

DOROTA MILER

Circumvention of Law in Polish Private Law

*Max-Planck-Institut
für ausländisches und internationales
Privatrecht*

*Beiträge zum ausländischen
und internationalen Privatrecht*

147

Mohr Siebeck

Beiträge zum ausländischen und internationalen Privatrecht

147

Herausgegeben vom
Max-Planck-Institut für ausländisches
und internationales Privatrecht

Direktorium:
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Circumvention of Law in Polish Private Law

A Comparative Analysis from
Polish, German and European Perspectives

Mohr Siebeck

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ISBN 978-3-16-164409-2 / eISBN 978-3-16-164410-8

DOI 10.1628/978-3-16-164410-8

ISSN 0340-6709 / eISSN 2568-6577

(Beiträge zum ausländischen und internationalen Privatrecht)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at <https://dnb.dnb.de>.

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Printed on non-aging paper. Typesetting: Laupp & Göbel, Gomaringen.

Mohr Siebeck GmbH & Co. KG, Wilhelmstraße 18, 72074 Tübingen, Germany
www.mohrsiebeck.com, info@mohrsiebeck.com

To my husband and children

Preface

This work was accepted as a post-doctoral dissertation (*Habilitationsschrift*) by the Faculty of Law of the University of Augsburg in the spring of 2024. It takes account of case law, statutory provisions and literature generally as of 1 January 2024.

I would like to express my deepest gratitude to my mentor, Professor Dr. Phillip Hellwege, whose invaluable guidance and unwavering support have been instrumental in the completion of this work. His thought-provoking comments and questions provided new perspectives and motivated me to explore different dimensions of my work. I am also very grateful to Professor dr. hab. Jerzy Pisuliński and Professor Dr. Martina Benecke, who provided mentorship during my post-doctoral research. Their remarks inspired me to reconsider and refine various aspects of my work. Additionally, I would like to thank Professor dr. hab. Piotr Tereszkieicz for reviewing my post-doctoral dissertation.

I am very grateful to Professor Dr. Holger Fleischer, Professor Dr. Ralf Michaels and Professor Dr. Anne Röthel for giving me the opportunity to present and discuss the main theses of my post-doctoral research during the Ninth Max Planck PostDoc Conference on Private Law at the Max Planck Institute for Comparative and International Private Law in Hamburg in May 2024. I would like to thank Professor dr. hab. Jerzy Pisuliński for organizing a lecture at the Law and Administration Faculty of the Jagiellonian University in Kraków in April 2023, and Professor dr. hab. Adam Olejniczak for organizing a lecture at the Law and Administration Faculty of Adam Mickiewicz University in Poznań in March 2019, during which I exchanged my ideas with Polish scholars and received critical feedback about my work. I am also very thankful to my colleagues with whom I had the pleasure of working at the University of Augsburg, particularly to Georg Obermayer and Daniel Wikulin, who have assisted me in the multifaceted evaluation of my work.

Further, I would like to thank the Bavarian Government for its financial support, which was provided through the Bavarian Gender Equality Grant “Promoting Equal Opportunities for Women in Research and Teaching” during the preparation of my post-doctoral dissertation.

Moreover, I would like to express my gratitude to Professor Dr. Holger Fleischer, Professor Dr. Ralf Michaels and Professor Dr. Anne Röthel for accepting

this work in the series published by the Max Planck Institute for Comparative and International Private Law.

Finally, I would like to thank my family. I am grateful to my parents, Ewa and Wojciech Bogajewscy, to my uncle, Almond Vern Schock and, foremost, to my husband, Maciej Miler, and my children, Marianna and Liliana, for their encouragement and support.

Gdańsk, December 2024

Dorota Miler

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List of abbreviations

AcP	Archiv für die civilistische Praxis
Acta UW	Acta Universitatis Wratislaviensis
Anh.	Anhang
Apel.-Lub.	Apelacja – Sąd Apelacyjny w Lublinie
ArchBürgR	Archiv für Bürgerliches Recht
art./arts.	article/articles
BAGE	Sammlung der Entscheidungen des Bundesarbeitsgerichts
BeckOGK-BGB	beck-online.GROSSKOMMENTAR.BGB
BeckOK-ArbR	Beck'scher Online-Kommentar – Arbeitsrecht
BeckOK-BGB	Beck'scher Online-Kommentar BGB
BeckOK-GmbHG	Beck'scher Online-Kommentar – Gesetz betreffend die Gesellschaften mit beschränkter Haftung
BeckOK-InsR	Beck'scher Online-Kommentar – Insolvenzrecht
BeckRS	Beck-Rechtsprechung
BetrVG	Betriebsverfassungsgesetz [Works Constitution Act]
BGB	Bürgerliches Gesetzbuch [German Civil Code]
BGBI	Bundesgesetzblatt
BGHZ	Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen
Biul.SAKa	Biuletyn Sądu Apelacyjnego w Katowicach
BSN	Biuletyn Sądu Najwyższego
C-	Case
CJEU	Court of Justice of the European Union
CLI	Corporate Legal Insights
CML Rev	Common Market Law Review
D.	Digesten
DNotZ	Deutsche Notar-Zeitschrift
DPBISP	Doradztwo Podatkowe Biuletyn Instytutu Studiów Podatkowych
DR	Doradca Restrukturyzacyjny
DStZ	Deutsche Steuer-Zeitung und Wirtschaftlicher Beobachter
Dz.U.	Dziennik Ustaw
e.g.	for example
EBLR	European Business Law Review
EC	European Community
ECLI	European Case-Law Identifier
ed./eds.	edition/editor/editors
EEC	European Economic Community
ERCL	European Review of Contract Law

