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Adaptation of Contracts to New Circumstances in Polish Law

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Key words: termination of contract; amendment of contract; change of circumstances; clausula rebus sic stantibus; unilateral change of contract; contracts for a specific work; tenancy contract; lease contract; mandate contract

https://doi.org/10.32082/fp.v3i53.218

The aim of the article is to analyse selected issues relating to the statutory provisions and contractual terms which allow to amend or terminate a contract in the event of a change in circumstances occurred after the conclusion of the contract. Many provisions of the Polish Civil Code[1] grant in such a case one of the parties the right to unilaterally amend or terminate the contract by its declaration of will or a right to demand for a change or dissolving the contract by the court. The parties may also agree the specific terms in the contract which allow adopting their contractual relation to new circumstances. If a party affected by change of circumstances exercises its right to modify the contract it should be considered a problem of how the interests of the other party should be protected. Particularly the question arises whether the statute or the contract grants such a party the right to terminate the contract.

1. Introduction

Adaptation to new circumstances does not only apply to long-term contracts creating continuous contractual relationships (such as lease or hire),[2] but also to those contracts where a one-

1 Act of 23 April 1964, consolidated text: Journal of Laws of 2019, item 1145, as amended, hereinafter referred to as "CC".

2 Polish civil law distinguishes two types of contracts: a tenancy/hire contract [*umowa najmu*] and a lease contract [*umowa dzierżawy*]. By the contract of tenancy (hire) a landlord undertakes to give to the tenant the thing for use for a definite or an indefinite period of time and the tenant undertakes to pay the landlord the agreed rent [Art. 659 § 1 CC. By the contract of lease the landlord undertakes to give to the lessor a thing for use and collection of profits for a definite or an indefinite period of time and the lessor undertakes to pay to the landlord the rent agreed on (Art. 693 § 1 CC).

off performance is extended in time.[3] This can, for example, be a construction contract under which the deadline for performance of the obligation (delivering a building to an investor) may be even as long as several years from the conclusion of the contract. If there is a longer period between the conclusion of the contract and the performance of the obligation, a change in circumstances, a contract may either be amended automatically if the conditions set out in such a contract are met (e.g. an automatic increase of the interest rate in the event of a change of LIBOR) or following a declaration made by one of the parties (e.g. a change of rent resulting from a notice given by the landlord).

Parties often do not expect that there will be any changes in circumstances or that such changes will have an impact on the possibility of performing their contract.

or if a long-term contract has been concluded, the circumstances may change and the contract may need to be revised. Where the parties expect that circumstances may change after the conclusion of their contract, they may introduce contractual provisions which will provide for the effects of such changes. These may be provisions allowing both an amendment of the contract and its termination (this is particularly important in the case of fixed-term contracts, as the assumption behind them is that they cannot be terminated before the end of their term as specified in such contracts).[4] In the event of

However, parties often do not expect that there will be any changes in circumstances or that such changes will have an impact on the possibility of performing their contract. Then, the contract may only be amended or terminated in cases provided for in statutory pro-

3 The problem of a change of contract in the event of a change of circumstances will not arise when the conclusion of a contract coincides with its performance (e.g. when a contract of sale is concluded in a shop, as in the case of everyday shopping, or a contract of carriage by public transport which is performed immediately after a ticket has been purchased).

4 See Resolution of the Supreme Court (SC) of 27.10.1997, III CZP 49/97, *Orzecznictwo Sądu Najwyższego Izba Cywilna (OSNC)* (Rulings of the Supreme Court Civil Chamber) 1998, No. 3, item 36, in which the Supreme Court held, in relation to a fixed-term lease, that it was ineffective to reserve a contractual right to terminate the lease at any time because such a provision was contrary to the nature of a fixed-term contract; the Supreme Court expressed a similar opinion on a tenancy agreement in its resolution of 3.3.1997, III CZP 3/97, OSNC 1997, Nos. 6–7, item 71; on the other hand, in a resolution of 7 Supreme Court Judges of 21.12.2007, III CZP 74/07, OSNC 2008, No. 9, item 95, a reservation of the right to terminate a fixed-term lease or hire/tenancy agreement was accepted as long as such a right is reserved for cases specified in a given contract (the Supreme Court disagreed with the practice of reserving the right to terminate without specifying the grounds on which such a right can be exercised). See also Art. 673 § 3 CC which currently allows to reserve the right to terminate in a fixed-term hire/tenancy agreement in cases specified in such an agreement (this legal provision applies accordingly to lease agreements – Art. 694 CC). The issue of whether it is permissible to reserve the right to terminate a fixed-term contract is also controversial in the literature, cf. M. Romanowski, *Dopuszczalność wypowiedzenia umowy zawartej na czas oznaczony w świetle zasady swobody umów* (Permissibility of terminating fixed-term contracts in the light of the freedom of contract principle), Przegląd Prawa Handlowego 2002, no. 11, p. 47 et seq. (according to the author, no general rule should be formulated to prohibit or restrict the freedom to terminate such contracts).

