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SUBMISSION OF THE POINT OF LAW WHICH RAISES SERIOUS DOUBTS IN CIVIL PROCEEDINGS FOR THE RESOLUTION BY THE SUPREME COURT

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Abstract
The institution of questions of law, as a result of which the court ruling in the case is bound by the view of the Supreme Court expressed in its resolution, is an exception to the constitutional principle of subordination of judges solely to the Constitution and statues (Article 178(1) of the Constitution of the Republic of Poland).

The point of law which raises serious doubts because divergent interpretation of the same provision exist in the case-law could be submitted when in the opinion of the appellate court each of these interpretations can be adopted in view of its significant legal arguments, and neither the position of the jurisprudence nor the doctrine of law explains which interpretation should be chosen.

The point of law submitted to the Supreme Court for resolution under Article 390(1) of the Code of Civil Procedure must meet three basic requirements. Firstly, the point of law must be of an abstract nature and concern the interpretation of legal provisions, as it is unacceptable to present to the Supreme Court a question of law simply to get an answer on how to settle the case. Secondly, the point of law needs to concern a legal doubt which needs to be clarified in order to examine the legal remedy; in other words, in order to use the right set forth in Article 390(1) of the CCP, a link must exist between the presented point of law and a decision to be made on the merits of the case, and such link needs to be demonstrated through the juridical consistency of the point of law formulated at the outset and the reasons thereto, and through the proper reference to the facts of the case in such generally defined question of law. Thirdly, the point of law to be resolved needs to concern a legal issue which raises serious

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doubts; if ordinary doubts arise, the court of second instance needs to settle them on its own. The significance of the issue or the discrepancies in the jurisprudence and literature regarding the ways of its resolutions are not per se independent premises for raising a question of law.

Keywords: points of law, Supreme Court, uniformity of the case-law

GENERAL REMARKS

The basic jurisdictional function of the Supreme Court is to supervise courts' activities by ensuring legal compliance and uniformity of the case-law by common courts and military courts.[1]

In civil proceedings, it performs supervision by assessing correctness of law interpretation and application by common courts, while the courts ruling on the merits of the case are competent for establishment of facts underlying cases heard and for the preceding evidence assessment.[2]

In respect of judicial supervision, the Supreme Court's competences are set out in Article 1 of the Supreme Court Act,[3] under which the Supreme Court is a judicial authority established to administer justice by ensuring, as part of its supervision, compliance with the law and uniformity of the jurisprudence by common and military courts when examining appeals to the highest instance, and other legal remedies, by adopting resolutions which resolve points of law and by deciding on other matters specified in statutes. These are the distinctive tasks of the Supreme Court within the judiciary organisation structure.

The uniformity is the basis for the stabilisation of existing legal order and social and economic relations, and therefore a foundation for the rule of law and legal security.[4] It ensures that the constitutional principle of citizens' trust in the State and in legislation made by that State becomes a reality. Moreover, the doctrine notes that the postulate of uniformity of the law basically propounds that the examination of cases revealing similar facts should end with similar rulings, and courts, as the norms addressees, should apply and understand such norms in a uniform way.[5]

Of course, this does not preclude the courts from issuing decisions which differ from the well-established case-law; however, whenever such departure from the well-established case law is made, the court should present strong arguments in support of its divergent interpretation of provisions.

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1 Markiewicz, K., in: Ereciński, T., Lubiński, K., (eds), *System Prawa Procesowego Cywilnego. Tom IV. Część I. Postępowanie nieprocesowe*, Warszawa, 2021, Legalis.

2 Decision of the Supreme Court of 23 September 2010 r., III CSK 288/08, LEX No. 970081.

3 The Supreme Court Act of 8 December 2017, i.e. Journal of Laws of 2–21, item 1904, as amended.

4 Piasecki, K., *Organizacja wymiaru sprawiedliwości w Polsce*, Kraków, 2005, p. 76.

5 Szmulik, B., *Pozycja ustrojowa Sądu Najwyższego*, Warszawa, 2008, p. 285 et seq.; Banaszek, B., *Konstytucja RP. Komentarz*, Warszawa, 2009, p. 808; Trzciński, J., 'Materiały z obrad Zgromadzenia Sedziów NSA w dniu 23 kwietnia 2007 r. w Warszawie', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2007, No. 3, p. 14.

From this perspective, the role of the First President of the Supreme Court and the obligation under Article 6 of the Supreme Court Act to ensure the consistency of the legal system seem to be of particular importance. The consistency standard is discussed in the literature along with the postulate of legal uniformity.[6]

Resolutions made by the Supreme Court to settle points of law which raise doubts of the appellate court and which have emerged while hearing particular cases are one of the tools used for judicial supervision in order to ensure correctness, uniformity and consistency of the case-law.[7] These resolutions aim to clarify, by means of interpretation, those legal provisions which raise doubts or which lead to discrepancies in practicing the application of law.

The literature stresses that along with ensuring uniformity of the case law in terms of its substance, resolutions also serve to ensure "the unity in methodology", as they formulate guidelines on how to reach a specific resolution, as well as values and theoretical assumptions.[8]

Apart from legality, the rule of law, objectivity, and certainty, the uniformity of the case-law is one of the most important internal values of law. It is understood as a sign of legal certainty, which manifests itself in decisions issued based on legal norms.[9] The jurisprudence of the Supreme Court highlights: "The postulate of the uniformity of the case-law undoubtedly emphasises the certainty of judicial application of the law".[10]

The starting point for this analysis is Article 390 of the Code of Civil Procedure (CCP). Under this article, if during an appeal a point of law raising serious doubts is recognised, the court may refer it to the Supreme Court for resolution, while adjourning the case. The Supreme Court is competent to take over the case for examination or to refer the point of law for resolution to its extended panel.

