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PROTECTION AGAINST THE FRUSTRATION  
OF THE RIGHT OF FIRST REFUSAL  
(ARTICLE 600 § 1 OF THE CIVIL CODE)<sup>1</sup>

Reservation of the right to enter a transaction of purchase-sale of a given thing for one of the parties in a legal regulation or legal action in case the other party sold it to a third party – this is how the right of first refusal is defined in Article 596 of the Civil Code. Another provision of the Civil Code stipulates that not only a thing may be a subject to sale but also rights and energy (Article 555); and also the sale of organised sets (complexes) of tangible and intangible assets (a company) are included in the whole statutory regulation. The right of first refusal has been the subject matter of consideration for legal rulings and the doctrine for years<sup>2</sup>. The settlement in this field is not of fundamental importance for this work so I assume that the dominating standpoint<sup>3</sup> is correct

<sup>1</sup> The article makes use of another text by the author: *Udaremnienie prawa pierwokupu – uwagi na tle art. 600 § 1 Kodeksu cywilnego* [Frustration of the right of first refusal – comments in the light of Article 600 § 1 of the Civil Code], sent to print, Stowarzyszenie Notariuszy RP, a publication commemorating the renewal of prof. Maksymilian Padan's doctorate.

<sup>2</sup> Among the latest publications, compare the especially interesting analysis by J. Frąckowiak, *Skutki zastrzeżenia prawa pierwokupu w umowie na tle regulacji w kodeksie cywilnym* [Consequences of reservation of the right of first refusal in a contract in the light of the regulation in the Civil Code], [in:] *Rozprawy z prawa prywatnego. Księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce* [Treatises on Private Law – Jubilee book dedicated to prof. Aleksander Oleszko], (ed.) A. Dańko-Roesler, J. Jacyszyn, M. Pazdan, W. Popiołek, Warszawa 2012, pp. 108–123.

<sup>3</sup> Compare especially the resolution of the Supreme Court of 22 January 1973, III CZP 90/72, OSNC 1973, No. 9, item 147 and the sentence of the Supreme Court of 19 February 2002, IV CKN 784/00, OSNC 2003, No. 1, item 14, and also: R. Czarnecki [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], Warszawa 1972, p. 1324; J. Frąckowiak, *Skutki zastrzeżenia prawa pierwokupu...* [Consequences of reservation...]; Z. Gawlik [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], Volume III, *Zobowiązania – część szczególna* [Liabilities – Special Issues], (ed.) A. Kidyby, Warszawa 2010, p. 177; J. Górecki, *Umowne prawo pierwokupu* [Contractual Right of First Refusal], Kraków 2000, p. 17 and next; A. Kunicki, *Zakres skuteczności prawa pierwokupu* [Scope of effectiveness of the right of first refusal], *Nowe Prawo* 1966, No. 12, p. 1527 and next; M. Nesterowicz [in:] *Kodeks cywilny z komentarzem* [Civil Code with a Commentary], Volume II, (ed.) J. Winiarz, Warszawa 1989, p. 585; P. Machnikowski, Gloss on the ruling of the Supreme Court of 10 October 2008, II CSK 221/08, OSP 2010, vol. 1, p. 21; Z. Radwański, J. Panowicz-Lipska, *Prawo zobowiązań – część szczegółowa* [Law of Liabilities – Details], Warszawa 2012, p. 66 and next; M. Safjan [in:] *Kodeks cywilny. Komentarz do artykułów 450–1088* [Civil Code – Commentary on Articles 450 – 1088], Volume II, (ed.) K. Pietrzykowski, Warszawa 2011, p. 356;

and the entitled to the right of first refusal is subject to the unilateral-modification clause and can declare in due time the will to use this right (Article 597 § 2 of the Civil Code) if the obligor concludes a conditional contract for sale with the third party. The declaration of the will to use the right of first refusal results in an agreement between the obligants that has the same content as the contract between the obligor and the third party.

It is rightly highlighted in the doctrine that susceptibility to actions aimed at thwarting the possibility of satisfying the entitled obligant's interest is in a way typical of the right of first refusal<sup>4</sup>, but the binding normative regulation does not strengthen the protection of the obligee<sup>5</sup> and, as some lawyers say, indeed encourages to attempt to deprive him/her of the possibility to make use of their rights<sup>6</sup>. The critical assessment of the current legal state is accompanied by comments that "the introduction of a clause on the right of first refusal to a contract is an expression of the parties' trust in a partner's loyalty" because the normative regulation is such that one can only believe that the obligor is going to act in accordance with the content of the right of first refusal and the resulting relationship<sup>7</sup>.

There are various reasons why parties undertake actions aimed at thwarting the rights. The most frequently highlighted one is an intention to sell an object to a person who is not entitled to the right of first refusal or a wish to obtain an object that will be freed from the obligation imposed by the right of first refusal. The catalogues of actions that thwart the possibility of satisfying the interest of the entitled party to the right of first refusal include:

- concluding an unconditional contract for sale;
- desisting from notifying the entitled party about the conclusion of a conditional contract for sale;
- concluding a fictitious conditional contract for sale;
- concluding, in order to circumvent the law, a contract for sale that is not subject to the right of first refusal<sup>8</sup>;

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J. Skąpski [in:] *System prawa cywilnego. Prawo zobowiązań – część szczegółowa* [Civil Law System. Liability Law – Details], (ed.) S. Grzybowski, Ossolineum 1976, p. 169; K. Wyżyn-Urbaniak, *Sposoby ochrony uprawnionego z tytułu umownego prawa pierwokupu* [Ways of protecting the entitled to the contractual right of first refusal], Rejent 1996, No. 10, p. 92 ad next and p. 97 and next.