visions.[5] If the change of circumstances affects both contractual parties to a similar extent, there will usually be no problem negotiating a change of contract or even terminating it. In most cases, however, changes do not affect the legal situation of both parties to the same extent; therefore, the party which is affected more will be the one that wants to amend the contract or to terminate it. Statutory provisions may allow such a party to amend the content of the contract or to terminate it. A contract may be amended in two ways:

- the law may allow for a unilateral amendment of the contract by making a declaration to the other party resulting in a change of contract, or for termination of a contract – also by a unilateral declaration to the other party;
- the law may allow the party affected by a change of circumstances to request the court to change the content of the contract or to terminate it by way of a court ruling; in such a case, the change or termination will take place once the court's ruling becomes final and unappealable, and the ruling may also determine settlements between the parties relative to their partial performance of the contract.

The purpose of this paper is to present examples of such statutory regulations, as well as discussing the permissibility of contractual provisions which serve to adapt a contract to new circumstances. The final part will discuss the problem of protecting the other party's interests in the event that the right granted by law or contract to change the content of a contract or to terminate it is exercised.

5 In Polish civil law, courts are not empowered to change the content of civil law relationships, unless authorised to do so by statutory law.

2. The right to amend or terminate a contract under statutory provisions

2.1. Provisions allowing for the amendment of a contract

There are many examples of provisions in the Polish Civil Code that allow for the amendment of a contract if circumstances change after its conclusion. They can be divided into two groups: provisions allowing to amend the content of a contract if there is an extraordinary change of circumstances after the contract was concluded, which is referred to as the *clausula rebus sic stantibus* doctrine (e.g. Art. 357^1, Art. 632 § 2 CC) and those that allow for an amendment to the content of the contract even if the change of circumstances is not extraordinary (Art. 358^1 § 3, Art. 685^1, Art. 700, Art. 907 § 2, Art. 913 § 1 CC). The change of the contract procedure may either be to allow the affected party to modify the contract unilaterally (e.g. to cancel the rent, cf. Art. 685^1 CC) or to apply to a court (bring an action) for a change of contract (e.g. Art. 357^1, Art. 358^1 § 3, Art. 913 § 1 CC). Sometimes, however, the law does not determine the change procedure explicitly (e.g. Art. 632 § 2, Art. 700, Art. 907 § 2 CC). Where the law provides that a party is entitled to demand a change in a contractual term (e.g. the agreed amount of remuneration or rent), and the other party does not agree to the proposed change, the party so entitled may demand that the content of the contract be changed by the court. For example, if, as a result of a change in relationships which could not have been foreseen at the time of concluding a contract of specific work [*umowa o dzieło*], such a performance would pose a risk of a serious loss to the person who accepts the order for that work, such a person may bring an action for a change of the fixed remuneration agreed in the

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contract[6] or even demand that the court terminates the contract (Art. 632 § 2 CC).[7]

However, the foregoing legal provisions do not specify the time within which a party may request the court to change the content of a contract. With reference to a demand to adjust a consideration (performance of a monetary obligation) following a significant change in purchasing power after the obligation arose (Art. 358^1 § 3 CC), the Supreme Court held that a creditor may make such a request even after the debtor has performed his/her obligation.[8] The Supreme Court held that to perform the obligation at the nominal amount – despite a significant drop in the purchasing value of money – would be contrary to the principles of community life [*zasady współżycia społecznego*] (Art. 354 § 1 CC).[9] In such a situation, performance at a nominal amount does not satisfy the creditor's interests. However, the Supreme Court qualified this by stating that the obligation expires if the creditor does not make, upon accepting the performance, a reservation that he/she demands an adjustment of the consideration. There are doubts whether the ruling is correct, since a change in purchasing power does not automatically lead to a change in the amount of consideration, and a constitutive court ruling is necessary for such a change to be effected.[10] It is also doubtful whether such a solution can be applied to other cases in which the amendment of a contract is demanded following a change of circumstances (e.g. where a lessee paid the agreed rent, even though he/she could have demanded its reduction as a result of a significant decrease in the income from the leased property[11] – the lessee can only demand a reduction in rent for the future, provided that the conditions for demanding changes in the rent are still met).[12]

The Polish Civil Code contains only two general provisions which allow a party to request that an obligation be modified by the court if circumstances have changed after the contract was concluded. These are Art. 357^1 CC and Art. 358^1 CC. Other provisions referred to above relate to changes in the content of individual nominate contracts (e.g. contracts for a specific work [*umowy o dzieło*],[13] hire/tenancy agreements

6 This is because, where a fixed (flat-rate) remuneration is agreed, the general rule is that the person who accepts the order cannot demand that the remuneration is increased, even though it was not possible to predict the size or the cost of work at the time of concluding the contract for a specific work (Art. 632 § 1 CC).

