



# The Court's Interference with Contracts by Supplying and Converting the Contractual Terms

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## ARTICLE



## ABSTRACT

Most modern legal systems have been searching for a legal measure that would help to imply omitted terms as well as rescue the validity of unsuccessfully concluded agreements, and they found such a solution in the concept of supplementary interpretation of contract, an example of which is *conversio actus iuridici*. The tendencies visible in *genere* prove that whenever the law provides for too rigorous requirements for private ordering, the idea to supplement, imply, or convert contracts occurs. The presented comparative legal perspective is of great importance for Polish jurisprudence, which generally rejects the concept of supplementary interpretation of contracts, but accepts *conversio actus iuridici*. The analysis presented in this paper encourages representatives of Polish jurisprudence to wider adoption of the idea of supplementary interpretation of contracts, following the example of foreign legal orders.

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## 1. INTRODUCTION

The court should not make the contract for the parties – this thesis has been applied in many court cases.<sup>1</sup> However, as will be presented in this paper, modern legal systems have shown tendencies not only to interfere with the intentions of parties involved, but also to substitute for the bargain actually made by them whenever ‘making the contract for the parties’ by the court seemed to be a fair and reasonable measure to mitigate too rigorous consequences of unenforceability or nullity of contract or its terms. In this article I will present legal methods that are admissible in various jurisdictions by which courts interfere with parties’ intentions and substitute for the agreement made by them. The analysis that follows indicates that most modern legal orders adopt a broad understanding of the concept of contract interpretation according to which courts are empowered to supply the express intent of parties. This approach, however, is not shared by Polish jurisprudence. The main aim of this analysis is to advocate for a change in the way in which Polish jurisprudence perceives the process of such supplementary interpretation of a contract and its usefulness in determining the contractual obligations.

For this purpose, I will conduct a comparative analysis of modern legal orders (Poland, Germany, Switzerland, Austria and the American law of contract) in order to identify differences and similarities in the various approaches toward the concept of supplementary interpretation of contracts and its various forms. I will also verify why and to what extent modern legal orders allow for such – sometimes gross – court interference with contracts. Such a research objective justifies a broad comparative approach which has the ‘inestimable value of sharpening our focus on the weight of competing considerations’.<sup>2</sup> One such consideration is the principle of freedom of contract according to which parties are free to enter into contracts and to decide on the contractual terms. It must be remembered, however, that the principles of contractual freedom include not only freedom of contract, but also freedom from contract in the case in which the parties did not reach one.<sup>3</sup>

In my argumentation, in order to avoid terminological inaccuracies, I will firstly present and define legal methods by which courts in various jurisdictions interfere with parties’ intentions and substitute for the agreement made by them. In this part of the argumentation I will also elaborate on the state of jurisprudence on the discussed matters in the legal orders under comparison (Sections 2–3). Then I will comment on conceptual relations and theoretical distinctions in the field of interpretation of contracts (Sections 4–5) which are necessary to present the application of the discussed legal methods in practice by courts in various jurisdictions (Sections 6–8). At the end I will sum up those conclusions that are particularly important for Polish jurisprudence (Sections 9–10).

## 2. VARIOUS FORMS OF SUPPLEMENTARY INTERPRETATION IN MODERN LEGAL ORDERS – COMPARATIVE PERSPECTIVE

The analysis focuses on such legal concepts as: (1) construction of an omitted term, (2) hypothetical intent of the parties, (3) *conversio actus iuridici*. *Conversio* (German: *Umdeutung* or *Konversion*) is, generally speaking, a method of legal reasoning whereby a legal act can be enforced, despite its invalidity, as another functionally similar legal act.<sup>4</sup> The prerequisite for

<sup>1</sup> For example, see (in the scope related to the United States): *Henrietta Mills, Inc v Commissioner* 52 F 2d 931, 4th Cir 1931, 10 AFTR 516; *Harrison v Fortlage* 161 US 57, 16 S Ct 488, 40 L Ed 616; *Gavinzel v Crump* 89 US 308, 1874 WL 17445, 22 L Ed 783, 22 Wall 308; *The Harriman* 76 US 161, 1869 WL 11480, 19 L Ed 629, 9 Wall 161; *Lowber v Bangs* 69 US 728, 1864 WL 6590, 17 L Ed 768, 2 Wall 728; *McMicken v Webb* 47 US 292, 6 How 292, 1848 WL 6443, 12 L Ed 443; Steven J Burton, *Elements of contract interpretation* (OUP 2009) 185.

<sup>2</sup> *McFarlane v Tayside Health Board* [1999] 4 All ER 961.

<sup>3</sup> Burton (n 1) 185.

<sup>4</sup> This definition is based on the wording of §140 BGB of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) which should be considered representative for explaining the essence of *conversio* as it has been widely adopted in European literature. See, for example: Isabel Wachendorf Eichenberger, *Die Konversion ungültiger Verfügungen von Todes wegen* (Helbing & Lichtenhahn 2003) 4, 27; Karol Gandor, ‘Konwersja nieważnych czynności prawnych’ (1963) 4 *Studia Cywilistyczne* 27. The legal nature of *conversio* was the subject of my monograph: Magdalena Bławat, *Konwersja nieważnych czynności prawnych* (CH Beck 2019). Thus, I will not elaborate more on this issue and would like to refer to the concept of *conversio* presented there.

*conversio* is a hypothetical intent of the parties that they would have concluded this substitute legal act had they been aware of the invalidity of the one that was actually concluded. For instance, a void aval (guarantee on a bill of exchange) can be converted into a valid civil suretyship;<sup>5</sup> a void pledge can be converted into a *pactum de pignore dando* (an agreement to establish a pledge) etc.<sup>6</sup> The objective is to enforce the contract despite its legal deficiencies (quite serious ones, as they lead to invalidity of the contract) even though the activity of the court will actually resemble ‘making the contract for the parties’.

I will refer to these concepts in order to generalize about the phenomenon of courts rewriting the contracts in the process of supplementary interpretation of a contract. In my view, all these legal concepts are distinguished by one important feature: at the conceptual level, they can be generally classified as various examples of the supplementary interpretation of contracts. In international legal academic writing, the concept of supplementary interpretation is known by different names and can be disguised in various forms (English: gap-filling, supplying omitted terms, construction, implication; German: *Lückenfüllung*, *ergänzende Auslegung*, Polish: *wykładnia uzupełniająca*).<sup>7</sup> It must, however, be explained that – from a theoretical perspective – all these legal measures (as well as the universal concept of supplementary interpretation of contracts itself) must be clearly distinguished from the interpretation of expressed terms.<sup>8</sup> It is particularly important to distinguish the interpretation of express terms from other techniques subsequent to the interpretation where the conclusion has been drawn that a gap remains in the content of the contract that must be filled in.

The main subject of comparative analysis is German law, which contains relevant normative regulations for the discussed legal concepts, and American law of contract, in which I will search for their functional equivalents. It must, however, be noted that for the purposes of the research in this respect it is more relevant to conduct the in-depth analysis of specific court opinions rather than to focus on a presentation of state legislation or federal law. The main comparative analysis, as already indicated, will be complemented by references to Swiss, Austrian and Polish jurisprudence.

Under the German Civil Code (*Bürgerliches Gesetzbuch*, BGB)<sup>9</sup> *conversio* finds its legal background in §140 BGB. It states that if a void legal act fulfils the requirements of another legal act, then the latter is deemed to have been entered into provided that it may be assumed that its validity would have been intended by the parties if they had known about the invalidity of the concluded legal act. The legal basis for the supplementary interpretation of contracts is provided by §157 BGB, according to which contracts are to be interpreted as required by good faith, taking customary practice into consideration (as opposed to §133 BGB related to interpretation of express terms which emphasizes the necessity to ascertain the true intention of a declaration of intent).