<sup>4</sup> Compare J. Górecki, *Umowne...* [Contractual...], p. 162.

<sup>5</sup> Compare especially J. Górecki, *Umowne...* [Contractual...], p. 162; K. Mularski, A. Olejniczak, *Ochrona uprawnionego z tytułu prawa pierwokupu przed pozornymi oświadczeniami woli* [Protection of the entitled to the right of first refusal against the fictitious declaration of will], RPEiS 2013, vol. 1, p. 29 and next; K. Wyżyn-Urbaniak, *Sposoby ochrony...* [Ways of protecting...], p. 92 and next.

<sup>6</sup> J. Górecki, *Umowne...* [Contractual...], p. 162. In the practice of the right of first refusal administration, one can also notice activities of the obligor and the obligee that aim to extort the implementation of the right of first refusal by using such a third person who does not want to buy an object and only pretends to intend to buy by concluding a conditional contract for sale (compare J. Górecki, *Umowne...* [Contractual...], pp. 164–165).

<sup>7</sup> K. Wyżyn-Urbaniak, *Sposoby ochrony...* [Ways of protecting...], p. 108.

<sup>8</sup> Donation can be such a contract. Contractual extension of the right of first refusal of real property to cases when the a purchaser donates it to a third party would strengthen the protection of the entitled

- encumbering an object with other obligations;
- formulating a conditional contract for sale in the way that discourages the entitled party from making use of the right of first refusal.

Literature presents the analysis of some instruments that serve the protection against actions thwarting the right of first refusal. In particular, it concerns concluding unconditional contracts for sale, concluding contracts for sale that is not subject to the right of first refusal and concluding fictitious contracts<sup>9</sup>. The issue of formulating a contract with the third party in the way that thwarts the right of first refusal is analysed in the doctrine and the judicature rather seldom; and only some aspects of this issue are analysed despite its importance for the economic turnover and difficulties connected with its interpretation<sup>10</sup>.

The consideration presented in this article are limited to the violations of the right of first refusal against which the entitled is protected based on Article 600 § 1 sentence 2 of the Civil Code, which stipulates that the resolutions of the agreement with the third party that are aimed at the frustration of the right of first refusal are void for incapacity. The regulation should be thought to aim to protect the entitled to the right of first refusal against the obligor's actions aimed at stopping the obligees from making use of their rights.

First of all, it is necessary to define the conditions for treating the resolutions of a contract as such that aim to obstruct the implementation of the right of first refusal and next the consequences of this qualification.

It is necessary to start characterising the conditions for treating the resolutions of a contract as such that aim to obstruct the implementation of the right of first refusal by pointing out that what must be established are the resolutions of the contract concluded between the obligor and the third party. It does not refer, however, to any contract but a contract concluded by the obligor with another party that does not have the right of first refusal.

In the process of interpretation, one must take into account the taxonomy of the Act and the circumstance that for the appropriate reconstruction of a legal norm<sup>11</sup> protecting the entitled party cannot be confined to the content of the

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to the right of first refusal although *de lege lata* it was rightly assumed by the Supreme Court to be inadmissible (compare the resolution of the Supreme court of 16 February 1996, III CZP 10/96, OSN 1996, No. 4 item 59, with an approval gloss by M. Litwińska, PPH 1996, No. 11, p 33 and next).

<sup>9</sup> Compare J. Górecki, *Umowne...* [Contractual...], p. 162 and next; K. Mularski, A. Olejniczak, *Ochrona uprawnionego...* [Protection of the entitled...], p. 29 and next and M. Safjan, [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], p. 378 and next; Compare also the ruling of the Appellate Court in Poznań of 14 November 2007, I ACa 698/07, LEX No. 370789.

<sup>10</sup> Compare J. Górecki, *Umowne...* [Contractual...], p. 162 and next; J. Jezioro [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], (ed.) E. Gniewka and P. Machnikowskiego, Warszawa 2013, p. 1105; K. Mularski, A. Olejniczak, *Ochrona uprawnionego...* [Protection of the entitled...], p. 30 and M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], p. 378 and next.

