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Abstract:

The article critically analyses the growing process of unequal treatment of economic actors. It illustrates the problem in the fields of bankruptcy law, intellectual property, bilateral investment treaties and the Cape Town Convention. The paper essentially argues, that during the last thirty/forty years the most powerful sectors of the world economy have successfully lobbied for granting them significant privileges, which are characterized in the legal and economic literature as super priorities. These special rights, are usually justified because of the systemic importance of the beneficiaries of those privileges.

The author argues, that the processes of departing from the principle of formal equality of private law parties started in the seventies/eighties of the last century. It is worth mentioning, that exceptions from the principle of the equal treatment had been granted earlier almost exclusively in favor of weaker persons/entities (e.g. employees, consumers, small and medium size companies).

At the outset of the article, the author describes the growing process of special treatments of banks and other financial institutions in the field of bankruptcy law, which has led to granting the privileged parties numerous preferences in blatant disregard of the principle of equal treatment of the creditors. Parties to netting contracts, repurchase agreements (repos), derivatives etc., who, unlike the other creditors, can seize and liquidate collateral, net out gains and losses, terminate their contracts with the bankrupt party, as well as benefit from concessions they obtained from the insolvent party on the eve of bankruptcy, although other creditors would have to return such benefits to the bankruptcy administrator. To sum up, privileges granted to the financial institutions

in bankruptcy law consist both in absolving them from the standard bankruptcy disciplines and obtaining a priority to satisfy their claims ahead of the remaining creditors of the bankrupt estate.

No doubt, banks and other financial institutions play an important and systemic role in the modern economy. Clearly, bankruptcy law save harbors limit the risks of the privileged entities. However, they shift the risk to the shoulders of the other creditors, including other financial institutions. Thus the said save harbors do indeed reduce the risk of the privileged economic actors but transfer those risks to other players (mainly the so called real economy entities). Based on recent legal and economic studies, especially published in the United States, the author illustrates the central point of criticism, namely, that the said super priorities constituted one of the main causes of the recent financial crisis. The super priorities weaken market discipline and discourage prudential supervision of the market by other creditors who are unable to evaluate the creditworthiness of the parties that are muzzled by such financial instruments like repos, derivatives or netting agreements. It is worth noting the paradox that establishing a lien or mortgage, regardless of its amount, requires registration and publication of such rights in the public register while the said super priorities are practically invisible and subject to no formalities aimed at informing every person to monitor the financial situation of a party who established any priority right.

Until recently Polish banks enjoyed an important procedural privilege *vis-à-vis* their clients known as the banking enforcement title. It enabled the banks to initiate their enforcement claims without obtaining a judicial award. The Constitutional Tribunal ruled, that such procedural privilege is unconstitutional as contrary to Art. 32 subsection 1 of the Constitution. The author concludes, that the banking privilege constituted yet another unjustified exception from the principle of equal treatment of private parties, in particular, such special right was established in favor of a stronger party. The author approves the decision of the Constitutional Tribunal, which ruled that the legislator shall repeal Art. 96 and Art. 97 of the banking law by August 1, 2016.

The paper also discusses the privileges of owners of intellectual property introduced by national laws and several international agreements. The advocates of strengthening intellectual property protection advance several justifications. First, they invoke the importance of intellectual property assets; second, they refer to the ease of piracy and the need to promote the progress of science, technology. Recently, several economic and legal studies demonstrated, that overprotection of intellectual property produces detrimental effects both in developed and developing economies. The paper observes, that during the last decade the Supreme Court of the United States and case law in other countries reversed the trend of the said overprotection and issued decisions aimed at restricting some unduly powerful remedies in the relevant field (for instance, permanent injunctions and treble damages). It is also emphasized, that the advocates of increasing protection of intellectual property frequently advance an argument that privileges of IP owners are aimed at protecting

weaker parties (e.g. authors and artists). In fact, the overwhelming majority of IP rights are owned by enterprises or employers of the creators.

In the past, it was generally agreed, that foreign investors should not be entitled to any privileges and enjoy substantive and procedure rights available to citizens and companies of a foreign country in which they settled or invested. While evaluating the procedural and substantive rights of foreign investors, in particular, those regulated by bilateral investment treaties (the so called BITs), the author maintains, that the special treatment of the investors is irreconcilable with the Polish Constitution and constitutions of many other countries, which provide for equal treatment of citizens and economic actors. He also points out, that the EU law tolerates the reverse discrimination of citizens and legal persons if permitted by domestic legislation of Member States. However, the EU legal doctrine substantially agrees that discrimination *a rebours* is subject to constitutional constraints. The paper points out, that the Polish Constitutional Tribunal has ruled at least in one case that the reverse discrimination of Polish domestic companies is contrary to the Constitution.

Finally, the article discusses the privileges of foreign creditors and lessors of expensive equipment, such as aviation and railways products accorded by the Cape Town Convention.

In the final remarks, the author observes, that the growing list of exceptions to the principle of equal treatment of economic actors undermines a fair competition in several fields of economic activity. The list of privileges recently lobbied by the leading economic sectors is not limited to those discussed in the paper. Therefore, the article calls for the need to reverse those trends, which have not been discussed or even noticed in the handbooks of civil law so far. However, the paper stresses that the courts, in particular, the Constitutional Tribunal, have issued first decisions aimed at containing the detrimental effects of the unequal treatment of economic actors.