate expectations of the bank's client, the purpose as well as construction of the examined contracts. The sources of such duties lie both in the traditionally-perceived statutory law as well as in deontological principles which, in themselves, constitute a subject of a heated discussion.

In consequence, the fifth chapter regards sanctions of breach of the abovementioned duties. The chapter includes analysis of the possible modification of the defective contract.

The first fundamental thesis presented in this paper is as follows: each bank's client has a weaker position than the bank, which should be reflected in the fiduciary and information duties imposed upon the bank at the moment of the contract conclusion.

The second basic thesis is as follows: the risk resulting from the concluded contract is inherent from the very beginning, and should therefore be assessed at the moment of the contract conclusion. This applies, in particular, to a currency risk, which often is revealed thereafter in conditions of a sudden turmoil in the market.

An analysis of the abovementioned issues has led to the following conclusions. The pre-contractual obligations of the bank, which include fiduciary and information duty, are non-enforceable. However, their breach triggers substantial legal consequences. This situation can lead to unlawfulness of the contract or to the defects in of declarations of intent.

The fiduciary and information duty imposed on the bank are equally important in the both foreign exchange derivative and loan agreement with foreign exchange provisions. This results from the EU law imposing such obligations on the bank as the financial institution, both in terms of the foreign exchange clauses as embedded derivatives, and within the scope of consumer protection against unfair contractual terms.

It is necessary to apply absolute invalidity, sanction to all cases of entering into contracts which are contrary to law or good faith. The most conspicuous contractual provisions, such as currency option structures or loan agreements with foreign exchange provisions, disappear from the market, except for a short period of market anomalies.

The purpose of the contract being the transfer of the one party's currency risk, i.e. the risk of occurrence of unfavourable currency quotations, to the other party, is achieved by applying the condition precedent. A future and uncertain event is the occurrence of a specific exchange rate quotation.

A necessity for the bank to take into account the currency risk while bearing in mind the best interest of the client in the process of shaping the contract requires the development of such a wording of the contract which will not only reflect the client's willingness to bear the market risk, but which will also allow the client to assess the risk at any time during the term of the contract. In addition, the defectiveness of the terms applied in contractual practice which provide for the discretion of the bank in determining the amount of the performance may affect the entire contract relation.