The key task of the discussed institution is to ensure proper interpretation and foster uniformity in the jurisprudence of common courts.[11] Judging on a point of law means that proceedings become speedy and predictable, and the authority of the administration of justice is upheld. Without such provisions, the process would

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[6] Nowak-Far, A., 'Standard jednolitości i spójności prawa. Przykład prawa Unii Europejskiej', in: Nowak-Far, A. (ed.), *Jednolitość i spójność prawa. Perspektywa Unii Europejskiej i Federacji Rosyjskiej*, Warszawa, 2013, p. 15.

[7] Łazarska, A., in: Szanciło, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Art. 1–505[39]. Tom I*, Warszawa, 2019, Legalis.

[8] Szczucki, K., in: *Ustawa o Sądzie Najwyższym. Komentarz*, 2nd ed., Warszawa, 2021; Grochowski, M., 'Uchwały Sądu Najwyższego a jednolitość orzecznictwa. Droga do autopojetyczności systemu prawa?', in: *Jednolitość orzecznictwa. Standard – Instrumenty – Praktyka. Tom I*, Warszawa, 2015, p. 92.

[9] Leszczyński, L., 'Jednolitość orzecznictwa jako wartość stosowania prawa', in: Grochowski, M., Raczkowski, M., Żółtek, S. (eds), *Jednolitość orzecznictwa. Standard – instrumenty – praktyka*, Warszawa, 2015, p. 10.

[10] Resolution of the full panel of the Supreme Court of 5 May 1992, KwPr 5/92, OSNKW, 1993, No. 1–2, item 1 and Leszczyński, L., 'Jednolitość orzecznictwa…', op. cit., p. 9 et seq.

[11] See Osajda, K., 'Przesłanki odmowy podjęcia uchwały przez Sąd Najwyższy w postępowaniu cywilnym', in: Gudowski, J., Weitz, K. (eds), *Aurea praxis aurea theoria. Księga pamiątkowa ku czci profesora Tadeusza Erecińskiego. Tom 1*, Warszawa, 2011, p. 427 et seq.; Wiśniewski, T., *Przebieg procesu cywilnego*, Warszawa, 2013, p. 383.

become disorganised, leading to jurisdictional chaos and destabilising legal situation of the parties concerned, and, as a result, would disrupt legal transactions.[12]

This paper intends to review conditions for the admissibility of questions of law referred to the Supreme Court, and to analyse relevant proceedings before the Supreme Court against the normative and dogmatic background as well as the substantive position expressed by the latter. Considering interests of the parties and other participants to the proceedings, uniformity of the application of law is of prime importance as a factor which serves to ensure legal certainty, equality before the law and, finally, legal security of citizens. Against this backdrop, questions of law are one of the instruments of correct and uniform application of the law. Systematising these questions boils down to shaping proper decision-making standards, both in terms of how decisions and conclusions should be formulated on doubt-raising points of law, and rulings made thereafter. Our considerations take into account the change in the model of hearing the cases in appellate proceedings, introduced by the amendment of 4 July 2019.[13] In this respect, it is first of all necessary to establish whether it is admissible to refer a point of law to the Supreme Court while examining legal remedies other than appeals, and next, to define the court authorised to present such point of law and its composition, in particular after amendments introduced by the Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts. To this end, this paper relies on the most recent pieces of jurisprudence of the Supreme Court regarding the matter under discussion.

INSTITUTION OF POINTS OF LAW

The institution of the questions of law was aptly defined by the Supreme Court in its decision of 4 October 2002 (III CZP 62/02[14]), where it stressed that while the institution had a rich tradition in Polish civil proceedings and played a major role in the development of the jurisprudence, it should be used with full awareness of its unique nature.[15] In particular, the institution of points of law may not be used to shift to the Supreme Court the task of making a jurisdictional decision which incriminates the adjudicating court.[16]

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[12] Markiewicz, K., op. cit.; Sanetra, W., 'O roli Sądu Najwyższego w zapewnianiu zgodności z prawem oraz jednolitości orzecznictwa sądowego', *Przegląd Sądowy*, 2006, No. 9, pp. 18–20; Łochowski, M., 'Wiążąca sądowa wykładnia prawa, ocena prawna, wskazania co do dalszego postępowania (uwagi na tle art. 386 § 6 i art. 393-17 k.p.c.)', *Przegląd Sądowy*, 1997, No. 10. pp. 22–23; Oklejak, A., *Apelacja w procesie cywilnym*, Kraków, 1994, p. 118.

[13] The Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts, Journal of Laws of 2019, item 1469.

[14] *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2004, No. 1, item 7.

[15] See decision of the Supreme Court of 13 January 2022, III CZP 41/22, LEX No. 3303283; decision of the Supreme Court of 20 January 2022, III CZP 15/22, LEX No. 3303386; decision of the Supreme Court of 14 March 2014, III CZP 132/13, LEX No. 1482402; decision of the Supreme Court of 5 December 2019, III CZP 33/19, LEX No. 2749464; decision of the Supreme Court of 18 January 2019, III CZP 67/18, LEX No. 2609481; decision of the Supreme Court of 5 October 2016, III CZP 50/16, LEX No. 2148609.

[16] Decision of the Supreme Court of 18 February 2021, III CZP 13/20; decision of the Supreme Court of 25 January 2022, III CZP 72/22, LEX No. 3303512.