ErfK	Müller-Glöge/Preis/Gallner, Erfurter Kommentar zum Arbeitsrecht
EU	European Union
EUR LJ	European Law Journal
FamRZ	Zeitschrift für das gesamte Familienrecht
ff.	and following pages
FIDIC	Fédération Internationale des Ingénieurs-Conseils
FP	Forum Prawnicze
GA	Goldammer's Archiv für Strafrecht
GewA	Gewerbearchiv – Zeitschrift für Wirtschaftsverwaltungsrecht
GmbH	Gesellschaft mit beschränkter Haftung [Limited liability company]
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG [Limited Liability Companies Act]
GSP	Gdańskie Studia Prawnicze
GSP-Prz.Orz.	Gdańskie Studia Prawnicze – Przegląd Orzecznictwa
HK-BGB	Bürgerliches Gesetzbuch, Handkommentar
HKK	Historisch-kritischer Kommentar
HWiG	Haustürwiderrufsgesetz [(former) Doorstep Selling Termination Act]
I.C.L.Q.	International & Comparative Law Quarterly
i. e.	id est [that is]
IN	Ius Novum
InsO	Insolvenzordnung [Insolvency Code]
Ius.	Iustitia
JA	Juristische Ausbildung
JR	Juristische Rundschau
Jur. Pod.	Jurysdykcja Podatkowa
JurA	Juristische Analysen
JuS	Juristische Schulung
JW	Juristische Wochenschrift
JZ	JuristenZeitung
KPP	Kwartalnik Prawa Prywatnego
KPPod	Kwartalnik Prawa Podatkowego
Kr. Pr.	Krytyka Prawa
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
KSP	Krakowskie Studia Prawnicze
KTS	Zeitschrift für Insolvenzrecht
Leg. Issues Econ. Integration	Legal Issues of European Integration
LEX/el.	LEX electronic
M. Pr. Bank.	Monitor Prawa Bankowego
Masst J Eur & Comp L	Maastricht Journal of European and Comparative Law
MDR	Monatsschrift für Deutsches Recht

MHLS	Michalski/Heidinger/Leible/Schmidt, Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung
MiLoG	Gesetz zur Regelung eines allgemeinen Mindestlohns (Mindestlohngesetz – MiLoG) [Act Regulating a General Minimum Wage]
MoP	Monitor Prawniczy
MoPod	Monitor Podatkowy
MoPr	Monitor Prawa Pracy
MPH	Monitor Prawa Handlowego
MüKo-BGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
MüKo-GmbHG	Münchener Kommentar zum GmbHG
MüKo-InsO	Münchener Kommentar zur Insolvenzordnung
Nieru.	Nieruchomości
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungs-Report Zivilrecht
No.	Number
NP	Nowe Prawo
NPN	Nowy Przegląd Notarialny
NZA	Neue Zeitschrift für Arbeitsrecht
NZA-RR	Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report
NZBau	Neue Zeitschrift für Baurecht und Vergaberecht
NZG	Neue Zeitschrift für Gesellschaftsrecht
OG	Orzecznictwo Gospodarcze
OJ L	Official Journal of the European Union L
ÖJZ	Österreichische Juristen-Zeitung
OSA	Orzecznictwo Sądów Apelacyjnych
OSAB	Orzecznictwo Sądów Apelacji Białostockiej
OSN	Orzecznictwo Sądu Najwyższego
OSNAP	Orzecznictwo Sądu Najwyższego Izba Pracy
OSNAPiUS	Orzecznictwo Sądu Najwyższego Izba Administracyjna, Pracy i Ubezpieczeń Społecznych
OSNC	Orzecznictwo Sądu Najwyższego Izba Cywilna
OSNCK	Orzecznictwo Sądu Najwyższego Izby Cywilnej i Izby Karnej
OSNCP	Orzecznictwo Sądu Najwyższego Izby Cywilnej, Pracy i Ubezpieczeń Społecznych
OSNC-ZD	Orzecznictwo Sądu Najwyższego Izba Cywilna – Zbiór Dodatkowy
OSNKW	Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa
OSNP	Orzecznictwo Sądu Najwyższego Izba Pracy
OSNwSK	Orzecznictwo Sądu Najwyższego w Sprawach Karnych
OSP	Orzecznictwo Sądów Polskich
OSPiKA	Orzecznictwo Sądów Polskich i Komisji Arbitrażowych
OTK	Orzecznictwo Trybunału Konstytucyjnego
p./pp.	page/pages

