

ADAM OLEJNICZAK

ANTICIPATORY BREACH OF CONTRACT
ACCORDING TO ARTICLE 492¹ OF THE CIVIL CODE

I. Durability and stability of legal regulations in codes is a matter of the past. The Civil Code has been in force for over half a century now but there has been no single year without amendments to that Act over the last decade. Many of them resulted from the necessity of introducing the European Union norms to the Polish legal system. It also concerns Directive 2011/83/EU of the European Parliament and the Council on consumer rights of 25 October 2011 (OJ L 304/64, 22 November 2011, p. 64), commonly called the directive on consumer rights. It amends Directive 1999/44/EC of the European Parliament and the Council on certain aspects of the sale of consumer goods and associated guarantees and also amends Council Directive 93/13/EEC on unfair terms in consumer contracts. At the same time, the new Directive on consumer rights repeals Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts¹.

As a result of the amendments to the European Union law, it was necessary to adjust Polish legislature to the provisions of the new Directive. Thus, the act on consumer rights of 30 May 2014 was passed (Journal of Laws of 2014, item 827), which not only amended the Civil Code but also substituted the regulations in the repealed acts: Act on the protection of certain consumer rights and on liability for damage caused by a hazardous product of 2 March 2000 (uniform text: Journal of Laws of 2012, item 1225) and Act on special conditions of the consumer sale and on the amendment to Civil Code of 27 July 2002 (Journal of Laws No. 141, item 1176 with amendments that followed). The new law entered

¹ To find more about amendments to consumer law introduced by the Act, compare *Ustawa o prawach konsumenta. Kodeks cywilny (wyciąg). Komentarz* [Act on consumer rights – Civil Code (an extract) – Commentary], B. Kaczmarek-Templin, P. Stec and D. Szostek (eds.), Warszawa 2014; A. Olejniczak, *Komentarz do zmian w kodeksie cywilnym wynikających z ustawy z dnia 30 maja 2014 r. o prawach konsumenta* [Commentary on amendments to the Civil Code resulting from Act on consumer rights of 30 May 2014], [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], A. Kidyby (ed.), vol. III, *Zobowiązania. Część ogólna* [Obligations – General issues], Warszawa 2014, pp. 19–27.

into force on 25 December 2014, after six-month *vacatio legis* from the day of its publication.

The amendments to the Polish law introduced by the Act on consumer rights substantially modified the former regulations on liabilities. The modifications concern regulations on consumer contracts, especially those negotiated in untypical circumstances (away from business premises and distance ones) in respect of the provision of information, formal requirements connected with concluding such contracts and the right to withdraw from a contract. They also regard regulations on the sale contract, especially amending the Civil Code in respect of warranty and guarantee. At the same time, the new law introduces changes to general regulations on contractual obligations (Article 383¹ of the CC was added) and regulations in respect of the fulfilment of obligations and the consequences of their non-fulfilment².

Not undermining the importance of the consumer protection issue, literature should also take an interest in the issue of the non-fulfilment of contractual obligations in the light of the amended Civil Code of 30 May 2014 characterised above. These are two changes in the Civil Code, i.e. the extension of the Act by the addition of Article 492¹ and the modification of the regulation in Article 494. The former is unquestionably a completely new regulation in the Polish legal system, and these are usually not free from interpretational doubts. The article aims to analyse Article 492¹ of the CC in order to answer the question about the scope of its application and to determine the rationale and consequences of the use of protection that the regulation provides for the creditor. It concerns the position of the right to withdraw from the contract in the statutory regulation on the consequences of the non-fulfilment of obligations.

II. The new regulation of the Civil Code provides the creditor with a statutory right to withdraw from the contract in case of the debtor's refusal to fulfil the obligation. It has been highlighted in literature that there is an unclear situation of the creditor whom the debtor expressly informs 'in advance', i.e. still before

² To find more about amendments to the law on liabilities introduced by Act on consumer rights, compare J.R. Antoniuk, [in:] *Ustawa o prawach konsumenta, komentarz do art. 494* [Act on consumer rights, commentary on Article 494]; M. Lemkowski, *Zapowiedź niespełnienia świadczenia (protestatio) jako podstawa odstąpienia od umowy wzajemnej (art. 492¹ KC)* [Announcement of refusal to fulfil the obligation (protestatio) as grounds for withdrawal from the mutual contract (Article 492¹ of the CC)], MoP 2015, No. 1, pp. 9–17; A. Olejniczak, *Komentarz do zmian w kodeksie cywilnym wynikających z ustawy z dnia 30 maja 2014 r. o prawach konsumenta* [Commentary on the amendments to the Civil Code resulting from Act on consumer rights of 30 May 2014], [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], A. Kidyba (ed.), vol. III, *Zobowiązania. Część ogólna* [Liabilities – General issues], Warszawa 2014, pp. 19–27; P. Stec, [in:] *Ustawa o prawach konsumenta, komentarz do art. 492¹* [Act on consumer rights: Commentary on Article 492¹], K. Zagrobelny, [in:] *Kodeks cywilny. Komentarz* [Civil Code – Commentary], E. Gniewek and P. Machnikowski (eds.), Warszawa 2014, commentary on Article 492¹ and Article 494.