7 This provision applies to construction work contracts accordingly; see resolution of the Supreme Court of 29.9.2009, III CZP 41/09, OSNC 2010, No. 3, item 33. Some scholars speak against the applicability by analogy of the provisions on a contract for a specific work, which are not listed in Art. 656 CC, to construction work contracts, cf. K. Zagrobelny, *Odpowiedzialność inwestora z umowy o roboty budowlane* (Investor's liability in respect of a construction work contract), Warsaw 2013, p. 62 et seq. (he believes that, being an exceptional provision, Art. 632 CC cannot be applied by analogy, but, in the event of an extraordinary change of relationship, Art. 357^1 CC can be applied to a construction work contract).

8 See, for example, resolution of the Supreme Court of 3 April 1992, I PZP 19/92, OSNC 1992, No. 9, item 166; judgment of the Supreme Court of 28 September 1993, I CRN 7/93, OSNC 1994, No. 7–8, item 162; judgment of the Supreme Court of 5 February 2003, II CKN 1245/99, Lex (database) No. 80235.

9 This provision stipulates that the debtor must perform his/her obligation in accordance with its content and in a manner consistent with its socio-economic objective and the principles of community life and, where there are certain customs, also in accordance with those customs.

10 See P. Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), Warsaw 2017, p. 673; G. Kozieł, in: M. Załucki, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), Warsaw 2019, p. 845.

11 If income from the leased property is reduced as a result of circumstances which do not relate to the lessee and for the occurrence of which the lessee is not responsible, the lessee may demand a reduction in the rent pursuant to Art. 700 CC. The provision does not require the change of circumstances to be a result of extraordinary and unforeseen events. Art. 700 CC is based on the assumption that the lessee pays rent from the funds obtained from the sale of benefits derived from the leased asset. If such benefits are significantly lower or the price falls and the income from their sale decreases, it may be difficult for the lessee to pay the agreed rent. Therefore, this legal provision allows the lessee to pass on the risk of reduction in income to the lessor.

12 If there is another change of circumstances and the leased property begins to generate a higher income (again), the right to demand a change in rent expires.

13 By a specific work contract the party accepting the order undertakes to complete a specific work and the party order-

[*umowy najmu*], and lease agreements [*umowa dzierżawy*]). The regulation in Art. 685[1] CC is exceptional. This is because that provision does not specify any circumstances on the occurrence of which the landlord's right to cancel the contractually agreed amount of rent would depend.[14] Such a right of the landlord is only restricted under separate legal provisions in relation to residential premises.[15] This is where Art. 685[1] CC provides for a significant departure from the overall principle of *pacta sund servanda*. This is all the more important given that the possibility to cancel rent applies not only to tenancy agreements made for an indefinite duration, but also to fixed-term ones which should be more stable.

The Polish Civil Code contains only two general provisions which allow a party to request that an obligation be modified by the court if circumstances have changed after the contract was concluded.

The aforementioned Art. 357[1] CC expresses the so-called *clausula rebus sic stantibus* doctrine.[16] It allows a party to demand a change of contract by court if there has been an extraordinary change in the parties' relationship after the conclusion of the contract, which the parties did not foresee, and, as a result of which, the contractual performance would involve excessive difficulties or pose the threat of a serious loss to the debtor. If these conditions are met, the court may, at the request of the affected party, after considering the interests of both parties and in accordance with the principles of community life,[17] modify the manner in which the obligation is to be performed, change the amount of the consideration to be provided or even terminate the contract.[18] On the other hand, Art. 358[1] § 3 CC allows parties to demand a change in the amount of monetary performance if there is a significant change in purchasing power after the obligation arises and before it expires.[19] A party

ing the work undertakes to pay him/her remuneration (Art. 627 CC).

14 Other provisions, such as Art. 632 § 2 and Art. 700 CC, specify the conditions which must be fulfilled in order to demand an amendment of the contract.

15 A rent may not be changed (increased) more frequently than every 6 months (cf. Art. 9.1b of the Act of 21 June 2001 on the protection of tenants' rights, consolidated text: Journal of Laws of 2018, item 1234). Furthermore, pursuant to Art. 8a.3 of that Act, in order to be valid, a declaration (notice) to cancel rent should be made in writing. The annual rent after an increase must not, as a rule, exceed 3% of the replacement value of the flat (Art. 8a.4 in conjunction with Art. 9.8 of the Act).

16 For more information on this regulation, see A. Brzozowski, *Wpływ zmiany okoliczności na zobowiązania. Klauzula rebus sic stantibus* (How changes in circumstances affect obligations. Clausula rebus sic stantibus doctrine.), Warsaw 2014.