<sup>11</sup> More broadly about the reconstruction of norms from legal regulations, norm segmenting in regulations and a the reconstruction phase of interpretation, compare Z. Radwański, M. Zieliński, [in:] *System Prawa Prywatnego* [System of Private Law], volume 1, *Prawo cywilne – część ogólna* [Civil Law – General Issues], (ed.) M. Safjan, Warszawa 2012, p. 500 and next.

second sentence of Article 600 § 1 of the civil Code. For the analysed norm, it is important that in the first sentence of the paragraph the Act stipulates that: “the implementation of the right of first refusal results in the same contract between the obligor and the obligee as between the obligor and the third party [...]. At the same time, the provisions of Articles 596–599 and 601 of the Civil Code also apply to that contract. This means that a term “a contract with the third part” used by the legislator twice in Article 600 § 1 of the Civil Code refers to the conditions of the contract for sale concluded by the obligor and the third party. It refers to a valid contract for sale under the condition that the entitled party does not make use of the right of first refusal. The legal construction of the right of first refusal in the Civil Code is built in such a way that only in the event of a valid conditional contract for sale concluded with the third party, the entitled party can make use of the right of first refusal. Thus, if the obligor concludes an unconditional contract or an invalid conditional contract with the third party, it means that Article 600 § 1 sentence 2 does not apply. Thus, the determination of the content of the term “frustration of the right of first refusal” is of key importance for the determination of substantive qualification premises of the contract resolutions based on Article 600 § 1 sentence 2 of the Civil Code.

In literature, it is highlighted that since the aim of the right of first refusal is to make it possible for the entitled party to buy a given object, “the direct frustration of the right of first refusal would have to be connected with an attempt to make the purchase of the given object void with regard to the identity or the obligee’s right of first refusal”<sup>12</sup>. The analysis of the aim and function of the ascribed right of first refusal, despite some disputes over the legal character of the relationship between the obligor and the obligee, allows for the determination that by virtue of a legal regulation of the right of first refusal or in the course of legal action, the legislator wants to establish specific protection of the interest of one party in case another party wanted to sell an object. This protection consists in the right to be first to enter a business transaction of purchase but the possibility of applying the right is strictly defined with regard to the time of purchase and the content of the contract that guarantees that the holder of the right will become the owner of the object. A lack of the obligee’s decision in a certain period results in the loss of the right. This means that the legislator, using the term “frustration of the right of first refusal”, highlights a potential threat to the established protection: it refers to a situation when the obligee who intends to make use of his right, in a way against himself, will not be eager to file an adequate declaration. He would make this unfavourable decision with regard to the content of the obligation relationship that occurs in the event of making use of the right of first refusal specified by the resolutions of the contract for

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<sup>12</sup> M. Gutowski, *Bezskuteczność czynności prawnej* [Inefficiency of Legal Action], Warszawa 2013, pp. 279–280.

sale. As a result, the frustration of the right of first refusal means the obligee is deprived of the established protection.

The frustration of the right of first refusal may result from various resolutions of the conditional contract for sale, thus both essential terms (*essentialia negotii*) and clauses (*accidentalia negotii*)<sup>13</sup>. First of all, these will be contract clauses specifying the main obligation aspects, i.e. the price and object, resolutions regarding extra obligations and additional conditions, e.g. a deadline, down payment, the right to withdraw from the contract, compensation for contract termination or a penalty fixed by contract.

It must be emphasised that the content of those contract resolutions must be subject to assessment. The meaning of the parties' declaration of intention should be reconstructed based on the rules of interpretation formulated by Article 65 of the Civil Code. This reconstruction, also taking into account all accompanying circumstances and the general social norms and customs, is made in the course of interpretation in order to define the individual norm established by the parties<sup>14</sup>.

The normative regulation contained in the second sentence of Article 600 § 1 of the Civil Code requires that the aim of introducing given resolutions in a contract is defined and the establishment that their aim is the frustration of the right of first refusal is the premise of protecting the party entitled to the right of first refusal.

The parties to a contract establish its content in order to achieve an intended objective. This objective is legally relevant because while formulating the content of the expressed declarations of intent by the parties, one cannot be limited to the wording of the formulated document but must take into account the agreed intent of the parties and the aim of the contract (Article 65 § 2 of the Civil Code). It is thought that a contract aims to lead to the implementation of a state of things intended by the parties (expressed in the contract or not) or the state of things intended by one party and known to the other party<sup>15</sup>.

However, Article 600 § 1 sentence 2 does not speak about such an aim. It refers to the intent the obligor associates with a particular contract clause regardless of circumstances whether this intent is shared by the third party

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<sup>13</sup> Compare J. Jezioro [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], p. 1105; M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], pp. 378–379.

<sup>14</sup> With respect to the interpretation of declarations of will, compare especially Z. Radwański, *Wykładnia oświadczeń woli składanych indywidualnym adresatom* [Interpretation of Declarations of Will Addressed to Individuals], Ossolineum 1992; *ibid.*, [in:] *System Prawa Prywatnego* [System of Private Law], vol. 2, *Prawo cywilne – część ogólna* [Civil Law – General Issues], (ed.) Z. Radwański, Warszawa 2008, p. 39 and next.

<sup>15</sup> Por. Z. Radwański, [in:] *System Prawa Prywatnego* [System of Private Law], vol. 2, p. 226. Compare also a critical gloss by P. Księżak on the ruling of the Supreme Court of 28 October 2005 (II CK 174/05, OSN 2006, No. 9, item 149), recognising a legal action void because its illegal aim was known only to one party to a contract (gloss in MoP 2007, No. 23, p. 1325 and next).

(the other party of a conditional contract for sale) or not, whether it is known to that party or not. Thus, it is necessary to establish, regardless of the aim of the contract expressed in its content or not, whether any resolutions of the contract with the third party aim at the frustration of the right of first refusal. The intent to frustrate the right of first refusal should constitute the reason of formulating the contract in a particular way.