the date of the fulfilment of the obligation, that he will not fulfil his obligation³. The doubts concerned the consequences of the refusal to fulfil the obligation and in particular the recognition of the non-fulfilment of the obligation and that there are grounds to withdraw from the contract and to claim compensation. It has also been suggested that such a statement made by the debtor who is delayed should lift the creditor's obligation to provide the debtor with an additional time limit to fulfil the obligation⁴. Thus, the new regulation concerns an issue noticed by the doctrine and called an anticipatory breach of contract, which also covers a situation when, because of other reasons than the debtor's refusal to fulfil the obligation, it becomes clear that the obligation will not be fulfilled on time. In every case, it concerns a certain event that does not constitute the non-fulfilment of the obligation *per se* but it indicates that such a consequence will take place in the future. This creates a situation in which the creditor, bound by the obligation relationship, must assume in his economic and legal calculations that the debtor will not fulfil his obligation. Thus, passing the new regulation, the Polish legislator addresses the issue of great practical importance. Thanks to the new regulation, the creditor is given legal grounds for withdrawing from a contract, *expressis verbis* defined in the Civil Code, which creates favourable conditions for negotiating a contract with another party.

The range of application of Article 492¹ of the CC is very broad because it covers every type of **obligation in a mutual contract**. The legislator introduced a new provision to the legal regulation on the non-fulfilment and inappropriate fulfilment of obligations in mutual contracts, thus deciding that the norm will be used exclusively towards obligations from these contracts. Taking into account a broader and broader definition of a mutual contract, it is necessary to share an opinion that in some cases this is the way in which parties will try to avoid the limitation, the sense of which is not clear⁵.

The new provision can be applied in ordinary, consumer and professional trade and commerce, thus regardless of the type of parties to the mutual contract, in spite of the amendment to the Civil Code introduced by the Act on the protection of consumer rights. However, in connection with the commonness of **consumer contracts**, it will undoubtedly be broadly applied in case of a trader's

³ Compare especially J. Napierała, *Odpowiedzialność dłużnika za nieuchronne niewykonanie zobowiązania* [Debtor's liability for the unavoidable non-fulfilment of an obligation], Warszawa 1997. Compare also A. Klein, *Ustawowe prawo odstąpienia od umowy wzajemnej* [Statutory right to withdraw from the mutual contract], Wrocław 1964, p. 73; M. Lemkowski, *Wykonanie i skutki niewykonania zobowiązań z umów wzajemnych. Komentarz do art. 487–497 Kodeksu cywilnego* [Fulfilment and non-fulfilment of mutual contracts' obligations – Commentary on Articles 487–497 of the Civil Code], Warszawa 2012, pp. 61–64; *ibid.*, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 9 and the following.

⁴ Compare W. Popiołek, [in:] *Kodeks cywilny* [Civil Code], vol. II, *Komentarz do artykułów 450–1088* [Commentary on Articles 450–1088], K. Pietrzykowski (ed.), Warszawa 2011, p. 108; T. Wiśniewski, [in:] *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania* [Commentary on the Civil Code – Book III – Liabilities], vol. 1, Warszawa 2009, p. 760.

⁵ Compare M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 10.

refusal to fulfil an obligation towards a consumer. The Preamble to Directive 2011/83/EU on the consumer rights and Article 18 of the Directive provide that if a trader has failed to deliver the goods at the time agreed upon with the consumer, before withdrawing from the contract the consumer shall call upon him to make a delivery within an additional period of time and shall be entitled to terminate the contract if the trader fails to deliver the goods within that additional time⁶. The provision should not be applied, however, if a trader has explicitly refused to deliver the goods. It should not be applied also in certain circumstances, in which a date of delivery is essential, e.g. in case of a wedding dress, which should be delivered before the wedding ceremony. It should not be applied also in the circumstances, in which a consumer informs the trader that the delivery on a specified time is essential. In these specific cases, if the trader fails to deliver the goods on time, the consumer shall be entitled to terminate the contract immediately after the time limit agreed upon earlier ends.

However, it is rightly noticed in literature that the new regulation also applies to a situation in which the debtor refusing to pay is a consumer; then the trader is entitled to withdraw from the contract⁷.

