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The Rise and Essence Form of Contract for Evidentiary Purposes in the French Code civil and Its Effective Use on Polish Territories in the 19th and 20th Centuries

The article discusses the origins and significance of the French institution of the form of contract for evidentiary purposes in the context of the development of the principle of freedom of contract in canon law in Europe. The second aim of the paper is to demonstrate the implementation of this institution in the Polish legal system in the 19th and 20th centuries, as well as its application by Kraków courts following the introduction of the French Code civil on Polish soils.

Keywords: *French Code civil, The Free City of Cracow, freedom of contract, the form of contract for evidentiary purposes*

In my essay I would like to draw your attention to the institution of the written form of a legal action for evidentiary purposes, so-called form of contract *ad probationem*. This legal structure was introduced on Polish soil by the Code civil (the Code Napoléon), which was in force in the Free City of Cracow for forty-five years until 1855.[1] The French Code civil was then replaced by the Austrian Civil Code (ABGB). Until 1810, the West Galician Code was in force in Kraków. Austrian law did not know the written form of contracts for evidentiary purposes. A written form for evidentiary purposes was therefore a distinctive feature of the French legal system. Despite its liberal-egalitarian character, the Code civil adopted more restrictive solutions than Austrian law (the West Galician Code and ABGB) with regard to the forms of legal transactions. The Code civil did not explicitly declare the principle of freedom to choose the form of a contract, as did

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1 Free City of Cracow (*Wolne Miasto Kraków*) was established at the Congress of Vienna, as an autonomous political and political structure under the protectorate of Austria, Russia and Prussia. Its internal relations were defined by a constitution imposed by the Protectors, which, among other things, placed legislative, governmental and judicial power in the hands of the Poles. However, the policy of the Free City authorities was under the permanent control of three residents. It encompassed the territory of Cracow and its surroundings (including Chrzanów, Trzebinia and Nowa Góra) with an area of 1150 km². The population in 1815 was about 90.000 (by 1843 the population rose to 145.787, of which 10 per cent of the inhabitants were Jews). In 1846, the Free City of Cracow ceased to exist and was incorporated into the Austrian Empire.

the Austrian West Galician Code of 1797, which stated that the parties were obliged to perform the contract regardless of whether it was concluded orally, in writing, before or out of court.[2]

This *par excellence* French legal institution has a history of over two hundred years on Polish soil. Although the historical development of this institution of civil law did not proceed in a linear manner, it still exists in the Polish legal order to this day. The form for evidentiary purposes remained in force in the lands of the Kingdom of Poland until 1876.[3] The Russian civil procedure introduced on Polish soil at that time abolished the evidentiary ban of the Code civil.[4] The French institution was alien to Russian law. The form for evidentiary purposes according to the French Code civil was that for all legal transactions exceeding the value of 150 francs, they had to be concluded in the form of a notarial deed or a document with a private signature (Article 1341 of the Cc.). Failure to observe this form of legal transaction precluded the possibility of witness evidence at trial, unless there was a 'commencement of proof in writing' (Article 1347 of the Cc.).

The Polish Code of Obligations of 1933 returned to the form for evidentiary purposes, but in a modified version compared to the provisions of the Code Napoléon.[5] The Polish legislator did not use the general clause that every legal transaction exceeding a certain monetary value should be drawn up in written form for evidentiary purposes. The Polish Code of Obligations referred to it only for certain types of legal transactions, such as a lease agreement (Article 371 of the Code of Obligations) a loan agreement (Article 431 of the Code of Obligations) a partnership (Article 550 of the Code of Obligations), or a life contract (Article 600 of the Code of Obligations). In cases where the written form was not stipulated on pain of nullity, the legal act was valid, but witness evidence could not be taken in court proceedings without the consent of the parties (Article 110 of the Code of Obligations). Following the example of the Code civil, the evidentiary prohibition did not bind the court when there was a commencement of written evidence.[6]

The form for evidentiary purposes was abolished in the People's Republic of Poland after the Second World War (1950). The removal of the *ad probationem* form from the Polish legal order was motivated by the conviction that the court in civil proceedings should strive to establish the material truth by means of all available means of evidence. It was pointed out that the form for the purposes of evidence was not understandable to lay people, as well as could in practice lead to disadvantaging a party unfamiliar with the law. However, the drafters of the 1964 Polish

2 For detailed comments on the differences between Austrian and French legal culture, see: Dziadzio, Der Code civil in der Rechtsprechung der Freien Stadt Krakau (1815–1846). Zwischen französischer und österreichischer Rechtskultur 269–277.

3 The Kingdom of Poland, in union with Russia, was established in 1815 at the Congress of Vienna, and over time Polish lands were incorporated into the Russian Empire. From 1807 to 1815, the Duchy of Warsaw existed in central Poland under the patronage of *Napoleon*, who introduced the Code civil. Kraków was incorporated into the Duchy of Warsaw in 1810.