Pal.	Palestra
para./paras.	paragraph/paragraphs
PB	Prawo Bankowe
PCC	Polish Civil Code – Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code]
PCCC	Polish Commercial Companies Code – Ustawa z dnia 15 września 2000 r. Kodeks spółek handlowych [Act of 15 September 2000, Commercial Companies Code]
PCCP	Polish Code of Civil Procedure – Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure]
PCoC	Polish Commercial Code – Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 czerwca 1934 r. Kodeks handlowy [Regulation of the President of the Republic of Poland of 27 Juni 1934, Polish Commercial Code]
PiP	Państwo i Prawo
PiZS	Praca i Zabezpieczenie Społeczne
PLC	Polish Labour Code – Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy [Act of 26 June 1974, Labour Code]
PLN	Polish zloty
PN	Przegląd Notarialny
POP	Przegląd Orzecznictwa Podatkowego
POSAG	Przegląd Orzecznictwa Sądu Apelacyjnego w Gdańsku
PP	Przegląd Podatkowy
PPH	Przegląd Prawa Handlowego
PPP	Przegląd Prawa Publicznego
PPr	Prawo Pracy
PPR	Przegląd Prawa Rolnego
Prok.	Prokurator
Prok. i Pr.	Prokuratura i Prawo
Prok. i Pr.-wkł.	Prokuratura i Prawo – wkładka
PrSp	Prawo Spółek
Prz.Leg.	Przegląd Legislacyjny
PS	Przegląd Sądowy
PUG	Przegląd Ustawodawstwa Gospodarczego
PUSiG	Przegląd Ubezpieczeń Społecznych i Gospodarczych
PwD	Prawo w Działaniu
r.	rok [year]
R. Pr.	Radca Prawny
R. Pr. ZN	Radca Prawny Zeszyty Naukowe
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RAP	Roczniki Administracji i Prawa
Rej.	Rejent
RGZ	Amtliche Sammlung von Entscheidungen des Reichsgerichts in Zivilsachen
RPEiS	Ruch Prawniczy, Ekonomiczny i Socjologiczny
SC	Studia Cywilistyczne

SI	Studia Iuridica
SIT	Studia Iuridica Toruniensia
SJZ	Schweizerische Juristen-Zeitung
Śl.Pracow.	Służba Pracownicza
SN	Sąd Najwyższy [Supreme Court]
SP	Studia Prawnicze
SPC	System Prawa Cywilnego
SPH-[#]	System Prawa Handlowego. Komentarz, Vol. No. [#]
SPP	Studia Prawa Prywatnego
SPP-[#]	System Prawa Prywatnego. Komentarz, Vol. No. [#]
SPPr-[#]	System Prawa Pracy. Komentarz, Vol. No. [#]
SPRM	Studia Prawnicze. Rozprawy i Materiały
Stud.Prawnoustr.	Studia Prawnoustrojowe
StuW	Steuer und Wirtschaft
Tem.	Temidium
TPP	Transformacje Prawa Prywatnego
TzBfG	Teilzeit- und Befristungsgesetz [Part-time and Fixed-term Employment Law]
UR	Umsatzsteuer-Rundschau
VerwArch	Verwaltungsarchiv – Zeitschrift für Verwaltungsrecht und Verwaltungsgerichtsbarkeit
vol.	volume
WPP	Wojskowy Przegląd Prawniczy
WRP	Wettbewerb in Recht und Praxis
WuW	Wirtschaft und Wettbewerb
YEL	Yearbook of European Law
Z. Savigny-Stift. Rechtsgesch., Rom.	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung
ZAkDR	Zeitschrift der Akademie für Deutsches Recht
ZCLA	Zeszyty Cywilistyczne Lege Artis
ZfBR	Zeitschrift für deutsches und internationales Bau- und Vergaberecht
ZfRV	Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung
ZPO	Zivilprozessordnung [German Code of Civil Procedure]
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZK	Zürcher Kommentar
ZNUJ	Zeszyty Naukowe Uniwersytetu Jagiellońskiego Prace z Prawa Własności Intelektualnej
ZRP	Zeitschrift für Rechtspolitik
ZVertriebsR	Zeitschrift für Vertriebsrecht

Introduction

The phenomenon of circumvention of law is inherent to all legal systems.¹ Namely, in every legal system, it is possible – by undertaking certain legal or factual transactions – to exclude the application of statutory provisions that prevent the accomplishment of certain legal or economic results and to instead take advantage of statutory provisions that allow the achievement of these results.² The legal norms regulating the right of pre-emption seem especially prone to being circumvented. An example has been identified by the Polish Supreme Court: Person A borrows from Person B a sum of money secured with a mortgage on real estate that is encumbered (per statutory law) with a right of pre-emption. The borrower (Person A) later transfers the ownership of the real estate to the lender (Person B) to release himself from the obligation to repay his³ loan. These transactions considered together circumvent the statutory right of pre-emption that is stipulated under Polish law in art. 599 § 2 of the Polish Civil Code [PCC].⁴ Namely, according to art. 599 § 2 PCC, the right of pre-emption can be exercised by the entitled entity only if the encumbered real estate is being sold. However, neither of the legal transactions specified above (concluding a loan agreement secured with a mortgage and a subsequent transfer of the property to release the borrower from the loan obligation) constitute a sale agreement. Therefore, these transactions are not included in the class of potential behaviour that is regulated by art. 599 § 2 PCC, and this excludes the possibility of subsuming them under the legal norm regulating the right of pre-emption. Art. 599 § 2 PCC is thus inapplicable.