III. According to the provision of Article 492¹ of the CC, if the party obliged to fulfil an obligation states that he will not fulfil that obligation, the other party is entitled to withdraw from the contract without specifying an additional period of time as well as before the time limit set in the contract ends. It is necessary to clarify whether the applicability of Article 492¹ of the CC concerns both **fixed-time obligations** and **open-ended** ones. It is also necessary to establish if in case of fixed-term obligations it applies only to situations in which a debtor states that he refuses to fulfil an obligation when the time limit for it has not ended yet, or also to a case of a refusal after the time limit for the fulfilment of an obligation. The wording of Article 492¹ of the CC, especially the words ‘also before [sic! – A.O.] the set time to fulfil an obligation’, suggests that the provision is applied not only in this situation, thus does not only concern fixed-term contracts before the time limit ends. It may be applied also when a debtor refuses to fulfil an obligation after the time limit ends and when he refuses to fulfil an open-ended obligation (before the creditor calls upon him to fulfil the obligation, Article 455 of the CC). According to Article 492¹ of the CC, the statement made by the debtor in the period when the fulfilment of an obligation is delayed is also relevant.

⁶ The Polish legislator introduced relevant legal regulation in the provision of Article 543¹ of the CC, which stipulates that in case of consumer sale, if the contract does not determine otherwise, the sales person is obliged to provide the buyer with the object without delay, not later than 30 days from the contract conclusion, and in case of the seller’s delay, the buyer may give the seller additional period of time for the provision of the object, and after it passes with no effect, he may withdraw from the contract. Besides, the provisions of Articles 492, 492¹ and 494 of the CC are applied.

⁷ Sic! M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 9.

Because of that, it is necessary to establish the relationship between the new regulation and the provisions on the debtor's delay and the creditor's entitlement to withdraw from the contract, especially Article 491 of the CC.

The issue is especially important as other provisions provide that, in order to withdraw from the mutual contract, the creditor must give the debtor additional time limit (e.g. Article 491 and Article 543¹ § 2 of the CC), and impose a condition for the entitlement to withdraw from the contract: the debtor's responsibility for the delay (e.g. Article 491 of the CC), or do not impose such a condition (e.g. Article 543¹ § 2 of the CC). On the other hand, the debtor having the right in accordance with Article 492 of the CC can make use of it without the necessity of giving additional time for the fulfilment of the obligation in accordance with its wording.

It must be clearly emphasised that **the legislator does not bind the new regulation and the provisions for the debtor's delay together** (Articles 491–492 of the CC), formulating a new provision the wording of which in no place mentions the debtor's responsibility. **There are also no grounds for different treatment of the situation when the refusal takes place before the time for obligation fulfilment ends and during the delay.** The legislator does not demand that the debtor's refusal to fulfil the obligation be justified by circumstances for which the debtor is not responsible. Article 492¹ of the CC does not point out any circumstances excluding the creditor's entitlement to withdraw from the contract. Based on the wording and expression of the new regulation in the Civil Code, a conclusion must be drawn that the statutory right to withdraw from the contract expressed in Article 492¹ of the CC does not depend on the debtor's responsibility for the delay in the obligation fulfilment⁸. It is not a novelty in the Civil Code because Articles 635 and 783, sentence 1 of the CC contain such rules.

The debtor's statement on his refusal to fulfil the obligation specified in the mutual contract is the conduct violating the contract of an obliging relationship between the parties, which is illegal and gives grounds for protecting the creditor. Nevertheless, if the provisions currently in force provide the debtor, in the existent circumstances, with the right to refuse to fulfil the obligation, making use of that right does not allow for protecting the creditor in accordance with Article 492¹ of the CC. As a result, it is true that most often the creditor will make use of the right to withdraw when the debtor will be responsible for the refusal to fulfil the obligation, but the lack of the debtor's responsibility for the reason of the refusal does not have to deprive the creditor of the right to terminate the contract unilaterally if he acted contrary to the obligation. On the other hand, the possible **debtor's responsibility will be an important factor in liability for damages.** Article 492¹ of the CC, however, does not define it. Article 494 of the CC does it referring (*expressis verbis* after the amendment) to general rules of liability for

⁸ Differently: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 11.

non-fulfilment of an obligation and in this scope a contractual regulation of the consequences of non-fulfilment of an obligation is possible.

At the same time, it is necessary to emphasise that **the provision is a self-contained one** in the sense that it does not matter whether the creditor is entitled to withdraw from the contract based on other provisions. This means that the creditor's right provided by Article 492¹ of the CC to withdraw from the contract without the necessity of giving the debtor an additional period of time to fulfil the obligation can be executed regardless of the delay in the fulfilment of the obligation.

If the debtor makes a statement about the refusal after the time limit for the fulfilment of the obligation ends, the right to withdraw from the contract can be executed regardless of other regulations providing the creditor's entitlement to withdraw from the contract even if those provisions point out the necessity of giving additional time limit as a premise of the withdrawal. It is necessary to approve of the stand that **if the creditor can withdraw from the contract on various grounds** (e.g. Articles 491, 492, 492¹ of the CC), **the entitled is the party that has the choice** and it is him who should decide which entitlement he would like to be applied⁹. However, it is not applied to the case when the debtor's refusal takes place during the creditor's delay if he earlier made a statement that he is not going to accept the debtor's fulfilment of the obligation. In this case, the provision of Article 492¹ of the CC is not applied because the consequences of the creditor's delay are regulated in Article 486 of the CC and there is a lack of grounds to protect him as he breaks his obligations. Similarly, the provision of Article 492¹ of the CC is not applied if the obligation became impossible to fulfil. It is regardless of the fact whether the debtor is responsible or not for the reasons why the obligation cannot be fulfilled. If the debtor's statement that is discussed in Article 492¹ of the CC is to have sense, it must refer to the obligation that the debtor can fulfil within the existent commitment. Only then the refusal to fulfil constitutes a new situation in which the creditor deserves protection. On the other hand, if the debtor's statement is a confirmation of the fact that the fulfilment of the obligation is not going to take place because of the inability to fulfil the obligation, the situation is regulated by the provisions of Articles 493 and 495 of the CC and the circumstance of making a statement by the debtor is irrelevant from the legal point of view¹⁰.