4 According to the civil law in force in the lands of the Kingdom of Poland after 1876, a written form of an agreement was still required for evidentiary purposes when concluding a partnership agreement. In this way, the French legal construction survived on Polish soil until the entry into force of the 1933 Code of Obligations.

5 After Poland regained independence in 1918, a Codification Commission was established to unify the law, as three legal systems were in force: German, Austrian, and Russian. A civil code was not introduced in Poland during the interwar period, but only a Code of Obligations (1933) and a Commercial Code (1933) were issued.

6 Rozporządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 27 października 1933 r. – Kodeks zobowiązań, Dz.U. Nr 82, poz. 59.

Civil Code, which is still in force today, reinstated the written form for evidentiary purposes, in a version similar to the Napoleonic Code. This was because it applied to all legal transactions whose value of the subject matter exceeded the amount specified in the Code. Another interference of the Polish legislator in the provisions on form for evidentiary purposes took place in 2003. The legal state of affairs changed in such a way that this form is now reserved for the types of contracts specified in the Civil Code, as was the case in the 1933 Code of Obligations. However, there has been an exclusion of the application of the provisions on form for evidentiary purposes in business-to-business relations, as well as a restriction on its application in consumer trade.

The form of legal action for evidentiary purposes persisted in the Polish legal order despite the fact that the implementation of this French institution by the courts of the Free City of Cracow did not proceed smoothly. Krakow judges educated in Austrian legal culture, different from French legal culture, were close to the idea of complete freedom of the choice of the contractual form. Although European jurisprudence came under the strong influence of canon law and the law of nature, which thoroughly deformalised agreements, the history of contract law unfolded differently in Austria and France.

The Code Napoléon provision on the form for evidentiary purposes was taken directly from the Royal Ordinance of 1566. The Ordinance of *Moulins* stipulated that all legal transactions concerning things worth more than 100 livres were to be performed either before notaries or drawn up in the form of a written document.[7] In the event of a breach of the form prescribed by the Ordinance, witness evidence was inadmissible at trial. The motives for the legal solution adopted emphasised the good and interest of the judiciary in the speedy adjudication of litigation. The reason for the change in the law stemmed from the fact that witnesses too often gave false testimony, which reflected negatively on the proper course of proceedings. The Ordinance of 1566 was therefore intended to eliminate the lengthy trial involving witnesses and to deliver a court judgment without delay, the evidentiary basis of which was based on the contents of a written document.[8] The Ordinance of *Moulins* limited the freedom of the parties to act as they wished, forcing them to write down a document if they later wished to successfully pursue their claims in court. The provision of the Ordinance was an instrument of state control over legal transactions in the interests of French noble families. They demanded that the king introduce safeguards against rash and ill-considered dispositions of their members' property.[9] Implicit in the content of the Ordinance was also a disapproval by the State authority of the effects of the contract theory adopted by canon law.

According to canonists, the assertion in court of claims arising from an oral contract was not hindered by the fact that the contract was neither written down nor supported by an oath. Canon law linked the thesis of the actionability of oral contracts to the proposal of new means of proof. Instead of oaths, duels and trials by ordeal, it favoured rational means of proof, in particular witness evidence. Although Canon Law also took into account the evidentiary value of written documents but because of cases of forgery, it gave greater evidentiary weight to witness

7 Ordonnances du Roy pour la réformation et reiglement de la justice, tant ès cours souveraines que inférieures, faictes en l'assemblée des princes et seigneurs de son Conseil et des députez des cours de parlements et Grand Conseil, tenue à Moulins au mois de febvrier 1566, https:// gallica.bnf.fr /ark: /12148 /bpt6k97398516 /f50.item texteImage (10. 10. 2025).

8 More on this topic, see: Dziadzio – Mataniak – Michalik, The French Civil Code in the Free City of Cracow 210–212.

9 This purpose was served by the introduction in the Ordinance of Blois in 1579 of the consent of the family to the marriage as a breaking obstacle, giving rise to the annulment by the royal court of the marriage entered into. This provision was contrary to canon law.

testimony.[10] There was thus a shift in canon law away from the view that documentary evidence was superior to oral evidence. French customary law at the end of the Middle Ages thus underwent a major transformation, taking over both the canonical idea of the actionability of ordinary informal contracts (*pacta nuda*) and the principle that witnesses were better than writs.[11]

The contents of the Ordinance of *Moulins* thus indirectly expressed the secular authority's distrust of the position of canon law. Canon law aimed to base contractual relations on the autonomy of the will of the parties and to leave them free to dispose of the means of proof in the trial. Commentators on the contents of the Ordinance explained that it was not witness evidence that was disavowed by the secular power, but its degeneration in judicial practice. The legislative initiative of the French king was explained by the corruption of customs, which manifested itself in the fact that the fear of God was not a brake against giving false testimony.[12]