The clauses that are usually classified as those that aim to frustrate the right of first refusal include the resolutions with regard to the obligation object, especially the price, resolutions restricting additional obligations and clauses establishing links with other contracts<sup>16</sup>.

Reservation of a flagrantly high price in a conditional contract for sale is thought to be relatively frequent practice revealing the intent to frustrate the right of first refusal. It means the price is intentionally inflated. It is, however, highlighted that the establishment of the price at the level exceeding the average market prices is not yet the reason *per se* to convince that it was intended to frustrate the right of first refusal. But the price that absolutely goes beyond market prices may suggest the fictitiousness of a contract<sup>17</sup>. Here, it is necessary to draw attention to difficulties connected with legal classification of the findings regarding prices.

1) The intention of the parties might be a conclusion of an absolutely fictitious contract<sup>18</sup> with a flagrantly high price. The parties of such a contract enter into a secret agreement that the official contract is not binding. The obligor and the third party want to make an impression that the competence of the entitled party to declare the will to make use of the right of first refusal is up-to-date and the deadline is now fixed so if the entitled party fails to use his rights in due time, he will lose the right of first refusal. The conclusion of such a fictitious contract with a flagrantly high price is to discourage even the entitled party who is in possession of sufficient funds to make use of his right of first refusal. However, because the contract is void, the right of first refusal neither expires, nor there is a possibility of making effective use of this right<sup>19</sup>.

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<sup>16</sup> Compare J. Jezioro, [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], p. 1105; M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary], p. 379; J. Skąpski [in:] *System prawa cywilnego...* [System of Civil Law...], p. 171.

<sup>17</sup> M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], p. 378.

<sup>18</sup> It regards a declaration of will that was not filed in order to hide other legal consequences – with the consent of the other party, the declaration of will was filed only under false pretence (about types of pretence more closely, compare K. Mularski, A. Olejniczak, *Ochrona uprawnionego...* [Protection of the entitled...], p. 31, and also the ruling of the Supreme Court of 10 June 2013, II PK 299/12, LEX No. 1393828 and a ruling of the Appellate Court in Katowice of 24 September 2013, I ACa 701/13, LEX No. 1381388).

<sup>19</sup> More loosely about the consequences of invalidity of a fictitious absolutely conditional contract for sale, K. Mularski, A. Olejniczak, *Ochrona uprawnionego...* [Protection of the entitled...], p. 31 and next.



(2) The intention of the parties might be a conclusion of a fictitious contract specifying a different, lower price for a hidden legal relationship that is to bind the parties in fact. So it is a relatively fictitious contract<sup>20</sup> because the parties agree that they will be bound by a contract (described as a dissimulated one) but with a different content than the revealed one. The determination of the consequences of such decisions causes many difficulties. It must be determined whether they are void or not and how effective the undertaken legal steps (parts of the clauses) are.

A fictitious contract is void, however, the validity of a dissimulated (hidden) contract is assessed in accordance with the features of this action (Article 83 § 1 sentence 2 of the Civil Code), thus the requirements for validity specified for a hidden declaration (Article 83 § 1 of the Civil Code)<sup>21</sup>. It refers to the conformity of actions with the normative requirements, the maintenance of which is essential for effective and valid performance of particular actions, while in the event of specific named contracts, it is necessary that parties take into account all elements that are important and constitute the given contract.

In such a situation, the maintenance of a special form *ad solemnitatem*, first of all a notarial act, is of key importance. After years of disputes, it should be assumed with approval that in accordance with the dominating opinion, the relatively fictitious declaration is void if the relatively fictitious (simulated) contract was concluded in a special form *ad solemnitatem* (compare e.g. Article 158 of the Civil Code), required for a dissimulated (hidden) contract<sup>22</sup>. This standpoint is applied also in the event when only a part of a contract is hidden, especially the

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<sup>20</sup> Compare K. Mularski, A. Olejniczak, *Ochrona uprawnionej...* [Protection of the entitled...], p. 32.

<sup>21</sup> In my opinion it is right that the parties entering the fictitious legal action, hiding the result they want to cause do not really perform two different activities but one, the consequences of which they hide, revealing “for the sake of appearance” simulated effects. The use of a term “another activity” in Article 83 only aims to point out that the activity is different than the revealed one. An activity with so defined (dissimulated) results may turn out to be important (compare M. Kepiński, *Pozorność w umowach o przeniesienie własności nieruchomości* [Fictitiousness in agreements on the conveyance of real property], NP 1969, No. 9, p. 1375 and Z. Radwański, [in:] *System Prawa Prywatnego* [System of Private Law], vol. 2, p. 393). The use of terms “a fictitious contract” and “a hidden contract” is to facilitate the specification of legal consequences of the declarations of will and does not indicate approval of the thesis on the performance of two different legal actions.