The aim and functions attributed to Article 492¹ of the CC suggest that it is necessary to interpret the term obligation strictly as the object of commitment. It is the debtor's behaviour towards the creditor indicated in the contents of

⁹ Compare K. Zagrobelny, [in:] *Komentarz, teza 10 do art. 492¹ k.c.* [Commentary, thesis 10 on Article 492¹ of the CC].

¹⁰ Similarly: K. Zagrobelny, [in:] *Komentarz, teza 5 do art. 492¹ k.c.* [Commentary, thesis 5 on Article 492¹ of the CC] and P. Stec, *Ustawa o prawach konsumenta, teza 3 do art. 492¹ k.c.* [Act on consumer rights, thesis 3 on Article 492¹ of the CC].

the obligation. The concept is essential for the decision about the application of Article 492¹ of the CC if the debtor's refusal concerns the fulfilment of a part of the obligation. It is similar if the contract is the source of the commitment with a temporary obligation and the debtor's refusal does not cover all the obligations due in particular periods. It is justified to draw a conclusion that the creditor can make use of his right only when **the debtor states that he is not going to fulfil the object of his commitment, thus the whole due obligation**¹¹. However, the assessment whether the debtor's refusal covered the whole due obligation towards the creditor should take into account the situation at the moment of refusal, thus with the consideration of the fact that the commitment might have been partly fulfilled. Different interpretation opens the way to infringe the debtor's interest, which is hardly protected.

IV. Some doubts occur with the assessment of the contents and character of the debtor's statement about the refusal to fulfil the obligation. The provision of Article 492¹ of the CC only stipulates that it refers to the situation when the debtor "states that he will not fulfil the obligation". Thus, it is necessary to explain the character of this statement because only then it will be possible to answer such questions as e.g. whether it is possible to make a statement in an implicit way or whether the debtor must do it in person, whether he can annul the statement or whether he can fulfil the obligation after having stated that he refuses to fulfil the obligation.

The declaration of intent, in accordance with the legal definition in Article 60 of the CC, should be perceived only as an element of the process of performing a legal action. It concerns "the intent of the person performing a legal action". In connection with some types of conduct, there are doubts whether they take the form of a legal action¹². Making a payment or appropriating movables can be an example. The conduct of the entity entitled to a specified communicative sense causing the formation, change or termination of the civil law relationship should be treated as a declaration of intent. In the case we are interested in, it will concern attributing a certain meaning to the announcement of other party of the contract that he will not fulfil the obligation. Such a declaration does not constitute an element of a legal action. In the Polish doctrine, especially under the influence of Z. Radwański's research results, there is a popular stand that specifies a legal action and its core, the declaration of intent, as the regulation

¹¹ Concerning temporary obligations, similarly: K. Zagrobelny, [in:] *Komentarz, teza 7 do art. 492¹ k.c.* [Commentary, thesis 7 on Article 492¹]; differently: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 12.

¹² Compare Z. Radwański, [in:] *System Prawa Prywatnego* [Private law system], vol. 2, *Prawo cywilne – część ogólna* [Civil law – General issues], (ed.) Z. Radwański, Warszawa 2008, p. 14 and the following.

of civil law relationships performed by civil law entities and with the fulfilment of conditions provided for by law¹³.

Thus, the conduct aimed at regulating his legal position is a declaration of intent even if the party is not aware of all the consequences of this conduct. However, if we assess the conduct of the party who refuses to fulfil the obligation specified in the commitment, it is difficult to treat this conduct as the one regulating the relationship with the other person because even in the basic scope it does not determine legal consequences it would have. In addition, in Polish law there is a dominant stand not admitting freedom to perform unilateral legal actions, even in the area of obligatory legal relationships¹⁴. The regulation in Article 492¹ of the CC does not constitute a legal basis for performing a legal action but only specifies some consequences of this event. As a result, **the debtor's declaration of refusal to fulfil the obligation should not be qualified as a declaration of intent as defined in Article 60 of the CC because its contents do not regulate the obligation relationship between the parties.**

The statement about non-fulfilment of the obligation in the future is transmission of information, **notification** of a certain fact. This declaration can be true or false, however, it has “no modeling influence on the development of the existing obligation relationship”¹⁵, which is a constituent feature of a declaration of intent. Treated as notification, it **will produce legal consequences only in cases provided for in a legal provision**, as e.g. a debtor's statement that he will not accept the obligation (Article 486 § 2 *in fine* of the CC) or notification of the defects in the product sold (Article 563 of the CC)¹⁶.