When, over time in the late 16th and early 17th centuries, the canonical principle of keeping oral contracts, taken over by the school of natural law, was becoming widespread, French legal scholarship was looking for a way to restore the importance of witness evidence in civil proceedings. Therefore, the legal construction of the 'commencement of written evidence' appeared in French law, as a condition for admitting witness evidence at trial in the event of a dispute over the performance of a contract, even though it had not been concluded in writing. According to the legal construction of the 'commencement of written evidence', witness evidence was always to be admitted at trial in cases where it could serve to support written evidence. In this modified form, the Ordinance of *Moulins* found its way into *Louis XIV*'s Ordinance on Civil Procedure

10 Landau, Pacta sunt servanda. Zu den kanonischen Grundlagen der Privatautonomie 778.

11 The principle *témoins passent lettres* of canon law was replaced in the Ordinance by its opposite, that documentary evidence has greater value than witness testimony (*lettres passent témoins*). The absorption by the common law of the norms of canon law is evidenced by the 1280 index of the law of the district of Clermont by *Philip de Beamonoir*, which took over the canonical rule of *pacta sunt servanda*, based on the moral obligation to keep contracts, stating: *"All contracts must be honoured and a contract prevails over the law, except when it comes to contracts made for evil purposes [for example] when someone undertakes to kill a man for a hundred livres."*

12 Similar reasons led to the adoption in England in 1677 Statute of Frauds, which was modelled on the French Ordinance. The Statute of Frauds contained in its preamble a phrase that referred directly to the assessments that appeared in the French commentaries on the Ordonnance of Moulins, see: Rabel, The Statute of Frauds and Comparative Legal History 174–176. In England since the 15th century the protection of 'oral contracts' was ensured by the Court of Chancery, which, following the contract theory of canon law, recognized in its judgments the autonomy of the parties' will in shaping their contractual relationships. For this reason, litigants preferred the Court of Chancery in disputes concerning obligations arising from simple promises. The removal of jurisdiction from the ecclesiastical courts in matters concerning lay persons in the 17th century led to the Westminster courts significantly expanding their powers at the expense of both the ecclesiastical courts and the merchant tribunals. This meant that jury in the Westminster courts, which had jurisdiction over simple oral agreements, had to rely extensively on testimonial evidence in reaching their verdicts, which they were not always able to assess correctly. This led, on the one hand, to erroneous and unfair judgments, and on the other, to an increasing number of cases flowing into the Westminster courts, as their attitude encouraged unscrupulous individuals to pursue false and baseless claims. Faced with this state of affairs, the English Parliament sought remedies to improve the judicial system, see: Helmholz, Conflicts between Religious and Secular Law; Common Themes in English Experience, 1240–1640, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2487&context=journal_articles (10. 10. 2025).

(1667). It was taken over in the same form by the Code Civil, which only defined the term 'commencement of written evidence'.[13]

As written above, the Code civil, in terms of the forms of contract, adopted a more restrictive solution than the Austrian ABGB of 1811. This resulted from the reference to the rules of the *ancien régime* period. As already noted, The Code civil did not explicitly declare the principle of freedom of choice of the form of contract, as the Austrian law did. Following on from canon law, the Austrian codes (West-Galician Code and later the ABGB) adopted the principle *of ex nudo pacto oritur actio et obligatio*, abandoning contractual nominalism altogether.

Judges in the Free City of Cracow, accustomed to the system of Austrian law, which they had applied for more than 12 years, did not immediately recognise the peculiarities of the Code civil regulation with regard to the form of a legal act for evidentiary purposes. During the initial period of application of the French Code, there was a case of misinterpretation of the Code civil provision on the form of a legal act for evidentiary purposes. The misinterpretation of the provision was demonstrated to the courts by the Faculty of Law of the Jagiellonian University.[14] Cracow's judges – who had previously ruled on the basis of Austrian law, in which the form of *ad probationem* was absent – initially interpreted the provision of the Code civil (Article 1341) as a prohibition on disproving the contents of a document by witness testimony.[15]

They overlooked the fact that the provision specified the form of a legal action. They gave the judgment as if it was based on Austrian law and not French law! In a case involving a dispute over an oral land exchange agreement worth more than 150 francs, two court instances in the Free City of Cracow recognised the validity of such an agreement on the basis of witness evidence.[16] The courts admitted the witness evidence on the assumption that, since the rule prohibited this evidence against the wording of the document, it therefore *a contrario* allowed witness evidence in the absence of a written agreement. It was not until the court of third instance, relying on

13 According to the Code civil the commencement of proof was *"every act in writing which emanates from the party against whom the demand is made, or from him whom such party represents, and who renders probable the fact alleged"* (Article 1347 of the Cc.).