It should be emphasised that the possibility to request the Supreme Court to resolve a point of law, thereby binding lower courts adjudicating in a specific case by the Supreme Court's view expressed in its adopted resolution, constitutes an exception to the constitutional principle of judges being subject solely to the Constitution of the Republic of Poland and to statutes.[17]

Please note that pursuant to Article 178(1) of the Constitution of the Republic of Poland, judges are independent and subject to the Constitution and statutes; therefore, the provision which extends the rule and make the judge bound also by the view of another judge(s), as expressed in the resolution (Article 390(2) of the CCP), needs to be applied with caution and restraint. The independent handling of cases and determination of underlying factual and legal issues is a fundamental, inalienable duty of the judge, which arises from the exercise of their judicial authority.[18]

In fact, the provision of Article 390 of the CCP does not impose on the court of second instance the obligation to request the Supreme Court to resolve the point of law, even if such point of law raises serious doubts.[19]

The Supreme Court rightly emphasises in its case-law that it is the duty of a judge to adjudicate in cases they have been requested to examine. Therefore avoiding this obligation by leaving it to a higher court cannot be the only way to resolve complicated points of law. The consistent position of the Supreme Court is that, in practice, Article 390 of the CCP should be applied solely in truly exceptional circumstances. From this standpoint, it is entirely correct and consistent to believe that the decision of the appellate court not to exercise its right to present a point of law to the Supreme Court (Article 390(1) of the CCP) is not subject to a review in a higher instance.[20]

This solution aims to assist the appellate court examining a specific case and enable the Supreme Court to influence the correct interpretation of the law, including in other cases examined by courts. According to 390(2) of the CCP, the resolution of the Supreme Court is binding solely in the case for which the question of law has been submitted. However, given the Supreme Court's authority, the adopted resolution shapes the interpretation of law in other cases examined by courts as well.

Therefore, the institution of questions of law, established under Article 390(1) of the CCP as a derogation from the constitutional principle of the judicial independence of judges who, in exercising of their duties, are subject solely to the Constitution and statutes (Article 178, paragraph 1 of the Constitution of the Republic of Poland)

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[17] See the reasoning to the Resolution of the Supreme Court (7) of 30 March 1999, III CZP 62/98, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1999, No. 10, item 166.

[18] Góra-Błaszczykowska, A., Karolczyk, B., Lubiński, K., in: Ereciński, T., Wiśniewski, T. (eds.), *System Prawa Procesowego Cywilnego. Tom II. Część II. Postępowanie procesowe przed sądem pierwszej instancji*, Warszawa, 2016; decision of the Supreme Court of 26 June 2014, III CZP 35/14, Biuletyn Sądu Najwyższego, 2014, No 6.

[19] Ruling of the Supreme Court of 12 September 2000, I PKN 10/00, OSNAPiUS, 2002, No. 7, item 156.

[20] Decision of the Supreme Court of 20 January 2022, III CZP 15/22, LEX No. 3303386; decision of the Supreme Court of 22 October 2010, III CZP 80/10, LEX No. 694256; decision of the Supreme Court of 19 October 2017, III CZP 47/17, LEX no 2439109.

requires strict interpretation.[21] In this respect, there is consensus regarding the narrow interpretation of the norm established under Article 390(1) of the CCP and whether replies can genuinely be provided to a point of law in isolation from the issue at stake and any teleological arguments.[22]

PREMISES FOR SUBMITTING A POINT OF LAW TO THE SUPREME COURT FOR RESOLUTION

Firstly, it needs to be noted that Article 390 of the CCP does not set any rules decisive for the Supreme Court's resolution or refusal to adopt a resolution on points of law that have risen doubts for the appellate court during the examination of specific cases. Requirements to be met by the point of law have been further defined in case-law. Analysis of numerous pieces of jurisprudence of the Supreme Court helps identify the premises for a valid submission of the question of law to the Supreme Court for resolution.

The matter must concern a point of law referring to the application of substantive or procedural law norms, rather than findings of fact or assessment of evidence in the case under examination.[23]

The jurisprudence propounds that the question of law submitted to the Supreme Court for resolution needs to be defined in general and abstract terms, so it can be resolved in isolation from the specific case. It must be purely legal in nature. Factual issues are not subject to the assessment under Article 390 of the CCP, as they are reserved for the exclusive competence of the court ruling on the case's merits.[24] Of course, the point of law submitted to the Supreme Court for resolution under Article 390 of the CCP needs to be properly linked to the facts established by the appellate court. It also needs to be formulated, considering the circumstances that make up the case facts, as established by the court.

The requirement to formulate the question of law in a general manner aims to give the Supreme Court the opportunity to provide a universal reply, which should not be used in lieu of resolving the specific case.[25]

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[21] See resolution of the seven-judge panel of the Supreme Court of 30 April 1999, III CZP 62/98, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1999, No. 10, item 166.

[22] See also resolution of the seven-judge panel of the Supreme Court of 30 April 1999, III CZP 62/98, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1999, No. 10, item 166.

[23] Decision of the Supreme Court of 17 December 1991, III CZP 129/91, LEX No. 612283; decision of the Supreme Court of 23 February 2018, III CZP 97/17, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2019/1/12, LEX No. 2453045; decision of the Supreme Court of 27 August 1996, III CZP 91/96, LEX No. 26246.

[24] Are also excluded matters of mixed nature, i.e. those formulated in terms of legal issues and of facts – see Włodyka, S., Przesłanki dopuszczalności pytań prawnych do Sądu Najwyższego, *Nowe Prawo*, 1971, No. 2, p. 173; Wiśniewski, T. in: Dończyk, D., Iwulski, J., Jędrejek, G., Koper, I., Misiurek, G., Orecki, M., Pogonowski, P., Sołtysik, S., Zawistowski, D., Zembrzuski, T., Wiśniewski, T., *Kodeks postępowania cywilnego. Komentarz*, Volume II, Articles 367–505, Warszawa, 2021.

[25] See decision of the Supreme Court of 15 October 2002, III CZP 66/02, LEX No. 57240.