The comparative research presented in this paper also includes Swiss and Austrian jurisprudence, where, as in Poland, there is no normative regulation for *conversio actus iuridici*; nevertheless, *conversio* is applied by the courts, following German legal thought in this respect. For instance, the Supreme Court of the Republic of Poland (*Sąd Najwyższy*, SN) allowed *conversio* of an invalid

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5 See justification of the judgment of the Supreme Court of the Republic of Poland (*Sąd Najwyższy*, SN) dated 26 November 2002 (V CKN 1445/00) LEX nr 78013.

6 Gandor (n 4) 72; Elly Weil, *Konversion von Rechtsgeschäften* (Diss Zürich 1934) 66, 70.

7 See: Jan M. Smits, *Contract Law. A Comparative Introduction* (2nd edn, Edward Elgar 2017) 131.

8 Dietrich Bickel, *Die Methoden der Auslegung rechtsgeschäftlicher Erklärungen. Kritische Analyse seit dem Inkrafttreten des BGB vertretener Lehrmeinungen und Versuch einer Neubegründung* (Elwert 1976) 171–173; Bogna Kaczorowska, *Wykładnia umów obligacyjnych w świetle współczesnych tendencji rozwoju prawa prywatnego* (Wydawnictwo i Drukarnia Świętego Krzyża 2018) 267, 350–351. Such distinctions have been applied by some authors in various contexts, see for example: Edward Allan Farnsworth, ‘“Meaning” in the Law of Contracts’ (1966–1967) 76 *Yale Law Journal* 939, 940; Jaap Baaij, David Cabrelli, Laura Macgregor (eds) *Interpretation of Commercial Contracts in European Private Law* (Intersentia 2020) 5. It must be noted, however, that some scholars do not distinguish the interpretation of an express term from inferences related to omitted terms as the common goal of those processes is to establish the legally binding meaning of the contract: Claire Huguenin, *Obligationenrecht. Allgemeiner und Besonderer Teil* (2nd edn, Schulthess Verlag 2014) 97.

9 <BGB – nichtamtliches Inhaltsverzeichnis ([gesetze-im-internet.de](https://www.gesetze-im-internet.de))> accessed 10 July 2022.

transfer of copyrights to a licence agreement<sup>10</sup> and the Federal Supreme Court in Switzerland (*Bundesgericht*, BGE) converted an invalid sales contract (which according to the intention of the parties was to be effective at the time of death of the seller) into a testamentary disposition.<sup>11</sup>

Such a concept of *conversio actus iuridici* has been not recognized in common law legal orders.<sup>12</sup> Nevertheless, the scope of my comparative research also covers the American law of contract.<sup>13</sup> The analysis that follows will focus mostly on case law developed in New York State which will be accompanied by analysis of leading English contract law cases for historical reasons (as most states, except Louisiana, adopted the common law of England as their basic legal system before American independence).

The analysis of American contract law is also useful because of the extensive literature on the idea of gap-filling which corresponds to the idea of supplementary interpretation of contracts present in European legal systems.<sup>14</sup> For instance, there is a visible conceptual relationship between gap-filling and the rule expressed in Article 2.2 of the Swiss Law of Obligations (*Obligationenrecht*, OR) which states the rule that, characteristic of supplementary interpretation of contract, in the event of failure to reach agreement by the parties on secondary terms of the contract, the court must determine them with due regard to the nature of the transaction.

The concept of supplementary interpretation of a contract is generally accepted in modern legal orders,<sup>15</sup> except in Poland.<sup>16</sup> That is why the outlined comparative research is of great importance for Polish jurisprudence, which generally rejects the concept of supplementary interpretation, but accepts its particular and most far-reaching example – *conversio actus iuridici*.

In the comparative research a functional approach was applied, aimed at searching for functional equivalents of given legal institutions. The comparative reasoning presented in this paper was based on the assumption that modern legal orders often encounter in practice the same problems that they solve in an analogous way.<sup>17</sup> It should, however, be stipulated that the considerations presented in this paper are not particularly applicable to contractual relations between entrepreneurs and consumers because, according to the case law of the European Court of Justice with respect to the Unfair Terms Directive 93/13, the eventual admissibility of converting unfair terms could annihilate its preventive function.<sup>18</sup> That is why the analysis that follows focuses rather on the issue of interpretation of contracts concluded within business relations.

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<sup>10</sup> Judgment of SN dated 25 November 1999 (II CKN 573/98) LEX nr 145313.

<sup>11</sup> BGE 12 June 1967 – 93 II 223.

[http://relevancy.bger.ch/php/clir/http/index.php?lang=it&type=show\\_document&page=1&from\\_date=&to\\_date=&from\\_year=1954&to\\_year=2016&sort=relevance&insertion\\_date=&from\\_date\\_push=&top\\_subcollection\\_clir=bge&query\\_words=&part=all&de\\_fr=&de\\_it=&fr\\_de=&fr\\_it=&it\\_de=&it\\_fr=&orig=&translation=&rank=0&highlight\\_docid=atf%3A%2F%2F93-II-223%3Ait&number\\_of\\_ranks=0&azaclir=clir#page223](http://relevancy.bger.ch/php/clir/http/index.php?lang=it&type=show_document&page=1&from_date=&to_date=&from_year=1954&to_year=2016&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=0&highlight_docid=atf%3A%2F%2F93-II-223%3Ait&number_of_ranks=0&azaclir=clir#page223) accessed 10 July 2022.

<sup>12</sup> Blawat (n 4) 18, 253.

<sup>13</sup> By this term I will refer, following a common usage, to the general principles of contract law that are widely recognized in the many state jurisdictions within the United States. See Brian A. Blum, *Contracts* (6th edn, Wolters Kluwer 2013) 26.

<sup>14</sup> Smits (n 7) 122, 131.

<sup>15</sup> See tendencies visible in German law as well as in common law legal systems described by: Martijn W. Hesselink, 'The Politics of a European Civil Code' (2004) 6 *European Law Journal* 680; Smits (n 7) 131. However, criticism of this concept was also raised; see: Olaf Muthorst, 'Contract Interpretation under the German BGB and under the DCFR', in Bettina Heiderhoff, Grzegorz Żmij (eds) *Interpretation in Polish, German and European Private Law* (Sellier 2011) 59.

<sup>16</sup> Inter alia: Krzysztof Mularski and Zbigniew Radwański, in Zbigniew Radwański (ed) *System Prawa Cywilnego*, vol 2: Prawo cywilne – część ogólna (CH Beck 2019) 76.

<sup>17</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 39. The above observation led the authors to the conclusion on the necessity to adopt the 'presumption of similarity' (*praesumptio similitudinis*) as a basis for comparative research. Therefore, the authors encourage reanalysing such comparative research, the results of which seem to prove the existence of extremely different solutions in the compared legal orders.

<sup>18</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29; Case C-618/10 *Banco Español de Crédito, SA v Joaquín Calderón Camino* [2012] ECLI:EU:C:2012:349.

