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PROPERTY DEVELOPMENT CONTRACT
IN THE SYSTEM OF POLISH PRIVATE LAW**Introduction**

Since Act on the protection of the rights of a purchaser of a flat or a house of 16 September 2011 (Journal of Laws No. 232, item 1377), hereinafter referred to as Act on property development, entered into force, there has been a great need to determine the nature, the substance and the importance of a real estate development agreement to the current private law system in Poland.

The scope of such studies obviously includes the regulations of Act on property development, though it also ought to embrace the analysis of those regulations through the prism of the Constitution of the Republic of Poland and other Polish laws, such as the Civil Code, Act on the ownership of flats, Act on the protection of competition and consumers, Act on land and mortgage registry, Notary Law¹, Act – Banking law, Act – Construction law, Act on bankruptcy and debt restructuring and many others.

In addition, the studies should include comparative threads, which would refer to solutions adopted in the legal systems of highly developed EU countries, such as Germany, France or the Netherlands².

¹ See P.L. Murray, R. Stürder, *The Civil Law Notary – Neutral Lawyer for the Situation*, München 2010, pp. 1–6.

² See H. Locher, W. Koeble, *Baubetreuungs- und Bauträgerrecht*, Düsseldorf 1985, No. 24–26; R. Kniffka, W. Koeble, *Kompendium des Baurechts*, München 2008, pp. 612–614; G. Basty, *Der Bauträgervertrag*, Köln–München 2009, pp. 6–8, 50–51; R. Strzelczyk, *Umowa deweloperska w systemie prawa prywatnego* [Property development agreement in the system of private law], Warszawa 2013, pp. 9–20; E. Hansen, V. Nitschke, H. Brock, *Bauträgerrecht*, Neuwied 2006, p. 24; B. Gliniecki, *Umowa deweloperska. Konstrukcja prawna i zabezpieczenie wzajemnych roszczeń stron* [Property development agreement – legal construction and security of parties' claims], Warszawa 2012, pp. 49–92; A. Jedyńska, *Umowa deweloperska w prawie niemieckim* [Property development agreement in German law], Rej. 2005, No. 7–8, pp. 53–57.

Property development agreement as a new type of a specified contract (*contractus nominatus*)

Firstly, the precise legal content of a property development agreement (Article 22.1) together with the presence of its legal definition (Article 3, Section 5 of the Act) determine – in my opinion – the need to classify it into a category of the so-called “named” contracts³. It is not a contract of sale as it does not transfer the ownership of real estate, which a sales contract – based on its definition – does.

Secondly, it is also difficult to agree with the argument encountered sometimes that the use of the term “price” in Act on property development automatically categorizes such a contract as a sales contract. Such a position would lead to the erroneous conclusion that “supply agreement”, “cultivation contract” or “timeshare contract” are also not specified (named) contracts and should all be considered *in gremio* as contracts of sale, merely because the term “price” is used in them. Such a conclusion would be – in my opinion – totally unacceptable.

The need to recognize a property development agreement as a new type of a specified contract is clearly supported by the legislature. Because, if the Parliament had not intended to create a new type of a specified contract and wanted a real estate development contract to be classified as a sale of real estate, then, a property development agreement would not require the whole separate legal regulation.

In the existing legal regime, the abuse of the term “a property development agreement” is a problem. It causes the risk that individuals purchasing commercial properties and legal persons acquiring real estate by signing agreements incorrectly entitled “property development agreements”, may be under the mistaken belief that their rights are protected by Act on property development, while this Act does not apply to their legal situation in any manner.

The subjective scope of a property development agreement, i.e. an agreement signed in accordance with the regulations of Act on property development, is narrower than the subjective scope of an agreement signed based on Article 9 of Act on the ownership of flats. According to Act on property development, a developer may enter into an agreement only with a natural person, while the parties-to-be to an agreement under Article 9 of Act on ownership of flats are not specified as such.

However, it is worth noting that according to the formula adopted by the current Polish legislature, a property development agreement may – but does not need to – be a consumer contract. As a result, a purchaser of a flat or a house may or may not be entitled to additional consumer protection. A natural person signing a property development agreement in the course of this person’s trade or

³ See K. Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin–Heidelberg 1991, p. 200.

business activity, who therefore – within the meaning of Article 22¹ of the Civil Code – is not a consumer, is protected only under Act on property development. The rights of such a person will not be protected by the regulations that ensure protection to consumers.