Such classification of a statement of refusal to fulfil the obligation causes that, in this case, legal norms defining the declaration of intent mode are not applicable, although there is an opinion in the doctrine that there is a possibility of using some provisions on the declaration of intent (e.g. Article 61, sentence 1 of the CC)¹⁷ to notification, by analogy and to a certain extent. Thus, it is necessary to establish conditions that the debtor's announcement must fulfil in order to constitute strong grounds for the creditor's withdrawal from a contract.

It is beyond doubts that the right given by the legislator is special in character, protects mainly the creditor's interest and aims to conclude the obligation

¹³ Compare Z. Radwański, [in:] *System...* [System...], vol. 2, pp. 33–35.

¹⁴ Compare *ibid.*, pp. 178–180.

¹⁵ *Ibid.*, p. 27.

¹⁶ Compare similar classification of a declaration of Article 492¹ of the CC, M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13 and P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492¹, teza 5* [Act on consumer rights, comments on Article 492¹, thesis 5]; differently: K. Zagrobelny, [in:] *Komentarz, teza 12 do art. 492¹ k.c.* [Commentary, thesis 12 on Article 492¹ of the CC].

¹⁷ Compare Z. Radwański, [in:] *System...* [System...], vol. 2, p. 27. Concerning declaration of refusal to fulfil the obligation, similarly: P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492¹, teza 5* [Act on consumer rights, comments on Article 492¹ of the CC, thesis 5]; differently: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13.

relationship against the basic rule that imposes the necessity of fulfilling the obligation in accordance with its wording. It is necessary to emphasise the special character of the discussed regulation, especially as the creditor already has numerous rights protecting his interests¹⁸. In this case, he is given one more tool, with the use of which he can act with more ease than before. Without the need to give the debtor an additional time limit to fulfil the obligation, even without the necessity of waiting until the time limit to fulfil the obligation ends, he is allowed by Article 492¹ of the CC to terminate the contract unilaterally. That is why, while determining the conditions that the debtor's declaration must fulfil in order to constitute strong grounds for the creditor's unilateral termination of a contract, it is necessary to take into account the interest of the debtor, especially as it concerns the obligation of the mutual contracts. Thus, **it is recommended that the formulation of 'boundary conditions' for communicating information by the debtor should be treated with much caution**. At the same time, the interpretation rule requiring the assumption that there is lack of the debtor's statement referred to in Article 492¹ of the CC in case of any doubts as to the character of the party's announcement of non-fulfilment of the obligation is right¹⁹.

First of all, it must be established **whether the debtor's declaration that he will not fulfil the obligation requires its communication to the creditor. It seems that there is no such necessity**. The legislator often formulates a requirement of submitting the declaration "to the other party" but this time it has not been done²⁰. This does not mean that it is irrelevant how, by whom, to whom and in what circumstances the message is submitted and how it is formulated.

The provision of Article 492¹ of the CC does not determine **any formal requirements**, which means that the debtor's declaration of refusal to fulfil the obligation submitted in any form constitutes grounds for the creditor's withdrawal from the contract. Thus, the debtor's declaration can have various forms. However, I think that the way the debtor behaves and material results of his conduct must clearly reflect his decision of the non-fulfilment of the obligation. It is rightly highlighted that the debtor must express **firm, unconditional, unambiguous refusal to fulfil the obligation**²¹. It must not be just a thought expressed in

¹⁸ K. Zagobelny, [in:] *Komentarz, teza 2 do art. 492¹ k.c.* [Commentary, thesis 2 on Article 492¹ of the CC] rightly points out that the introduced solution results in further increase in disproportion between the debtor's and creditor's rights with respect to the possibility of withdrawing from the obligation. Thus, the demand that the debtor can withdraw from the contract in case of the creditor's delay is getting more and more up-to-date.

¹⁹ Compare M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13.

²⁰ *Ibid.*

²¹ Compare A. Klein, *Ustawowe prawo* [Statutory law], p. 73; M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13; J. Napierała, *Odpowiedzialność* [Liability], pp. 67–69; A. Olejniczak, *Komentarz* [Commentary]; P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492¹, teza 5* [Act on consumer rights, comments on Article 492¹, thesis 5]; also K. Zagobelny, [in:] *Komentarz, teza 12*

a conversation assessing the general state and prospects for trade relations. It must be communicated in a clear and evident announcement expressing a negative decision, which the debtor has definitely made in the subject matter of the fulfilment of the obligation. In his declaration, the debtor should not make his refusal to fulfil the obligation dependant on certain circumstances, e.g. changes of the provisions of the contract or their specific interpretation. Only unconditional refusal can be legally relevant. On the other hand, unambiguity of the refusal consists in the lack of doubts as to the contents of the declaration²².