The appellate court should point to significant discrepancies in the doctrine or jurisprudence regarding the interpretation of substantive or procedural law, which in turn raise doubts as to its correct interpretation. Moreover, the court should indicate which interpretation it believes is accurate, providing the appropriate legal argumentation, and explain why the resolution of its point of law will be of importance for the case settlement.

Secondly, it is correctly assumed in the doctrine[26] that as a point of law which is to be resolved by the Supreme Court may not relate to doubts of fact, similarly it may not relate to subsumption, i.e. the question of whether a specific legal norm should be applied in a given case. Hence, if the appellate court poses a question about the application of law (subsumption, i.e. whether a specific legal norm should apply in a specific situation or which norm should apply), its intention is in fact to have the Supreme Court relieve it of its adjudication task.

Then, a point of law submitted for resolution under Article 390(1) of the CCP cannot be reduced to a question being posed to the Supreme Court in order for it to make a subsumption, and to resolve the case as a result.[27]

Both the aim of the institution of points of law presented to the Supreme Court and the case law show beyond any doubt that if such point of law was considered in terms of subsumption (i.e. requiring the assessment of specific circumstances of the case instead of an *in abstracto* review) it could simply not be resolved. Indeed, the statement of the Supreme Court would be situational, depending on the facts established in the case, and would be devoid of general significance.[28]

Moreover, importantly, the Supreme Court may reply solely within the scope of the point of law presented for resolution; the SC may not go beyond such point of view or proceed to reinterpret it, as this would violate the principle of independent resolution of the case by the competent court, or would lead to a review of issues that actually do not raise doubts for the court of second instance.[29] The Supreme Court cannot correct the contents of the operative part of the decision where the point of law has been formulated to make it more compliant, as it would believe, with the contents of the provision to which it pertains.[30]

At the same time, it should be stressed that mere reservations from the appellate court regarding the view expressed by the court of first instance would not suffice. The decision to present a point of law should be justified with several solution variants for a specific question.[31]

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[26] See in this respect: decision of the Supreme Court of 22 October 2002, III CZP 64/02, LEX No. 77033; decision of the Supreme Court of 11 January 2022, I USK 351/21, LEX No. 3340967; decision of the Supreme Court of 17 September 2008, III CZP 84/08, LEX No. 470907; decision of the Supreme Court of 16 November 2012, III CZP 64/12, LEX no 1293792.

[27] 'Decision of the Supreme Court of 22 October 2002, III CZP 64/02', *Prokuratura i Prawo*, 2003, No. 7–8, item 37.

[28] Decision of the Supreme Court of 20 December 2012, III CZP 87/12, LEX No. 1288686.

[29] Decision of the Supreme Court of 14 March 2017, III SZP 1/17, BSN 2017, No. 3.

[30] Decision of the Supreme Court of 7 May 2015, III PZP 3/15, LEX No. 1771513.

[31] Decision of the Supreme Court of 14 December 2007, III CZP 116/07, LEX No. 345549; decision of the Supreme Court of 15 December 2021, III CZP 91/20, LEX No. 3273406; decision of the Supreme Court of 26 October 2016, III CZP 60/16, LEX No. 2152395; decision of the Supreme

Thirdly, the point of law needs a substantive link to the proper examination of the initiated legal remedy.

The question of law may pertain solely to matters requiring resolution to examine the legal remedy in a specific case properly. The doctrine posits that there needs to exist even "a causal link between the presented question of law and the decision to be made on the case's merits".[32] The link exists when resolving the specific point of law is necessary to issue the ruling to end the appeal proceedings, also on a formal level.[33] This link needs to be demonstrated through the juridical consistency of the initially formulated point of law and the reasons thereto, and through proper reference to the case facts in such a generally defined question of law.[34]

This requirement is not met if, in its argumentation, the requesting court identifies and supports only one possible solution while discrediting the alternative variant, and exercises the right to use the Supreme Court's interpretative assistance solely to confirm its position is correct.[35] The institution of points of law cannot be used to place on the Supreme Court the task of taking the jurisdictional decision that incriminates the adjudicating court.[36]

Therefore, the court presenting a point of law for resolution should explain its doubts, why it believes they are serious, and demonstrate that they are causally linked to the case resolution. It should be noted that the court needs to present its own views, and solely presenting other courts' positions will not suffice.[37]

Indeed, Article 390 of the CCP links the institution of points of law submitted to the Supreme Court for resolution with a specific case that has given rise to a question of law, leading to serious doubts and requiring a resolution before the appeal could be heard. Therefore, it excludes the possibility of submitting any points of law that are not impactful for the appeal being examined and are purely theoretical and detached from any specific needs.

Jurisprudence has explained that "It is not the Supreme Court's task to analyse theoretical issues in isolation from the circumstances of the case, as this is the domain

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Court of 5 November 2014, III CZP 79/14, LEX No. 1551372; decision of the Supreme Court of 13 January 2011, III CZP 127/10, LEX No. 738113.

[32] See Zieliński, A., in: Zieliński, A. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warszawa, 2010, p. 642. See also the jurisprudence: decision of the Supreme Court of 9 April 2002, III CZP 16/02, LEX No. 560857; decision of the Supreme Court of 14 March 2001, III CZP 53/00, LEX No. 52363; decision of the Supreme Court of 25 August 2004, I PZP 4/04, LEX No. 1615717; decision of the Supreme Court of 22 May 2009, III CZP 25/09, LEX No. 511985.

[33] See also decision of the Supreme Court of 22 November 2013, III CZP 71/13, LEX No. 1413561.

[34] Decision of the Supreme Court of 24 January 2002, III CZP 76/01, LEX No. 53308; decision of the Supreme Court of 25 October 2018, III UZP 7/18, LEX No. 2575525.

[35] Decision of the Supreme Court of 9 October 2020, III CZP 92/21, LEX No. 3066655.