Another conclusion that should be presented is that the comparison of the objective scope of a development agreement and the objective scope of an agreement signed in accordance with Article 9 of Act on ownership of flats, ought to be made at two levels. On the one hand, the objective scope of a development agreement is broader than the objective scope of an agreement signed in accordance with Article 9 of Act on ownership of flats, as it covers not only flats but also houses. On the other hand, the objective scope of a property development agreement is narrower than the object scope of an agreement signed in accordance with Article 9 of Act on ownership of flats, because it does not refer to commercial premises.

Comprehensive analysis of civil law has led me to the conclusion that the current legal status of a construction contract and the transfer of the ownership of the object ordered may be executed in three modes, which are:

- 1) within the freedom to contract, which, results from Article 353¹ of the Civil Code,
- 2) in accordance with Article 9 of Act on ownership of flats,
- 3) under the terms of Act on property development.

Only an agreement indicated in the third option stated above, that is signed under the terms of Act on property development, may be classified as a property development contract.

However, it should be said that the above-mentioned classes are not separable. A property development agreement signed in accordance with Act on property development may – at the same time – meet all the conditions laid down in Article 9 of Act on ownership of flats. This would be the case of a development agreement concerning an apartment, which has been signed by the developer, who had owned the land and who – at the moment of signing the contract – had a building permit, and due to which a buyer's claim would have been disclosed in the land and mortgage registry.

Legal consequences of an omission of statutory elements in a property development contract

As far as the consequences of omissions of statutory elements in a property development contract are concerned, it is worth mentioning that Article 22.1 of Act on property development lists elements that a property development agreement “includes in particular.” In my opinion, this strongly imperative wording (the legislature does not use the less assertive words “should include”) leads to

the conclusion that these are the required elements of a property development contract⁴.

In my view, when there is no clear statutory permission for its omission, an element must be regarded as a compulsory component of any contractual relationship imposed by law. The penalties for violation of the obligation may be diverse. It may be – among others – the invalidity of legal action, the admissibility of the withdrawal from an agreement or even the worsening of the position of the infringer in a court of law⁵.

It should be noted that Article 22.1 (cited above) lists the components of a property development agreement that represents various levels of importance. On the one hand, in Section 2, it mentions “the price of the acquired flat or house” (referred to in other provisions of the Act as “cash benefits”) and thus an absolutely critical part of a property development contract (*essentialia negotii*), without which the successful conclusion of an agreement is not possible. On the other hand, it requires – in Section 12 – “to determine the conditions under which the right to withdraw (referred to in Article 29) is actualised”. That imposes a *de facto* obligation to transfer this regulation from Act on property development into an agreement, which is of minor importance since this regulation fully applies even if not quoted in a property development agreement.

With such a large number and variety of elements of an agreement referred to in Article 22.1, one needs to answer two fundamental questions, namely:

- 1) Should a development agreement include all those elements listed in that regulation?
- 2) What sanctions are triggered by the omission of individual components?

The answer to the first question asked above is pretty obvious. You cannot place all the elements listed in this regulation in an agreement, simply because some of them concern flats, while others cover houses. For example, if a contract relates to a house, it becomes devoid of the requirement of including information on the location of a flat in the building, referred to in Section 5. Similarly, in the case of a buyer, who is not provided by the developer with a bank guarantee or an insurance guarantee, it becomes devoid of the requirement of including information on these guarantees, laid down in Section 9 of this regulation.

⁴ See Z. Radwański, [in:] Z. Radwański (ed.), *System prawa prywatnego, t. 2. Prawo cywilne – część ogólna* [System of private law, vol. 2 – Civil law – general issues], Warszawa 2008, p. 430; J. Pisuliński, [in:] *Rozprawy z prawa prywatnego. Księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce* [Proceeding under private law – Professor Aleksander Oleszko commemorative book], Warszawa 2012, pp. 435–436.

