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THE INSTITUTION OF ANTICIPATED NON-PERFORMANCE UNDER POLISH LAW IN THE CONTEXT OF THE DOCTRINE OF *ANTICIPATORY BREACH OF CONTRACT* – ON THE STRUCTURE OF ART. 492[1] OF POLISH CIVIL CODE (A COMPARATIVE LEGAL ANALYSIS)

INTRODUCTION

Breach of obligation which takes place before an obligation is due is a phenomenon commonly recognized under contract law, which has evolved for decades as a distinct institution, i.e. the so-called *anticipatory breach* (*anticipatory repudiation* or *anticipatory non-performance*; some authors called it *protestatio*).[1] This originates in common law and serves as a basis for a withdrawal from a bilateral contract. Unlike in continental law, this system of entitlements of contractual parties relies on the superiority of the right to withdraw from a contract.[2] Intended to make the contractual relationship more flexible, this institution has been implemented both in various acts and international agreements and directly in the legal

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[1] See, for example M. Lemkowski, „Zapowiedź niespełnienia świadczenia (protestatio) jako podstawa odstąpienia od umowy wzajemnej (art. 4921 k.c.),” *Monitor Prawniczy* 1 (2015): 11ff.

[2] The institution of damages plays a primary role in the legal systems of Anglo-Saxon countries in relation to other remedies, especially the so-called specific performance.

systems of particular states of the European Union (e.g. in the Netherlands,[3] Italy,[4] Germany[5]).[6]

The wealth of cases, particularly in common law countries, demonstrates that the award of the right to "be released from a contract" to a debtor who refuses to perform the contractual obligation before it becomes due has a positive influence on the situation of both parties. An earlier extinguishment of a contractual relationship makes it possible to considerably mitigate the harm suffered by the creditor, which for obvious reasons would have to be compensated by the non-performing party. The unclear fate of a particular obligation often prevents assets from being economically allocated or urgent decisions from being made. The doctrine of anticipatory non-performance, then, is a solution whereby the person awaiting the performance of an obligation becomes in a way the "administrator" of the contractual relationship.

In line with tendencies visible in other countries, the Polish lawmakers decided to deal with the said non-performance in a comprehensive manner as the regulation thereof was featured in an embryonic form, among others, in articles 610, 635 and 656 of the Polish Civil Code.[7] This situation changed radically with the entry of art. 44 para. 4 of the Act of 30 May 2014 on consumer rights,[8] amending the Civil Code[9] by adding the provision of art. 492^1 CC: "If the party required to perform an obligation declares that it is unable to perform the obligation, the other part may

[3] See Art. 6:80 BW (the Dutch civil code), accessed January 24, 2017, http://www.dutchcivillaw.com/civilcodegeneral.htm.

[4] Permissible by virtue of art. 1219 of the Italian civil code (based on a written statement of the debtor). See L. Antioniolli, "Particular remedies for non-performance. *Art. 1219 C.C.:* Placing in default, in *Principles of European Contract Law and Italian Law. A Commentary*, ed. L. Antoniolli and A. Veneziano (The Hague: Kluwer Law International, 2005), 422–23.

[5] See §323 of BGB (German civil code), accessed January 24, 2017, https://www.gesetze-im-internet.de/ englisch_bgb/; also M. Strüner and D. Medicus, "Kommentar zu § 323 BGB," in *Kommentar*, 9th edition (Cologne: Luchterhand Verlag, 2014), 631–32.

[6] Also in the law of Denmark, Austria, Slovenia, Greece, Czech Republic, Portugal, and Hungary. See R. Strugała, „Odstąpienie od umowy z powodu przewidywanego lub zapowiedzianego jej naruszenia," *Transformacje Prawa Prywatnego* 4 (2014), 34, and the literature cited therein.

[7] Act of 23 April 1964 (Civil Code), Journal of Laws of 2017, item 459 [hereafter CC]. The provisions that regulate a contract for delivery, specific task contract and construction works contract did lay stress on timely performance of a contractual obligation, offering a right to withdraw from the contract if a breach was anticipated (the commissioned party, supplier or contractor failing to meet the deadline).

[8] Act of 30 May 2014 on consumer rights, Journal of Laws, of 2014, item 827.

[9] The said provision finds its application in contracts concluded after the amendment of the Consumer Law, and consequently in those concluded after December 24, 2014 (the so-called Christmas Amendment). Earlier on, the absence of a legal basis that would permit a withdrawal in the case of default was a contentious issue. See J. Napierała, *Odpowiedzialność dłużnika za nieuchronne niewykonanie zobowiązania* (Warsaw: Dom Wydawniczy ABC, 1997), 74ff.

withdraw from the contract without setting an additional period or before the performance becomes due."