<sup>22</sup> Compare the rulings of the Supreme Court of 12 October 2001, V CKN 631/00, OSNC 2001, No. 7–8, item 91, of 27 April 2004, II CK 191/03, LEX No. 399727 and of 13 April 2005, IV CK 684/04, LEX No. 284205 and a resolution of the Supreme Court of 22 May 2009, III CZP 21/09, OSNC 2010, No. 1, item 13 and of 9 December 2011, III CZP 79/11, OSNC 2012, No. 6, item 74. Compare also, E. Drozd, *Pozorność w umowach przenoszących własność nieruchomości* [Fictitiousness in contracts conveying real property], *Studia Cywilistyczne* 1974, vol. XXII, p. 73 and next; K. Mularski, *Pozorność...* [Fictitiousness...], p. 636 and next and literature mentioned there; Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna* [Civil Law – General Issues], Warszawa 2013, p. 271; K. P. Sokołowski, Gloss on the resolution of the Supreme Court – Civil Chamber of 22 May 2009, III CZP 21/09, *Orzecznictwo Sądów Polskich* 2010, vol. 6, p. 438 and next.

one specifying its important elements as to the subject matter, e.g. the price<sup>23</sup>. One cannot speak about the maintenance of a special form of a particular contract if its *essentialia negotii*<sup>24</sup> has not been specified in the legally required form. This means that only the actions for which no special form is required will occur to be valid. As a result, a contract for sale of real property is in such a situation void. But a sale of movable property is valid and the parties are bound by the price really agreed upon (the specification of the revealed price will be invalid as being in collision with the real intention of the parties).

The recognition of this standpoint as the right one means that if the intention of the parties to a conditional contract for sale was to limit the fictitious character of a concluded contract to the element of price (instead the one specified in the contract, the hidden, in fact lower, price was to be binding for the parties) and the object to be sold is a movable, the concluded conditional contract (a dissimulated one) is valid and parties are bound by price established in a secret agreement. In such a situation, the conditions for an effective use of the right of first refusal by the entitled party who will buy the object based on the same contract “with the same content as the contract concluded between the obligor and the third party” (Article 600 § 1 sentence 1 of the Civil Code), i.e. for a lower price. However, if the object for sale is real property, because of the invalidity of a conditional contract for sale (a dissimulated contract), neither the right of first refusal expires, nor there is a possibility of using it effectively.

In literature, there is also an opinion that “if it was possible to determine the real price established between the parties, a conditional contract for sale would be valid and only the fictitious price would be void for the entitled party (it would be a modification of the consequence of Article 83 resulting from a special regulation of Article 600 § 1”<sup>25</sup>.

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<sup>23</sup> However, in this scope, a different standpoint is presented in the resolution of the Supreme Court of 9 December 2011 (III CZP 79/11, OSNC 2012, No. 6, item 74), stating that the provision of Article 83 § 1 of the Civil Code “refers to another hidden legal action and not the fact of hiding an element of the content of the same legal action, e.g. a real price in the contract”. At the same time, it refers to the ruling of the Supreme Court of 27 April of 2004 (II CK 191/03, LEX nr 399727), which states that it is inadmissible to prove the underpricing in a notarial act in order to prove the fictitiousness of a contract. It seems that the fictitiousness of a notarial act can be proved by witnesses’ testimonies and interrogation of the parties also between the participants of the action and the limitations provided for in Article 247 of the Civil Procedure Code are not applicable here (sic rightly in the ruling of the Appellate Court in Lublin of 13 March 2013, ACa 773/12, LEX No. 1306003). The standpoint in the two decisions of the Supreme Court results, in my opinion, from an erroneous assumption that the parties performing a fictitious legal action, hiding the result they want to achieve, perform in fact two different acts (compare footnote 27).

<sup>24</sup> Also aims support this type of interpretation. The legislator requires that some actions should be performed in special forms, especially the provision of the turnover certainty (compare K. Mularski, A. Olejniczak, *Ochrona uprawnionego...* [Protection of the entitled...] p. 33).

<sup>25</sup> Sic M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary], p. 379, who refers to W. Czachórski’s standpoint (*Zobowiązania. Zarys wykładu* [Liabilities – Lecture Outline], Warszawa 1994, p. 300); this opinion seems to be shared also by J. Górecki, *Umowne...* [Contractual...], p. 163 and next.



Firstly, it is difficult to approve of the thesis that the provision of Article 600 § 1 of the Civil Code contains special norms in the presence of Article 83 of the Civil Code and that both articles do not have a common scope.

Secondly, Article 600 § 1 sentence 1 of the Civil Code is applied in cases when a conditional contract for sale is valid. As it was already highlighted, the construction of the right of first refusal in the Civil Code is built in such a way that only in the event of a conclusion of a valid conditional contract for sale with the third party, the entitled party can make use of the right of first refusal. It also applies to the protection provided for in Article 600 § 1 sentence 2 of the Civil Code. If a legal regulation is applicable in a specified legal action, it is assumed to be valid. If it were different, the Act uses a term “invalid”. In Article 600 § 1 sentence 2 of the Civil Code there is no term “invalid” contract only a possibility of recognising some of its elements as void for incapacity. This interpretation is strengthened by the way in which absolutely void actions are understood as such that do not result in any legal consequences of those that would if they were valid. This means that it is inadmissible for the legal system to require the recognition of only some elements of a contract as void (and only for the entitled to the right of first refusal) if the whole contract is invalid. This standpoint is in concord with the function ascribed to the provision of Article 600 § 1 sentence 2 of the Civil Code, and this is the protection of the entitled party who can make use of the right of first refusal in the event of the conclusion of a legally binding conditional contract for sale. If by virtue of the binding regulations, whether because of formal reasons or regarding the content of the concluded contract between the obligor and the third party, the contract is invalid, the norm specified in Article 600 § 1 sentence 2 of the Civil Code is not applicable at all. Because there is no subject to the regulation, i.e. legally binding “contract with the third party” against which the entitled party should be protected. His right of first refusal is not going to be violated. Invalidity of that contract means that the entitled party continues to have the right of first refusal with all the consequences specified in Article 597 and next of the Civil Code. Since a fictitious action is always invalid, a hidden action may prove to be valid. Then, it is possible to examine its content and aims in the light of the criteria expressed in Article 600 § 1 sentence 2 of the Civil Code<sup>26</sup>.