¹ See e.g., *Schurig*, in: *Festschrift für Murad Ferid*, p. 379. The references to circumvention of law made by Roman jurists make it very likely that circumvention of law is as old as the law itself, D. I,3,29; Ulp. D. 1, 3, 30.

² For a detailed discussion of the definition of circumvention of the law, see pp. 240ff.

³ To improve readability and to avoid awkward constructions such as “he or she” and “his or her,” masculine pronouns are used unless the context requires the use of feminine pronouns or gender-neutral language. Where masculine pronouns have been used, readers should assume that they refer to all genders, unless the context suggests otherwise. Moreover, except where otherwise indicated, the English translations of literature and court rulings have been provided by the author.

⁴ Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code], Dz.U. 2023 item 1610, with later amendments. Judgment of the Supreme Court of 7 March 2008, III CSK 317/07, LEX No. 385585.

What differs between legal systems is the significance that each legal system attaches to the concept of circumvention of law. A discrepancy that can be noticed at first glance is one found at the legislative level, namely *whether* and, if yes, *how* circumvention of the law and its legal consequences have been regulated in each jurisdiction. Further distinctions result from the analysis and systematization of circumvention of the law by academics: Is it necessary and useful to distinguish the concept of circumvention of the law from other legal concepts? How can it be defined? What are its prerequisites? What legal consequences should it have? Ultimately, the utility of statutory provisions and the validity of scholarly proposals are verified in court practice, in which abstract questions are replaced with a case-by-case examination of transactions potentially circumventing the law under the given factual circumstances.

Polish law explicitly articulates circumvention of the law as one of the grounds for declaring a legal transaction void (art. 58 § 1 PCC). Despite the clear wording of art. 58 PCC, the significance of circumvention of the law has been minimized in Polish legal literature. To date, only a limited number of publications concerning the circumvention of Polish private law have been authored.⁵ This is a result of most scholars classifying “transactions having as their objective the circumvention of the law” (art. 58 § 1 PCC) as transactions *contra legem*.⁶ The significance of circumvention of law has been further reduced by a draft of a new Polish Civil Code, which proposes not expressly regulating it.⁷ However, the practical importance of circumvention of the law in Polish law is revealed by an analysis of the practice of Polish courts.⁸ Specifically, Polish courts have explicitly named circumvention of the law as a ground for decisions and, in the

⁵ There are only four legal publications (one monograph and three journal articles) dedicated exclusively to the circumvention of Polish private law: *Iwański; Wąsowicz*, KPP 1/1999; *Stawiecki*, in: *Nadużycie; Kudła*, ZCLA III (2010).

⁶ See pp. 99ff.

⁷ Information about the draft of a new civil code is available at: “Akademicki Projekt Kodeksu Cywilnego” <www.projektkc.uj.edu.pl> (accessed 11 November 2023).

⁸ Polish courts issue decisions (*orzeczenia*) in civil law cases. These include, judgments (*wyroki*), payment orders (*nakazy zapłaty*), resolutions (*uchwały*), orders (*postanowienia*), and entries (*wpisy*). Judgments, payment orders, and resolutions resolve the matter as to the substance; orders issued in a court process are of a non-substantive nature, i.e., they decide issues relating to the proceedings (procedural issues). A judgment is issued once a trial is closed (art. 316 § 1 PCCP); a payment order is issued if a specific provision stipulates it (art. 353¹ § 1 PCCP); an order is issued if the PCCP does not require issuing a judgment or a payment order (art. 354 § 1 PCCP). PCCP is Polish Code of Civil Procedure – Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure], Dz.U. 2023 poz. 1550, with later amendments. In civil law cases, resolutions are issued by the Polish Supreme Court when the Court resolves legal issues that raise serious doubts. The Supreme Court is comprised of five chambers. A resolution issued by all the chambers (“full bench of the Supreme Court”), at least two chambers combined, or a single chamber acquires the force of legal principles upon its adoption. Moreover, a panel of 7 judges may decide to give the resolution the force of a legal principle (art. 87 of ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym [Act of 8 December 2017 on the Supreme Court], Dz.U. 2018

reasons provided for these decisions, identified it as an independent legal institution. Nevertheless, they have not set out specific and detailed guidance on how to identify a circumvention of the law.