Some doubts may arise in connection with the question about the admissibility of recognition of the debtor's extra-linguistic behaviour as the refusal to fulfil the obligation in accordance with Article 492¹ of the CC. In literature there is no uniform opinion about the admissibility of recognition of the refusal made *per facta concludentia*²³ as the declaration referred to in Article 462¹ of the CC. However, I believe that a very thorough analysis of the circumstances of a particular case can make you incline to a different opinion. For example, such an opinion can concern a definitive transfer of the ownership of the object that is subject to the contact with the creditor and necessary to fulfil the contract by the debtor for the benefit of a third party. I think that similar circumstances can make you incline to classify the debtor's conduct as a refusal to fulfil the obligation.

The refusal to fulfil the obligation (the declaration) must come from the debtor. As far as notification is concerned, the legal system does not define the rules of attributing it to the subject. In case of natural persons, it is the declaration submitted by the debtor in person and in case of legal and statutory persons (Article 33¹ of the CC), the **declaration submitted by their organs or representatives is legally relevant**. The use of legal norms applicable to other forms of a trading intermediary (e.g. indirect substitution) or subcontractor is inadmissible as legal grounds to attribute the declaration to the debtor²⁴.

In my opinion, it is also not right to invoke the similarity to the inappropriate recognition of a claim, which breaks the course of limitation. In this case we deal with a circumstance that already exists (e.g. the accountant confirms the amount of debt in accordance with the information available). On the other hand, the refusal to fulfil the obligation does not state the fact that occurred but is a declaration

do art. 492¹ k.c. [Commentary, thesis 12 on Article 492¹ of the CC]; however, he acknowledges that it concerns the declaration of intent.

²² Compare more thoroughly, J. Napierała, *Odpowiedzialność* [Liability], p. 67 and the following.

²³ Against: P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492¹, teza 5* [Act on consumer rights, comments on Article 492¹, thesis 5]. For such classification: K. Zagrobelny, [in:] *Komentarz, teza 12 do art. 492¹ k.c.* [Commentary, thesis 12 on Article 492¹ of the CC]. Very prudent: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13.

²⁴ Partly differently: M. Lemkowski, *Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 13; the opinion indicating Article 474 of the CC as grounds for attributing the declaration to the debtor if his "employee, co-worker or another alike person" submits it, if only because it is a person "of the debtor's party, responsible for the fulfilment of the obligation", cannot be agreed with.

that specifies the debtor's conduct in the future. It expresses certain intention and only the declaration is a fact. There should not be a possibility that legally relevant declarations may be submitted by any person who is involved, indirectly or directly, in the fulfilment of the obligation on the debtor's behalf. For example, a sales department employee can submit such a message effectively, but as a messenger submitting a declaration of the legal person's organ that made a decision to refuse to fulfil the obligation. Thus, the submission of information about refusal is ineffective if the organ or representative of the debtor did not actually refuse to fulfil the obligation. Referring to the necessity of protecting a contractor "acting with confidence in the other party's conduct and in accordance with standard trading practice"²⁵ is not convincing. The debtor who, in such a situation, thus without an attempt to establish the debtor's actual standpoint on the fulfilment of the obligation, terminates the contract, should not be subject to protection. On the other hand, the declaration "made by the debtor's subordinates with his knowledge and consent"²⁶ constitutes the information about the debtor's refusal.

The adopted legal interpretation of the debtor's declaration makes it possible to establish **the inadmissibility of the withdrawal (cancellation)** of the debtor's declaration of refusal to fulfil the obligation in the future. The legislator did not institute any rules of removing the consequences of the event. However, the event once taking place (the submitted declaration) constitutes grounds for undertaking a legal action by the creditor, regardless of the intent to fulfil the obligation expressed by the debtor later. If the creditor does not exercise the right to withdraw from the contract in accordance with Article 492¹ of the CC, although in my opinion he may do this even after the debtor's offer to fulfil the obligation, and accepts it, it means that the information submitted by the debtor is false and the obligation shall be fulfilled in accordance with its wording²⁷.

V. According to Article 462¹ of the CC, the creditor obtains a statutory right to withdraw from the contract, which may be exercised without the need to give the debtor the additional time limit to fulfil the obligation in accordance with its wording. Thus, the consequence of the debtor's refusal to fulfil the obligation is the creditor's competence (entitlement) to unilateral termination of the

²⁵ P. Stec, [in:] *Ustawa o prawach konsumenta, uwagi do art. 492¹, teza 6* [Act on consumer rights, comments on Article 492¹ of the CC, thesis 6].