It is not justified to pursue *per fas et nefas* such a result of the interpretation of the Civil Code regulations to enable the entitled to use his right of first refusal. The aim of the legal regulation of Article 600 § 1 sentence 2 of the Civil Code is only to protect the entitled party against depriving him of his right that

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<sup>26</sup> This is how the Supreme Court interprets the possibility of examining the content and aim of a legal action with regard to the assessment whether it aims to circumvent the law or violates social rules. Such qualification is not possible in the event of a fictitious act as a void one and only a hidden action can be qualified as such if, based on Article 83 § 1 sentence 2, it might turn out to be valid (compare the ruling of the Supreme Court of 22 November 2012, UK 246/12, LEX No. 1308046).

he will be able to use when there is a statutory condition for declaring the will to make use of the right of first refusal. It is always the conclusion of a valid conditional contract for sale between the obligor and the third party. For the assessment of the contract validity, the content of Article 600 § 1 sentence 2 is legally irrelevant.

(3) Finally, the third situation – among differently classified contractual regulations with regard to price – takes place if in order to frustrate the right of first refusal the parties' aim is to introduce to the contract a price that considerably exceeds the market value of an object but it is not a fictitious contract but a binding one. The inflated price that the third person is ready to pay is to discourage the entitled to make use of the right of first refusal. In such a case, Article 600 § 1 sentence 2 of the Civil Code is applicable.

Apart from the provisions regarding the price of sale, the clauses that are classified as those that are intended to frustrate the right of first refusal include clauses making reservations of additional obligations, especially those that make the entitled a subject to especially difficult additional obligations that make the purchase absolutely unattractive<sup>27</sup>. These are often very untypical obligations that are personal in character. However, it is rightly highlighted in literature that the personal nature of these obligations reserved in a contract with the third party does not allow for recognising them as frustrating the right of first refusal<sup>28</sup>. This interpretation is supported in the content of Article 600 § 2 of the Civil Code, which provides for a possibility of paying the value of the obligation without the necessity to obtain the obligor's consent if the contract concluded between the obligor with the third party specifies an additional obligation the entitled cannot fulfil<sup>29</sup>. The regulation takes into account obligations that because of their character and the entitled party cannot be fulfilled. In general, it applies to such

<sup>27</sup> M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], s. 379; J. Skąpski [in:] *System prawa cywilnego...* [System of Civil Law...], p. 171.

<sup>28</sup> J. Jezioro [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], p. 1105; M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], pp. 378–379.

<sup>29</sup> There is no possibility of exchange if the entitled to the right of first refusal is the State Treasury or an organisational unit of local government because such an obligation is then treated as unreserved (Article 600 § 2 of the Civil Code). The scope of application of Article 600 § 2 of the Civil Code is subject to narrowing interpretation in the judicature and the doctrine. Compare especially the resolution of the Supreme Court of 21 April 1971, (III CZP 17/71, OSN 1971, No. 11, item 194), stating that it is not possible to treat the lifelong right to use a flat free of charge (personal easement) established on the real estate as unreserved due to the fact that the State Treasury made use of the right of first refusal and became the owner of the real estate. About the application of Article 600 § 2 of the Civil Code and the rights of the life annuitant and the Agricultural Property Agency if it makes use of the right of first refusal based on Article 4 of the Act of 11 April 2003 on the development of the agricultural system, compare J. Matys, *Niektóre problemy umowy dożywocia na tle ustawy o kształtowaniu ustroju rolnego* [Some issues connected with a contract for life usufruct in the light of the Act on the development of the agricultural system], *Nowy Przegląd Notarialny* 2005, No. 1, p. 30 and next and J. Mikołajczyk, *Uwagi na tle ustawy o kształtowaniu ustroju rolnego* [Comments on the Act on the development of the agricultural system], *Studia Prawno-Ekonomiczne* 2004, No. 69, p. 111 and next.

obligations that the entitled cannot fulfil because of their personal character, e.g. writing a literary work etc., although it can also be an additional obligation binding the third party to give the seller individually specified objects<sup>30</sup>. In such and similar situations, the entitled to the right of first refusal can make use of it covering the value of the obligations and this results in a change in the content of the obligation in the course of the implementation of the right of first refusal<sup>31</sup>.

The proof of an untypical obligation, i.e. a very rare use of them in the civil-legal turnover, is not recognised as sufficient. It is necessary to determine that by introducing them to the contract the parties wanted to frustrate the right of first refusal. Thus, it is rightly emphasised that the assessment must be made carefully and recommended that in each case an analysis of the relationship between these resolutions and the aim to frustrate the right of first refusal should be made<sup>32</sup>.

