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## The Abstraction Principle and the Separation Principle in German Law

One of the differences that appears to be particularly vivid is the application of the ownership transfer rule in German law, that is the principle of abstraction and the principle of separation. I thought that this would be interesting for the audience of this conference, as it is a legal solution which does not exist in the Russian or Polish legal systems, but is very characteristic of German law.

### 1. Introduction

The principles which are the subject of my speech cannot be found in Polish law and, therefore, before they are defined, how they are addressed in Polish legislation should be explained. According to the Polish Civil Code, a sales agreement or other agreement involving the obligation to transfer ownership entails material consequences and obligations, so it transfers ownership. However, German Civil Code (Hereinafter: BGB) regulates this issue in a different way. According to the separation principle (*Trennungsprinzip*), legal acts creating obligation and legal acts on property transfer (disposition)<sup>1</sup> are separate. This means that the transfer of ownership requires not only a sales or donation agreement, but also an agreement on actual property transfer.

Then, according to the abstraction principle (*Abstraktionsprinzip*), a defect in an obligatory contract will not invalidate a contract on ownership transfer<sup>2</sup>. It may, therefore, happen that after the conclusion of the two agreements, the obligatory contract is not valid, but this does not affect the validity of the contract which transferred the ownership. Despite the void obligatory contract (i.e. sales agreement) the purchaser becomes the owner of the property. This ensures the effectiveness of contracts on ownership transfer.

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1 R. Bork, *Allgemeiner Teil des Buegerlichen Gesetzbuchs*, 2011, p. 176.

2 R. Bork, *Allgemeiner Teil des Buegerlichen Gesetzbuchs*, p. 188.

## 2. Obligatory and dispositive legal acts

When discussing the two principles, a thorough analysis of obligatory and dispositive legal acts should be carried out as a starting point.

A legal action is a whole legal event which includes at least one statement of intent. The doctrine provides a number of different legal classification criteria for legal acts. From the point of view of the principles discussed here, three divisions are relevant.

The first criterion classifies legal actions in terms of the legal consequences of acts for the property of the person making a statement of intent. Three types of acts can be distinguished.

### 2.1 Obligatory legal acts

Obligatory legal acts involve an obligation to increase liabilities. The result is the creation of claims which did not exist before, thus leading to the formation of an obligatory relationship. One party is obliged to provide what the other party may require. Thus, there is an obligee and an obligor. This condition is a consequence of a legal act, not a statutory duty.

In German law, this situation arises, for example, as a result of a sales agreement, § 433 of BGB. The buyer acquires the claim to transfer ownership of a property to him. Thus, with the conclusion of the contract he does not acquire ownership. Therefore, after the conclusion of this agreement, no vindicative claims against the seller arise as the buyer is not yet the owner of property<sup>3</sup>.

### 2.2 Dispositive legal acts

Dispositive legal acts are another type in this classification. They involve extinguishing or encumbering rights. This means that this legal act results in acquisition of an existing right by another party.

In German law, an example of this legal act is the norm found in § 929 BGB. It is a provision of great importance. It provides that a transfer of ownership requires the actual delivery and transfer of a title. The transfer of the title is defined as the mutual consent for the transfer of ownership at the time of conveying ownership. It is not, therefore, a statement of intent, but an intent to transfer occurring at the time of the transfer.

This act, as a logical interpretation of the provision indicates, is a legal act that is separate from an obligation - and this is the essence of the principle of separation.

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<sup>3</sup> R. Bork, *Allgemeiner...*, p. 177.

### 2.3 Legal acts of double effect

Legal acts of double effect work in opposition to obligatory and dispositive legal acts. They involve both obligatory and dispositive consequences. This means that such acts contain both aspects of obligation and ownership transfer. Therefore, there is no need to perform two legal acts to achieve the desired legal effect.

I would like to use the transfer of ownership in Polish law as an example of this kind of act. According to the standard provided in art. 155 § 1 of the Polish Civil Code, a contract obliging the transfer of ownership conveys ownership to the buyer. The conclusion of the contract of sale does not lead to the formation of a claim for transfer of ownership, but it actually transfers ownership. It is, therefore, a contract resulting in both obligatory and ownership transfer consequences.