²⁶ *Ibid.*

²⁷ Differently: K. Zagrobelny, [in:] *Komentarz, teza 11 do art. 492¹ k.c.* [Commentary, thesis 11 on Article 492 of the CC], who believes that the debtor's offer to fulfil the obligation after the prior refusal substantially changes the situation, depriving the creditor of the possibility of withdrawing from the contract. M. Lemkowski sees it slightly differently and interprets the possibility of acknowledging the withdrawal from the contract as the overuse of the creditor's right in case the debtor cancels the announcement of refusal to fulfil the obligation (*Zapowiedź niespełnienia* [Announcement of non-fulfilment], p. 14).

contract²⁸. The creditor does not have to exercise his right and may demand the fulfilment of the obligation.

The creditor's declaration of the termination of the contract should be submitted to the other party to the contract. The party's declaration of withdrawal from the contract may be submitted in the way that makes it obvious and in order to establish its contents it is necessary to explain it in the way required with respect to the circumstances in which it was submitted, the principles of community life and established customs (Article 65 § 1 of the CC). Owing to the possibility of claiming damages without the withdrawal from the contract, it does not seem possible to treat the declaration the wording of which is limited only to the claim of damages as the withdrawal from the contract. The legislator does not determine **the time limit for the submission of the declaration** of the withdrawal from the contract. It should be assumed, however, that the competence expires with the limitation of the obligation to which the creditor is entitled.

The form of withdrawal from the mutual contract is regulated in Article 77 of the CC. According to this provision, if the parties had retained any special form when concluding the mutual contract, it is required that the declaration of the withdrawal should be in a standard written form for the purpose of proof (*ad probationem*). However, if the parties had not concluded the mutual contract in a special form, but for example in an oral form, the withdrawal from that contract also does not require any special form²⁹.

If the creditor exercises his right to withdraw from the contract according to Article 492¹ of the CC, **the mutual contract stops binding the parties**. In such a situation, Article 494 of the CC is applicable, in accordance with which the party that withdraws from the mutual contract is obliged to return the other party everything obtained based on the contract, and the other party is obliged to accept that. The party withdrawing from the contract may demand not only the return of what was provided but also compensation for damage caused by the non-fulfilment of the obligation in accordance with general regulations (Article 494 of the CC). In consumer relationships, the duty to return what is due to the consumer should be fulfilled without delay (Article 494 § 2 of the CC). The provision of Article 494 of the CC is rather laconic and does not highlight all legal consequences of such an event clearly. The analysis of the consequences of Article 494 of the CC, however, goes beyond the scope of this article's subject matter.

²⁸ Concerning the classification of the statutory right to withdraw from the contract as the entitlement to discretion, freedom to decide about the termination of the obligation by the submission of a unilateral declaration of intent, compare the sentence of the Supreme Court of 2 April 2008, III CSK 323/07, Lex no. 453089.

²⁹ Concerning the form of successive legal actions undertaken in connection with the formerly concluded contract, compare more thoroughly Z. Radwański, [in:] *System...* [System...], vol. 2, pp. 146–149.

ANTICIPATORY BREACH OF CONTRACT ACCORDING TO ARTICLE 492¹ OF THE CIVIL CODE

Summary

Polish legislator introduced a new provision to the Civil Code – Article 492¹ of the CC, which is of key practical importance for the parties to mutual contracts as it regulates the consequences of the debtor's refusal to fulfil the obligation, especially when it takes place before the time limit for the fulfilment of the obligation. In the doctrine it is called the anticipatory breach of contract and it also covers a situation when, because of reasons other than the debtor's refusal to fulfil the obligation, it becomes clear that the obligation will not be fulfilled on time. The creditor then obtains the statutory right to withdraw from the contract. The article aims to analyse Article 492¹ of the CC in order to establish the scope of its application and determine the premises and consequences of using the protection that the provision gives the creditor. It is about the establishment of the place of the new provision on the withdrawal from the contract in the statutory regulation of the consequences of the non-fulfilment of the obligation. The condition of exercising the entitlement is the debtor's declaration of the refusal to fulfil the obligation expressed in a decisive, unconditional and unambiguous way. It is inadmissible to withdraw (cancel) the debtor's declaration of refusal to fulfil the obligation in the future. If the creditor exercises his entitlement to withdraw from the contract in accordance with Article 492¹ of the CC, the mutual contract stops binding the parties. What also comes into existence is the duty to return what was obtained earlier and to compensate for the damage resulting from the non-fulfilment of the obligation.

***ANTICIPATORY BREACH OF CONTRACT* NA PODSTAWIE ART. 492¹ KODEKSU CYWILNEGO**

Streszczenie

Polski ustawodawca wprowadził do Kodeksu cywilnego nowy przepis art. 492¹ k.c., o dużej doniosłości praktycznej dla kontrahentów umów wzajemnych, regulujący skutki odmowy dłużnika spełnienia świadczenia, zwłaszcza gdy ma ona miejsce jeszcze przed terminem wymagalności świadczenia. W doktrynie problem ten określany jest mianem nieuchronnego niewykonania zobowiązania (*anticipatory breach of contract*) i obejmuje także sytuację, gdy z innych powodów, niż odmowa spełnienia świadczenia przez dłużnika, stanie się oczywiste, że zobowiązanie w terminie nie zostanie wykonane. Wierzyciel uzyskuje ustawowe prawo do odstąpienia od umowy. Celem niniejszego opracowania jest analiza art. 492¹ k.c., aby ustalić zakres jego zastosowania oraz określić przesłanki i konsekwencje skorzystania z ochrony, jakiej ten