[36] Decision of the Supreme Court of 18 February 2021, III CZP 13/20, LEX No. 3125994.

[37] Decision of the Supreme Court of 26 October 2011, III CZP 59/11, LEX No. 1102648; decision of the Supreme Court of 16 November 2021, III CZP 75/20, LEX No. 3275897; decision of the Supreme Court of 30 June 2020, III CZP 61/19, LEX No. 3063018; decision of the Supreme Court of 14 September 2016, III CZP 42/16, LEX No. 2152394; decision of the Supreme Court of 27 May 2010, III CZP 32/10, LEX No. 590616; decision of the Supreme Court of 29 October 2009, III CZP 79/09, LEX No. 533836.

of science. If the question is of theoretical and abstract nature and is unrelated to the case circumstances, the answer is not needed for its resolution."[38]

The Supreme Court's jurisprudence highlights that the appellate court submitting the question of law under Article 390 should properly define ("name") the legal issue underlying the question posed to the Supreme Court. The court of second instance needs to show that the point of law is linked to the case in such a way that the Supreme Court's legal answer is essential (necessary) for the appeal to be heard. To meet this requirement, the point of law must be professionally worded, has to refer to the case's legal remedy, and its resolution must be necessary to examine the appeal merits.[39]

Fourthly, the point of law at hand needs to raise serious doubts.[40] By granting the appellate court the right to submit a point of law to the Supreme Court under Article 390(1) of the CCP, the lawmaker made exercising this right conditional upon the emergence of serious legal doubts in the case and an expectation that the reply is needed to settle the case.

The Supreme Court's jurisprudence explains that "the institution of questions of law neither serves to settle a specific case in lieu of the competent court nor to confirm that the opinion presented by the court submitting the point of law is accurate". Thus, the point of law covers clear doubts concerning a specific provision (norm) or set of provisions (norms), or, more broadly and generally, doubts as to the specific legal framework (legal institution).[41]

Interestingly, some Supreme Court's jurisprudence posits that what is decisive for the admissibility of the point of law is "not its practical significance nor discrepancies emerging upon its resolution, but rather whether the court has real, serious doubts as to how it should be resolved". The importance of the issue or the discrepancies in the case-law or literature is not, as such, a premise for submitting a question of law.[42]

However, it should be noted that the normative regulation is unclear as to whether doubts justifying resolution should be of subjective nature (i.e., referring to the court which presents a point of law) or rather of objective type. It seems that the adjective "serious" added as a qualifier to doubts justifying the submission of the point of law to the Supreme Court strongly supports their objective nature. At the same time, subjective doubts must arise; otherwise, the adjudicating panel would not see the need to submit a point of law.[43]

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[38] Resolution of the Supreme Court of 23 March 2016, III CZP 102/15, LEX No. 2005761; decision of the Supreme Court of 12 June 2008, III CZP 42/08, LEX No. 420375.

[39] Decision of the Supreme Court of 7 March 2018, III UZP 1/18, LEX No. 2467695; Ruling of the Supreme Court of 9 October 2019, I NSK 63/18, LEX No. 2727400.

[40] See decision of the Supreme Court of 27 September 2012, III CZP 47/12, LEX No. 1222122; decision of the Supreme Court of 8 August 2012, III CZP 43/12, LEX No. 1217216.

[41] Decision of the Supreme Court of 12 January 2021, I USK 4/21, LEX No. 3106200.

[42] Decision of the Supreme Court of 20 September 2005, III SZP 2/05, LEX No. 2640398.

[43] See the ruling where the Supreme Court declared for the need for both objective and subjective doubts: decision of the Supreme Court of 10 August 2018, III CZP 16/18, LEX No. 2531311; decision of the Supreme Court of 10 August 2018, III CZP 15/18, LEX No. 2531310; decision of the Supreme Court of 17 January 2013, III CZP 95/12, LEX No. 1324309; decision of the Supreme Court of 20 October 2011, III CZP 56/11, LEX No. 1106991.

The qualifying adjective "serious" means that there must exist fundamental difficulties in explaining them through basic interpretation methods, especially when various interpretations of questionable provisions are possible, and each interpretation is supported by arguments which are significant in the appellate court's opinion, and moreover, when the identified point of law has no statement from the Supreme Court and no uniform, convincing position of the doctrine for the appellate court.[44]

However, if ordinary doubts arise, the appellate court must settle them independently,[45] relying on the knowledge provided by legal provisions and their understanding in the existing jurisprudence and science of law.[46]

The jurisprudence of the Supreme Court clearly emphasises that the possibility of submitting a point of law is not a tool to "reform" atypical procedural situations which go beyond standard civil proceedings and result from manifest errors made by the adjudicating court. It is up to the competent court, in the specific proceedings and instance, to find a solution.[47]

Hence, the court should explain this premise, demonstrating the link between the legal basis of the resolution, assumed based on established facts, on the one hand, and the formulated point of law, on the other hand. The Court should then include in reasons thereto legal considerations which prove that the identified doubt is "serious", i.e. its settlement encounters difficulties beyond usual legal interpretation. If the court fails to do so, it will not be admissible for the Supreme Court to take a relevant resolution.[48]

Therefore, doubts should be presented as own, independent considerations of the court which submits the point of law, along with arguments that may potentially point to divergent legal assessments.[49] The Supreme Court may only step in with its substantive and binding legal assistance when the court presenting a specific point of law clearly states that arguments exist in favour of one of possible solutions.

It is worth quoting here the statement expressed by the Supreme Court in its decision of 27 May 2010, III CZP 32/10[50]; the SC ruled that referring to some identified and detailed controversies might not be a premise for submitting a point of law because their presentation cannot be equated with the existence of a point of law raising serious doubts.