Another criterion of legal act classifications is the *causae* criterion (criterion of cause). This division applies only to adoptive actions and it is crucial from the point of view of the principle of abstraction. We can distinguish causal acts for the existence of which the existence of the legal cause is necessary. Here again, I would like to use an example in Polish law, according to which the transfer of ownership requires a valid (without an invalidity defect) obligation. Due to the provision in art. 155 § 1, the existence of the consequence is absolutely dependent on the existence of causes (*causae*), which is an obligation in this case.

The issue is addressed differently for abstract acts, which constitute the second type of legal acts in the cause criterion division. Here, the existence of cause does not determine the existence of the act. This is an example of the abstraction principle. This means that a dispositive legal act is valid and effective regardless of the validity of an obligatory act. The final criterion of the legal act division that is relevant to the issue being discussed here is the criterion of how a statement of intent is made.

The first type is consensual acts, where the very statement of intent is sufficient to give rise to a consequence. An obligatory act is an example of this type. In German law, a claim for ownership transfer arises under the sales contract.

The other category is real acts. These are acts which require actual acts to be effective. A German solution for the transfer of ownership is an excellent example. § 929 of the BGB requires that a property is delivered, which is a purely factual action. It is only after the actual holding of a property is transferred and the other premises have been met that the transfer of ownership can occur.

Obviously, there are some exceptions to this rule, but they usually refer to specific situations, for example an item is already held by the purchaser, as previously the purchaser was a party in the lease relationship.

### 3. The separation principle

Having analysed the types of legal acts and their classifications, I would like to describe the principles of separation and abstraction.

As was mentioned before, the separation principle separates the obligatory area from the ownership transfer area completely<sup>4</sup>. By obligation, the parties should render services. By disposition, the obligation is realized<sup>5</sup>. This leads to a situation where the standard sales contract involves the conclusion of three contracts: one obligatory contract, one contract on the transfer of the property and one on the transfer of money.

### 4. The abstraction principle

Discussion of the principle of abstraction focuses on the question of how the ineffectiveness of the causal (obligatory) act affects the effectiveness of the related dispositive act. There are two possible answers. One answer is that the effectiveness of the disposition is assessed in relation to the effectiveness of the obligation in accordance with the principle of causality, where the ineffectiveness of the causal act results in the ineffectiveness of the dispositive act.

The German legislature decided on the principle of abstraction as opposed to the principle of causality. Thus, the effectiveness of a single act has no impact on the effectiveness of the other. Both legal acts are independent from each other and do not affect each other in their effectiveness. The abstraction principle provides that the obligatory act is abstract in the sense that its ineffectiveness does not affect the effectiveness of the dispositive act. Therefore, if the sales contract is successfully challenged by the seller, for example, because of an error in the statement of intent, it will not affect the ownership.

At first glance, this provision seems unnecessary as it leads to totally absurd situations. However, it emphasizes the importance of ownership rights and some autonomy of property rights. Here, the ownership right is so protected that even if there were doubts about the validity of the acquisition grounds, it remains under special protection.

In this case, the settlement between the parties will have to be based on the provisions of baseless enrichment.

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4 F. Baur *et al.*, *Sachenrecht*, München 2009, p. 55.

5 R. Bork, *Allgemeiner...*, p. 176.

## 5. Practice

Let's examine this issue in practice. Undoubtedly, this unusual, from the point of view of Russian or Polish civil law, solution involves a number of differences in practice. I would like to present some examples, which will help us to see this interesting phenomenon more clearly. German jurisprudence has developed a special system to approach case solving. In order to avoid overlooking any of the premises, case solving schemes have been devised. They are not limited to civil law; but also refer to criminal or public law.

When solving a case ad hoc, as students at Polish universities do, one has to identify a problem which occurs in the case and then describe it in detail, noting doctrinal disputes on the matter. German jurisprudence has created a scheme for each type of case in order to analyse a given case. Thus, when solving a case, one must examine one by one all premises that may play a role in solving the case, stopping in those places where a problem emerges. There one should cite conflicting opinions on the subject and support one of them. This practical approach makes it impossible to ignore any premises.

Such schemes also exist for cases involving the acquisition of property, and thus they are directly connected with the abstraction principle and the principle of separation discussed here.

