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Law of obligations in Poland: Selected issues

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The article provides a brief overview of the Polish law of obligations. In particular, the main sources of obligations are briefly presented, i. e., contracts, torts and unjust enrichment. Special attention is paid to mutual obligations, joint and several obligations, pecuniary obligations and obligations deriving from consumer contracts. The article discusses the legal instrument for concluding a contract such as preliminary contract, and also performance, discharge and remedies for breach of contract. In particular, the consequences of delay in the performance of an obligation and the types of such delay are considered. The author pays special attention to the issues of liability for non-performance of obligations, in particular, compensation for losses from non-performance. The article reveals the content of the *pacta sunt servanda* principle in Polish law and the existing exceptions to this rule. Such a method for the termination of an obligation is specifically considered, in addition to its performance, as a set-off. The author presents different measures that may discipline the parties to perform the obligation, such as contractual penalties and earnest money deposit. Finally, the article addresses the notion of damage, principles of liability and obligation to compensate. When describing the obligations from unjustified enrichment, special attention is paid to the fact that the loss of enrichment excludes its reclamation from the enriched person if he lost the enrichment without knowing about the obligation's existence. In regard to tort law, it is emphasized that there are cases of innocent liability for causing harm in Polish law as an exception to the general rule. Only illegal actions or omissions can be qualified as guilty and entail responsibility. Polish law does not recognize the general obligation to refrain from causing harm. The culpability of misconduct is presumed. In some cases, the behavior cannot be recognized as illegal, even if it violates the general prohibition established by law. In particular, this concerns causing harm in the case of necessary defense, extreme necessity, permissible self-help and in a number of other cases.

Keywords: obligations, contract, breach of contract, liability, unjust enrichment, set-off, tort, loss, causation, damages.

1. Sources of the law of obligations

Obligations under Polish law constitute the most extensive part of civil law. They regulate trade in goods and services. The basic source of obligations is Book Three of the Civil Code (hereinafter CC). It contains general regulations that apply to many types of obligations regulated in the Civil Code as well as other legal acts (Art. 353–534 of the CC) as well as provisions specifying individual types of obligations resulting from obligation agreements (Art. 535–921 (16) of the CC). Outside the Civil Code, obligations are regulated in many other acts, which supplement or modify the provisions of the Civil Code. European Union law is also becoming a more and more important source of the law of obligations, in particular in the field of consumer contracts[1].

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[1] *Łętowska E., Osajda K.* [Untitled] // System Prawa Prywatnego: in 20 vols. Vol. 5: Prawo zobowiązań — część ogólna / ed. K. Osajda. Warszawa: C. H. Beck, 2020. P. 72.

For some types of obligations, legal provisions regulate their existence or legal effects in a particular manner[2]. This applies in particular to obligations arising from mutual contracts, joint and several obligations, pecuniary obligations and obligations deriving from consumer contracts. The last two categories are the subject of separate dispositions, so below are some comments about obligations under mutual agreements and joint and several obligations.

As a rule, the obligations are bilateral, but on each side there may be several debtors or creditors. If there are several stakeholders on one side of the obligation relationship, and the debtor's performance is divisible, then it is considered that the debt and the receivables are divisible, creating separate single-entity liabilities (Art.379 of the CC).

A performance is divisible if it can be satisfied in part without materially changing its object or value, such as money or things designated as to their kind (e. g. coal, grain). The situation is different, however, if a legal provision or an agreement between the parties provide that the obligation is joint and several.

The joint and several nature of the obligation must result of legal provisions or contract concluded by the parties (e. g. Art. 441 of the CC establishes joint and several tort liability and Art. 864 of the CC provides that partners are jointly and severally liable for the obligations arising of a civil law partnership).

If several debtors are jointly and severally liable, the creditor may seek the performance in whole or in part by any of them, by several of them or all of them. Satisfying the creditor entirely by the debtor relieves the remaining ones from the debt to the creditor (the obligation towards him expires — Art. 366 et seq. of the CC). However, such a debtor is entitled to a recourse against other debtors who have failed to provide or provided less than they should, on the basis of their relationship (Art. 376 of the CC)[3].

2. Formation of obligation

The most common source of obligations are legal acts, especially contracts, although some obligations arise through unilateral actions, such as, for example, a public promise (Art. 919–921 of the CC) or a legacy (Art. 968–981 of the CC).

Moreover, obligations may arise *ex lege*, i. e. as a result of torts (Art. 415 et seq. of the CC), unjust enrichment (Art. 405 et seq. of the CC) or intervention in another's affairs without mandate (Art. 752 et seq. of the CC). Also, administrative acts and court decisions may constitute a source of obligations, such as a decision granting compensation for expropriated property or a court decision dissolving a partnership.

A preliminary contract is a legal instrument that aims to prepare the contract (*pactum de contrahendo*) and includes the obligation of the parties (or one of the parties) to conclude a definitive contract in the future (Art. 389–390 of the CC). The preliminary contract may be unilaterally or bilaterally binding.