17 Principles of community life [*zasady współżycia społecznego*], also referred to as principles of social coexistence, are understood to be the non-legal standards of appropriate, commendable and honest conduct of people towards each other which are generally accepted in society, cf. A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej* (Civil law. Outline of the general part), Warsaw 2018, p. 89. The principles of social coexistence play a similar role as a good faith principle in other legal systems. Particularly a legal act which is contrary to the principles of social coexistence is void (Art. 58 § 2 CC).

18 Unlike in some other legal systems, the Polish Civil Code does not require the affected party to attempt to negotiate an amendment to or termination of a contract with the other party before bringing an action.

19 A significant change in purchasing power does not need to be abrupt. Parties must take account of changes in purchasing power, which is normal in the economy. Therefore, only a

affected by a change in purchasing power may bring an action for a change in the amount of monetary performance (e.g. a creditor may demand an award of an amount higher than the one which was agreed) or in the manner of performance (e.g. to decrease the number of instalments agreed, and shorten or extend the payment period). When making its decision, the court is obliged to consider the interests of both parties in accordance with the principles of community life. The conclusion courts draw from this obligation, as can be seen in case law, is that they should not place the burden of changes in purchasing power on one party only[20] (therefore, both parties should share the risk of changes in the purchasing power, not necessarily equally).[21] The right under Art. 358[1] § 3 CC is not vested in a party who runs a business if the obligation is connected with such business activities (Art. 358[1] § 4 CC). Furthermore, Art. 358[1] § 3 CC does not – by virtue of separate provisions[22] – apply to changes in the amount of monetary performance in bank account and loan agreements.

The relationship between Art. 358[1] § 3 and § 4 CC and Art. 357[1] CC is not fully clear.[23] According to some authors, Art. 358[1] § 3 CC should be regarded as a specific provision in relation to Art. 357[1] CC.[24] This view is questionable because the scope of and conditions for the application of the two provisions are different. Firstly, Art. 357[1] CC applies only to contractual obligations, while Art. 358[1] § 3 CC applies to all obligations in which the original obligation is to pay a specific amount of money (argument from Art. 358[1] § 1 CC).[25] Secondly, Art. 357[1] CC applies to every obligation arising from a contract,[26] while Art. 358[1] § 3 CC applies to monetary obligations only. Thirdly,

The relationship between Art. 358[1] § 3 and § 4 CC and Art. 3571 CC is not fully clear.

significant change in purchasing power (such as the one in the early 1990s in Poland when annual inflation was as high as several hundred per cent) can be accepted as the basis for demands to modify an obligation, cf. P. Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), p. 671.

20 See, for example, Supreme Court judgment of 20.5.1998, I CKN 690/97, Legalis (database) No. 336432, Supreme Court judgment of 6.11.1998, III CKN 2/98, Legalis No. 1760266; in literature see, for example, P. Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), p. 673; G. Kozieł, in: M. Załucki, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), Warsaw 2019, p. 845; Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna* (Obligations – General Part), Warsaw 2014, p. 74.

21 Id. P. Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), p. 673.

22 See Art. 13 of the Act of 28 July 1990 on amendments to the Civil Code, Journal of Laws No. 55, item 321.

23 For more information on this topic, see A. Brzozowski, *Wpływ zmiany okoliczności…* (How changes in circumstances affect…), p. 216 et seq.; W. Robaczyński, *Kilka uwag na temat relacji między art. 357[1] art. 358[1] § 3 k.c.* (Several comments on the relationship between Art. 357[1] and Art. 358[1] § 3 CC), Rejent 1996, No. 11, p. 70 et seq.

24 See J. Gołaczyński, *Wybrane problemy waloryzacji świadczeń pieniężnych w świetle przepisu artykułu 358[1] § 3k.c.* (Selected problems of consideration adjustment in the light of Art. 358[1] § 3 CC), Acta Universitatis Wratislaviensis No. 1690, Prawo CCXXVIII, Wrocław 1994, p. 57.

25 Therefore, this provision does not apply to those obligations in which the monetary obligation is of a secondary nature (e.g. when it consists in paying the equivalent of improvements made or benefits obtained without the underlying legal basis). Nor does it apply to payments of damages, since the determination of damages is based on prices as at the date of adjudication (Art. 363 § 2 CC), which makes it possible to take account of any price changes in the period between the dates of damage and determination.

26 However, in its rulings the Supreme Court allows the application of Art. 357[1] CC to obligations which do not arise from contracts (see the decision of the Supreme Court of

Art. 357[1] CC allows for an amendment or termination of a contract only in the event of an extraordinary change in relationship, which could not have been foreseen at the time of concluding the contract. On the other hand, Art. 358[1] § 3 CC does not require a change in purchasing power to result from extraordinary circumstances,[27] nor does it limit the possibility of changing [*the contract*] to a situation where the parties could not foresee the change in purchasing power.[28] Fourthly, entrepreneurs are not allowed to demand that an obligation be modified (Art. 358[1] § 4 CC), while Art. 357[1] CC currently does not provide for such a limitation.[29] Therefore, it should be concluded that the scope of application of the two provisions overlaps[30] and, therefore, Art. 358[1] CC does not exclude the application of Art. 357[1] CC to monetary obligations arising from a contract.[31]

2.2. Provisions allowing for termination of contract

As has been mentioned earlier, some of the provisions allowing the amendment of a contract in new circumstances also provide that the contract may be terminated. Such a termination may be effected through the submission of an appropriate declaration (notice) by one of the parties or following a court ruling. The first group of provisions, i.e. those allowing for the termination of a contract following a unilateral declaration of one of the parties, may include for example: Art. 631 CC;[32] Art. 644 CC;[33] Art. 716 CC;[34]

Needed is a review of the special part of contract law with regard to the rights to demand a change of contract.