The schemes are constructed according to a very logical rule that seems obvious, but it allows systematized structural thinking, which is very useful when solving complex cases, such as the ones based on the principles of abstraction or separation. Their structure is repeated at each premise and is as follows:

- *Obersatz* that is the introductory sentence which, in the conditional mood, expresses the possibility of the occurrence of a given premise;
- Definition, quoting a legal doctrine or derived from the jurisdiction definition of a given concept;
- Subsumption, a comparison of the facts with the definition mentioned in the previous section;
- The result, the final effect of the analysis, confirmation or exclusion of the premise.

Additionally, in civil cases the existence of the claim is checked. Thus, the general scheme based on three points is as follows:

- a claim arises;
- failure to satisfy the claim;
- possibility of performing the claim.

Depending on the standard on which one wants to base the claim, the content of the premises in each of the three points varies.

Of course, we are interested in premises related to claims, or states of ownership, which are based on the principles of abstraction or separation.

The most common cases related to the principles of separation and abstraction are the ones concerning debt recovery claims. They are constructed in such a manner that ownership is problematic. For some reason, a binding agreement between the parties turns out to be vitiated by nullity. A debt recovery claim under § 985 BGB does not usually arise (it is eliminated at the first point in the scheme) in the absence of the premise of ownership. The seller has lost ownership because the dispositive agreement has remained effective, despite the invalidity of the binding agreement. Cases are constructed in such a way that the cause of the invalidity of the binding agreement is the fact lying in the very contract, and not, for example, in the lack of legal capacity of a party. For the invalidity would affect both contracts in this case, and the seller would remain the owner.

Another classic type of case involving the principles of abstraction and separation is where there is an analysis of the quantity of legal actions taking place at the sale. Here is an example:

K buys two newspapers at the same time from V for the total price of 70 cents and pays one 50 cent coin and one 20 cent coin. V hands over both newspapers. How many legal actions have been taken?

- Sales Agreement between K and V (Kaufvertrag) (§§ 433 ff. BGB);  
Obliging action;
- Transfer of ownership of a 50-cent coin from K to V (§ 929 S.1 BGB);  
Obliging action;
- Transfer of ownership of a 20-cent coin from K to V (§ 929 S.1 BGB);  
Dispositive action;
- Transfer of ownership of the first newspaper from V to K (§ 929 S.1 BGB);  
Dispositive action;
- Transfer of ownership of the second newspaper from V to K (§ 929 S.1 BGB);  
Dispositive action.

The schemes drawn up by German jurisprudence generally make it easy to solve cases, especially those containing a few problems. They help to prevent the overlooking of any of them.

Here is an example of the scheme containing premises related to the transfer of ownership (§ 929 S.1 BGB):

- the seller is the owner;
- the good is transferred to the buyer;
- consent on ownership transfer;
- duration of consent at the time of transfer.

## 6. Summary

The principles of separation and abstraction are characteristic of the German system of civil law. They do not exist in Polish law. The comparison of these solutions leads to the following conclusions: In Germany, there is better and more secure ownership protection. The need for a two-step transaction is admittedly more problematic for legal transactions, however, it guarantees certainty. There is also a better protection of the buyer. He gains certainty about the acquired ownership rights, regardless of the possible invalidity of the obligatory contract. Polish solutions do not provide such certainty, but they significantly simplify and accelerate legal transactions.

## 7. Final thought

I hope that the comparison of legal solutions in different countries will help you to reflect on different possible regulations of the same legal issues. Such comparisons make it possible to select a solution which is more functional and is an inspiration for interesting legislative ideas.

### **Biographical reference:**

Kornel Sadowski – student of German and Polish Law at the Adam Mickiewicz University in Poznań and the European University in Viadrina Frankfurt (Oder). His studies are conducted simultaneously by two universities, one Polish and the other German, and he is taught these two legal systems. This allows him to reach very interesting conclusions. Firstly, it is noticeable that the general way of thinking about the state and law is very similar in both countries. Secondly, however, there are some differences in specific aspects. This leads to a discussion and comparison of the efficacy and functionality of various solutions and a reflection on legislative solutions.

### SUMMARY

#### **The abstraction principle and the separation principle in German law**

The aim of the study is to evaluate the selected principles applied in German law system – the abstraction principle and the separation principle. Presenting the proposed subject the author focus on the obligatory and dispositive legal acts and practical dimensions of the functioning of the selected principles.

KEYWORDS: abstraction principle, separation principle, German law system