The resolutions in the contract with the third party that aim to frustrate the right of first refusal also include the introduction of additional contractual reservation in the form of the seller's right to withdraw from the contract if the entitled decides to use the right of first refusal<sup>33</sup> or a decision made in case such a situation takes place to establish the seller's right to repurchase the object. It can also be, introduced in case the entitled uses his right of first refusal, a decision to establish options of purchase for the seller or another person. It can also be an option of exchange, long-term rent or lease<sup>34</sup>. Attention is also drawn to the possibility of making the reservation in the form of a clause that introduces links between this contract and elements of another contract and this way reasonably decreases the attractiveness of the purchase<sup>35</sup>.

The implementation of the right of first refusal is a formal prerequisite of making use of the protection against the actions aimed at the frustration of the right of first refusal. The entitled party implements the right by filing a declaration to the obligor, i.e. the seller (Article 597 § 1 sentence 1 of the Civil Code), which becomes binding the moment it reaches the obligor and he can get to know its content (Article 597 § 2 sentence 1 in connection with Article 61 § 1 of the Civil Code)<sup>36</sup>. It results in a contract between the obligor and the obligee that is in general the same as the conditional contract concluded by the obligor and the third party (Article 600 § 1 sentence 1 of the Civil Code). The only differences

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<sup>30</sup> Compare the explanation of reasons for the resolution of the Supreme Court of 21 April 1971, III CZP 17/71, OSN 1971, No. 11, item 194.

<sup>31</sup> J. Skąpski [in:] *System prawa cywilnego...* [System of Civil Law...], p. 172.

<sup>32</sup> M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], pp. 378–379.

<sup>33</sup> J. Skąpski [in:] *System prawa cywilnego...* [System of Civil Law...], p. 171.

<sup>34</sup> Compare M. Gutowski, *Bezskuteczność...* [Inefficiency...], pp. 281–282.

<sup>35</sup> M. Safjan [in:] *Kodeks cywilny. Komentarz...* [Civil Code – Commentary...], p. 379.

<sup>36</sup> In a special regulation contained in Article 110 item 1 of the Act of 21 August 1997 on real property management (uniform text: Journal of Laws of 2010, No. 102, item 651 with amendments that followed), a declaration of will to make use of the right of first refusal is not required to be filed to another person and becomes valid on its submission to a notary.

are that the buyer is the entitled to the right of first refusal and the sale is unconditional with the legal substantive consequence, i.e. the conveyance of property<sup>37</sup>.

In accordance with the principle of freedom to choose a form of legal action (Article 60 of the Civil Code), the declaration can be made in different forms. This rule does not apply to cases when the right of first refusal relates to a contract for sale that requires the use of special forms in order to be valid. As Article 597 § 2 sentence 2 of the Civil Code stipulates, in such a situation, the declaration of the decision to use the right of first refusal should be filed in this particular special form. If the subjects to the right of first refusal are objects or rights requiring a special form of sale to remain valid, the failure to comply with that requirement in the course of implementing the right of first refusal makes the declaration invalid and does not result in the contract for sale between the obligor and the obligee.

The thesis that the implementation of the right of first refusal is the necessary prerequisite of the use of protection measures specified in Article 600 § 1 sentence 2 of the Civil Code should not raise doubts. It was highlighted earlier that the legislator protects the entitled in a situation when the entitled and the obligor enter into a contract with the third party that is specified in Article 600 § 1 sentence 1 of the Civil Code. If the entitled does not use the right of first refusal, he deprives himself of this right and makes the annulment of the contract between the obligor and the third party senseless. At the same time, Article 600 § 1 sentence 2 of the Civil Code provides the entitled with protection in the event when he wants to make use of his right despite those clauses that really discourage him from doing it. It is true that then the valid contract between the obligor and the obligee will be the same as the conditional contract between the obligor and the third party. However, then and only then, the entitled will be subject to the protection that the analysed provision stipulates. The judicature confirms that the above interpretation of Article 600 § 1 of the Civil Code is correct. The Appellate Court in Poznań stated in its ruling of 21 November 2007 that “Article 600 § 1 second sentence regards only these cases in which the right of first refusal is implemented and a contract between the obligor and the entitled (the first sentence of the provision) is concluded”<sup>38</sup>. Also in literature, void resolutions specified in Article 600 § 1 of the Civil Code that aim to frustrate the right of first refusal are linked with “the implementation of the right of first refusal based on the contract for sale including an inflated price”<sup>39</sup>.

Thus, the application of Article 600 § 1 sentence 2 of the Civil Code should be denied in the event when the obligor and the third party did not conclude a contract for sale (in accordance with Article 600 § 1 sentence 1 of the Civil

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<sup>37</sup> Compare the decision of the Supreme Court of 17 July 2008, II CSK 114/08, LEX No. 465911.

<sup>38</sup> I ACa 920/07, Lex No. 370761.

<sup>39</sup> J. Górecki, *Umowne...* [Contractual...], p. 164.

Code). Either because of an unconditional character of a contract for sale (the Appellate Court in Poznań analysed this fact in the quoted ruling of 21 November 2007), or because of any other reasons, e.g. when a declaration of the use of the right of first refusal was not filed or the filed declaration proved to be invalid.