In order to be valid, the parties must at least agree on essential elements of the promised contract. The conclusion of a preliminary contract instead of a definitive contract must depend on other circumstances than a lack of agreement between the parties as to the scope of their rights and duties[4].

Designation of a specific time limit for concluding a final agreement does not determine the preliminary contract's validity[5]. Where the time limit within which the promised

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[2] *Radwański Z., Olejniczak A.* Zobowiązania — część ogólna. Warszawa: C. H. Beck, 2018. P. 3.

[3] *Kaliński M.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. Warszawa: Wolters Kluwer Polska, 2019. P. 115.

[4] *Radwański Z., Olejniczak A.* Zobowiązania — część ogólna. P. 145.

[5] *Krajewski M.* [Untitled] // System Prawa Prywatnego. Vol. 5. P. 943–944.

contract is to be concluded has not been specified, the party entitled to demand the conclusion of the final agreement may, within one year, set an appropriate time limit for the conclusion of this agreement. In case of bilaterally binding preliminary contracts both parties are entitled to demand the conclusion of the promised contract and each of them may set an appropriate time limit to that end; the parties shall be bound by the time limit specified by the party which had made the relevant declaration earlier (Art. 389 § 2 of the CC).

If the deadline is not indicated in the contract or is not set by the parties as specified above, it leads to a situation in which neither of the parties may demand that the promised contract is concluded and the parties' claims expire.

A valid preliminary contract gives the creditor the possibility to seek damages if the obliged party refuses to conclude a definitive contract. Unless the preliminary contract provides otherwise, the damages are limited to the compensation for actual losses suffered by expecting the conclusion of the promised contract (the so-called negative contractual interest). This sanction is called the weaker (limited) effect of the preliminary contract[6].

The stronger legal effect, on the other hand, is the possibility to compel the contract's conclusion via the courts. The preliminary contract has a stronger effect only if it complies with the requirements which the validity of the promised contract depends on (e. g. for the sale of real estate a notarial deed is required, so the preliminary contract has a stronger effect only if it has been concluded by a notary, Art. 390 of the CC). In commercial transactions, the obligations deriving from a preliminary contract are enhanced by the provisions of contracting parties concerning advance payment or contractual penalty[7].

3. Due performance of obligations

The due performance of the obligation takes place when the debtor performs the obligation. The debtor is obliged to perform the obligation: 1) in accordance with the contents of the obligation as defined in a contract or by law), 2) in accordance with the socioeconomic purpose of the obligation, 3) in accordance with the principles of social coexistence (public policy), and 4) in accordance with established customs, e. g. binding in international trade (Art. of 354 of the CC).

The debtor may perform in parts unless such performance violates the creditor's justified interest (Art. of 450 of the CC). As for the quality of performance, the debtor should perform the obligation with due diligence (Art. 472 of the CC). A party to a contract who fails to perform with due diligence, may be obliged to repair any damage resulting from the non-performance or improper performance of his obligations (Art. 471 of the CC). It should be diligence which is generally required in the relations of a given kind (Art. 355, §1 of the CC), which mean an average due diligence.

An assessment of diligence should be objective (individual features of the debtor are not taken into consideration). A pattern of conscientious debtor behaviour in a given type of relationship is established, taking into account the content and the circumstances of the performance[8].

If the debtor is a professional and performs obligations as part of his business activity, the legislature tightens the quality the criteria for assessing the quality of the perfor-

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[6] *Brzozowski A.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. P. 197–198.

[7] *Grykiel J.* [Untitled] // Kodeks cywilny: in 3 vols. Vol. II: Komentarz. Art. 353–626 / ed. M. Gutowski. Warszawa: C. H. Beck, 2019. P. 337–338.

[8] *Brzozowski A.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. P. 302–303.

mance: then the professional nature of his activity should be taken into account (Art. 355 § 2 of the CC). It is assumed then that the professionalism of the debtor should result in diligent (especially precautionary and reliable) and professional conduct (in accordance with knowledge, not only in a given field but also in another necessary for professional activity, e. g. legal). Such diligence is required from the entrepreneur in both commercial and consumer transactions. It does not matter whether the entrepreneur is registered as running a business or evades this obligation.

Where the debtor is obliged to render performance of things specified as to their kind, it is sufficient for the debtor to deliver items of average quality, unless specific provisions, parties' agreement or circumstances stipulate otherwise (Art. 357 of CC).

The parties may decide on the time (date) of performance of the obligation in the contract, or it may result from the nature of the obligation (e. g. delivery of Valentine's Day cards to the store). If the date of performance of the obligation is not specified, then the debtor should perform immediately after the creditor summons him to perform the obligation (Art. 455 of the CC). The place of performance may also be decided by the parties (Art. 454 of the CC), but if there is no indication, then the performance should be rendered at the place where at the moment the obligation arose the debtor had his domicile or seat. However, pecuniary performance should be rendered at the creditor's domicile or seat at the moment of performance.