The opinion prevailing in Polish legal literature is not unique. Since the publication of Arndt Teichmann's manuscript in 1962,⁹ the position that circumvention of law is a problem related to interpretation of the law and/or analogy has dominated in German legal literature.¹⁰ This view was widely accepted in spite of the rich literature dedicated to this issue. Any references made to circumvention of the law in case law have been criticised as unnecessary and bringing no benefit.¹¹ The fiercest opponent even called circumvention of the law "a legal weed" (*juristisches Unkraut*).¹² The opinion represented in German legal literature influences the position taken by academics in other countries, for instance in Austria and Switzerland. There is, however, no direct evidence that the view prevailing in German legal literature has influenced the position taken in Polish legal literature. Nevertheless, the prevailing opinion of Polish legal literature – practically – mirrors the opinion dominant in German legal literature. The assessment of circumvention of law by German courts has not been as consistent as the one put forward by German legal scholars.¹³ Despite this fairly uniform position taken in German legal literature, an analysis of the case law of German courts indicates – as does an analysis of the case law of Polish courts – that those courts indeed classify some legal transactions as circumventing the law. The German Federal Labour Court, in particular, has continuously recognized circumvention of the law as an independent ground for its decisions.¹⁴ The significant difference between Polish and German law can be attributed to the absence of either a general regulation of circumvention of law or a specification of its consequences under German private law. Instead, special legal provisions explicitly extending the scope of application of particular legal norms to legal transactions circumventing these norms are scattered throughout German private law (e.g., § 75d(2) HGB, § 487(2) BGB).

item 5, with later amendments). In land registration proceedings, the court's decision amounts to an entry, art. 626⁸ PCCP).

⁹ Teichmann.

¹⁰ Klöpfer, p. 64.

¹¹ See e.g., Fuchs, p. 72; Endemann, JW (1918), 409; Teichmann, p. 55.

¹² Fuchs, p. 7.

¹³ Asmus, pp. 100–101; Benecke, p. 23. The same is stated by Maday about Swiss jurisprudence, see Maday, p. 18 (Swiss literature).

¹⁴ See e.g., judgment of the Federal Labour Court of 11 July 1995 – 3 AZR 154/95, NZA 1996, 207, 208–209; judgment of the Federal Labour Court of 11 December 1997 – 8 AZR 654/95, NZA 1999, 262, 263; judgment of the Federal Labour Court of 18 August 2005 – 8 AZR 523/04, NZA 2006, 145, 148; judgment of the Federal Labour Court of 25 October 2007 – 8 AZR 917/06, NZA-RR 2008, 367, 370; judgment of the Federal Labour Court of 21 May 2008 – 8 AZR 481/07, NZA 2009, 144, 148.

In contrast, there is no strong difference between the position regarding circumvention of the law as taken in European private law legal scholarship and the one advanced by the Court of Justice of the European Union. In accord with the evolution of the Court's case law, the problem of circumvention of law has been recognized (only) as a subcategory of the broadly understood concept of abuse of EU law.¹⁵ This concept applies to primary as well as to secondary law¹⁶ in most if not all fields of EU law.¹⁷ Classifying circumvention of law as merely a case of abuse of law has not been challenged in legal literature. As observed, one of the possible reasons is that the relevant European legal scholarship has been developed in response to the Court's decisions.¹⁸ Similarly, EU legislators recognized the possibility of an abuse of European Union law, especially by means of its circumvention, only after the Court recognized the notion in its case law. Thus, at the beginning of the 90s, EU legislation began including references to circumvention of law.¹⁹ In particular, EU legislation includes prohibitions against specific kinds of circumvention of law in chosen areas of EU law, or it mentions in the preamble to directives and regulations the possibility of various provisions being circumvented. The special provisions regulating particular cases of circumvention of law under EU law are supplemented by the judicially developed principle of abuse of law.²⁰ However, many questions – including the one regarding the necessity of distinguishing circumvention of law

¹⁵ See e.g., C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, ECLI:EU:C:2003:512, para. 136; C-456/04, *Agip Petroli SpA v. Capitaneria di porto di Siracusa and Others*, ECLI:EU:C:2006:241, para. 25; *Baudenbacher*, ZfRV (2008), 216. Based on the case law of the Court of Justice, the following forms of abuse have been identified and distinguished: circumvention of the law, abuse of rights, deception, and fraud. See e.g., *Koch*, *Die Beteiligung*, pp. 200–204; *Englisch*, *StuW* (2009), 10. Vogenauer questions classifying fraud as a category of abuse of law (Vogenauer, in: de la FERIA/Vogenauer, p. 561) and finds that “the prohibition of abuse of law, as developed by the Court for cases of rule avoidance and rule appropriation, is much more akin to domestic doctrines such as *fraude à la loi* and *Gesetzesumgehung* than to the typical ‘abuse of rights’ scenario” (Vogenauer, in: de la FERIA/Vogenauer, p. 555).