Fifthly, it should be noted that under Article 390(1) of the CCP, points of law can only be presented in order "to be resolved" rather than "to be

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[44] Decision of the Supreme Court of 20 May 2014, I PZP 1/14, OSNP, 2015, No. 11, item 150; Ruling of the Supreme Court of 10 March 2016, III BP 7/15, LEX No. 2026399.

[45] Decisions of the Supreme Court of 25 January 2007, III CZP 100/06, unpublished, of 14 October 2010, III CZP 66/10, unpublished, of 20 October 2010, III CZP 68/10, unpublished and decisions referred therein, of 26 October 201, III CZP 59/11, unpublished.

[46] Decision of the Supreme Court of 7 March 2019, III PZP 1/19, LEX No. 2634557.

[47] See decision of the Supreme Court of 28 March 2019, III CZP 92/18, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2019, No. 12, item 127.

[48] Decision of the Supreme Court of 30 June 2020, III CZP 61/19, LEX No. 3063018.

[49] Decision of the Supreme Court of 16 June 2016, III UZP 7/16, LEX No. 2086108.

[50] LEX No. 590616.

complemented".[51] As a result, if a specific point of law presented by the appellate court is formed as a question to be complemented, this circumstance will justify the Supreme Court's refusal to adopt a resolution.[52] Such questions would always start with "does", always include an alternative reply, and the requested party is expected to choose the correct answer.[53]

To recapitulate, doubts raised by a common court should each time be formulated and justified in such a way as to legitimise its hesitation in choosing a specific legal concept from among options that may be considered. It is rightly emphasised that the Court requesting clarification of a point of law in a given case should specify the essence of its doubts by detailing the reasons why it does not know how to interpret the specific provision, provide arguments which sustain the existence of such doubts in the form of possible alternative solutions to the issue at stake,[54] and then state which of the possible and discussed interpretations it believes to be correct and why.[55] Importantly, the Supreme Court will provide answers only to the extent outlined by the content of the question of law.[56]

If no doubts need to be clarified, the Supreme Court may refuse to adopt a resolution in the case presented under Article 390(1) of the CCP. Please note that even a change in the legal situation which gave rise to serious doubts of the court while hearing the appeal (complaint), as it occurs after such court made a decision to submit a question of law to the Supreme Court for resolution under Article 390(1), may justify the latter's refusal to adopt the resolution.

Further, it should be noted that the Supreme Court may adopt its resolution not because of doubts of the parties regarding the interpretation of the newly enacted provisions but because the point of law arises "while hearing the appeal", and therefore its resolution is essential for awarding the legal remedy at stake.[57]

In other words, if the court examines the appeal at a hearing and the need arises to address a question of law to the Supreme Court, it will not be acceptable to issue a decision on that matter at a closed session. This view is supported by the opinion established based on the previous legal situation, which argues that it is particularly important that the decision to present a point of law be issued

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[51] Decision of the Supreme Court of 14 June 2019, III CZP 8/19, LEX No. 2684185; decision of the Supreme Court of 21 August 2014, III CZP 44/14, LEX No. 1514749; decision of the Supreme Court of 20 August 2021, V CSK 456/20, LEX No. 3398368; decision of the Supreme Court of 13 March 2015, III CZP 3/15, LEX No. 1675927.

[52] Decision of the Supreme Court of 30 March 2011, III CZP 6/11, LEX No. 829176.

[53] Decision of the Supreme Court of 9 April 2008, II PZP 5/08, OSNAPiUS, 2009, Nos. 15–16, item 203.

[54] See decision of the Supreme Court of 12 January 2001, III CZP 45/00, LEX No. 536843; decision of the Supreme Court of 29 November 2005, III CZP 102/05, LEX No. 177297; decision of the Supreme Court of 30 November 2005, III CZP 97/05, LEX No. 175459.

[55] See Decisions of the Supreme Court of 27 August 1996, III CZP 91/96, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1997, No. 1, item 9, of 28 August 2008, III CZP 67/08, unpublished.

[56] Decision of the Supreme Court of 14 October 2010, III CZP 66/10, unpublished, of 20 October 2010, III CZP 68/10, LEX No. 677764 and the decision referred therein, of 26 October 2011, III CZP 59/11, LEX No. 1102648, of 7 May 2015, III PZP 3/15, unpublished.

[57] See also decision of the Supreme Court of 9 July 2009, III CZP 19/09, *Orzecznictwo Sądu Najwyższego Izba Cywilna – Zbiór Dodatkowy*, 2010, No. B, item 48; decision of the Supreme Court of 11 December 2014, III CZP 59/14, BSN, 2015, No. 1.

at a hearing (Article 375 of the CCP) so that the parties are not prevented from expressing their position on that matter.

In the previous legal situation it was commonly believed that the appellate court could not issue a decision to submit a point of law to the Supreme Court at a closed session, but only at a hearing.[58] The shared view was that for the Supreme Court to be able to adopt a resolution on a specific point of law, not only the aforementioned substantive requirements needed to be met, but also "the decision to submit a point of law which raises serious doubts to the Supreme Court needed to be formally correct – it should be made during a procedure pending before the court of second instance, and if such requirement was not met the Supreme Court would refuse to adopt its resolution".[59]

This position of the jurisprudence has lost some of its validity due to the change in the model of examining cases in appeal proceedings as the possibility of hearing them at a closed session was introduced. One of the goals of the lawmaker was to make the appeal procedure swifter, also by making it possible to hear cases at closed sessions (provided that such option is not excluded). The wording "while hearing the appeal" is of key importance here. This means that if the court examines the appeal at a hearing and a need arises to submit a question of law to the Supreme Court, it will be unacceptable to issue a decision on that matter at a closed session. However, issuing such a decision in a closed session is now not entirely excluded. The provisions of Article 374 of the CCP, in its amended wording of 4 July 2019[60] (effective since 7 November 2019) are a novelty as they allow the case to be examined in appeal proceedings at a closed session. This option is available when a hearing is not required. It is up to the appellate court to decide whether the case can be heard in a closed session.[61] Please note, however, that the lawmaker has granted the party the discretion to decide whether their case will be examined by the court of second instance at the hearing. Therefore, we should share the view of the doctrine which argues that if such a request is made, there is no risk to the external or internal transparency of the proceedings, and thus it is the party (the requesting party or other parties) who has a decisive say on whether the hearing should be held or not.[62]