The debtor does not have to perform in person. The debtor does not have to perform in person. It may be used by other entities e. g. subcontractors, unless the law or the contract stipulate otherwise, or the service is closely related to the debtor's person, for example in an agreement concluded with a doctor or an artist-painter (Art. 356 of the CC).

The debtor should perform directly to the creditor or a person authorised by the creditor[9]. If the performance is rendered to a person not authorised to accept it, the debtor is released from the performance to the extent to which the creditor has taken benefit from the performance (Art. 452 of the CC). The debtor rendering the performance may demand a receipt from the creditor, and if the creditor refuses to issue a receipt, the debtor may refrain from performing or place the object of the performance at the court deposit (Art. 462–463 of the CC).

According to the *pacta sunt servanda* rule, the obligation of the debtor is to perform the obligation in accordance with its content, regardless of the circumstances that have arisen after the obligation was created. However, in court, you can request a change in manner how the obligation is performed, a change in the amount of the obligation or even the termination of the contract, if the following conditions occur (jointly): there has been an extraordinary change in relations after the conclusion of the contract; the performance of the obligation would be associated with excessive difficulties or would result in gross loss by one of the parties (the balance between the parties' was broken); when concluding the contract, the parties did not anticipate the risk of changing relations. When deciding, the court will be guided by the interests of the parties and the principles of social coexistence (Art. 357 (1) of the CC)[10].

As soon as the obligation is fulfilled in accordance with its content, the obligation is discharged due to the satisfaction of the creditor's interest. However, the discharge of obligation may occur as a result of other, similar events: placing the object of performance at the court deposit or a set-off.

If the debtor fails to fulfill the obligation for reasons attributable to the creditor (for example: inability to determine the creditor, delay of the creditor, refusal to confirm the

[9] *Janiak A.* [Untitled] // Kodeks cywilny. Vol. II. P. 999–1000.

[10] *Brzozowski A.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. P. 320–321.

performance), he may submit the object of performance to the court deposit and notify the creditor thereof in writing (Art. 467–468 of the CC).

Placing the object of performance in court deposit is beneficial for the debtor as it has the same legal effect as rendering the performance (Art. 470 of the CC): the creditor may not demand that the debtor perform (or render the performance) (the debtor is not in delay), and the debtor is not at risk of accidental loss of or damage to the object of performance.

The discharge of an obligation may also result from a set-off (compensation). Two types of set-off may be distinguished: 1) a contractual set-off, and 2) a statutory set-off. The contractual set-off takes place as a result of mutual consensual declarations made by two creditors, who write off, in whole or in part, their mutually opposing receivable debts. This type of a set off does not have any specific legal regulation and is possible by means of a contract on terms and with the effect specified by the parties.

A more important role in practice has a statutory set-off regulated in Art. 498–505 of the Civil Code, because it is made under the terms and effects specified by law. Such a deduction may be made by a declaration made by one of the parties without the necessity of obtaining the consent of the other creditor[11]. The opposite receivables belonging to two different persons are cancelled. Such compensation is possible if the following requirements are met jointly (Art. 489 § 1 of the CC): two persons are creditors and debtors with respect to each other; both receivables are of the same kind (for instance the object of both debts are money or things of the same kind); both receivables are due; both receivables are actionable.

The set-off is prohibited where: receivables may not be seized by the court enforcement officer; the maintenance and alimony receivables; receivables are a tort-related indemnity; receivables towards which set-off is excluded by specific provisions (Art. 505 of the CC).

As a result of the set-off, both receivables cancel one another to the amount of the lower debt — the lower debt is cancelled in full, and the higher debt is cancelled to the amount of the lower debt. The effect of the set-off is retroactive and it becomes effective from the moment when the set-off became possible.

4. Non-performance of obligation

The debtor does not always act in accordance with the content of the obligation. His behaviour then constitutes non-performance of the obligation or improper performance of the obligation. The consequences of such behaviour on the part of the debtor may be various and depend on the type of the obligation, the reason for the non-performance or improper performance, or possible contractual provisions on the effects of the debtor's behaviour[12]. Most often, the debtor is obliged to repair the damage caused to the creditor as a result of the non-performance of the obligation (liability for damages). In addition to the general rules on liability for non-performance or improper performance of obligation, the legislator has adopted specific legal solutions for certain cases of failure to fulfill obligations by the debtor.

General rules of liability for damage resulting from non-performance or improper performance of an obligation are specified in Art. 471 et seq. of the CC. It is assumed that it refers to damage caused by the non-performance or improper performance of any obli-

[11] *Pyziak-Szafnicka M.* [Untitled] // System Prawa Prywatnego: in 20 vols. Vol. 6: Prawo zobowiązań — część ogólna / ed. A. Olejniczak. Warszawa: C. H. Beck, 2018. P. 1582–1583.