### 3. THE PROBLEM OF SUPPLEMENTARY INTERPRETATION OF CONTRACTS IN THE POLISH LEGAL ORDER

It would not be an exaggeration to say that Polish jurisprudence is attached to a very liberal perception of freedom of contract and a restrictive approach to its limitations.<sup>19</sup> Polish courts are, indeed, eager to supplement the contract with default rules codified directly by law. They tend, however, to avoid construing the contract on the basis of the hypothetical intent of the parties, general rules of law, equity, nature of a given legal relationship, or usage of trade.<sup>20</sup>

That is why one can say that Polish legal thought is currently facing the challenge of addressing the problem of the admissibility of legal concepts such as construction, supplementary interpretation and hypothetical intent of the parties. In Poland, under the influence of German legal thought, the concept of *conversio actus iuridici* was, however, adopted (together with the prerequisites for *conversio* as formulated in §140 BGB), although Polish civil law has never provided an explicit legal basis for *conversio*. Thus, some legal academics and commentators in Poland treat *conversio* as a method of interpretation of expressed terms.<sup>21</sup> Nevertheless, such a qualification does not reflect the true nature of *conversio* which must be qualified as an example of supplementary interpretation.<sup>22</sup>

Surprisingly, the idea of supplementary interpretation was, however, rejected in Polish legal thought because of the lack of an explicit legal provision in support of its admissibility.<sup>23</sup> The judiciary also remains rather reluctant to adopt this concept, despite some encouragement from academics for more resolute, but proportionate interference with the content of the contractual relationship if needed.<sup>24</sup> Opposition to the concept of supplementary interpretation and, at the same time, the perception of *conversio* as a method of interpretation of expressed terms seem to be contradictory to some extent. One should clearly distinguish between disputes over the meaning of the act of communication (disputes over expression – resolved in the course of interpretation) and disputes over issues not regulated or even foreseen at all by the parties. Those can be resolved in the process of supplementary interpretation of contracts.

### 4. THE CONCEPTUAL RELATIONS BETWEEN THE SUPPLEMENTARY INTERPRETATION OF CONTRACTS AND *CONVERSIO ACTUS IURIDICI*

One might ask why the issue of supplementary interpretation of contracts is distinguished from interpretation of express terms, but at the same time is related to the concept of *conversio actus iuridici*. As has already been indicated, the purport of applying *conversio* arises when the already interpreted contract turns out to be null and void. The relation between the concepts of the supplementary interpretation of contract and *conversio*, the premise of which is the nullity of contract, must then be explained.

Known already in Roman law, the concept of *conversio* spread in jurisprudence and in the legislation of some European countries – the legal regulation of *conversio* can be found in civil codes in Germany, Greece, Italy, the Netherlands, Hungary and Portugal.<sup>25</sup> Some civil codes (such as the codes of Austria, Switzerland, and Poland) do not include any specific provisions

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<sup>19</sup> Roman Trzaskowski, *Granice swobody kształtowania treści i celu umów obligacyjnych*. Art. 353<sup>1</sup> k.c. (Zakamycze 2005) 56.

<sup>20</sup> Roman Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem* (LexisNexis 2013) 434.

<sup>21</sup> Inter alia: Zbigniew Radwański, *Wykładnia oświadczeń woli składanych indywidualnym adresatom* (Zakład Narodowy im. Ossolińskich 1992) 118.

<sup>22</sup> See: n 4.

<sup>23</sup> Inter alia: Zbigniew Radwański, *Teoria umów* (Państwowe Wydawnictwo Naukowe 1977) 191; Mularski, Radwański (n 16) 76.

<sup>24</sup> Trzaskowski (n 20) 434; Łukasz Węgrzynowski, 'Sądowe ustalenie treści stosunku umownego' (2007) 5 *Przegląd Prawa Handlowego* 47.

<sup>25</sup> See for instance Article 3:42 of the Civil Code of the Netherlands (*Burgerlijk Wetboek*); Gandor (n 4) 28.

of law related to *conversio*. Nevertheless, *conversio* is applied by the courts. In Switzerland, the prerequisites for *conversio* presented in §140 BGB are considered as an unwritten rule of law.<sup>26</sup>

As a result of widespread recognition of the concept of *conversio* and, at the same time, a lack of its explicit legal regulation in much European legislation,<sup>27</sup> some legal academics and commentators considered *conversio* as a method of interpreting declarations of intent.<sup>28</sup> It has already been noted that whether or not this view can be accepted as correct depends on how far one is prepared to take the notion of ‘interpretation’ and on how one perceives what actually takes place in the process of *conversio*.<sup>29</sup> Most international legal academics and commentators agree that, from a theoretical perspective, *conversio* might be treated as a type of supplementary interpretation based on the concept of hypothetical intent of the contracting parties which must, however, be clearly distinguished from interpretation of expressed terms.<sup>30</sup>

Generally speaking, supplementary interpretation based on the concept of the hypothetical intent of the contracting parties might be useful in the case of gaps in a contract (1) or in the case of its invalidity (2).

In the first example, supplementary interpretation would serve as a method of supplying omitted terms which were not included by the parties directly in the wording of the contract, but they must be perceived as implied (by law or in fact) in the contract as otherwise the contract would be unenforceable. The court searches for the hypothetical intent of the parties by asking how the missing gap would be filled by reasonable and fair contracting parties, having in mind the purpose of the contract and the rest of the contractual provisions.

The second example shows the inference characteristic of *conversio actus iuridici*. In this example, the hypothetical intent of the parties would be established by purely abstract reasoning to determine what the parties would have done if they had been aware of the invalidity of the concluded legal act. Would they have entered into another functionally similar contract or would they have decided to abandon the transaction? It is evident that such hypothetical reasoning would be based on non-existent circumstances (as in hypothetical knowledge about the invalidity of the contract and its potential substitution), as opposed to the actual circumstances. Through *conversio* the court would substitute for the contract actually made by the parties, one which the court deems to be different but functionally similar. This observation might raise some concerns as ‘the court should not make the contract for the parties’.

## 5. THE DISTINCTION BETWEEN THE INTERPRETATION OF A CONTRACT AND ITS CONSTRUCTION

In order to verify why and to what extent the principle of freedom of contract allows for the court’s interference with contracts, it is useful to begin with a distinction between the interpretation of a contract and its construction, which corresponds to the difference between the interpretation of express terms and the supplementary interpretation (*einfache und ergänzende Auslegung*), known in German literature.<sup>31</sup>

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26 Christoph Krampe, *Die Konversion des Rechtsgeschäfts* (Klostermann 1980) 21.

27 Please note that continental lawyers treat codified statutes as a main basis for legal reasoning. General rules regulated in the civil codes are of primary importance in the process of applying the law.

28 Radwański (n 21) 118; Maciej Gutowski, *Nieważność czynności prawnej* (CH Beck 2008) 410. I have presented a detailed polemic with this approach, which is dominant in Polish doctrine, in the monograph entitled *Konwersja nieważnych czynności prawnych* (CH Beck 2019) 82–188. See also: Krampe (n 26) 2, 282; Johannes Hager, *Gesetzes- und sittenkonforme Auslegung und Aufrechterhaltung von Rechtsgeschäften* (CH Beck 1983) 115, 154.

29 Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1st edn, reprinted, Juta & Co Ltd 1992) 684.

30 See: Krampe (n 26) 2, 282; Hager (n 28) 115, 154; Helmut Heiss, *Formmängel und ihre Sanktionen: Eine privatrechtsvergleichende Untersuchung* (Mohr Siebeck 1999) 190; Florian Faust, in Thomas Heigel, Rainer Hüßtege, Heinz-Peter Mansel, Ulrich Noack (eds) *BGB. Allgemeiner Teil. EGBGB* (3rd edn, Nomos 2016) 1095; Hans Brox, Wolf-Dietrich Walker, *Allgemeiner Teil des BGB* (38th edn, Vahlen 2014) 165; Blawat (n 4) 50.

31 Jacques H Herbots, ‘Interpretation of Contracts’, in Jan M. Smits (ed) *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 440, 441.

