Universal invention or historical relic? The question of a common model of obligation in European legal culture

One of the oldest and fundamental instruments of private law in European legal systems is the obligation (see e.g. art. 353 of the Polish Civil Code; § 241 of the German Civil Code, art. 1100 of the French Civil Code). On the basis of an obligation, the creditor is entitled to demand performance and the debtor is obliged to fulfil this obligation. The creditor's right is referred to as a 'claim' (receivable) and the debtor's obligation as a 'debt'. These statements are only seemingly obvious, as the construction of legal obligation conceals many mysteries.

In modern legal systems, in principle, any obligation may be enforced. This gives rise to many doubts. For it is not clear whether the right to enforce an obligation is an element of that obligation. The legal literature of European countries points to two different approaches to this problem: a) dualistic and b) monistic.

According to the dualistic approach, the elements of 'debt' and 'liability' (Ger. *Schuld und Hanftung)* are to be distinguished in the legal obligation. On the basis of this approach, a distinction is made between the obligation of voluntary performance (debt) and the obligation of the debtor to resist enforcement against all his assets in the event of non-performance (liability) (A. Brinz, K. von Amira, O. von Gierke). With the passing of time, the concept of liability began to be used in parallel with the concept of 'actionability (Ger. *Erzwingbarkeit, Klagbarkeit*), which is the creditor's right to enforce legal obligation. Both the concepts of enforceability and liability express the substantive legal right to enforce an obligation. On the premise of this theory, there can be an obligation (debt) without a sanction (liability).

According to the monistic approach, the obligation consists of a debt and a claim, but not the elements of "liability" or "contestability". Only the public right to lodge a complaint with a court and initiate an enforcement procedure of the obligation is distinguished. However, this is a public (procedural) right and not a substantive one. This approach is based on the assumptions of the imperative theory of law (Austin, Kelsen), according to which there cannot existsan obligation without sanctions (it is then only a moral, natural obligation). Liability is simultaneously contained in debt and actionability in claim (receivable).

The research project aims to determine which model of obligation is appropriate and common for the European legal culture. It is at the same time a question whether it makes sense to distinguish the construction of obligation at all. There are systems in which the distinction of law of obligations is disputable (e.g. English law). The research will be based on historical and comparative law perspectives.

But why is it worth discussing a common model of legal obligation?

Firstly, the analysis of the elements of obligation is important from a theoretical point of view. The discussion on a monistic or dualistic theory has not been definitively resolved or even more widely explicated to this day. This causes much uncertainty in legal science.

Secondly, the identification of the model of obligation may allow the resolution of many specific issues. It can be debated whether the parties to the obligation are entitled to contractually modify the content of actionability. This second perspective is of socio-economic importance. In international professional trade (B2B) and in trust law, clauses modifying personal liability (with assets) are frequently applied.

Third, the question concerns the impact of the dualistic or monistic theory of obligation on private international law (conflict of laws) in the enforcement of obligations. It may be asked whether the law applicable to actionability is determined by the law applicable to the obligation (*lex causa*) or the law of the adjudicating court (*lex fori*).

Fourthly, the possibility of enforcing the obligation may arise not only before a court but also outside court proceedings. In today's digital economy, various instruments are used to enable a creditor to be satisfied without the involvement of state authorities. This concerns the so-called 'digital jurisdiction', *lex informatica* (for example, smart contracts, enforcement by an internet service provider). All this leads to the question - are the indicated forms of extrajudicial enforcement of the obligation legal? Is it possible to identify the principle of state monopoly on enforcement in private law? The adoption of a monistic or dualistic conception of obligation may have an important impact in this respect.