⁵ See R. Strzelczyk, *Obligatoryjne elementy umowy deweloperskiej w świetle ustawy o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego* [Obligatory elements of a property development agreement in the light of Act on the protection of a purchaser of a flat or a house], Rejent of 2012, No. 9, pp. 120–121; F. Schmidt, J. Eue, *Bausträgerkauf* [in:] *Münchener Vertragshandbuch*, v. V, München 2003, pp. 304–305.

This means that the components listed in Article 22.1 should be considered as the minimum level of information needed to be incorporated in a property development agreement.

It is more difficult to answer the second question asked above about penalties for the omission of individual elements in a property development agreement. While the lack of the price of the acquired flat or a house referred to in Section 2 of this regulation would – without a doubt – destroy this agreement, the omission of the statement of a buyer on receipt of the prospectus referred to in Section 15 of this regulation, would result only in the possibility of nullification of potential agreement in accordance with Article 29.2 of Act on property development.

I conclude that the sanction for the omission of elements listed in Article 22.1 in a real estate development contract will depend on which elements have been omitted. These penalties may be dependent on the particular case. A court may – on the basis of general principles of civil law – decide that an agreement is null and void, ineffective or unable to be pursued in court. Another possible way of nullification of this agreement – based directly on Article 29 – would be by a buyer's withdrawal within 30 days from the date of signing an agreement.

In my view, the legislature did the right thing by refusing to invalidate agreements automatically due to the situation in which any statutory element has been omitted. Such a solution could – in certain cases – prove disadvantageous to the buyer by cancelling an agreement against his will. It is therefore to be regarded as a justified legal structure in which a buyer is able to decide unilaterally on the possible invalidation of “deficient” real estate development contracts by the exercise of his statutory right.

Property development contract provisions laid down in Article 22.1 are not a closed list. They cover only the minimum mandatory content of this agreement, which may be extended by the will of the parties. The contracting entities have not lost autonomy in shaping the contents of a contractual relationship linking them. A contract may also include additional conditions, not stated by the regulation mentioned, provided – however – that they are not less favourable to a buyer than the regulations of Act on property development, because – otherwise – they would be null and void *ex lege* due to Article 28 of Act on property development.

Additional agreements of a real estate development contract, not listed in Article 22.1 may be constituted by, for example, a clause allowing a buyer to withdraw from a property development contract for reasons other than those mentioned in Article 29 or a clause stating the chosen way and method of payment of the costs associated with contractual disposition, such as notary fees and legal costs in the proceeding of the land and mortgage registry⁶.

⁶ See P.L. Murray, R. Stürder, *The Civil Law Notary – Neutral Lawyer for the Situation*, München 2010, pp. 209–210.

One should remember that a property development agreement in which a buyer is a consumer, which is a rather typical situation in practice, should not contain abusive clauses, which have been listed in the register of abusive clauses maintained by the Office of Competition and Consumer Protection.

Legal nature of a property development agreement and effects of its conclusion

One of the most important issues related to a property development agreement is the legal nature of this contract and the consequences of signing it. The research issue should be described as answering the question of whether a property development agreement constitutes an obligation to transfer ownership in accordance with Article 156 of the Civil Code or represents only a commitment to signing another agreement, which is an obligation to transfer ownership.

Before answering the question asked above, it should be reminded how contemporary Polish civil law uses the sixteenth-century concept of allocation of rights to things: (1) *iura ad rem* – understood as a contractual (obligational) right to the thing, and (2) *iura in re* – understood as a property right to the thing. Rights belonging to the first group are weaker and relative, which means their effectiveness exists only *inter partes* (only between the contracting parties), while the rights belonging to the second group are recognized as absolute, which means they are effective *erga omnes* (for all entities who are subject to Polish legislative system).

The subdivision of rights into obligational and property rights separates legal actions promising (obliging) to transfer ownership of things from legal actions transferring ownership of things. The material effect causes only the latter one, i.e. an action transferring ownership. According to the scheme adopted by Johann Apel, a German legal thinker and advocate of the above concept of allocation of rights, an agreement obliging the transfer of ownership must be understood as *titulus*, while the transfer of ownership is the *modus*.

According to the above concept, a contract that requires an obligation is a contract in which an owner of the goods agrees to (and is obligated to) the future transfer of the ownership of the goods to another person, while a contract in which an owner transfers the ownership of goods to another person, or disposes of it is a disposition.