26.11.1992, III CZP 144/92, *Orzecznictwo Sądów Polskich* (Jurisprudence of Polish Courts) 1993, No. 11, item 215).

27 Changes in purchasing power usually result from changes in the market situation which are a normal feature of a market economy.

28 However, if parties expect a change in purchasing power, they may include an adjustment clause in their contract (Art. 358[1] § 2 CC) by which they can link the amount of contractual monetary performance to a measure of value (certain goods or even another currency) they specify in the contract. In such a case, generally, the right to demand a change in the amount of monetary performance is excluded, since the parties have included an adjustment mechanism for this purpose in their contract (see the judgment of the Supreme Court of 7 November 1995, I PRN 40/95, *Orzecznictwo Sądu Najwyższego Izby Administracyjnej, Pracy i Ubezpieczeń Społecznych* (Rulings of the Supreme Court, Administrative, Labour and Social Insurance Chamber) 1996, No. 12, item 168).

29 In 1996, Art. 357[1] § 2 CC was repealed. The article provided that a party may not demand that the manner of performing the obligation be changed or that the contract be terminated if the consideration is related to the business run by the party.

30 Id. W. Robaczyński, *Kilka uwag…* (Several comments…), p. 78

31 Id. W. Robaczyński, *Kilka uwag…* (Several comments…), p. 82. The applicability of Art. 357[1] CC to monetary obligations was also supported by the Supreme Court in the statement of grounds for the resolution of 7 judges of 29.12.1994, III CZP 120/94, OSNC 1995, No. 4, item 55 (the case related to an insurance contract).

32 This provision grants the party who orders a specific work the right to rescind the contract in the case of substantially increasing the remuneration based on a cost estimation.

33 According to this provision the party ordering a specific work may at any time, until the specific work is completed, renounce the contract while paying the remuneration agreed on. More about this provision see below.

34 Pursuant to this provision the lender is entitled, among others, to demand the return of the thing borrowed for use if the thing becomes necessary to the lender for reasons not expected at the moment of the contract's conclusion, even though the contract has been concluded for a definite period of time.

Art. 746 CC;[35] Art. 764[2] § 1 CC,[36] Art. 830 § 1 CC;[37] Art. 844 § 1–2 CC;[38] Art. 859[7] CC;[39] Art. 869 § 2 CC.[40] The second group includes, for example: Art. 357[1] CC, Art. 632 § 2 CC (discussed earlier).

A termination may be effected through the submission of an appropriate declaration (notice) by one of the parties or following a court ruling.

Two subgroups can be distinguished among the provisions mentioned in the first group. The first includes provisions which allow for termination by a unilateral declaration of will of the party in whose interest the agreement was made. Such a solution is primarily characteristic of service contracts (these are the provisions concerning e.g. contract for a specific work, mandate contract [*umowa zlecenia*], storage contract or insurance contract). An example of such provisions would be Art. 644 CC, which gives the client (principal) who orders a specific work the right to rescind the contract until the work has been completed. However, the client (principal) is obliged to pay the remuneration agreed in the contract.[41] Similarly, a client (principal) may terminate a mandate contract [*umowa zlecenia*] at any time pursuant to Art. 746 § 1 CC, but is obliged to reimburse the provider (party accepting the mandate) for expenses incurred by the provider to properly perform the contract, and if a remuneration was agreed – to pay a portion of the remuneration corresponding to the activities performed by the provider. If the contract is terminated without a good reason,[42] and the provider was to be paid for his performance, the client (principal) is also obliged to redress the damage caused to the provider. It follows from Art. 746 § 3 CC that the right of ter-

35 More about this provision see below.

36 According to this provision the contract of agency, even though it has been concluded for a definite period of time, may be terminated by notice without notice as a result of non-performance of duties in their entirety or in part by one of the parties as well as where extraordinary circumstances occur.

37 This provision grants the insuring party the right to terminate the insurance contract by notice at all times while observing the time limit specified in the contract of personal insurance or in general insurance terms; and in its absence – with immediate effect.