Therefore, it cannot be ruled out that in such a case the court of second instance will conclude that the Supreme Court needs to be addressed "while hearing the appeal" in a closed session.[63] The term "may", included in Article 374, indicates

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[58] Decision of the Supreme Court of 21 April 2016, III CZP 7/16, LEX No. 2066987.

[59] Decision of the Supreme Court of 14 June 2019, III CZP 9/19, LEX No. 2685576.

[60] The Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts, Journal of Laws of 2019, item 1469.

[61] Manowska, M., in: *Apelacja w postępowaniu cywilnym. Komentarz. Orzecznictwo*, 5th ed., Warszawa, 2022, pp. 193 et seq.; Michalska-Marciniak, M., in: Zembrzuski, T. (ed.), *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, Vol. 1, Warszawa, 2020, pp. 845 et seq.

[62] Ruling of the Administrative Court in Białystok of 21 April 2020, I ACa 210/20, LEX no 3030515, and M. Michalska-Marciniak, M. in: *Kodeks postępowania cywilnego…*, op. cit., pp. 845 et seq.

[63] Partyk, A., in: Piaskowska, O.M. (ed.), *Kodeks postępowania cywilnego. Postępownie procesowe. Komentarz aktualizowany*, LEX/el., 2021, Article 390.

that the appointment of a closed session is not obligatory and the decision is left at the discretion of the presiding judge. The circumstances of a case are decisive. In addition, the presiding judge's decision that a hearing is unnecessary is not binding on the court of second instance. In other words, the court may change the order of the presiding judge and decide to hold a hearing.[64]

The next practical question concerns the court authorised to submit a point of law to the Supreme Court. As a matter of fact, the point of law may be submitted to the Supreme Court not only during and appeal hearing but also when it emerges while hearing other legal remedies: complaint or petition against the decision of the court officer.

As follows from the provisions of Article 390 § 1 of the CCP, and as confirmed by the Supreme Court's case-law, the point of law may only be presented by the court of second instance; thus, no such right is vested on the court of first instance. However, due to the requirement to properly apply provisions on appeal proceedings, as laid down in Article 397(3) of the CCP, it can be posited that the court of second instance may present a point of law to the Supreme Court that has arisen during a complaint hearing. It should be noted, though, that if such a point of law is submitted, it must closely relate to the issue resolved in the complaint proceedings, rather than to the crux of the case.

Please note that after the 2019 amending Act[65] entered into force, a request to resolve a point of law which raises serious doubts may be made to the Supreme Court in pending complaint proceedings under Article 390(1) of the CCP, in conjunction with Article 397(3) of the CCP, or under Article 390(1) of the CCP in conjunction with Article 394-1a(2) or Article 394-2(2) of the CCP. In line with Article 397(3) of the CCP, provisions on appellate proceedings should apply accordingly to proceedings pending as a result of a complaint. Hence, since 7 November 2019 a point of law may be submitted to the Supreme Court for resolution also by the court of first instance examining the complaint in a different composition, based on Article 394(1a)(1) and (2) of the CCP.[66]

In light of the aforementioned provisions, the point of law submitted for resolution to the Supreme Court needs to arise when the complaint is being heard. This applies not only to complaints made to the court of second instance (appeal through devolution) but also to horizontal complaints.[67]

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[64] See also Kłos, M., in: Marciniak, A. (ed.), *Kodeks postępowania cywilnego. Tom 2. Komentarz. Art. 205[1]–424[12]*, Warszawa, 2019, p. 932; Wiśniewski, T., in: Dończyk, D., Iwulski, J., Jędrejek, G., Koper, I., Misiurek, G., Pogonowski, P., Sołtysik, S., Zawistowski, D., Zembrzuski, T., Wiśniewski, T., *Kodeks postępowania cywilnego. Komentarz. Tom II. Artykuły 367–505[39]*, Warszawa, 2021, Article 374, Article 375, pp. 82–83.

[65] The Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts, Journal of Laws of 2019, item 1469, as amended.

[66] The Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts, Journal of Laws of 2019, item 1469, as amended.

[67] Decision of the Supreme Court of 25 February 2021, III CZP 18/20, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2021, No. 7–8, item 55; Dziurda, M., 'Przedstawianie zagadnień prawnych na podstawie art. 390 § 1 k.p.c. w czasach epidemii i nowelizacji', *Przegląd Sądowy*, 2021, No. 11–12, pp. 21–42. See also Ereciński, T., in: Ereciński, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze. Tom 3*, Warszawa, 2016, gloss to Article 390, comment 1;

The matter has been subject to review in one of the latest pieces of jurisprudence of the Supreme Court, i.e. its decision of 20 August 2021 (III CZP 40/20),[68] one of many issued recently to respond to requests made to the Supreme Court for the interpretation of regulations, in particular those regarding the amended legal provisions on complaints, introduced by the Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts.[69]

In the reasons for this decision, the Supreme Court discussed whether an answer can be provided to a submitted point of law formulated in respect of a horizontal complaint heard by the court of first instance at a closed session. Relying on the well-established case-law, the SC highlighted that "the point of law may be submitted to the Supreme Court solely by the *ad quem* court, i.e. the court to which the remedy has been addressed, instead of the *a quo* court".[70] It further stated that "given that in the said situation the court of first instance plays the role of an *ad quem* court, no obstacles exist for it to present a point of law under Article 390(1), in conjunction with Article 397(3) of the CCP". The Supreme Court is of the following opinion: "Moreover, it is undeniable that the court ruling in complaint proceedings is competent to submit a point of law to the Supreme Court for resolution not only when assessing the merits of the complaint but also when examining its admissibility, despite the fact that Article 390(1) of the CCP uses the wording 'when hearing' the appeal, and not also, respectively, the complaint (Article 397(3) of the CCP)".