przepis udziela wierzycielowi. Chodzi o ustalenie miejsca, jakie w kodeksowej regulacji skutków niewykonania zobowiązań zajmuje nowe, ustawowe prawo odstąpienia od umowy. Prawo to może być wykonywane bez potrzeby zagrożenia dłużnikowi odstąpieniem od umowy i bez konieczności wyznaczenia mu terminu dodatkowego na spełnienie świadczenia. Przesłanką skorzystania z tego uprawnienia jest wyrażenie przez dłużnika stanowczej, bezwarunkowej, jednoznacznej odmowy spełnienia świadczenia. Niedopuszczalne jest cofnięcie (odwołanie) przez dłużnika złożonej deklaracji o niespełnieniu w przyszłości świadczenia. Jeżeli wierzyciel skorzysta z uprawnienia do odstąpienia od umowy, przyznanego mu na podstawie art. 492¹ k.c., to umowa wzajemna przestaje wiązać strony. Powstaje obowiązek zwrotu wcześniej dokonanych świadczeń oraz naprawienia szkody wynikłej z niewykonania zobowiązania.

ANTICIPATORY BREACH OF CONTRACT TRAITÉ À LA BASE DE L'ART. 492 DU CODE PÉNAL

Résumé

Le législateur polonais a introduit au Code civil un nouveau règlement art. 492 du code civil avec une grande importance pour les contractants des contrats réciproques qui règle les effets du refus de la part du débiteur de l'exécution de prestation surtout quand ce refus a lieu avant le terme de préention de la prestation. Dans la doctrine ce problème est défini par le terme de non-exécution inévitable de la prestation (*anticipatory breach of contract*) et il comprend aussi la situation où en autres raisons que le refus de l'exécution de la prestation, il apparait évident que la prestation à terme ne soit pas exécuté. Le créancier obtient le droit conforme à la loi pour la dérogation du contrat. Le but de l'article présent est une analyse de l'art. 492 du code civil pour définir le cadre de son application ainsi que pour déterminer des prémisses et conséquences de profiter de la protection donnée au créancier par cet article. Il s'agit exactement de trouver la place laquelle est prise dans la régulation des effets de non-exécution de la prestation par le droit conforme à la loi de déroger au contrat. Le droit peut être exécuté sans nécessité de menacer le débiteur par la dérogation au contrat sans besoin de lui fixer la date supplémentaire pour exécuter la prestation. Les prémisses pour profiter de ce règlement doivent être exprimées par le débiteur avec une expression définitive du refus équivalent et sans conditions de l'exécution de la prestation. Il est inadmissible de retirer (déroger) par le débiteur la déclaration prise de non-exécution de la prestation à l'avenir. Si le créancier profite du droit de déroger au contrat conforme à l'art. 492 du code civil, le contrat réciproque cessera d'être obligatoire pour les deux parties. Il ne reste que le devoir de rembourser les prestations antérieures et de réparer les dommages causés par la non-exécution de la prestation.

ANTICIPATORY BREACH OF CONTRACT НА ОСНОВЕ СТ. 492¹ ГРАЖДАНСКОГО КОДЕКСА

Резюме

Польский законодатель ввёл в Гражданский кодекс новое положение ст. 492¹ УК о чрезвычайной практической важности для контрагентов двусторонних договоров, регулирующее последствия отказа должника в выполнении надлежащих действий, в особенности в случаях, когда он имеет место перед сроком требования оплаты долга. В теории данная проблема определяется как неминуемое неисполнение обязательства (*anticipatory breach of contract*) и касается также ситуации, когда – по другим причинам, кроме отказа должника исполнять обязательства, станет очевидно, что обязательство не будет исполнено в срок. Кредитор приобретает определённое законом право на отказ от договора. Целью настоящего исследования является анализ ст. 492¹ ГК, и дальнейшее определение рамок её применения, а также определение предпосылок и последствий использования защиты, которую данное положение предоставляет кредитору. Речь идёт об определении места, которое в кодексном регулировании последствий неисполнения обязательств занимает новое законное право на отказ от договора. Данное право может быть реализовано без необходимости угрозы для должника отказом от договора и без необходимости определения для него дополнительного срока исполнения обязательства. Условием осуществления этого права является выражение должником твёрдого, безусловного, однозначного отказа исполнять обязательство. Отмена (отказ) должником представленной декларации о неисполнении в будущем обязательства является недопустимым. Если кредитор воспользуется правом на отказ от договора, признаваемого ему на основании ст. 492¹ ГК, то двусторонний договор прекращает обязательства сторон. Становится актуальной обязанность возврата ранее произведённых оплат, а также возмещения ущерба, имеющего место в результате неисполнения обязательства.