38 Although this provision does not use the term 'termination', it allows taking back an item given for safekeeping, which is equivalent to the termination of contract, id. A. Klein, *Problem jednostronnego ukształtowania czasu trwania zobowiązaniowego stosunku prawnego o charakterze ciągłym* (Duration of Continuous Legal Relationships – Problem of Unilateral Determination), in: *Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa oferowana Profesorowi Józefowi Skąpskiemu* (Papers on Polish and European Private Law. A commemorative book offered to Professor Józef Skąpski), Kraków 1994, p. 165; A. Pyrzyńska, *Zobowiązanie ciągłe jako konstrukcja prawna* (Continuous obligation as a legal construct), Poznań 2017, p. 538.

39 More about this provision see below.

40 More about this provision see below.

41 According to the opinion expressed by the Supreme Court in the judgment of 26 January 2001, II CKN 365/00, OSNC 2001, No. 10, item 154, payment of remuneration is not a condition for the declaration (notice) of termination to be effective. For a different view in the literature see e.g. K. Zagrobelny, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny* (Civil Code). Commentary, Warsaw 2017, p. 1314, according to whom the payment of remuneration is to secure the interests of the provider.

42 An important reason for termination within the meaning of this provision is, for example, the provider's failure to furnish information concerning order fulfilment or loss of confidence in the provider's honesty or skills (see P Machnikowski, in: E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz* (Civil Code. Commentary), p. 1451.

mination for good reason cannot be excluded from the contract.[43] Those provisions show a certain relation, namely the obligation to pay the other party the agreed remuneration, or a part thereof, if the contract provides for payment for the service and is terminated before the service is provided.

which provides for the right (of both the mandatory and the mandator) to terminate the contract for services for good reason. Good reasons are understood to include reasons which relate to the person himself/herself as well as those relating to the property of the party that terminates the contract. Such reasons could

In the event of termination by notice for good reason, the other party is not entitled to demand compensation for damage caused by the premature termination of the contract.

The second sub-group are the provisions that allow for termination of contract – even a fixed-term one (which is more stable) – for good (important) reason [*ważne powody*].[44] This idea is referred to, for example, in: Art. 859[7] CC which allows a warehouse keeper to demand, for good reason, that the person who deposited items for storage in the warehouse takes them back, even if the storage contract was concluded for a fixed term[45] (this is equivalent to termination of the storage contract); Art. 869 § 2 CC, which allows a partner in a civil partnership to terminate, for good reason, his or her participation and thus leave the partnership, even if the partnership contract is concluded for a fixed term; Art. 746 CC, already quoted, be e.g. bad health of a party, loss of trust in the other party or discontinuation of certain activities. Good reasons justifying termination also include a breach of obligation by one of the parties.[46] Some scholars[47] derive (by *analogia iuris*) a more general rule from these provisions, according to which any fixed-term contract[48] that creates a long-term relationship may be terminated, even if the statutory provisions do not expressly provide for such a possibility. Moreover, it would not be permissible to exclude, in a contract, the right to terminate it for good reason.[49] In the event of termination by notice for good reason, the other party

43 Legal provisions on the mandate contract [*umowa zlecenia*] apply as appropriate to other contracts for supply of services not regulated in other provisions (Art. 750 CC). Because of this reference, there is a discussion in the literature on whether it is admissible to apply Art. 746 CC to such innominate contracts for supply of services, see: A. Pyrzyńska, *Zobowiązanie ciągłe…* (Continuous Obligation…), p. 405 et seq.

44 For more information on this topic, see G. Tracz, *Sposoby jednostronnej rezygnacji z zobowiązań umownych* (Methods of unilaterally cancelling contractual obligations), Warsaw 2007, p. 148 et seq.

45 The warehouse keeper should set an appropriate time limit for the person who placed items in the warehouse to collect them.

46 See G. Tracz, *Sposoby jednostronnej rezygnacji…* (Methods of unilaterally…), p. 189.

47 See G. Tracz, *Sposoby jednostronnej rezygnacji…* (Methods of unilaterally…), p. 208 et seq.

48 If a contract is made for an indefinite term, each party may – as a rule – terminate such a contract in accordance with Art. 365[1] CC by giving a notice with such a period of notice as determined by the statute, contract or custom. In the absence of such a time limit, the obligation expires immediately after the notice of termination has been given. This rule is imperative; therefore, parties cannot exclude (but only restrict temporarily) termination of contracts made for an indefinite duration (this is a consequence of the prohibition to conclude eternally binding contracts – see Z. Radwański, A. Olejniczak, *Zobowiązania…* (Obligations…), p. 52).