[12] *Radwański Z., Olejniczak A.* Zobowiązania — część ogólna. P. 344.

gation, although this type of liability is traditionally referred to as ex contractu (as opposed to ex delicto liability — Art. 415 et seq. of the CC).

The breached obligation may have been created by contract, and this is most often the case, but it may also be a case of failure to perform an obligation imposed by a legal provision, or created by an administrative or court decision. In all these cases, the principle of the debtor's liability is his fault, whereas Art. 471 of the CC provides for the presumption of the debtor's fault. Therefore, it is sufficient for the creditor to prove that the damage incurred is a consequence of the debtor's non-performance[13].

It is the debtor who bears the burden of exculpation: he must prove that he failed to perform the obligation as a result of circumstances for which he is not responsible. Within the framework of ex contractu liability, other liability rules than fault apply very rarely, for example: regardless of fault, the seller is liable for defects in the goods sold (Art. 556 et seq. of the CC) or a person who gainfully runs a hotel for damage to the goods carried into the hotel by a guest (Art. 846 et seq. of the CC), while liability is generally mitigated in case of gratuitous obligations — the donor is not liable for ordinary negligence (Art. 891 of the CC).

If the debtor has used other persons to perform his obligation, he is liable for those persons as if for his own act or omissions. In these cases, too, in order to be discharged from liability, he must prove that the persons performing the obligation were not at fault. The fact that the debtor himself is innocent is irrelevant (Art. 474 of the CC).

For some situations where a party to an obligation fails to fulfil its obligations, the legislator has established specific legal solutions (e. g. in terms of impossibility to perform or the delay of a debtor or creditor). In practice, the rules concerning the debtor's delay are most often applied.

The debtor's obligation is to provide services within the time limit specified in the content of the obligation. Failure to do so means that the debtor is delaying the performance. Not every delay, however, causes very painful consequences for the debtor. Of course, the creditor's claim is always due and he can also enforce the execution of the obligation, also in court. Moreover, if the performance is pecuniary, the creditor may demand the payment of interest from the debtor for the delay. The interest rate may be fixed in a contract, and if the parties have failed to do so, the debtor is obliged to pay the statutory interest rate (Art. 481 of the CC)[14].

A distinction must be made between a debtor's ordinary and a qualified delay (*zwłoka*) in performing an obligation. The qualified delay consists in the non-performance of an obligation on time as a result of circumstances for which the debtor is responsible (e. g. failure to meet a deadline due to poor organisation of work). It is presumed that the delay occurred for reasons for which the debtor is responsible (Art. 476 of the CC). This means that if the debtor has not fulfilled his obligation on time, it is assumed that he is qualified delay. Thus, the debtor bears the burden of proof that the delay was a result of circumstances for which neither he nor the persons he is responsible for are liable[15].

A debtor's qualified delay has different legal consequences than those of a simple delay. If the debtor is in qualified delay, the creditor may choose one of two alternative ways of proceeding. First, the creditor may demand the debtor to perform while claiming compensation for the delay in performance (1). Second, he may seek compensation instead of the performance originally due (2).

(1) Despite the debtor's qualified delay, the creditor may still be interested in obtaining the benefit due to him. He may demand that the debtor perform it, as well as pay compensation for the delayed performance (Art. 477 § 1 of the CC). In certain situations,

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[13] *Gutowski M.* [Untitled] // Kodeks cywilny. Vol. II. P. 1068–1070.

[14] *Lemkowski M.* [Untitled] // Ibid. P. 1126–1128.

[15] *Radwański Z., Olejniczak A.* Zobowiązania — część ogólna. P. 358.

the debtor's qualified delay gives the creditor the possibility to resort to the so-called substitute performance:

— if the object of the performance are things designated as to their kind, the creditor may purchase them from another person at the debtor's expense (so-called purchase to cover), or demand the payment of their value from the debtor (Art. 479 of the CC), and
— if the performance consists of performing a specified action (e. g. a service), the creditor may seek authorisation from a court to perform the action (e. g. by another contractor) at the debtor's expense (Art. 480 of the CC).

In all cases of substitute performance, the creditor may at the same time claim compensation from the debtor if he has suffered damage as a result of the late performance (Art. 479, 480 of the CC)[16].

(2) The debtor's qualified delay may create a situation in which the creditor is no longer interested in performing the performance *in natura*. The legal system protects the creditor in such circumstances by giving him a chance to renounce the contract, while at the same time charging the debtor with the obligation to pay compensation for damage caused by non-performance of the obligation (not only that resulting from the qualified delay).

In case of the debtor's qualified delay in performing the obligation under the mutual agreement, the creditor may:

— set an appropriate, additional time limit for the performance, with a warning that when the set time limit lapses to no avail, the other party shall be entitled to renounce the contract (Art. 491 of the CC); and
— renounce the contract without setting an additional time limit for the performance: if the contract provides for renouncing the contract in the case of non-performance of the obligation within a strictly specified time limit (*lex commissoria*); if the performance of the obligation after the lapse of a specified time limit would have no significance for the creditor in view of (i) the nature of the obligation or (ii) the purpose of the contract known to both parties (Art. 492 of the CC).