American jurisprudence defines interpretation as the ascertainment of the meaning of a promise or agreement.<sup>32</sup> Thus, interpretation aims at explaining the meaning of the parties' communication on the basis of evidence. The starting point is the language of the contract. However, it is necessary to take into account all the other circumstances surrounding the parties' communication as well if they remain undisputed or proven.<sup>33</sup>

Construction, by contrast, means establishing the legal effects of a contract.<sup>34</sup> In a process of construction a court might depart far from the mere interpretation of express terms, especially when it must determine the legal position of the parties if they have not addressed, in the wording of their contract, all the specific issues which subsequently turned out to be contentious. In this case construction encompasses various non-interpretation decisions which a court may make regarding the content of a contract, including gap-filling or supplying omitted terms.<sup>35</sup>

Based on these assumptions, disputes over the meaning of the act of communication (disputes over expression – resolved in the course of interpretation) can be distinguished from those that concern issues not regulated in the contract at all (disputes over omission – resolved in the process of construction).<sup>36</sup>

In the process of construction the court might apply gap-fillers. The list of gap-fillers is constantly changing, as it depends on the current needs of the market.<sup>37</sup> An important role is played by such gap-fillers which can be inferred from facts and evidence (gap-fillers ad hoc).<sup>38</sup> Gap-fillers might also be construed on the basis of the nature of a given legal relationship<sup>39</sup> or usage of trade.<sup>40</sup> One can refer to those gap-fillers which have already been codified (implied terms in law, terms implied by statute, standardised terms in common relationships) or developed in case law (non-mandatory default rules).<sup>41</sup>

There is a tendency, visible in modern literature, to conflate interpretation and construction.<sup>42</sup> It is argued that courts in practice do not distinguish between the two processes,<sup>43</sup> or that they blur the distinction between those two processes.<sup>44</sup> It has also been pointed out that distinguishing between interpretation and construction does not seem to be a task that is either simple or necessary.<sup>45</sup>

It seems, however, that such a distinction is of considerable significance. As it was rightfully noted, 'there is no identity nor much similarity between the process of giving a meaning to words, and the determination by the court of their legal operation'.<sup>46</sup> Such a distinction allows

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<sup>32</sup> See: § 200 of the Restatement (Second) of Contracts (The American Law Institute 1981) ('Restatements').

<sup>33</sup> Kim Lewison, *The Interpretation of Contracts* (4th edn, Sweet & Maxwell 2007) 34.

<sup>34</sup> Inter alia: Arthur L Corbin, *Corbin on Contracts. One volume edition* (West Publishing 1952) 494.

<sup>35</sup> Randall H. Warner, 'All Mixed up about Contract: When is Contract Interpretation a Legal Question and When is it a Fact Question' (2010) 5 *Virginia Law and Business Rev* 126.

<sup>36</sup> Edward Allan Farnsworth, 'Disputes Over Omission in Contracts' (1968) 5 *Columbia L Rev* 860, 876; Farnsworth (n 8) 939, 940.

<sup>37</sup> Jack Beatson, Andrew S Burrows, John Cartwright, *Anson's Law of Contract* (29th edn, OUP 2010) 155.

<sup>38</sup> Lewison (n 33) 191.

<sup>39</sup> E.g. *Liverpool City Council v Irwin*, [1977] AC 239; *Grant (Martin) & Co Ltd v Sir Lindsay Parkinson & Co Ltd*, 29 Build LR 31 (1984).

<sup>40</sup> Beatson, Burrows, Cartwright (n 37) 157.

<sup>41</sup> Herbots (n 31) 423. See also: Mateusz Grochowski, 'The majoritarian concept of default rules: towards a shift in paradigms?' (2020) 1 *Studia Prawa Prywatnego* 65.

<sup>42</sup> Lewison (n 33) 19; Catherine Mitchell, *Interpretation of Contracts. Current Controversies in Law* (Routledge 2007) 26; Ewa Rott-Pietrzyk, in Piotr Machnikowski (ed) *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC. Komentarz* (CH Beck 2022) 459, 460.

<sup>43</sup> Eric A Posner, *Contract Law and Theory* (1st edn, Wolters Kluwer 2011) 135. In the United States the distinction between interpretation and construction is now being used in practice by courts in Iowa, New Jersey and Washington – Margaret N Kniffin, in Joseph M Perillo (ed) *Corbin on Contracts*, vol 5: Interpretation of Contracts (West Publishers 1998) 10; *Wahlenmaier v American Quasar Petroleum Co* 517 SW 2d 390.

<sup>44</sup> Warner (n 35) 127.

<sup>45</sup> Ewa Rott-Pietrzyk, *Interpretacja umów w prawie modelowym i wspólnym europejskim prawie sprzedaży (CESL)* (CH Beck 2013) 8.

<sup>46</sup> Corbin (n 34) 495.

us to properly understand and define all stages of the court's role in resolving disputes over expression and omission.<sup>47</sup> It can also serve as a useful tool to assess whether the court has just exceeded the limits of interpretation in a particular case.<sup>48</sup>

This conclusion is particularly important for research on the issue of the supplementary interpretation of a contract. When a court fills gaps in the contract and construes its omitted terms, it departs far from the interpretation of the contract, even if it may claim that such an exercise serves to give effect to the 'intention' of the parties.<sup>49</sup> Despite the fact that both interpretation and construction aim to provide a full picture of the legal consequences of a contract when such consequences obviously do not depend solely on the parties' intent, the need for introducing such a distinction arises when it becomes necessary to set limits on the court's intervention in private autonomy by imposing such contractual rights and obligations on the parties which were not expressed in the contract itself. It is essential to establish how far a court can go when interpreting a contract and to determine the boundary between construing unspoken terms and imposing on the parties contractual obligations to which they did not agree.

Admittedly, most legal systems allow both interpretation and construction to some extent, although the understanding of these concepts and their boundaries might vary from country to country. Therefore, it is worth distinguishing between the concepts of interpretation and construction, at least at the conceptual level. In the process of comparative analysis it may turn out that what, in a given country, the court would call the interpretation of a contract, in fact constitutes the construction of unspoken contractual terms, which may be questionable in another legal order.

## 6. HYPOTHETICAL INTENT OF THE CONTRACTING PARTIES AS A PREREQUISITE FOR GAP-FILLING

For the purposes of this analysis, it is important not only to distinguish construction from interpretation, but also to examine its characteristic features. This is particularly important due to the fact that courts might tend to hide construction under the guise of contract interpretation as will be indicated in this paper.

The border between interpretation and construction is marked by the moment when an interpreter deviates from the meaning of the wording of the contract in favour of inferences based on some objective patterns. One of those is the concept of hypothetical intent of the contracting parties. One practical example considered by German courts might help to clarify this general concept. In one of its judgments, the German Federal Court of Justice (*Bundesgerichtshof*, BGH) considered the following facts.<sup>50</sup> The claimant ordered a car from a car producer. The delivery was to take place less than three years after placing the order. The order form contained a provision according to which if there was a period of more than four months between placing the order and the delivery date, the seller had the right to change the list price and, consequently, the price of the car. The vehicle was delivered to the buyer on time. However, in the meantime, the list price had significantly increased. Nevertheless, the buyer collected the car and paid the amount shown on the invoice issued by the seller. Then, the buyer sued the car company for a refund of the difference between the price actually paid and the list price at the date of placing the order.

The courts examining the case found the clause that allowed the defendant to change the list price to be non-binding. However, despite the ineffectiveness of this clause, the claim was dismissed. The courts claimed that the gap created by the ineffective clause could be filled by a supplementary interpretation of the contract. As a result, the courts stated that the right of the seller to change the sale price should have been correlated with the buyer's contractual right

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<sup>47</sup> Blum (n 13) 307.

<sup>48</sup> Gerard McMeel, *The Construction of Contracts. Interpretation, Implication and Rectification* (OUP 2007) 10; Gregory Klass, 'Interpretation and Construction in Contract Law' (2018) 1947 *Georgetown Law Faculty Publications and Other Works* 47 <<https://scholarship.law.georgetown.edu/facpub/1947>> accessed 10 July 2022. See also: Blawat (n 4) 27.

<sup>49</sup> Corbin (n 34) 493.

<sup>50</sup> BGH 1 February 1984 – VIII ZR 54/83, *JurionRS* 1984, nr 12457.

to withdraw from the contract, which right was inferred through supplementary interpretation (though not explicitly expressed in the contract). The buyer did not take advantage of this right, as he collected the ordered car and paid the full invoiced amount.