The Polish legal system adopted the principle of causality in property agreements, which is guided by Article 156 of the Civil Code, sometimes referred to as material causality, which means that the validity of an agreement which transfers the ownership of things depends on the existence of an important – from the juridical point of view – legal basis for the transfer of the property.

A transfer agreement without a legal basis either does not exist or is invalid under law.

In my opinion, it is evident that a property development agreement does not transfer the ownership of property and – therefore – is only an independent material cause, as understood based on Article 156 of the Civil Code, to make the transfer in the future. Such a conclusion is strongly supported by the fact that on the basis of Section 7 of Article 22.1 of Act on property development, a property development agreement should provide the deadline for the signing of a future agreement transferring the ownership of the property to a buyer. Besides, Article 29.5 of this regulation grants a developer with permission to withdraw from a property development contract if a buyer evades the agreement transferring ownership. All these regulations lead to the conclusion that a property development agreement does not transfer ownership on its own.

Entry of a purchaser's claim in the land and mortgage registry

A few words of comment should be written about the essence and the nature of the legal entry of a property development contract claim in the land and mortgage registry. The considerations begin by noting that the overriding purpose of the Act is to protect the rights of buyers of flats or houses.

Undoubtedly, the intention of the legislature was to create a strong legal instrument, which protects the rights of a buyer. One of the instruments provided in Article 23 of Act on property development is the buyer's claim to entry in the land and mortgage registry. It protects a buyer from the sale of a flat or a house to a third party by allowing the buyer under Article 59 of the Civil Code to recognize such a third party agreement as ineffective against him and orders enforcement of the transfer of ownership of a flat or a house on his behalf.

Purchasers' claims on contracts with developers are entered in the land and mortgage registry based on Article 23 of Act on property development, which says that a real estate development agreement and a buyer's claims to a flat or a house are entered in the land and mortgage registry. Due to the imperative wording of Article 23.2, it should be considered obvious that the disclosure of the claim is mandatory⁷.

⁷ See R. Strzelczyk, *Obligatoryjność ujawnienia w księdze wieczystej roszczenia nabywcy z umowy deweloperskiej w świetle art. 23 ustawy z 16.09.2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego* [Obligatoriness of disclosure of a buyer's claims under a property development contract in the land and mortgage registry in the light of Article 23 of Act of 16 September 2011 on the protection of the rights of a buyer of a flat or house], PPH 2012, No. 10, pp. 20–23; H. Ciepła, [in:] H. Ciepła, B. Szczytowska, *Ustawa o ochronie praw nabywcy lokalu mieszkalnego i domu jednorodzinnego. Komentarz. Wzory umów deweloperskich i pism* [Act on the protection of the rights of a buyer of a flat or house – Commentary – Sample property developments contracts and documents], Warszawa 2012, p. 111.

In support of the above, it ought to be noted that the obligation of mandatory disclosure of entrepreneurs in the right registry is imposed upon them due to the identical wording contained in Article 43² § 2 of the Civil Code, according to which, a company is to be registered in the appropriate registry. If the intention of the legislature were the optional character of the disclosure of the claim discussed, the expression used would have appeared in a less imperative manner and would state that a buyer's claim "may be disclosed" in the land and mortgage registry (as it is in Article 16 of Act on the land and mortgage registry, which lists the individual rights and claims that "may be disclosed" in the land and mortgage registry).

The legislature has created Article 23 of Act on property development to an imperfect standard (*lex imperfecta*), which lacks sanctions – in particular a sanction to declare a contract null and void – which obviously does not mean that this standard is not applicable. Lack of sanctions does not allow discretion in applying the law. A collection of imperfect legal norms (*leges imperfectae*), understood as "without sanction", does not cover the set of dispositive legal norms (*iuris dispositivi*), the use of which may be excluded or limited by the will of the parties, although it must be noted that these are not separate, i.e. the rule of law can be designated to both sets.

Lack of sanctions for the parties to a property development contract for non-disclosure of a purchaser's claims in the land and mortgage registry does not absolve the notary who is drawing up a contract from the obligation to comply with the law. Besides, legal standards under Notary Law, in particular Article 80 § 2 of the Act, require that a notary ensure the proper protection of the rights and legitimate interests of the parties⁸.