14 Supervision of the application of the provisions of the Code Napoléon by the Cracow courts was exercised by the Faculty of Professors and Doctors of the Jagiellonian University, which heard the appeals of the parties in cases where the Court of First Instance and the Court of Appeals rendered unanimous judgments. The basis of an appeal could be an allegation that the courts had violated substantive or procedural law. If the Faculty of Law found a violation of law, the case was heard by the Court of Third Instance, which issued the final judgment, although it was not bound by the opinion issued by the Cracow's Faculty of Law.

15 Article 1341 of the Cc. stipulated that *"an act must be made before notaries or under private signature, respecting all things exceeding the sum or value of one hundred and fifty francs…; no proof can be received by witnesses against or beyond what is contained in such acts, nor touching what shall be alleged to have been said before, at the time of or subsequently to such acts."* The literal, and thus not very precise, translation of the provision into Polish may have caused it to be interpreted by Cracow's judges in a distorted manner, inconsistent with its legal meaning.

16 Dziadzio – Mataniak (prepared and published), Protokoły Posiedzeń Wydziału Profesorów i Doktorów Prawa Uniwersytetu Jagiellońskiego (1817–1833). Opinie o stosowaniu Kodeksu Napoleona przez sądy Wolnego Miasta Krakowa. [Minutes of the Meetings of the Faculty of Professors and Doctors of Law of the Jagiellonian University (1817–1833). Opinions on the Application of the Code Napoléon by the Courts of the Free City of Kraków] 423.

an opinion of the Faculty of Law of the Jagiellonian University, concluded in its ruling that the lower court had violated the prohibition on taking evidence in the form of witness testimony.[17]

However, one may wonder whether the interpretation of the Code civil provision was really due to an ignorance of the special rules of French contract law. Or whether, perhaps, the rulings contrary to the provisions of the French Code were a deliberate rejection of the excessive formalism of the Code civil in legal transactions and an expression of disapproval of the idea of limiting the means of proof in civil proceedings. Perhaps Cracow's courts wanted to provide legal protection to the weaker side of the litigation by following Austrian law, in which there were no evidentiary limitations. Indeed, the courts may have come to believe that the absence of a written contract in a case was the result of one party's ignorance, which was exploited by the other. A lawsuit was brought to a court by a poor and crippled labourer against the owner of a brickyard. The Court of First Instance recognised his claim, as witnesses confirmed the fact of the land swap agreement. The Court of Appeal upheld the judgment of the Court of First Instance as being in accordance with the law, even though it had the correct interpretation of the Code civil provision, which was provided by the defendant in his pleading. In spite of the uneasy experience of the judges of the Free City of Cracow with the application of the provision of the Code civil, causing negative consequences for the parties to a legal action in the event of its conclusion in a form other than that required by law,[18] French institution of the written form for evidentiary purposes was revived in the Polish legislation of the 20th century. As in the old French law, its value was perceived in securing legal transactions by means of quick proof of a legal act by means of a written document and immediate court judgment. Modern Polish law reserves the form of legal transactions for evidentiary purposes for a small group of contract types, bearing in mind that it formalises legal transactions and limits the free assessment of evidence by a civil court.

17 National Archives in Kraków, ref. no. WM 193. Judgment of the court of third instance dated April 22, 1830.

18 The form for evidentiary purposes was made stricter in the French Code civil by the introduction of a provision that formalised the requirements for the conclusion of bilateral contracts. According to Article 1325 of the Code civil. the conclusion of a written bilateral contract was only valid if it was drawn up and signed in as many copies as there were parties to the contract. Each copy of the agreement had to contain a clause stating that the agreement was concluded in two (or more) copies. If the mention of the number of copies made was not included in the contract, it was on this basis that one could demand that that the contract be declared invalid by the court. This demand could not be brought by the party that had executed the contract. Thus, in the event of a lawsuit to enforce the contract, the other party could obtain judicial nullity of the contract when it showed that either the written bilateral contract was drawn up in one copy or the copies of the contract did not mention the number of originals drawn up. The mere violation of the written form requirements of a bilateral contract, despite the parties' properly executed declaration of intent, could, according to Code civil, lead to the invalidation of the contract, which was a manifestation of contractual nominalism. The obtaining by a party of a judgment declaring the invalidity of a concluded contract in the form of an act with a private signature closed the way for the other party to assert its claims through the possibility of witness evidence. Detailed examples from the case law of Kraków courts regarding the interpretation of Article 1325 of the Code civil, see: Dziadzio, Vertragstypenzwang im Code civil? Die Gültigkeit gegenseitiger Verträge in der Judikatur der Freien Stadt Krakau 270–283.

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