It is worth pointing out that in the judgment it clearly states that the purpose of supplementary interpretation of a contract is not to clarify the actual intent of the parties, but to fill gaps in the contractual regulation on the basis of some objective criteria, such as a hypothetical intent of the parties. A gap-filling process based on a hypothetical intent of the parties does not require any evidence and does not depend on the content of the parties' declarations of intent. Nevertheless, it cannot merely contradict them.

These statements reflect the essence of supplementary interpretation the purpose of which is to strike a balance between the opposing interests of the parties while determining the binding content of their contractual relationship in case of some gaps.<sup>51</sup> In the above-described state of affairs, such balancing required two assumptions. Firstly, the buyer did agree to pay the list price that applied at the date of delivery. Secondly, the buyer decided not to exercise the implied right to withdraw from the contract on the grounds that that price significantly exceeded the original one.<sup>52</sup> Although the right of withdrawal was not explicitly addressed in the contract, it was created by the court on the basis of a hypothetical intent of the contracting parties through supplementary interpretation.

The central question of how to identify a hypothetical intent of the parties arises. It is not a simple task as this concept is variously understood in legal academic writings. It can consist of determining – firstly – how a specific issue would have been resolved by the parties if they had had it in mind when making the contract ('subjective approach'), or – secondly – how the same issue would have been resolved by a reasonable and honest person in the exact context of the parties ('mixed approach'); the concept of the hypothetical intent of the contracting parties might also simply refer to the approach of an average third-party bystander ('objective approach').<sup>53</sup>

To answer this central question, we should begin with a closer look at factors which, according to common views of jurisprudence, can be taken into account when interpreting declarations of intent. Undoubtedly, contracts should be interpreted in such a way as to achieve the contracting parties' reasonable expectations and the underlying purposes of the transaction. It must also be assumed that the parties are fair and reasonable persons and that they are seeking to effectuate their common mutual intents. These factors make it possible to conduct various mechanisms of inferential reasoning, such as *a maiori* and *a fortiori* inferences. One can also imagine *per analogiam* reasoning in relation to both the self-regulation made by the parties and the provisions of law, as well as the principles of good faith and fair dealing.<sup>54</sup> Thus, any supplied terms may be seen as natural and logically inferred consequences of, or an extension of, the contracting parties' intent.<sup>55</sup>

In fact, by asking what the parties would reasonably have agreed to, the court actually considers how a reasonable and honest person would have behaved under the same circumstances, as it is impossible to construe the presumed intent of the parties without using objective models referring to the general criteria of rationality and equity.<sup>56</sup>

It has already been noted in legal academic writings that the evolution of the concept of hypothetical intent of the contracting parties has resulted in the courts beginning to go

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<sup>51</sup> Rott-Pietrzyk (n 45) 60.

<sup>52</sup> BGH 1 February 1984 – VIII ZR 54/83, JurionRS 1984, nr 12457.

<sup>53</sup> Zbigniew Radwański, in Zbigniew Radwański (ed) *System Prawa Cywilnego*, vol 2: Prawo cywilne – część ogólna (CH Beck 2002) 42–43.

<sup>54</sup> Radwański (n 23) 204. This conclusion also applies to American courts which are prepared to supply the term by reading into a contract a duty of good faith and fair dealing, as appears from § 205 of Restatements as well as from § 1 – 203 of the Uniform Commercial Code (UCC). According to § 2 – 103 (1) (b) UCC, the phrase 'good faith' can be defined as 'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade'.

<sup>55</sup> Kniffin (n 43) 8.

<sup>56</sup> Judgment of SN dated 12 May 2000 V CKN 1029/00 (2002) 1 Orzecznictwo Sądów Polskich 1, with the commentary of Janina Preussner-Zamorska; Piotr Machnikowski, *Swoboda umów według 353<sup>1</sup> kc. Konstrukcja prawna* (CH Beck 2005) 368; Ewa Rott-Pietrzyk, *Klauzula generalna rozsądku w prawie prywatnym* (CH Beck 2007) 351.

significantly beyond the wording of contracts.<sup>57</sup> The courts have started to determine not what the contracting parties had actually agreed on, but what the court believes is fair and just – on the pretext that this was the intention of the parties.<sup>58</sup> This is particularly evident in those situations in which the court independently composes a contractual clause in the event of a fictitious, unforeseen and unpredictable situation by using an objective approach.

It is also argued that the justification of gap-filling on the basis of a hypothetical intent of the parties seems to be an artificial exercise as it ascribes to specific individuals intentions which they did not have in mind, in a situation which was not even foreseen by them.<sup>59</sup> This is, however, understandable, as such gap-filling only ostensibly consists in determining how a missing gap would have been filled by the parties themselves, while in fact the court rather asks whether the law has already defined the legal rule necessary to resolve the dispute,<sup>60</sup> or resorts to the generally understood rationality of the parties.<sup>61</sup>

For these reasons, modern common law has rightly abandoned the fiction that gap-filling on the basis of a hypothetical intent of the parties means searching for any intentions of the parties, whether they are real, presumed, or hypothetical. Such a conclusion should be applied more broadly to all discussed methods of supplementary interpretation. The court cannot interpret anything that a contract does not contain, although obviously its task is to apply legal rules sufficient to the circumstances of each case.<sup>62</sup> Construing the contracting parties' obligations on the basis of some objective patterns is not a matter of interpretation of their contract; to call it so is 'merely convenient camouflage'.<sup>63</sup> It is simply about finding a proper legal rule necessary to resolve the dispute, which is the sole responsibility of the courts.<sup>64</sup>

Instead of referring to the artificial concept of the hypothetical intent of the contracting parties, it should be said that by using this concept when supplementing the terms of a contract, the court makes an objective and reasonable assessment of the interests of the parties in the specific context ('mixed approach' is to be preferred). Such assessment is made in the light of general rules of law and equity if the law has not already defined, in a proper legal act or in jurisprudence, a specific legal obligation that should be imposed on the contracting parties in a given situation. In the case of commercial contracts it should also include requirements of good faith and good commercial practice, codes of ethics, best practice, usages of trade etc.<sup>65</sup> Such activity is necessary and permissible in light of the freedom of contract. However, the court should not hide this activity under the guise of contract interpretation.<sup>66</sup>

## 7. HYPOTHETICAL REASONING IN THE CASE OF *CONVERSIO ACTUS IURIDICI*

The issue as to whether or not the court may determine the hypothetical intent of the parties in the case where it turns out that the contract concluded by the parties is null and void, is questionable among modern legislations. As has already been mentioned, German law

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<sup>57</sup> Farnsworth (n 36) 860, 864, 879.

<sup>58</sup> *ibid* 860, 864, 879.

<sup>59</sup> *Bromarin AB & ANR v IMD Investments Limited* [1999] EWCA Civ 678, in which Chadwick J expressed this thought in the following words: 'It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event «A», and they did not contemplate event «B», their agreement must be taken as applying only in event «A» and cannot apply in event «B». The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event «B», which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction'.

<sup>60</sup> Beatson, Burrows, Cartwright (n 37) 155.

<sup>61</sup> Jules L Coleman, *Risks and Wrongs* (OUP 2002) 166, 173; Martin Hevia, 'Coleman on Gap-Filling and Default Rules' (2012) 12 *Diritto & Questioni Pubbliche* 165, 166.

<sup>62</sup> *Sheets v Selden* 74 US 416, 1868 WL 11073, 19 L Ed 166, 7 Wall 416.

<sup>63</sup> Corbin (n 34) 494.

<sup>64</sup> Farnsworth (n 36) 860, 865.

<sup>65</sup> Boris Kozolchyk, *Comparative commercial contracts. Law, culture and economic development* (West Academic Publishing 2014) 998. See also: BGH 18 December 1954 – II ZR 76/54, BGHZ 16, 71.