It is worth mentioning that Article 92 § 4 of Notary Law provides explicitly that "if the deed includes the transfer, the modification or the waiver of the rights disclosed and described in the land and mortgage registry or the establishment of the right that is subject to disclosure or if the legal action involves the transfer of the ownership of a real property, the notary who prepares a notary deed is required to include – in its content – the request for the appropriate registration in the land registry". The claim of a buyer of a property development agreement is – without a doubt – the establishment of the right that is subject to disclosure in the land registry, which is determined by Article 23.2, which states that the land registry "discloses" a buyer's claim. It has been commonly agreed in the Polish civil law jurisprudence that such a claim is one of a buyer's individual rights.

The conclusion that it is the notary's duty to include the request of the appropriate registration (in the land and mortgage registry) in a notary deed is

⁸ See P.L. Murray, R. Stürder, *The Civil Law Notary – Neutral Lawyer for the Situation*, München 2010, pp. 207–214.

also supported by the fact that the parties to a property development agreement cover the costs of the registration procedure according to Article 26 of Act on property development, which is dedicated to the notarial form of this agreement. The fact that the method of paying the court fees in respect of the request to the land and mortgage registry has been defined in the regulation that refers to a notary deed, proves that the legislature has established a direct connection between the payment of the court fees and the act of signing a deed, so that it is the notary who receives the payment and transfers it to the court.

The analysis of the normative material considered in this article has led me to believe that a notary who prepares a property development agreement has a statutory obligation to include, in a notary deed which documents the agreement, the request for full disclosure of the claims of a purchaser in the land and mortgage registry and to send this request to the land and mortgage court. The public character of the notary's duty means that even a buyer's explicit request to do otherwise addressed directly to the notary would not release the notary from the duty to include the above-mentioned request in a deed, although this duty exists only to protect the buyer's rights (*ius publicum privatorum pactis mutari non potest*).

To summarize, I believe that a notary who evades the duty to enclose the request to the land and mortgage register in a notary deed – even on demand of the parties – violates Article 92 § 4 and Article 80 § 2 of Notary Law and exposes himself not only to liability for damages, but also to disciplinary liability⁹.

A developer's rights to land

In my opinion, a developer is entitled to sign a contract with a buyer only if he owns the land or holds the right of perpetual usufruct. The key factor in these considerations should be the normative definition of a property development agreement, according to which the developer commits himself to transfer the ownership of a flat or a house at the end of the real estate development procedure.

Also, from my point of view, the definition mentioned above clearly shows that the developer should own the land or should hold the right of perpetual usufruct. As it was already explained, a property development agreement creates the developer's obligation to transfer the ownership of a flat or a house to a buyer together with the right to the land. The signing of such an agreement concerning somebody else's property (or perpetual usufruct) would not be binding for the

⁹ See M.K. Kolasiński, [in:] M.K. Kolasiński (ed.), *Civil liability of a notary and its insurance in Poland and other selected member states of the European Union*, Toruń 2012, pp. 31–48 and M. Bączyk, [in:] M.K. Kolasiński (ed.), *Civil liability of a notary and its insurance in Poland and other selected member states of the European Union*, Toruń 2012, pp. 83–114.

owner (or perpetual user), because *alterius contractu nemo obligatur*, and – therefore – it would not make him liable to a purchaser for the transfer of ownership of a flat or a house (*alteri stipulari nemo potest*).

In addition, if a developer signed such a contract, he would be unable to comply with the obligations undertaken – including the transfer of these rights to a purchaser – as he is not entitled to these rights. Of course, one can spin hypothetical discussions in which a developer might have a preliminary agreement to acquire the ownership of real estate (or the right of perpetual usufruct) to enable him to potentially comply with the obligations undertaken. Nevertheless, these reflections do not change the fact that the developer's commitment is premature, due to not having – at the moment of signing the agreement – the title to transfer these rights. Besides, if the obligation of a developer to transfer the ownership of real estate (or the right of perpetual usufruct) is a statutory element of a property development agreement, it may be implied that the legislature assumes that a developer already has a title to these rights.