In case of the debtor's qualified delay in the performance of obligations other than those resulting from a mutual agreement, the creditor may refuse to accept the performance if, as a result of debtor's delay in performing, the performance has, wholly or to a substantial degree, lost its significance for the creditor (Art. 477 § 2 of the CC).

In both cases when renouncing the contract or refusing to accept the performance, the creditor may seek compensation for the damage suffered as a result of non-performance of the obligation (Art. 477 § 2 and Art. 494 of the CC).

If the debtor's qualified delay constitutes a failure to perform continually or render periodic services (for instance: under a contract of lease, a contract of tenancy, a contract of lease with the option to purchase), legal provisions give the creditor the right to unilaterally terminate the contract without notice. Sometimes, however, they protect the debtor by making the creditor set an additional time limit to perform (cf. Art. 667, 672, 687, 698, 703, and 709[13] of the CC).

The parties to obligatory contracts may include a special clause stating that repair of any damage resulting from non-performance or improper performance of the obligation shall be made by paying of a contractually specified sum of money (contractual penalty)[17]. However, under Polish law it is possible to reserve the right to obtain a contractual penalty

[16] *Jastrzębski J.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. P. 372–373.

[17] *Drapała P.* [Untitled] // System Prawa Prywatnego. Vol. 5. P. 1279.

only in the event that the debtor fails to perform his non-pecuniary obligations (Art. 483 of the CC). Monetary obligations may be strengthened by reserving interest or advance payment, however, with the exclusion of the contractual penalty clause.

The obligation to pay a contractual penalty applies only to a debtor who is liable for non-performance or improper performance of an obligation. However, it is not necessary for the creditor to suffer damage. As for the amount of the contractual penalty, the Civil Code provides for the possibility of its subsequent reduction (also by court order) if the obligation has been performed in a significant part or if the penalty is grossly excessive (Art. 484 § 2 of the CC). Such a situation may take place when the creditor has not suffered any damage, or the damage is insignificant.

Payment of the contractual penalty does not release the debtor from the obligation (Art. 483 § 2 of the CC). However, the creditor may not claim damages beyond contractual penalty, unless the parties agreed otherwise (Art. 484 § 1 of the CC).

Another instrument that disciplines the parties to perform the obligation is an earnest money deposit (*zadatek*). The contract may stipulate that money or items designated as to their kind given by one party to another will be treated as an earnest money deposit. Moreover, under the interpretative rule of Art. 394 of the CC the money or the things designated as to their kind handed in by one party to another exactly at the time of contracting constitute an earnest money deposit rather than a simple deposit, down payment, compensation for termination of contract or other type of performance[18]. However, the parties may decide otherwise. Earnest money deposit may be made in cash, bank transfer, a cheque, etc.

The rights under the earnest money deposit are only relevant if one of the parties fails to perform the contract, for which that party is liable. In such a situation, the other party may renounce the contract and retain the earnest money deposit received or demand the payment of the deposit in the double amount, if it has made the payment itself. In other cases, the earnest money deposit shall be returned or counted towards the party's performance (Art. 394 § 2 and § 3 of the CC).

5. Unjust enrichment

Unjust enrichment occurs occurs when one person is enriched at the expense of at the expense of another person without legal basis (Art. 405 of the CC). Unjust enrichment becomes a source of obligation. The unjustly impoverished (the creditor) may demand the return of the profit from the unjustly enriched (the debtor).

The scope of application of unjust enrichment provisions is very broad. It concerns all unjustified profits (such as erroneous payment), but also other events such as the non-contractual use of someone else's goods (e. g. land, premises, machine, trademark), profits obtained by false pretence or transfer of certain things or animals to a neighbour's property by force of nature. It may occur as a result of the culpable or unintentional actions of an enriched or impoverished person or as a result of an accident[19].

If the unjustly enriched has relinquished the profit for the benefit of a third party gratuitously, the duty to return the profit to the unjustly impoverished devolves upon that third party (Art. 407 of the CC).

Unjust enrichment as a basis for claims is not however used very often, as the legislator has strongly limited the content of the claim for reimbursement. One may only demand the return of the actual enrichment as it stands at the time of the claim for return. The

[18] *Radwański Z., Olejniczak A.* Zobowiązania — część ogólna. P. 368.

[19] *Brzozowski A.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. P. 213–215.

unjustly impoverished may demand the return of the profit in kind or, if this is not possible, its equivalent within the limits of the existing enrichment[20]. If the unjustly enriched person has lost the profit or consumed it, the obligation to return the equivalent exists only if the unjustly enriched person should have considered the duty to return the profit when relinquishing or consuming it (Art. 409 of the CC)[21].