¹⁶ C-251/16, *Edward Cussens and Others v. T. G. Brosman*, ECLI:EU:C:2017:881, para. 30. See also, *Schick*, p. 220; *Fleischer*, *JZ* (2003), 869; *Edwards/Farmer*, in: *Essays in Honour of Sir Francis Jacobs*, p. 206; Vogenauer, in: de la FERIA/Vogenauer, p. 531.

¹⁷ C-251/16, *Edward Cussens and Others v. T. G. Brosman*, ECLI:EU:C:2017:881, para. 29. See also, *Sørensen*, *CML Rev* 43 (2006), 427, 437; *Nuyts*, in: de Vareilles-Sommières, p. 6; *Takis*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 27/2009, pp. 3–4; *Sørensen*, in: de la FERIA/Vogenauer, pp. 31–32 (observing that the situation is different as to matters that are exhaustively regulated by specific rules in a specific area of law); Vogenauer, in: de la FERIA/Vogenauer, p. 521; *Dourado*, in: de la FERIA/Vogenauer, p. 474. Similarly, *Sagan*, *EBLR* (2010), 24.

¹⁸ Vogenauer, in: de la FERIA/Vogenauer, p. 523.

¹⁹ *Ibid*, p. 522. There are legal provisions that contradict this hypothesis, see e.g., art. 6 of the Regulation (EEC) No. 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods.

²⁰ *Sørensen*, *CML Rev* 43 (2006), 438. There are various terms that have been used in the Court's case law as well as in legal literature to describe what is hereinafter referred to as “abuse of EU law”. For details, see Vogenauer, in: de la FERIA/Vogenauer, pp. 554–557.

(or even abuse of law) as a concept independent from rules of interpretation – have been left unanswered by the Court and are still unsettled in legal literature.

§ 1. *Research questions*

This brief introduction to the issue of circumvention of the law already reveals two basic concerns regarding circumvention of law.

Firstly, the understanding of circumvention of the law and the significance attributed to it in Polish and German legal literature as well as in Polish and German jurisprudence are to a wide extent incompatible. This divergence seems especially visible in the context of Polish law. Namely, there is a discrepancy between the minimal attention dedicated to discussing circumvention of the law in Polish legal literature and the practical importance of circumvention of law in the case law of Polish courts. This observation, coupled with the absence of detailed judicial reasoning for finding circumvention of law under a given set of factual circumstances, raises the following questions: Does circumvention of law really take place as often as it is found or considered by Polish courts? Or could the transactions circumventing law be classified as being, for instance, contrary to the law or contrary to good morals? In other words, are there any legal transactions whose validity cannot be classified under any legal concept other than circumvention of the law? The related question is thus whether this enigmatic legal notion is used by Polish courts merely as a convenient ground for pronouncing the instinctively desired nullity of the considered transaction even though a different legal classification would be (more) appropriate.

Secondly, regardless of the adopted regulation and the theoretical approach taken to the circumvention of law, each legal system is faced with transactions circumventing law and must develop a way of dealing with them. The differences in the regulation of circumvention of the law under Polish and German law lead to the question: Is an explicit general regulation of the consequences of circumvention of the law necessary so as to respond to instances where domestic law has been or will be circumvented? Or are these cases resolved satisfactorily by explicitly regulating the consequences for some of them and by classifying unregulated cases under other legal concepts and letting the legal consequences be determined accordingly?

These questions also seem justified in the context of German and European case law. German legal commentators have questioned German court rulings finding a circumvention of the law; a judicial finding of circumvention of the law is considered incorrect in German literature. Under European law, cases of circumvention of law are classified as cases of abuse of law. There is thus no room for finding a circumvention of the law.

§ 2. *Research goals*

The main aim of this work is to comprehensively analyse the theoretical conception and the practical application of circumvention of the law along with its legal consequences under Polish private law. The examination is based on a consideration of the relevant case law of the Polish Supreme Court.

In that body of case law, almost a hundred types of legal transactions have been considered as potentially circumventing the law or have indeed been found to circumvent the law. Thus, the analysis of the case law of the Polish Supreme Court aims at answering the question whether these legal transactions could have been classified differently; the inquiry asks, especially, whether these transactions could have been classified as a problem of interpretation regarding the declarations of intent, as ostensible declarations of intent, as contrary to the law, as contrary to the nature of the relationship, as contrary to good morals, or as an abuse of rights. Moreover, as regards legal transactions that can be classified under Polish law only as circumventing the law, an alternative classification will be looked for under German private law. Namely, the study will consider whether undertaking the legal transactions circumventing Polish law would lead to a circumvention of German law and, if that was not the case, what it is that makes German law resistant to circumvention.

So far, the Polish Supreme Court has not proposed a formula that allows an unambiguous identification of transactions “having as their objective the circumvention of law” (art. 58 § 1 PCC). Definitions developed by courts or borrowed from legal literature seem to be too theoretical to fulfil this function. Additionally, the significance of the subjective elements of a legal transaction (such as the parties’ awareness or intention) for finding circumvention of the law is disputed not only in legal literature but also in case law. Therefore, the second purpose of this work is to define the prerequisites that would allow determining whether a legal transaction circumvents the law under Polish private law. The prerequisites will be determined based on the features common to the legal transactions that can be classified under Polish law only as circumventing the law, and they will include any characteristics distinctive only to particular groups of legal transactions circumventing law.