The need for the contracting developer's ownership title existence or his right of perpetual usufruct of the land presence is confirmed in Article 36 of Act on property development, which has amended Act on bankruptcy and debt restructuring. The amendment adds a regulation of Article 425².1, according to which, in the case of bankruptcy of the developer, the ownership of the land or the right of perpetual usufruct of the real estate (which is object of the development project conducted) is confiscated into a separate bankruptcy estate to satisfy the buyers of apartments or houses. Also in this case, the regulation explicitly determines that the legislature considers a developer to be the owner of the land or to hold the right of perpetual usufruct to it.

What is worth noting is that a property development agreement with a developer who has no legal title to the land ought to be considered as extremely risky for purchasers of residential houses, and thus would be in evident contradiction to the primary objective of Act on property development, which has been designed to protect the rights of buyers (including providing them with a secure contractual position). A particularly high risk to a buyer would be involved in connection with signing a contract before the day when Act on property development entered into force, in which case a purchaser would be risking his investment to the developer (who does not hold any legal title to the land) as legal institutions such as the insurance of the trust account and the bank guarantee had not existed until their creation under Article 37 of Act on property development.

Besides the fact that a property development agreement must be prepared by a notary and according to Article 80 § 2 of Notary Law, a notary is obliged to ensure the sufficient protection of the rights and legitimate interests of the parties and other persons, to whom this action may result in legal consequences of any nature. In my view, a notary deed, which documents a property development

agreement signed by a developer who has no proper legal title to the land (i.e. the ownership or the right of perpetual usufruct) violates this regulation as it compromises the legitimate interests of both the buyer and the property owner (or the perpetual user), for both of whom this action results in legal consequences.

Consideration of the arguments of legal norms arising from these regulations as well as of the reasonableness of the legislature leads to the conclusion that the developer may enter into a property development agreement only if he owns the land or holds the right of perpetual usufruct. Legal norms express rules that prevent the entanglement of a buyer of an apartment or a house in a property development agreement with a party who has no legal title to the land.

To summarize, I believe that a notary should refuse to prepare an agreement in the absence of the developer's ownership of the land (or his right of perpetual usufruct). In the situation described, it is not enough – in my opinion – to inform a buyer of a flat or a house about the impossibility of the claim to the court of justice requesting the transfer of any legal rights, which has been the object of the agreement.

Due to the lack of a positive norm prohibiting a developer from building on someone else's land, Polish legal system has – in this respect – adopted German legal solutions, which have been stated by the Federal Court (*Bundesgerichtshof*), which firmly denied a developer the possibility of building on someone else's land. In my view – although it has not been confirmed by the Supreme Court of Poland – the current Polish law practice corresponds to the German one¹⁰.

I also believe, though this is more of an issue of banking practice than the theory of law, that the lack of the title to the land on the side of a developer should result in refusal to open an escrow bank account for the development project.

Legal character and a title of a contract signed in the fulfilment of the obligation expressed in a property development agreement

The signing of a property development agreement is not an ultimate goal. The role of this contract is – in fact – to lead to a final contract, which transfers the ownership of the object ordered to a buyer after its construction. The essence of the problem is actually to determine whether the second contract is a contract of the only-tangible effect that only transfers the ownership, or a contract of double-effect that obliges the transfer of ownership and – at the same time – transfers the ownership in the performance of that obligation. As a result, the question arises whether this second agreement should be titled “The agreement

¹⁰ See *Neuwe Juristische Wochenschrift* 1978, p. 1054.

to establish the separate ownership of an apartment and its transfer” or “The agreement to establish the separate ownership of an apartment and its sale”.

For brevity of discourse, the analysis conducted here is limited to a property development agreement concerning an apartment, but the conclusions also apply to house development contracts.

In the Polish legal system, contracts of sale, exchange or donation are – according to the literal expression of the normative definitions – binding agreements. For example, Article 535 of the Civil Code, which contains the legal definition of a contract of sale, provides a conclusion that a seller “agrees to” transfer the ownership of a thing to a buyer and the buyer agrees to receive it and pay the seller the “price”. According to Article 603 of the Civil Code, in a swap agreement each party “undertakes an obligation” to transfer something to the other party in exchange for “the commitment” to transfer another thing. Under Article 888 of the Civil Code, a donor in a donation agreement “commits” to a free benefit to the recipient at the expense of his estate. In these regulations, it is evident that those agreements do not transfer the ownership, but only agree on the transfer of it. Such a commitment is only a promise made by an owner, which might not be fulfilled.