In case of gratuitous transfer of the unjust profit for the benefit of a third party, a duty to release the profit shall pass on this third party (Art. 407 of the CC). The court may order the forfeiture of the profit to the State Treasury if the profit has been knowingly obtained by fraud or in exchange for the performance of an act prohibited by law (Art. 412 of the CC).

6. Torts

Under Polish law the general rule for tort liability is set out in Article 415 of the Civil Code, which provides that whoever has caused damage to another through his fault is obliged to repair it. At some instances tort liability may result from actions through no fault or events that are not one's actions but where, under specific circumstances, the legislator considers their liability to be justified.

The principle of being at fault, however, is of fundamental importance for the person who commits tort (liability for one's action). Only unlawful acts or omissions may be deemed to have been caused by someone's fault. Polish law does not impose a general and common obligation to refrain from causing damage[22].

The process of establishing whether the behaviour has been unlawful or not, is based on the qualification of the act of the person who commits tort into the category of prohibited acts on the basis of norms included in the entire legal system.

In some situations, one's behaviour cannot be considered unlawful, even though it violates a ban or an order of a universal nature, established by legal or moral norms. Circumstances excluding unlawfulness include: necessary defence (Art. 423 of the CC), a state of higher necessity (Art. 424 of the CC), permitted self-help (Art. 343 § 2 and Art. 432 of the CC), and other situations such as: exercising powers (Art. 149 of the CC, acting with the consent of the injured party or acting at one's own risk.

The unlawful behaviour of the subject makes it possible to deem him at fault: it is the negative assessment of the subject's behaviour taking the form of charging him with making an improper decision in a given situation wilfully or as a result of negligence, despite the fact that he could have behaved differently. A person may commit tort if he or she is at least 13 years and was sane at the time of committing the prohibited act.

Polish law also provides for the possibility of liability for the actions of others. If a person who commits a tort, due to his or her age or mental or physical condition cannot be imputed with the fault, the provisions of Art. 427 of the CC provide for liability of a person obliged (by law, contract or fact) to supervise such a person. Not only his or her liability is fault-based but there is also a presumption that the damage was caused as a result of improper supervision[23]. If a parent or teacher wishes to free himself from liability, he must prove that his supervision was appropriate or that the damage was not a result of improper supervision.

If someone else was entrusted with the performance of the act and the damage was caused while performing it, not only the person who commits a tort is liable but also the

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[20] *Mularski K.* [Untitled] // Kodeks cywilny. Vol. II. P. 431–433.

[21] *Mostowik P.* [Untitled] // System Prawa Prywatnego. Vol. 6. P. 314–317.

[22] *Kaliński M.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. P. 239–240.

[23] *Radwański Z., Olejniczak A.* Zobowiązania — część ogólna. Warszawa, 2018. P. 217.

person who has entrusted him or her with the performance of the act. The legal relationship between the person who entrusts the exercise of an act entrusting person and a person entrusted with the act is important as it determines, to a large extent, the scope of the entrusting person's liability.

The injured party may seek damages from a person who entrusts the exercise of an act on the basis of Art. 429 of the CC, which provides for liability on the basis of fault in choice (culpa in eligendo).

While fault of a person who entrusts another with the exercise of an act is presumed, he or she may discharge itself from liability by proving that he or she made the choice with due diligence, or that he entrusted the execution of the act to a professional (a person who professionally carries out such activities, Art. 429 of the CC). On the other hand, a person who on his own account entrusts the exercise of an act to a person who at the exercise of that act is subject to his supervision and who is obliged to abide by his guidelines, shall be liable for damage only if the latter was at fault (Art. 430 of the CC)[24].

For certain torts, the Polish legislator adopted special regulations. Here are some of the key points. Under Art. 417–417 (2) of the CC liability for damage caused by unlawful acts or omissions of public authorities has been regulated. As a rule the State Treasury or a local authority is liable for damage caused by their officials regardless of their fault. If, however, damage has been caused by issuing a normative act, a final court order or a final administrative decision, one may seek damages only after the illegality of the act has been determined in relevant proceedings[25]. Such preliminary proceedings are also necessary if a judgment or decision should have been issued and the damage results from the court's or administrative body's failure to act.

The increased danger to the environment caused by the activities of an enterprise which is set in motion by forces of nature, and the fact that it acts in the interest of the operator (*eius damnum cuius commodum*), justifies stricter liability for the damage caused by the entrepreneur regardless of his fault. Art. 435 of the CC applies to damages caused to any person by the activities of an enterprise operating by means of steam, gas, electricity, liquid fuels, etc. i. e. natural forces. It refers mainly to manufacturing and transportation enterprises. The circumstances that relieve the liability are only force majeure and the exclusive fault of the injured party or third party. The same applies to the liability of owners of mechanical means of communication operated by forces of nature, such as cars, motorcycles, motorboats (Art. 436 of the CC). Different regulation of liability applies only to two situations: 1) in case of a collision between these vehicles, the possessors of the vehicles can only claim damages from each other on fault basis, 2) the possessors of the vehicles are also liable on fault basis for damage caused to persons transported by courtesy (free of charge)[26].