Regarding the court's composition, it was rightly emphasised that "If, in connection with the assessment of the complaint admissibility, a point of law arises that needs to be submitted to the Supreme Court for resolution, such point of law should not be presented by a single judge at a hearing set to draw consequences from the complainant's failure to meet the conditions of admissibility of their complaint (Article 373(1) of the CCP), but rather by the three-member panel which has proceeded to examine the complaint, with the claim admissibility being considered first (Article 397(1) of the CCP).[71] This position was consistently upheld in subsequent Supreme Court decisions.[72] More specifically, the constitutional value of collegial adjudication and the exceptional nature of provisions on single-judge panels were detailed by the Supreme Court in its resolution of 1 July 2021,

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Wiśniewski, T., 'Rozstrzyganie zagadnień prawnych przez Sąd Najwyższy', *Państwo Prawne*, 2019, No. 1, p. 34.

[68] LEX No. 3212830.

[69] Journal of Laws, item 1469; the amendment was introduced based on the explanatory memorandum to the amending bill in order to speed up the proceedings, decrease their costs and reduce organisation issues (see also print of the Sejm of the 8th term No. 3137; point IV.27b); see in this respect: Resolution of the Supreme Court of 1 July 2021, III CZP 36/20, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2021, No. 11, item 74.

[70] See also decision of the Supreme Court of 15 March 2018, III CZP 109/17, LEX No. 2467067.

[71] See decision of the Supreme Court of 8 March 2019, III CZP 89/18, unpublished; decision of the Supreme Court of 14 June 2019, III CZP 33/18, LEX No. 2681229; decision of the Supreme Court of 25 February 2021, III CZP 18/20, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2021, No. 7–8, item 55.

[72] Resolution of the Supreme Court of 25 January 2022, III CZP 4/22, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2022, No. 9, item 85; decision of the Supreme Court of 21 January 2022, III CZP 10/22, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2022, No. 6, item 63.

III CZP 36/20.[73] The Supreme Court explained that single-judge adjudication in any appeal procedure – whether in appellate or complaint proceedings – constituted a departure from the principle of collegial adjudication on remedies at law, specific to the Polish civil procedure. Exceptions to the model should be made through clear legal provisions, and these requirements are not met by Article 397(1) of the CCP whose wording enhances the obligation to adjudicate in a three-member panel, as compared to Article 367(3) of the CCP on appeal proceedings.[74]

Furthermore, it should be underlined that a point of law may be submitted in any case, whether an appeal of the highest instance is admissible therein or not. A point of law can be effectively presented to the Supreme Court solely under valid proceedings. According to the well-established case-law, if one condition for the invalidity of proceedings is met, the Supreme Court refuses to adopt a resolution.[75]

In summary, the resolution of points of law by the Supreme Court has two main functions: on the one hand, it serves to exercise judicial supervision over common courts, and on the other hand, it helps dispel serious legal doubts at the appeal proceedings stage, and cannot go beyond them.[76] Therefore, before a resolution is adopted, the content of the issue at hand is assessed to determine how clear the articulated problem is, and arguments presented in the reasons are reviewed.[77]

Questions of law are an important instrument in the practice of solving difficult cases, unifying jurisprudence, and deciding on vital issues regarding the interpretation or validity of legal provisions. However, as such, they are specific in nature and, rather than being commonly used, should be applied with caution. The institution should not be perceived as a departure from the principle of judicial independence but more as a stabilising element intended to strengthen the sense of legal certainty and security, if not trust in law, at least in the process of its application.

It is the duty of the court submitting a point of law to the Supreme Court to demonstrate that serious legal doubts have emerged in the case at hand and that they need to be clarified before its settlement, necessitating a review of existing case-law and jurisprudence. Only upon establishing that neither doctrine nor case-law adequately explain existing legal controversies may the Supreme Court decide to resolve such altercations by way of resolution. Furthermore, the reply given by the Supreme Court should not be used by the court of second instance as support for formulating its unambiguous position on what it believes to be the proper interpretation of provisions applied to examine complaints.[78]

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[73] *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2021, No. 11, item 74.

[74] See also resolution of the Supreme Court of 7 December 2021, III CZP 87/20, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2022, No. 7–8, item 67, and decision of the Supreme Court of 29 April 2022, III CZP 77/22, LEX No. 3361825.

[75] Decision of the Supreme Court of 30 March 2011, III CZP 131/10, LEX No. 795783.

[76] Marcianiak, A. (ed.), *Kodeks postępowania cywilnego. Tom II. Komentarz do art. 205^1–424^{12}*, Warszawa, 2019.

[77] See resolution of the seven-judge panel of the Supreme Court of 30 April 1999, III CZP 62/98, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1999, No. 10, item 166; decision of the Supreme Court of 16 September 2021, III CZP 108/20, LEX No. 3225666.

[78] See also decision of the Supreme Court of 18 June 2015, III CZP 30/15, LEX No. 1747847; decision of the Supreme Court of 24 May 2002, III CZP 30/02, *Prokuratura i Prawo – wkładka*, 2003, No. 3, item 38, decision of the Supreme Court of 29 November 2005, III CZP 102/05, LEX

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