The most apparent difference existing between Polish and German law, in the context of circumvention of the law, is that under Polish law – unlike under German law – there is a general regulation of the legal consequences of circumvention of the law (art. 58 § 1 PCC). Therefore, the examination of the Polish case law also has the purpose of determining whether an explicit regulation of circumvention of the law and its legal consequences is necessary and useful, asking, in particular, whether explicitly regulating legal transactions circumventing the law is beneficial from the perspective of the courts’ practice and

whether it contributes to greater certainty and a greater predictability of the law. This question is significant not only in the context of the current Polish Civil Code but also in the context of the drafting of a new Polish Civil Code.

The majority of Polish scholars have seen circumvention of law as only a marginal legal problem. Most academic publications only briefly mention theoretical aspects of circumvention of the law. The handful of exceptions consider circumvention of the law from a theoretical perspective,²¹ concentrate on particular legal problems or judicial decisions²² or list examples of cases in which a circumvention of the law was found.²³ However, even authors commenting on specific court rulings in which circumvention of the law was found or considered have rarely examined the problem of circumvention of law in depth; rather, the topic has been addressed superficially, with the court's finding being accepted or rejected based on arguments relating to a different legal problem. Even the most recent monograph dedicated to circumvention of the law in relation to the Polish law of obligations²⁴ thoroughly considers only one example of circumvention of the law and, instead, concentrates on a theoretical examination of circumvention of the law. Thus, neither the court's practice – identifying in particular the exact facts of cases in which a circumvention of law was found – nor the prerequisites developed by courts have been critically evaluated or thoroughly examined in legal literature. Accordingly, there is no comprehensive publication examining circumvention of law from both theoretical and practical perspectives. Thus, this work's goal is to fill the gap existing in Polish legal literature by expanding the understanding of circumvention of the law in Polish legal commentary by adding insights gained from its application in Polish case law.

§ 3. Methodology

A critical evaluation of the relevant judicial decisions of the Polish Supreme Court, establishing the prerequisites for determining whether a legal transaction is circumventing the law under Polish private law and resolving the question of whether a general regulation of circumvention of law is necessary and useful under Polish law, requires a comprehensive examination of the interpre-

²¹ Wąsowicz, KPP 1/1999; Stawecki, in: Nadużycie.

²² See e.g., Marek, St.Pracow. 11/2014, 1–4; Radwański, OSP 9/2000, 454–456; Tracz/ Zoll, pp.71–77; Szpunar, PiP 1/1977, 168–173.

²³ See e.g. Grykiel/Lemkowski, Art. 58 para.14; Pietrzykowski/Saffjan (10th ed. 2020), Art. 58 para. 17; Rozwadowska-Herrmann (3rd ed. 2011), Art. 58 theses 27–28.

²⁴ Iwański.

tation and application of the legislative provisions on circumvention of the law under Polish law (specifically, art. 58 PCC).

The first step includes a comparison of Polish, German, and European legislation on circumvention of the law. Its goal is to show different models for regulating circumvention of the law. The history and content of the relevant statutes in Polish and German law – as currently in force – are discussed in the context of the legal literature published in these countries. Particular attention is paid to recognition of the need to explicitly regulate circumvention of the law – or to the perceived absence of such a need. In that context, the regulation and judicial development of circumvention of the law in the case law of the Court of Justice is briefly presented.

The second step amounts to distinguishing circumvention of law from other private-law concepts present in Polish private law, such as ostensible declarations of intent, legal transactions contrary to (statutory) law, legal transactions contrary to the nature of the relationship, legal transactions contrary to good morals (principles of community life²⁵), and abuse of rights. Circumvention of the law is also considered as a problem regarding the interpretation of legal transactions. Each time, the legal concept is theoretically discussed and – also in the light of the relevant observations made in German, Austrian and Swiss literature as well as in both the case law of the Court of Justice and the literature discussing it – compared with circumvention of the law. The theoretical consideration of each concept is followed by an analysis of those legal transactions which courts assessed in terms of whether they circumvented Polish private law but which can be classified under the examined legal concept.

The third step comprises a discussion of (i) the definition of circumvention of law, (ii) legal transactions that were identified in the case law of the Supreme Court and that cannot be classified under any of the other discussed concepts, (iii) a set of practical indicators (prerequisites) which allow determining whether a specific legal transaction, concluded under specific circumstances, aims to circumvent the law, (iv) the private-law consequences of circumvention of the law, (v) the function of the regulation of circumvention of the law, and (vi) circumvention of the law as an independent legal concept. These issues are explored based on Polish case law and legal literature, but their soundness is checked against – and the outcomes affirmed by – arguments adopted in German, Austrian, and Swiss legal literature. The compatibility of the proposals with European private law, including the case law of CJEU, is confirmed. Additionally, aspects of circumvention of the law that have yet to be examined in Polish literature, but that have been analysed in German, Austrian, and Swiss legal litera-

²⁵ There is no one official translation of “zasady współżycia społecznego”. Their alternative translation is “the principles of social cohabitation”. This translation is not used hereinafter.

ture, serve as an inspiration for widening the scope of research. Moreover, when appropriate and possible, Polish case law is considered from the perspective of findings made by German courts in cases having similar facts.