7. Obligation to repair damage

The general rules concerning repair of damage have been specified under Art. 361–363 of the CC, and they refer to all types damages, i. e. not only resulting from non-performance of obligations, but also caused by other events, especially torts. However, further provisions of the Civil Code provide for some differences, especially in the case of the system of tort-related liability (Art. 415 et seq. of the CC) and the damage caused by a dangerous product.

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[24] *Machnikowski P.* [Untitled] // System Prawa Prywatnego. Vol. 5. P. 474–475.

[25] *Kaliński M.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. P. 267–271.

[26] *Śmieja A.* [Untitled] // System Prawa Prywatnego. Vol. 5. P. 656–660.

In order to establish who is liable for repairing the damage, it is necessary to determine three premises: 1) the event for which the legal norm provides specific rules concerning the obligation to repair the damage (the harmful event), 2) the damage, 3) the causal link between the event and the damage.

Damage is defined as any injury to an interest protected by law. Thus, it may be damage to property or harm to a person (bodily harm, imprisonment, insult, or infringement of personal interests). Damage to property is always of a pecuniary nature, whereas harm to a person may be of pecuniary nature (for instance: covering the costs of medical treatment) or non-pecuniary nature (wrong: moral and physical suffering). Compensation of non-pecuniary damage is limited, possible only in cases prescribed by law (Art. 24 of the CC) and, as a rule, not allowed in case of non-performance of obligations (*ex contractu*).

Pecuniary damage includes the loss (otherwise, actual damage, damnum emergens) and lost profits (lucrum cessans), cf. Art. 361 § 2 of the CC. In order to establish damage, the differential) method is used: a comparison is made between the hypothetical condition of the injured party's assets if the damaging event had not occurred and the actual condition of the injured party's assets after the event that caused the damage. Damage is the difference between these values[27].

The Polish law adopts the concept of an adequate causal link, with the limitation, however, that one is only responsible for the normal consequences of a specific event (Art. 361 § 1 of the CC). This means that in order to attribute liability for damage to anyone, it must first be established that the damage would not occur if there was no action, omission or other event for which the subject is responsible (test *condicio sine qua non*). In the second place, however, a selection of consequences must be made, since the person liable for damage is liable only for the normal consequences of the damaging event. For instance, a person liable for leaving an iron plugged-in and the subsequent fire in the apartment is not liable for the death of a fireman who died while extinguishing the fire.

As for the method of repairing the damage, it is up to the injured party to choose: he or she can seek damages or benefits in kind, i. e., to bring about the state that would have existed if the damaging event had not occurred (restitutio, specific performance). It is usually more satisfactory for the injured party to seek damages. At the same time, the debtor may limit himself to damages if restitution is not possible or would entail excessive difficulties or costs for him. As a rule, the amount of damages is calculated on the basis of prices on the date of their calculation unless particular circumstances require that the prices existing at a different moment be adopted (Art. 363 of the CC).

Unless legal provisions or a contract between the parties do not provide for any other scope of the obligation to repair the damage, the obliged party should compensate for the entire damage caused, i. e. is the actual loss and the lost benefits. It is necessary to indicate some of the most important limitations of the obligation to compensate for damages, provided by law. The obligation to repair damage is reduced accordingly if the injured party contributed to the occurrence or increase of damage (Art. 362 of the CC). When assessing the scope of limitations of damages, all circumstances, especially the degree of fault of both parties, should be taken into account. If the injured party has not only suffered the damage, but the damaging event has become, at the same time, the source of a specific profit for him (for instance: he has received a certain compensatory benefit under the applicable laws), the obligation to repair the damage is reduced by the amount of the profit received (*compensatio lucri cum damno*)[28].

The legislator has also regulated separately the rules on damages for actions in tort. Art. 444 of the CC regulates the scope and mode of repairing pecuniary losses such as

[27] *Koch A.* [Untitled] // Kodeks cywilny. Vol. II. P. 111–113.

[28] *Radwański Z., Olejniczak A.* Zobowiązania — część ogólna. P. 98–99.

a bodily injury or a health disorder. Compensation of other pecuniary and non-pecuniary damage, if they are inflicted directly on a person or his or her personal rights, are regulated under Art. 445 and 448 of the CC as far as claims for the compensation of non-pecuniary damage are concerned and under Art. 446 the CC, wrongful death claims. Pursuant to Art. 446 (1) of the CC a child may demand the redress of the damage he or she suffered before the birth.