49 Cf. Art. 746 § 3, second sentence in Art. 869 § 2 CC.

is not entitled to demand compensation for damage caused by the premature termination of the contract.[50]

3. Contractual provisions allowing for unilateral change of contract

If the law does not permit the party affected by change of circumstances to change the content of the contract (whether by its own declaration of will or by way of a court ruling), the parties may stipulate in the contract that one or both of them may modify the content of their contract. Such contractual clauses (e.g. those which grant banks the right to change interest rates stipulated in contracts) are assessed on the basis of general legal provisions governing a review of the content of contracts (e.g. Art. 58 CC).[51] Furthermore, if such rights are included in standard contract terms (e.g. in rules or in general terms and conditions), they may be subject to a review on the basis of provisions on unfair contractual clauses. In Polish law, such provisions relate only to the review of terms contained in standard contracts used in B2C relationships (Art. 385^1 – Art. 385^3 CC). Pursuant to Art. 358^3 CC, contractual provisions which may[52] be considered impermissible in B2C relationships include those which reserve the right of a business to unilaterally amend the contract without good reason specified in the contract, the right of a business to change the essential features of the contractual consideration without good reason, or to set or increase the price or remuneration after the contract has been concluded without granting the consumer the right to rescind the contract in the event that such a right is exercised.

On the other hand, there are no provisions in Polish law which would allow a review of standard contracts used in the B2B context. It is only competition law that provides for such a review.[53] If one of the parties uses its dominant market position to impose contractual terms and conditions on the other (not necessarily only by using a standard contract), such terms may be declared invalid under Art. 9 of the Competition and Consumers Protection Act. There are exceptions where legislators decided to extend consumer protection by a standard contract review to standard contracts used in B2B relationships. Such an exception can be found in Art. 805 § 4 CC under which provisions on unfair contractual clauses in B2C contracts must also be applied, as appropriate, to general terms and conditions of insurance concluded with sole proprietors (businesses of natural persons). However, there is no such regulation for other financial services contracts between businesses and financial institutions.

> **The parties may stipulate in the contract that one or both of them may modify the content of their contract.**

4. Protection of the other party in case of a change of contract

If a party affected by change of circumstances exercises its right to modify the contract unilaterally by making its declaration of will, the resulting issue is how to protect the interests of the other party. There are two solutions possible here. First, a statute or contract may lay down the conditions for and the permissible extent of a change of contract (e.g. a bank reserves the right to change the contractual interest rate in the event of a change in the central bank refinancing rate

50 This results, e contrario, from Art. 746 § 1–2 CC.

51 Art. 58 CC provides that legal transactions which are contrary to the statute or principles of community life are considered null and void.

52 Under the Civil Code, a consumer shall be taken to mean a natural person who conducts a legal transaction which is not directly related to his or her business or professional activity (Art. 22^1 CC).

53 See the Competition and Consumers Protection Act of 16 February 2007, consolidated text: Journal of Laws of 2018, item 798.

or sets a maximum limit by which it may increase the contractual rate). If the required conditions for exercising the right to change the contract have not been fulfilled, the declaration of the party who declared such a change of contract is ineffective. However, a problem arises as regards the effectiveness of such a change of contract declaration where it fails to meet the criteria of a contract or a statute (e.g. a bank declares that it increases the interest rate more than provided for in the contract). Is the declaration entirely ineffective then, or is it perhaps effective, but results in a limited change of contract only (in the example which has been given – the interest rate is actually increased within the contractually defined limits)?

There are no provisions in Polish law which would allow a review of standard contracts used in the B2B context.

The second solution, which serves to protect a party in the event that the other party exercises its right to change the contract, is to grant such a party, whether by a statute or contract, the right to terminate the contract. This applies particularly to cases where a change of contract materially affects the original balance of rights and obligations between the parties to the contract. For example, if the landlord increases the rent by 100% compared to what was agreed in the contract,[54] the tenant should be able to terminate the lease even if it was concluded for a fixed term. This is because the tenant should not be forced to pay a higher rent. Unfortunately, there is no general rule in the Polish Civil Code which would regulate such a case of one party changing the content of a contract. Therefore, the parties have to reserve such a right for the other party in the contract in case the party affected by a change of circumstances decides to exercise its right to change the contract, unless the right to terminate is provided for in a statute. An example of such a statutory provision can be found in Art. 631 CC, which allows the client to rescind a contract for a specific work in a situation where it was necessary to significantly increase the remuneration agreed in the contract. However, the client should do so immediately after he or she has become aware of the need to pay more than the agreed remuneration (e.g. when additional work is needed which was not provided for in the contract).[55] The client is also obliged to pay a part of the agreed remuneration for the work which has already been carried out by the provider.[56]

5. *Conclusions*

Having assessed the Polish Civil Code provisions relating to the amendment of a contract or its termination (before the agreed term) in the event of a change in circumstances, it should be concluded that they are not based on a single and clear concept, and the solutions which are adopted are sometimes quite haphazard. With the growing complexity of legal relationships on the one hand, and globalisation leading to sudden

54 Pursuant to Art. 688[2] CC, the landlord may increase the rent by giving the tenant a notice specifying the new amount of rent. The new rent becomes effective from the end of a three-month notice period. As this provision applies to an indefinite-term tenancy, the tenant may terminate the lease agreement if he or she does not agree to pay a higher rent.