<sup>66</sup> Corbin (n 34) 494.

provides for a legal basis of reasoning according to which a legal act can be enforced, despite its invalidity, as another functionally similar legal act (*conversio actus iuridici*). The prerequisite for *conversio* is a hypothetical intent of the parties that they would have concluded this substitute legal act had they been aware of the invalidity of the one that was actually concluded.

Although at conceptual level *conversio actus iuridici* might be perceived as a method of supplementary interpretation (*ergänzende Vertragsauslegung*),<sup>67</sup> it must be noted that in the case of *conversio*, the court's reasoning goes in a slightly different direction from a typical gap-filling process. In a typical gap-filling process, it is obvious that the parties entered into the agreement. It is also clear what kind of contract they had entered into. The parties just did not address this particular missing issue, which later turned out to be disputable. *Conversio* goes much further, as the court must consider what the parties would have done if they had been aware of the invalidity of the contract between them.

The nature of *conversio* is well illustrated by the judgment of BGH on 15 December 1955.<sup>68</sup> The case concerned a conflict arising on the basis of a void general partnership agreement which the parties had entered into for the joint use and extension of a property belonging to one of the partners. As the partnership was not established for the purpose of conducting business activities, the court refused to register it officially with a court register, as it found the agreement to be invalid in the light of German law. As a consequence, the property owner demanded that the others pay rent for the premises. At the same time, he started negotiations with other entrepreneurs interested in starting construction in the area. The might-have-been partners claimed that a void general partnership agreement should be converted into an effective civil-law partnership contract. However, the owner of the property argued that he had refused to engage into a civil-law partnership and his intention was also known by the other parties.

Having the above in mind, the court converted the void general partnership agreement into a civil-law partnership contract and emphasized that even the property owner's clear objection to cooperation in the form of a civil-law partnership could not prevent *conversio*. Such a statement of intent should only be seen as an objection expressed at the time of concluding the agreement when the parties wrongfully thought that both forms of cooperation – a commercial-law partnership or a civil-law partnership – were available to them. In this case the property owner obviously preferred cooperation in the form of a commercial-law partnership. His statement, however, does not contradict the hypothetical intent that if he had been aware that it was unlawful to enter into a general partnership agreement without the purpose of conducting business, he would have agreed to engage in a civil-law partnership, which would have allowed all parties to achieve the intended economic purpose.

Despite the criticism of the above judgment,<sup>69</sup> it needs to be noted that, firstly, it defines the true nature of *conversio*.<sup>70</sup> It illustrates the basic problems encountered when converting legal acts such as the scope of acceptable hypothetical reasoning and the fear of excessive, paternalistic judicial interference with contractual relations. Secondly, the concept of *conversio* proposed in the judgment, based on the views of Otto Fischer,<sup>71</sup> has influenced German courts,<sup>72</sup> although one could also argue that the void commercial-law partnership agreement could be simply qualified as a valid civil-law partnership agreement without any reference to *conversio*.<sup>73</sup>

The last solution, however, does not seem to be accurate. It should be remembered that the parties are mainly interested in a specific legal classification of a concluded legal act. For example, a guarantor, before granting an *aval*, might consider how he would satisfy his recourse claims which in the case of an *aval* might be different from those in the case of a

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<sup>67</sup> See: Bławat (n 4) 47.

<sup>68</sup> BGH 15 December 1955 – II ZR 204/54, NJW 1956, 297–298.

<sup>69</sup> Karl Larenz, *Allgemeiner Teil des deutschen bürgerlichen Rechts* (CH Beck 1967) 459; Krampe (n 26) 9; Hager (n 28) 195; Manfred Wolf, Jörg Neuner, *Allgemeiner Teil des bürgerlichen Rechts* (10th edn, CH Beck 2012) 682.

<sup>70</sup> See more: Bławat (n 4) 46–50.

<sup>71</sup> Otto Fischer, 'Konversion unwirksamer Rechtsgeschäfte', in *Festschrift für Adolf Wach*, vol 1 (F Meiner 1913) 236.

<sup>72</sup> Mariusz Ząber, *Wybrane zagadnienia konwersji czynności prawnych (od prawa rzymskiego do współczesnej cywilistyki)* Archive of Jagiellonian University in Kraków (Dokt 2004/185) 383.

<sup>73</sup> BGH 29 November 1971 – II ZR 181/68, WM 1972, 21.

civil suretyship. Converting a void *aval* into a valid civil suretyship may, therefore, thwart the planned strategy for recourse claims. This example, valid under Polish law, demonstrates that *conversio* is not just a simple reduction, modification, or different legal classification of a void legal act because all those activities might result in distortion of the structure of the rights and obligations originally intended by the parties.<sup>74</sup> As has been observed in Polish literature, any interference with this structure might lead to the situation where a reduced, modified, or reclassified legal act would not fully reflect the parties' will and satisfy their interests.<sup>75</sup>

One of the premises for *conversio* is the hypothetical intent of the contracting parties that they would have made another (substitute) legal act if they had been aware of the invalidity of the actual one. As has already been explained, the presumed intent of the parties was never directly expressed in the wording of the contract. It may be well argued, but it is still only a hypothesis. Thus, *conversio* consists in projecting a potential alternative to the course of events which actually occurred and, as a result, only a potential alternative to a contract that had been concluded unsuccessfully.<sup>76</sup> That is why one Polish legal academic, Zbigniew Radwański, asked a fair question when he queried whether a mere hypothetical declaration of intent that has never been actually made can stand as the core of a transaction.<sup>77</sup> It must then be remembered that, in the case of *conversio*, the risk that the court will exceed the limits of permissible interference with a contract while construing unspoken contractual terms, is therefore greater than in the case of typical gap-filling.

## 8. STRIVING FOR PROPORTIONALITY IN 'MAKING THE CONTRACT FOR THE PARTIES'. *CONVERSIO* VERSUS SUPPLEMENTARY INTERPRETATION IN COMMON LAW LEGAL SYSTEMS

Foreign legal orders generally affirm the concept of construction. German legislation in §140 BGB goes further and allows for *conversio actus iuridici*. Under the influence of German legislation, the concept of *conversio* has been approved by Swiss, Austrian and Polish jurisprudence. It would probably not be an exaggeration to say that such far-reaching interference with the contractual relationship as *conversio* could be perceived by common law jurists as contrary to freedom of contract and thus impermissible, as the court should not make the contract for the parties. After all, *conversio* results in granting the courts wide-ranging powers to intervene in the sphere of concluding and shaping the essential terms of legal transactions<sup>78</sup> – a sphere that primarily belongs to individuals.

From this perspective, doubts may arise as to whether the courts should be empowered to make such far-reaching and strictly hypothetical determinations about whether the parties would have entered into another transaction if they had known about the invalidity of the transaction they had actually entered into. In the case of *conversio*, the interference with the freedom of contract is greater than in the case of a typical gap-filling when it is quite clear that the parties entered into a valid agreement and the missing gap relates only to a particular term, not to the question whether and what kind of a contract would have been concluded by the parties in a different state of affairs.

Nevertheless, it should be not forgotten that the *rationale* behind *conversio* refers to the Roman law principle of *utile per inutile non vitiatur*.<sup>79</sup> This justification is still valid and has led to widespread recognition of *conversio* in the contemporary legal systems of continental Europe. It may even have a universal meaning as common law courts have also been searching for

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<sup>74</sup> See more: Blawat (n 4) 46–50.

<sup>75</sup> Trzaskowski (n 20) 306.

<sup>76</sup> Fischer (n 71) 200.

<sup>77</sup> Radwański (n 21) 123.