The analysis is completed with the presentation of conclusions arrived at as a result of the study's comprehensive examination of the interpretation and application of Polish legislation on circumvention of the law.

§ 4. *Scope of the study*

The study comprehensively examines the interpretation and application of legislative regulation of the circumvention of law under the Polish Civil Code of 1964. As art. 58 § 1 PCC regulates the consequences of legal transactions having as their objective the circumvention of a statute, the study is limited to legal transactions that were concluded to potentially circumvent one or more legal provisions. Other forms of legal activities, such as undertaking a factual act or issuing a judicial decision with a specific content,²⁶ are excluded from the examination.

Further, the study examines legal transactions considered by the Polish Supreme Court in its case law as potentially circumventing law. In particular, it includes transactions that the Supreme Court explicitly found to have aimed at – or not to have aimed at – a circumvention of the law, or transactions in relation to which the Court considered the possibility of finding a circumvention of law without taking an unequivocal position. The judicial decisions of the Polish Supreme Court were selected based on the explicit references made to circumvention of the law in the Court's decision or its reasoning. For the selection of judgments, the Lex Legal Information System²⁷ was used. In exceptional cases, decisions available from other sources were analysed as well. This was the case, in particular, when an already selected decision referenced such a decision, or such reference was made in the legal literature on the subject. Additionally, the study includes an examination of selected legal cases considered circumventing law in the decisions of the Polish courts of appeal. These judicial decisions are included as they regard legal transactions that potentially circumvent legal provisions whose circumvention was also discussed in the case law of the Polish

²⁶ See e.g., judgment of the Supreme Court of 2 December 1997, I PKN 407/97, OSNP 1998/20/590. See also, circumvention of the law by obtaining a particular judgment, e.g.: judgment of the Supreme Court of 22 March 1995, II CRN 10/95, LEX No. 50589.

²⁷ <<https://sip.lex.pl/>> (accessed 11 November 2023). The research phrase was “circumvention of the law”. In this way, an empirical database was created. The core of the study consists of an examination of 2,761 judicial decisions.

Supreme Court. Examples of circumvention of the law suggested in legal literature are not considered.

The analysed legal transactions were considered in judicial decisions made between 1 January 1990 and 1 January 2020. Earlier case law in which circumvention of the law was considered is largely irrelevant due to the changes in the private law regime that accompanied the structural changes in Poland's economic, social, and political system in the 90s.

Further, the considered legal transactions have been selected based on the provisions regulating their conclusion (i) and based on the provisions that they potentially circumvent (ii).

(i) The study includes legal transactions whose conclusion is regulated in Book One (General Part) and Book Three (Law of Obligations) of the Polish Civil Code,²⁸ in the Polish Labour Code,²⁹ in the Polish Commercial Code,³⁰ or in the Polish Code of Commercial Companies.³¹

(ii) The potentially circumvented legal provision(s) are regulated in the General Part and in the Law of Obligations of the Polish Civil Code, in the Polish Labour Code, in the Polish Code of Commercial Companies, or in the Polish Commercial Code. Two additional groups of legal transactions, to which the listed parts of the PCC and the other legal acts do not apply are considered. Namely, selected fiduciary transactions (the transfer of the title to a thing to secure a debt) and legal transactions aimed at circumventing social security law. In later cases, however, only those transactions are considered that have a civil law nature or to which the provisions of private law apply by virtue of a statutory reference; they are discussed only to the extent that legal transactions regulated by labour law affect the validity of social security coverage. The argument of circumvention of law is inherent to considerations on the validity of these two groups of legal transactions. The omission of these two groups of transactions in any considerations on circumvention of law would thus constitute a significant gap in the research on the manner of applying art. 58 § 1 PCC. The study does not include circumvention of any norms other than those of a legislative nature; in particular, it does not consider the circumvention of contractual provisions.

Most of the legal transactions considered by the Supreme Court as circumventing the law meet these two premises ((i) and (ii)). In German literature, the

²⁸ Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code], Dz.U. 2023 item 1610, with later amendments.

²⁹ Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy [Act of 26 June 1974, Labour Code], Dz.U. 2023 item 1465, with later amendments.

³⁰ Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 June 1934 r. Kodeks handlowy [Regulation of the President of the Republic of Poland of 27 June 1934, Commercial Code], Dz.U. 1934 No. 57, item 502, with later amendments.

³¹ Ustawa z dnia 15 września 2000 r. Kodeks spółek handlowych [Act of 15 September 2000, Commercial Companies Code], Dz.U. 2022 item 1467, with later amendments.