On the other hand, under Article 155 § 1 of the Civil Code, if an agreement creates the obligation to transfer the ownership of a thing, which is a single-effect contract, such as a contract of sale, exchange or donation, and if it is signed provided that the cumulative fulfilment of the three conditions in that regulation – which are: (1) the object of the contract is specified as to its identity (e.g. a real estate), (2) parties to the contract have not excluded the transfer of the ownership, for instance by agreeing that the transfer of the property ownership would need a separate contract (because they have such a will), and (3) the immediate transfer of the ownership is not excluded by a specific regulation (e.g. by the statutory pre-emptive right of the municipality or the Agricultural Property Agency) – is existing, the agreement automatically transfers the ownership of property, which actually changes the character of this agreement into a double-effect contract.

Therefore, the obligation to transfer the ownership of an object specified as to its identity (such as its sale or the promise of it) by itself, automatically, transfers the ownership, unless the automatic transfer of the ownership has been excluded by a specific regulation or the parties have decided that the ownership of things would need to be transferred through a separate agreement later on. In the case of a statutory or contractual exclusion of the transfer of the ownership, a contract of sale, exchange or donation is still a single-effect contract, and it is necessary to sign an additional agreement by which the ownership-transferring effect would be obtained.

Based on the wording of the regulations referred to above, it is evident that a contract of sale may cause either a single-effect result or a double-effect result.

There is no third option (*tertium non datur*). Under Polish law, a sale contract is never just the ownership-transferring contract on its own.

As it was already mentioned above, in the Polish legal system, the principle of material causality in the real-property-ownership-transferring agreement is articulated in Article 156 of the Civil Code, which states – in a nutshell – that the validity of such an agreement depends upon the existence of a valid legal basis (reason) to enter into this agreement.

As regards the development agreement, it is evident that such an agreement requires an additional agreement to transfer the real property ownership, which of course should be concluded in the form of a notary deed. The correct title of such an additional agreement, signed in the implementation of a property development contract (first agreement), should be “the agreement to establish the separate ownership of an apartment and its transfer in the execution of a property development contract.” Such an agreement should not be titled “the contract of sale”, because such an inappropriate contract title would be misleading, as it suggests that the legal cause of transferring ownership is the sale, i.e. the obligation to transfer the ownership included in the second agreement (a notary deed), while – in fact – this obligation is included in the first agreement, i.e. in a property development contract, which was signed by the parties several months before¹¹.

Placing a wrong title in a notary deed does not invalidate a contract. The nature of the legal action is determined by its content and not by its name. There is no doubt, however, that such a misleading title should be avoided.

Developers and purchasers of apartments as members of the real estate community

The act of signing an additional agreement, i.e. an agreement that transfers the ownership of a house (together with the title to the land) to a buyer who previously signed a property development agreement, ends the developer’s relationship with the buyer. The ownership of the land (or the right of perpetual usufruct) together with a house becomes a separate property, for which a new land registry entry ought to be established, in which the buyer’s (or a perpetual user’s) name is disclosed. After the act of signing the final agreement, the developer and the buyer usually go their separate ways.

The situation is completely different – however – in the case of residential premises, such as a flat or an apartment. In the very moment of the establishment

¹¹ See R. Strzelczyk, *Charakter prawny i tytuł umowy zawieranej w wykonaniu umowy deweloperskiej* [Legal character and a title of a contract signed in the fulfilment of a property development agreement], *Nowy Przegląd Notarialny* 2012, No. 2, pp. 16–17.

of their separate ownership, a housing association is established, of which the first members are the developer and the purchaser of a flat or an apartment. The number of members of this community increases with the gradual establishment of separate ownerships of other residential premises (flats or apartments), because – according to Article 6 of Act on the ownership of flats – the housing association comprises all the owners whose flats are located within the property (building)¹².