In case of injury or health disorder, the repair of the damage includes any resulting costs (including, but not limited to costs of treatment: diagnosis, therapy, rehabilitation)[29]. At the request of the injured party, the person obliged to repair the damage should pay costs of his training for another occupation. In addition, the injured party is entitled to a pension if he or she has lost all or part of earning capacity, if his or her needs have increased or his or her prospects for the future have decreased (Art. 444 of the CC). The injured party may also claim compensation for non-pecuniary damages (Art. 445 of the CC).

In the event of the death of the injured party, other persons may also make claims against the person responsible for the repair of the damage caused by personal injury or health disorder:

- persons who have covered the costs of treatment and funerals may claim reimbursement;
- persons legally entitled to receive maintenance from the deceased may claim a pension in the amount and for the probable duration of the maintenance obligation;
- other persons in close relations with the deceased to whom he provided means of subsistence voluntarily and on a permanent basis, may demand the same pension if it results from the circumstances that it is required by the rules of social conduct;
- the closest members of the deceased's family may claim damages for pecuniary losses if deceased's death resulted in a significant deterioration of their life situation;
- the closest members of the deceased's family may seek damages for the harm suffered (Art. 446 of the CC).

The obligation to repair damage caused by a tort may be reduced by a court order, due to the financial condition of the injured party or the debtor. This should be supported by the principles of equity, and both the injured party and the person responsible for the damage must be natural persons (Art. 440 of the CC)[30].

In case of liability for damage caused by a dangerous product, liability only applies to personal damage (pecuniary and non-pecuniary) and damage to personal property, so only the injured individuals can claim under this special regime (Art. 449^1 and 449^2 of the CC)[31].

With certain limitations, the parties to the obligation may contractually determine rules of liability for damage that are different from the statutory rules[32]. In particular, the parties may tighten up the rules of liability and impose an obligation on the debtor to repair the damage caused by the non-performance of the obligation also in situations where, under the applicable regulations, he is not liable (for example: for actions he is not at fault). While, it is also possible to relax the rules of liability (exemption clauses) for example, the clause releasing the debtor from the obligation to repair damage intentionally caused to the creditor (Art. 473 of the CC) shall be invalid. There are also limitations to exemption clauses in relation to tort liability. The parties may not for instance exclude or limit the

[29] *Śmieja A.* [Untitled] // System Prawa Prywatnego. Vol. 5. P. 737–739.

[30] *Kaliński M.* [Untitled] // System Prawa Prywatnego. Vol. 5. P. 210–211.

[31] *Kaliński M.* [Untitled] // Brzozowski A., Jastrzębski J., Kaliński M., Skowrońska-Bocian E. Zobowiązania. Część ogólna. P. 283.

[32] *Kaliński M.* [Untitled] // System Prawa Prywatnego. Vol. 5. P. 205–207.

liability for traffic accidents and liability of entreprises powered by means derived from natural resources (Art. 437 of the CC).

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Обязательственное право в Польше: избранные вопросы

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В статье представлен краткий обзор избранных основных институтов польского обязательственного права, в частности — источники обязательств: договоры, правонарушения и неосновательное обогащение. В фокусе внимания оказываются встречные обязатель-

ства, а также делимые и солидарные обязательства. Рассматриваются вопросы обязательств, возникающих из договоров, одной из сторон которых является потребитель. Анализируются проблемы заключения предварительного договора. Подробно разъясняются такие вопросы, как исполнение обязательства и последствия его нарушения (неисполнение или ненадлежащее исполнение). Описаны последствия просрочки исполнения обязательства и виды такой просрочки. Автор отдельно сосредоточивается на вопросах ответственности за неисполнение обязательства, в частности возмещения убытков от неисполнения. Раскрывается содержание принципа pacta sunt servanda в польском праве и имеющиеся исключения из этого правила. Особое место уделяется такому способу прекращения обязательства помимо его исполнения, как зачет. Автор также представляет инструменты, побуждающие стороны к исполнению обязательства, такие как договорная неустойка и задаток. При описании обязательств из неосновательного обогащения обращается внимание на то, что утрата обогащения исключает его истребование у обогатившегося лица, если оно утратило обогащение, не зная о наличии обязательства по его возврату. В заключительной части исследования объясняются концепции вреда и ответственности за причиненный вред, а также обязательства по возмещению имущественного и морального вреда. Применительно к деликтному праву подчеркивается наличие в польском праве случаев безвиновной ответственности за причинение вреда в качестве исключения из общего правила ответственности за вину. Лишь неправомерные действия или бездействие могут быть квалифицированы как виновные и влекущие за собой ответственность. Польское право не признает общей обязанности воздерживаться от причинения вреда. Презюмируется виновность неправомерного поведения. В ряде случаев поведение не может быть признано неправомерным, даже если оно нарушает общий запрет, установленный законом. В частности, речь идет о причинении вреда при необходимой обороне, крайней необходимости, дозволенной самопомощи и в ряде других случаев.

Ключевые слова: обязательства, договор, нарушение договора, ответственность, неосновательное обогащение, зачет, задержка, деликт, убытки, причинение, вред.

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