Apart from the implementation of the right of first refusal, there are not other prerequisites of the entitled party's protection against the resolutions that aim to frustrate his right of first refusal. The above-discussed resolutions become void *ex lege* and do not have to be ruled by court. However, in the case of a dispute, the entitled party must prove the prerequisites of the recognition of particular provisions of the conditional contract for sale as aiming to frustrate the right of first refusal, thus are void in accordance with Article 600 § 1 item 2 of the Civil Code.

The consequence of recognising these resolutions as void towards the entitled is such a form of defectiveness of a legal transaction that "is characterised by full validity and effectiveness towards all the parties with the exception of that who is subject to the relative ineffectiveness of his action", which means that a legal action is important but there is a limitation of the circle of entities "for whom the action maintains a complete legal validity"<sup>40</sup>. Since in the case of defectiveness specified in Article 600 § 1 sentence 2 of the Civil Code, only some resolutions in the concluded contract are subject to a sanction of voidability, it is justified to use a term "partial voidability"<sup>41</sup> in these cases.

As a result, a conditional contract for sale containing resolutions that aim to frustrate the right of first refusal develops the content of a legal relationship with a party who is entitled to use the right of first refusal in such a way that the resolutions of the contract that aim to frustrate the right of first refusal will not shape the content of this relationship.

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<sup>40</sup> M. Gutowski, *Bezskuteczność...* [Inefficiency...], p. 47; similarly, Z. Radwański, A. Olejniczak, *Prawo cywilne...* [Civil Law...], p. 350.

<sup>41</sup> M. Gutowski, *Bezskuteczność...* [Inefficiency...], p. 421.

## **PROTECTION AGAINST THE FRUSTRATION OF THE RIGHT OF FIRST REFUSAL (ARTICLE 600 § 1 OF THE CIVIL CODE)**

### **Summary**

The right of first refusal (Article 595 and next of the Civil Code) create an obligor's obligation to sell objects to the third party unless the entitled party uses his right. The obligor and the third party can introduce to the contract they enter into various resolutions that aim to frustrate the right of first refusal. In accordance with Article 600 § 1 of the Civil Code, these resolutions are void. The work analyses the concept of frustration of the right of first refusal, shows prerequisites of the protection of the entitled that is specified in Article 600 § 1 of the Civil Code and explains the legal consequences, i.e. the sanction of partial relative voidability.

## **OCHRONA PRZED UDAREMNNIENIEM PIERWOKUPU (ART. 600 § 1 KODEKSU CYWILNEGO)**

### **Streszczenie**

Prawo pierwokupu (art. 596 i n. k.c.) kreuje po stronie zobowiązanego obowiązek sprzedaży rzeczy osobie trzeciej pod warunkiem, że uprawniony ze swego prawa nie skorzysta. Zobowiązany i osoba trzecia mogą wprowadzać do zawieranej warunkowej umowy sprzedaży postanowienia mające na celu udaremnienie prawa pierwokupu. Na podstawie art. 600 § 1 Kodeksu cywilnego postanowienia te są nieskuteczne względem uprawnionego. Opracowanie analizuje pojęcie udaremnienia prawa pierwokupu, wskazuje przesłanki zastosowania określonej w art. 600 § 1 k.c. ochrony uprawnionego oraz wyjaśnia konsekwencje prawne, czyli sankcję częściowej bezskuteczności względnej.

## **LA PROTECTION CONTRE L'ANÉANTISSEMENT DU PRIMOCHAT (ART. 600 § 1 DU CODE CIVIL)**

### **Résumé**

Le droit de primoachat (art. 596 et suivants du code civil) forme de la part de personne engagée le devoir de vente au tiers sous condition que cette personne ne profitera pas de son droit. La personne engagée ainsi que la personne tiers peuvent introduire au contrat conditionnel de vente tous les points qui ont le but d'anéantir le droit de primoachat. Vu l'art. 600 § 1 du Code civil ces décisions ne sont pas



efficaces pour la personne engagée. L'article analyse la notion de l'anéantissement du droit de primoachat, indique les prémisses pour appliquer la protection de la personne engagée définie dans l'art. 600 § 1 du Code civil et il explique aussi les conséquences légales, c'est-à-dire la sanction partielle de l'inefficacité relative.

## **ЗАЩИТА ОТ ВОСПРЕЯТСТВОВАНИЯ ПРЕИМУЩЕСТВЕННОМУ ПРАВУ ПОКУПКИ (СТ. 600 § 1 ГК)**

### **Резюме**

Преимущественное право покупки (ст. 596 ГК) наделяет соответствующего субъекта обязательством продажи вещей третьему лицу при условии, что имеющий эти полномочия не воспользуется своим правом. Наделённый обязательством вместе с третьим лицом могут включить в составляемый условный договор продажи постановления, имеющие целью воспрепятствование преимущественному праву покупки. На основе статьи 600 § 1 Гражданского кодекса эти постановления являются неэффективными по отношению к наделённому правом. В исследовании подвержено анализу понятие воспрепятствования преимущественному праву покупки, указываются предпосылки применения определённой в ст. 600 § 1 ГК защиты наделённого правом, а также выясняет последствия правового характера, иначе говоря – санкции частичной относительной неэффективности.