55 For example, if a car cannot be driven and is taken for repair because of an engine leak, and the cylinders are found to be damaged making it necessary to replace the entire engine, which the parties did not anticipate at the time when they were entering into the contract, the client may rescind such a contract.

56 The example given in the previous footnote may relate to the remuneration of the provider for the work of dismantling the engine and evaluating the extent of work needed for the repair.

and unpredictable economic changes on the other, it needs to be possible to adapt contractual relationships to changes. The existing solutions in the Polish Civil Code are certainly insufficient in this respect.

In particular, a general provision should be introduced in the general part of the contract law to allow for the termination of continuous obligation contracts[57] for good reasons and to specify what effects the exercise of such a right would have, especially with regard to settlements between parties. A general provision should also be introduced in the general part of contract law to provide for the right to terminate a contract in order to protect a party in case the other party exercises its right to unilaterally change the contract, which would be particularly relevant in the case of fixed-term contracts.

Unfortunately, there is no general rule in the Polish Civil Code which would regulate a case of one party changing the content of a contract.

As long as such an amendment of the Civil Code is not adopted a party in case the other party exercises its right to change the contract may be protected by the narrow interpretation of the statutory provisions which provide a right to amend the contract because of a change of circumstances. The scope of application of these statutory provisions which do not grant another party the right to terminate a contract after an amendment of a contract should be limited only to the contracts which are concluded for an indefinite period of time. Pursuant to Art. 365[1] CC each party may terminate the continuous contract by a notice if this contract is concluded for an indefinite period of time. Thus, if one party of such a contract exercises his/her right to amend the contract the other party is entitled to terminate the contract unless the other party accepts this modification. In the case of fixed-term contracts a party affected by the change of circumstances should not have the right to unilaterally amend the contract unless the parties agree in their contract to grant the other party the right to terminate the contract if the affected party exercises his/her right to change the contract.

Furthermore, what is needed is a review of the special part of contract law with regard to the rights to demand a change of contract in the event of a change in circumstances applicable to individual nominate contracts, as the application of many of these legal provisions is open to doubt.

57 This has been proposed e.g. by A. Klein, *Problem jednostronnego ukształtowania czasu trwania zobowiązaniowego stosunku prawnego…* (Duration of Continuous Legal Relationships – Problem of Unilateral Determination), p. 173.

Bibliography

Brzozowski A., *Wpływ zmiany okoliczności na zobowiązania. Klauzula rebus sic stantibus (How changes in circumstances affect obligations. Clausula rebus sic stantibus doctrine.)*, Warsaw 2014

Gniewek E. (ed.), Machnikowski P. (ed.), *Kodeks cywilny. Komentarz* (Civil Code. Commentary), Warsaw 2017

Gołaczyński J., *Wybrane problemy waloryzacji świadczeń pieniężnych w świetle przepisu artykułu 3581 § 3k.c.* (*Selected problems of consideration adjustment in the light of Art. 3581 § 3 CC*), "Acta Universitatis Wratislaviensis", No. 1690, Prawo CCXXVIII, Wrocław 1994

Klein A., *Problem jednostronnego ukształtowania czasu trwania zobowiązaniowego stosunku prawnego o charakterze ciągłym (Duration of Continuous Legal Relationships – Problem of Unilateral Determination)*, in: *Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa oferowana Profesorowi Józefowi Skąpskiemu* (*Papers on Polish and European Private Law. A commemorative book offered to Professor Józef Skąpski*), Kraków 1994

Pyrzyńska A., *Zobowiązanie ciągłe jako konstrukcja prawna* (*Continuous obligation as a legal construct*), Poznań 2017

Radwański Z., Olejniczak A., *Zobowiązania – część ogólna* (*Obligations – General Part*), Warsaw 2014

Robaczyński W., *Kilka uwag na temat relacji między art. 3571 a art. 3581 § 3 k.c.* (*Several comments on the relationship between Art. 3571 and Art. 3581 § 3 CC*), "Rejent" 1996, No. 11

Romanowski M., *Dopuszczalność wypowiedzenia umowy zawartej na czas oznaczony w świetle zasady swobody umów* (*Permissibility of terminating fixed-term contracts in the light of the freedom of contract principle*), „Przegląd Prawa Handlowego" 2002, no. 11

Tracz G., *Sposoby jednostronnej rezygnacji z zobowiązań umownych* (*Methods of unilaterally cancelling contractual obligations*), Warsaw 2007

Wolter A., Ignatowicz J., Stefaniuk K., *Prawo cywilne. Zarys części ogólnej* (*Civil law. Outline of the general part*), Warsaw 2018

Zagrobelny K., *Odpowiedzialność inwestora z umowy o roboty budowlane* (*Investor's liability in respect of a construction works contract*), Warsaw 2013,

Załucki M. (ed.), *Kodeks cywilny. Komentarz* (*Civil Code. Commentary*), Warsaw 2019