PROPERTY DEVELOPMENT CONTRACT IN THE SYSTEM OF POLISH PRIVATE LAW

Summary

When Act on property development of 16 September 2011 entered into force, an immediate need arose to determine the nature, substance and importance of a real estate development agreement within the contemporary private law system in Poland. The article describes a property development agreement as a new type of a specified contract (*contractus nominatus*), the legal consequences of the omission of its statutory elements, why the entry of a purchaser's claim in the land and mortgage registry is mandatory and why a notary who evades the duty to enclose the request to the land and mortgage registry in a notary deed violates the law and exposes himself not only to liability for damages, but also to disciplinary liability. The article also explains why a developer should be the owner of the land or at least hold the right of perpetual usufruct and the legal character of the contract signed in the fulfilment of the development agreement.

UMOWA DEWELOPERSKA W SYSTEMIE POLSKIEGO PRAWA PRYWATNEGO

Streszczenie

Wejście w życie ustawy z 16 września 2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego wykreowało konieczność określenia charakteru prawnego oraz miejsca umowy deweloperskiej w systemie prawa polskiego. W artykule wskazano argumenty przemawiające za uznaniem umowy deweloperskiej za

¹² See A. Turlej, [in:] R. Strzelczyk, A. Turlej, *Własność lokali. Komentarz* [Ownership of flats – Commentary], Warszawa 2013, pp. 154–192.

umowę nazwaną (*contractus nominatus*), omówiono skutki prawne pominięcia w niej ustawowych elementów, wyjaśniono, z których przepisów wynika obligatoryjność zamieszczenia w akcie notarialnym dokumentującym zawarcie umowy deweloperskiej wniosku o ujawnienie roszczeń nabywcy w księdze wieczystej, także pod kątem odpowiedzialności cywilnej i dyscyplinarnej notariusza uchylającego się od dopełnienia tego obowiązku. W artykule wyjaśniono ponadto przyczyny, dla których należy przyjąć, że umowę deweloperską powinien zawierać właściciel lub użytkownik wieczysty gruntu, a także omówiono charakter prawny umowy zawieranej w wykonaniu umowy deweloperskiej.

LE CONTRAT DE PROMOTEUR IMMOBILIER DANS LE SYSTÈME DU DROIT POLONAIS PRIVÉ

Résumé

La mise en œuvre du droit du 16 septembre 2011 conforme à la protection des droits de l'acheteur de l'appartement ou de la maison unifamiliale a créé la nécessité de définir le caractère légal et la place du contrat de promoteur immobilier dans le système des droits polonais. Dans l'article on a indiqué les arguments pour respecter le contrat de promoteur immobilier comme le contrat nommé (*contractus nominatus*), on a parlé aussi des effets d'y négliger les éléments juridiques et on a expliqué par quelles règles résulte l'obligation de définir dans l'acte du notaire formant le document du contrat de promoteur immobilier cette conclusion qui demande de l'acheteur de démontrer toutes les prétentions dans le livre foncier aussi bien sous l'aspect de la responsabilité civile que disciplinaire du notaire qui manque à ses devoirs. Dans l'article présent on a expliqué aussi les causes par lesquelles il faut accepter le contrat de promotion immobilier par le propriétaire ou l'usager éternel de terre ainsi qu'on a caractérisé le contrat de point de vue légal pour exécuter le contrat de promotion immobilier.

ДЕВЕЛОПЕРСКИЙ ДОГОВОР В СВЕТЕ ПОЛЬСКОГО ЧАСТНОГО ПРАВА

Резюме

Вступление в силу закона от 16 сентября 2011 г. о защите прав покупателя жилого квартирного помещения либо односемейного дома привело к необходимости определения правового характера, а также места девелоперского договора в системе польского права. В статье представлены аргументы в пользу признания девелоперского

договора договором, предусмотренным законом (*contractus nominatus*), оговорены следствия упушения в нём нормативных элементов, выяснено, из какого положения вытекает требование размещения в нотариальном акте, документирующем заключение девелоперского договора, запросе о раскрытии претензий покупателя в ипотечной (поземельной) книге, также с точки зрения гражданской и дисциплинарной ответственности нотариуса, уклоняющегося от выполнения данной обязанности. Кроме того, в статье выяснены причины, для которых следует признать, что девелоперский договор обязан заключать собственник либо узуфруктуарий земли, а также оговорён правовой статус договора, предполагающего выполнение условий девелоперского договора. заключаемого в выполнении девелоперского договора.