<sup>78</sup> By such a term I mean – following American jurisprudence – material, important terms of the transaction which constitute a reasonably certain basis for determining the existence of a breach and for giving an appropriate remedy – Arthur v Mehren, 'The Formation of Contracts', in *International Encyclopedia of Comparative Law*, vol 7: Contracts in General (Brill Nijhoff 2008) 35. The German Civil Code does not specify which terms are essential and what standard of definiteness these terms must satisfy; it has been left to judges and scholars to work out the applicable criteria which are variable depending upon the type of transaction in question – Arthur v Mehren, 39.

<sup>79</sup> Zimmermann (n 29) 683.

legal measures that would help rescue the validity or enforceability of unsuccessfully concluded agreements, and they have found such a solution in the general concept of supplementary interpretation of a contract.<sup>80</sup> This is indicated by the following English and American case law.

Formerly, in English case law gap-filling served to avoid the unenforceability of a contract that lacked the essential element of consideration.<sup>81</sup> The rigorously understood doctrine of consideration proved not to meet the needs of the market; thus, the consequences of the application of this doctrine started to be disproportionate to its purpose. That is why in *Haigh v Brooks* the court tried to creatively interpret the guarantor's statement in such a way as to maintain its effectiveness and to avoid the conclusion that the guarantee obligation was granted in exchange for the past consideration, which would result in declaring its ineffectiveness.<sup>82</sup>

At some point interpretative measures were no longer sufficient to maintain the effectiveness of contracts in view of the rigorously understood doctrine of consideration which can be observed in cases related to illusory contracts (in illusory contracts, the mutual promise necessary for the conclusion of the contract is formulated so enigmatically that it does not constitute a properly formulated consideration). An example of an illusory contract can be found in *Davis v General Foods Corporation*.<sup>83</sup> Davis, the author of a cooking recipe, sent it to a manufacturer which, in response, reserved the right for itself to decide whether it would use this recipe in the future in its production lines and whether it would pay any remuneration in return. When the manufacturer placed a product based on this recipe on the market without paying any fee to the author, a legal dispute arose. The court adjudicated that no contract was concluded as the manufacturer did not commit to give anything to the author of the recipe. However, it could be argued as well that, instead of focusing on the issue of the imprecision of the commitment, the court should have sought to establish the true nature of the obligation and apply the appropriate sanction for its violation.<sup>84</sup> By implying a duty of good faith and fair dealing,<sup>85</sup> it would be possible to impose, on the manufacturer, the obligation to reward the author of the recipe appropriately, taking into account the amount of the producer's profit and costs.

American jurists have come to even more far-reaching conclusions on the matter of supplementary interpretation on the basis of *Wood v Lucy, Lady Duff-Gordon*,<sup>86</sup> which concerned a dispute between a fashion designer and a distributor of her collection who was authorized, but not required, to sell her products on an exclusive basis in exchange for half of his profits. The court needed to consider whether the distributor's commitment was not merely an illusory promise. Although the obligation to pay half of the profit from sales was sufficiently specified in the contract, such an obligation would have arisen only if the distributor had undertaken any sales activity. Accordingly, such an obligation did not meet the requirement of specifying the distributor's consideration sufficiently to conclude a valid contract. However, the court found in the content of the contract the implied commitment of the distributor to use reasonable efforts to bring profits and revenues into existence, which allowed the contract to remain in force. The implied obligation, arising from the duty of good faith, was used to substitute for the faulty consideration, which made it possible to keep the contract in force. Thus, the court 'implied a good faith term to convert Wood's non-commitment into a promise'.<sup>87</sup> It must be also noted that '[t]he implied term of good faith is just a fiction that takes the place of consideration and

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<sup>80</sup> Blawat (n 4) 251–254. It is debatable, however, whether the examples of case law which are discussed below in the rest of this Section resemble *conversio*, gap-filling, implication or construction; that is why it is better to use a more general concept of supplementary interpretation of a contract which covers all discussed legal measures and must be distinguished from interpretation of express terms.

<sup>81</sup> Anthony G Guest, in *Chitty on Contracts*, vol 1: General Principles (31st edn, Sweet & Maxwell 2012) 952–953; Beatson, Burrows, Cartwright (n 37) 167.

<sup>82</sup> *Haigh v Brooks* [1835–1842] All ER Rep 438.

<sup>83</sup> *Davis v General Foods Corporation* 21 F Supp 445.

<sup>84</sup> Posner (n 43) 115.

<sup>85</sup> In the meaning established in American jurisprudence, but not known as such in English common law – see: n 54. See also: Andrew Taylor, 'A Comparative Analysis of US and English Contract Law - Interpretation and Implied terms' (2015) 9 International In-House Counsel Journal 9.

<sup>86</sup> *Wood v. Lucy, Lady Duff-Gordon* 222 NY 88, 118 NE 214.

<sup>87</sup> Posner (n 43) 119.

does not itself create obligations'.<sup>88</sup> The association with the concept of *conversio actus iuridici* as a method of supplementary interpretation of a contract is clearly visible here.

In *Wood v Lucy, Lady Duff-Gordon* the role of gap-filling was crucial because if the interpretation failed to yield a legally enforceable promise by each party, one could say that there had been no contract at all.<sup>89</sup> In this case the court was quick to realize that gap-filling does far more than shaping the performance of express terms;<sup>90</sup> it might serve to seek out for proper unspoken consideration as well.<sup>91</sup> Thus, in my view, although the American law of contract did not recognise the concept of *conversio actus iuridici* in the way that the concept is understood in the legal tradition of continental Europe,<sup>92</sup> supplementary interpretation of a contract based on an objective duty to act in good faith (in a version similar to *conversio*) was incidentally used to effectuate parties' interests and to create a consideration as to which the parties were silent and which was necessary to keep a contract in force, as *Wood v Lucy, Lady Duff-Gordon* demonstrates.

This observation suggests that, while striving for proportionality, whenever the court finds some gaps in a contract that lead to its invalidity or unenforceability, the court might be sometimes compelled to reinterpret, imply, supplement, convert, or 'call a spade a spade', to make the contract for the parties. The idea of supplying and converting contracts seems to be universal although legal measures serving this purpose, as well as the boundaries of the court's interference with contracts, might vary from country to country. Such an idea occurs whenever a given legal order provides for too rigorous norms of private ordering (self-regulation of contracting parties) or sanctions for failure to meet those requirements. Converting contracts through *conversio* or construction referring to hypothetical intent of contracting parties might serve as a way to mitigate, according to the principle of proportionality, too rigorous consequences of the nullity or unenforceability of a legal act.<sup>93</sup> In the American law of contract it was noticed that the implied obligation of good faith might become 'a *sub rosa* sort of equitable reformation'.<sup>94</sup> It could be even said that converting contracts is actually a way to correct the law (*das Mittel der Gesetzeskorrektur*).<sup>95</sup>

## 9. LESSONS FOR POLISH JURISPRUDENCE

The legal institutions presented in this paper and the outlined comparative legal perspective are of great importance for Poland. Poland, like other post-communist countries, is currently experiencing a renaissance of freedom of contract aimed at limiting state intervention in the right of the contracting parties to freely initiate and develop their contractual relations according to their own will.<sup>96</sup> This very liberal perception of freedom of contract and attachment to legal positivism are reasons why Polish courts are reluctant to construe contracts on the basis of equity or the nature of a given legal relationship, let alone the concept of hypothetical intent of the parties. A different trend can be noticed in countries with a stable and 'experienced' free market economy. Such countries are more concerned with legal obligations arising

<sup>88</sup> *ibid* 120.

<sup>89</sup> Nicholas R Weiskopf, 'Wood v. Lucy: The Overlap between Interpretation and Gap-Filling to Achieve Minimum Decencies' (2008) 2 PACE L Rev 220.

<sup>90</sup> *ibid* 233.

<sup>91</sup> It must be noted, however, that criticism of such an important role for the implied duty of good faith in the process of contract construction has been presented as well – see: Victor P Goldberg, 'Desperately Seeking Consideration: The Unfortunate Impact of U.C.C. Section 2-306 on Contract Interpretation' (2007) 1 Ohio State LJ 108-113; Harold Dubroff, 'The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic' (2006) 80 St John's L Rev 616-619.

<sup>92</sup> Blawat (n 4) 18, 253.

<sup>93</sup> In the scope relating to *conversio* see: Trzaskowski (n 20) 401. See also: Blawat (n 4) 212–218, where I discuss the principle of proportionality as a justification for *conversio*.

<sup>94</sup> Weiskopf (n 89) 224.

<sup>95</sup> Eugen Bucher, *Schweizerisches Obligationenrecht. Allgemeiner Teil* (2nd edn, Schulthess 1988) 171. See also: M. Schöll, *Die Konversion des Rechtsgeschäfts* (Stämpfli Verlag 2005) 145–151; Kozolchyk (n 65) 948.

<sup>96</sup> Hannes Unberath, in Jürgen Basedow, Klaus J Hopt, Reinhard Zimmermann, Andreas Stier (eds) *The Max Encyclopedia of European Private Law*, vol 1 (OUP 2012) 752; Arthur v Mehren, 'A General View of Contract' (n 78) 10.

from more general considerations.<sup>97</sup> That is why Polish legal thought is currently facing the challenge of addressing the problem of the admissibility of legal concepts such as construction, supplementary interpretation and hypothetical intent of the parties. At this stage of development of Polish civil law both courts and scholars are reluctant to adopt the concept of supplementary interpretation of contracts. This approach distinguishes Poland from other modern legal systems which, as a rule, approve of the concept of supplementary interpretation of a contract. The scope of legal measures used by Polish courts to supply omitted terms is much narrower than in foreign legal systems. As a consequence, resolving disputes over omission in Poland comes down to searching for codified legal rules applied directly or *per analogiam*, whereas gap-filling referring to the hypothetical intent of contracting parties could allow for a better adjustment of a court's decision to the individual circumstances of the case.

With respect to the discussed methods of supplementary interpretation, it should be noted that the content of §133 and §157 BGB does not differ greatly from the normative content of Article 65 and Article 56 of the Polish Civil Code (*Kodeks cywilny*, KC). Article 65 § 1 KC stipulate that a declaration of will should be interpreted as required due to the circumstances in which it was made, the principles of social coexistence (Polish: *zasady współżycia społecznego*) and established customs. Article 56 KC says that a legal act causes not only the effects expressed herein, but also those resulting from the law, the principles of social coexistence and established customs. Therefore, the reasons for which the supplementary interpretation of a contract as a rule is allowed in Germany, but not in Poland, may be of doctrinal rather than normative nature. In both Polish and German legal orders there are basically similar normative foundations for the development of the concept of supplementary interpretation as opposed to interpretation of express terms.

It is even more surprising that Polish legal thought did not follow German legal thought in the matter of supplementary interpretation, but adopted the concept of *conversio* as formulated in §140 BGB, although at the conceptual level *conversio* may be treated as a form of broadly understood supplementary interpretation. Such an approach of Polish jurisprudence seems to be contradictory to some extent. A wider adoption of the examples of supplementary interpretation of contract other than *conversio*, under the conditions presented in this article, would help to remove this contradiction as well as bring the Polish legal order closer to the tendencies visible in foreign jurisprudence. Such an affirmation might, however, be difficult to accept, as the Polish legal order has traditionally been strongly attached to legal positivism. Nevertheless, its adoption in the future, as a consequence of the influence of foreign legal thought and the tightening of ties between contemporary legal orders, seems probable. However, approval of this concept in Polish jurisprudence is a long-drawn-out process that requires, first of all, a revision of the perception of the law itself. In particular the question must be asked whether the application of the law should consist of the application of specific, codified legal norms only or of a judicial assessment of the parties' interests as well. It seems that for exceptional situations it is justified to grant judges such a competence, and Polish legal thought should aim to develop in this direction.

The difficulties in affirmation of the discussed concepts may be overcome by observing tendencies visible in foreign legal practice in the field of construing contracts which were presented in this article. Those tendencies demonstrate that the courts were not abusing amending powers and treated discussed legal concepts as exceptional measures.<sup>98</sup> Certainly courts must not supplement contractual terms in every case, as there is a general presumption against such a necessity.<sup>99</sup> As long as the problem of the unenforceability or nullity of the contract or its terms does not arise, the content of the parties' declarations of will should not be creatively developed.

To ensure that the acceptable limits for supplementary interpretation of a contract are not exceeded from the perspective of the freedom of contract, courts must only apply discussed legal concepts in the right proportion to the purposes which they are intended to serve. It is important to bear in mind that whenever the court searches for a gap-filler by asking what

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<sup>97</sup> Arthur v Mehren, 'A General View of Contract' (n78) 10.

<sup>98</sup> In the case of supplementary interpretation see: Burton (n 1) 16.

<sup>99</sup> Lewison (n 33) 202.

kind of term would have been made by the parties acting fairly or reasonably, there is the risk that the court will find an agreement that the parties never reached, or fail to find an agreement when the parties actually did reach one.<sup>100</sup> The basic principle that the law does not empower the courts to bargain instead of the parties remains, however, unchanged as a result of respecting the freedom of contract.<sup>101</sup> Thus, this is all the more reason why supplementary interpretation of a contract should be used with great caution and only in exceptional situations as *ultima ratio*.

## 10. CONCLUSIONS

The analysis presented in this paper led to two important conclusions regarding courts rewriting contracts which should influence the way in which Polish jurisprudence perceives the concept of supplementary interpretation of a contract.

Firstly, the legal concepts of construction, hypothetical intent of the parties and *conversio actus iuridici* confirm that courts in various jurisdictions have been searching for legal measures that enable them to actually ‘make the contract for the parties’ through different methods of supplementary interpretation of a contract. It was an intellectual exercise, reserved for exceptional situations, which the courts – both in common-law and civil-law jurisdictions – have been willing to undertake. Those legal concepts may turn out to be useful whenever potential unenforceability or nullity of contract (or its terms) caused by gaps in the contract seems to cause too rigorous, disproportionate, or unfair consequences for either one or both contracting parties. Contrary to intuitive understanding, the discussed legal concepts were used mostly in the process of finding and applying a proper legal rule to settle a dispute over omitted terms rather than in the process of interpretation of expressed will.

Secondly, the observed phenomenon of a general admissibility of the supplementary interpretation of contracts in modern legal orders suggests a need to adopt this concept in Polish jurisprudence. A wider adoption of this concept, under the conditions presented in this article, would help to remove the clearly visible dissonance in Polish legal thought between the rejection of the concept of the supplementary interpretation of contracts and the approval of the concept of *conversio actus iuridici*, which – at least at a conceptual level – may be treated as a specific form of the supplementary interpretation of contracts. Such a solution would also bring Polish legal thought closer to the legal concepts developed in foreign jurisprudence. Moreover, Polish jurisprudence would receive a useful legal measure for resolving disputes over omissions in contractual terms – a legal measure which is more flexible than codified *ius dispositivum* and therefore more appealing to the needs of the market. Although admittedly courts in different jurisdictions diverge in terms of when and to what extent they are willing to supply or convert contracts, the general idea of supplementary interpretation of a contract seems to be universal and, as a rule, admissible in modern legal orders. Thus, it should be considered by Polish jurisprudence as well.

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<sup>100</sup> Burton (n 1) 185. See also: Goldberg (n 91) 112.

<sup>101</sup> Inter alia: Radwański (n 21) 72; Jan Gwiazdomorski, ‘Próba korektury pojęcia czynności prawnej’ (1973) 1 Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z wynalazczości i ochrony własności intelektualnej 61.

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