The said solution reflects growing flexibility of contractual relationships. This tool is intended to protect the creditor, whereby it is now easier to sever ties with an unreliable contractor.[10] A specific notification issued by the contracted party is conceived of as a breach of the obligation, which fulfils the creditor's right to withdraw from a reciprocal contract. Given some controversy associated with the introduction of such a significant solution into the Polish legal system, the curious wording of art. 492[1] CC calls for thorough legal comparative analysis and an exhaustive commentary, especially in the context of the English doctrine of anticipatory breach (anticipatory repudiation).[11]

1. ANTICIPATORY BREACH IN COMMON LAW SYSTEMS

Anticipatory repudiation is an extremely flexible institution which in such countries as Australia, Canada, United States or Great Britain contributes to a wealth of cases. In contrast to the continental legal systems, this institution has a very broad application and can be invoked in response to any behaviour (not only in the case of the debtor's explicit notification)[12] whereby the other party manifests its intention not to perform the obligation or to remain unbound by the provisions of a bilatera contract,[13] which requires specific performance in the future.[14] Further, certain courts endorse the view that under circumstances that permit withdrawal from a contract express notification of the exercise of this right is not necessary for the obligation to become extinct (although this is a very controversial issue).[15] Therefore, the question

[10] Under the Anglo-Saxon law, an exchange of declarations of intent, given the role of available legal means, is in a sense a contract for compensation.

[11] The assumptions of the English doctrine regarded as a specific form of breach of contract were established by the ruling in the Hochster v. de la Tour case (1853) 2 E & B 678.

[12] The behaviour in question must by unequivocal, absolute and positive. See the case Larry Mollohan v. Black Rock Contracting, Inc. 235 S.E.2d 813 (W. Va. 1977).

[13] See *Jackson v. American Can Co., Inc.*, 485 F.Supp. 370 (WD.Mich. 1980), in which the court expressly indicates that the doctrine of anticipatory breach can be used only for bilateral contracts. See also *Harris v. Time, Inc.*, 191 Cal.App.3d 449 (Cal. Ct. App. 1987).

[14] See, among others, *New York Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936).

[15] *Canada Egg Products Ltd. v. Canadian Doughnut Co. Ltd.* [1955] S.C.R. 398. According to the judicial panel, an absolute and unconditional notification of non-performance implies that the other party has exercised its right to recede from the contract. In a dissenting opinion, however, it was claimed that if the absence of such a notification is harmful to the other party, the entitled party can be deprived of the right to withdraw.

whether parties to a contract remain bound by contractual obligations is resolved by the court, which considers all relevant facts.The origin should be also sought in the rise of the institution of anticipatory repudiation in common law. Some authors, while remaining sceptical towards the claim that the very announcement of contractual non-performance constitutes non-performance itself, avoid using the term "anticipatory breach of contract", preferring to use the term "anticipatory repudiation". These commentators express the view that it is hard to imagine the non-performance of a contract if the obligation to perform it has not yet materialized.[16] Those who prefer to apply the *breach of contract* regime to a communication of anticipated non-performance point out, however, that anticipatory breach of contract can be viewed as an actual non-performance, for instance because of the implied duty to remain in full readiness to perform a future obligation.[17] Although in fact no contractual obligation is breached, it is believed that pre-contract obligations should be given a more comprehensive consideration and that the current economic value should be estimated on the basis of the prospective performance of an obligation.[18] In practice, it is mainly about the creation of an effective mechanism that would ensure flexible protection of interests of this contractual party which, given the unquestionable circumstances, can reasonably believe that the contract will not be performed.

Over the years, the evolution of this institution under common law has involved chiefly precise determination of the limits and the weight of an anticipated breach of contract which would materialize the right to withdraw from a contract. Accordingly, contemporary case law proposes a test which is parallel to the traditional approach based on the doctrine of breach of contract,[19] consisting in studying specific *in concreto* circumstances, and intended to determine whether the imminent non-performance will ruin the basic purpose of the contract (the so-called fundamental breach of contract).[20] The criterion for an assessment of the degree of a contrac-

[16] J.D. McCamus, "Anticipatory Repudiation," in *The Law of Contracts*, 2nd ed., ed. J.D. McCamus, 689–709 (Toronto: Irwin Law, 2012), 690.

[17] Ibid., 691.

[18] See also T.H. Jackson, "«Anticipatory Repudiation» and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Non-Performance," *Stanford Law Review* 31, no. 1 (1978): 69.

[19] A test used to assess whether the creditor has been in fact deprived of all benefits which the creditor could have reasonably expected. See *Hong Kong FirShipping Co.* Ltd. *v. Kawasaki KisenKaisha Ltd*. [1962] 2 Q.B. 26 (C.A.).

[20] See, among others, *Barlow & Haun, Inc. v. United States*, *118 Fed.Cl.* 597 (2014); and *Mobil Oli Exploration & Producing Southeast, Inc. v. United States*, 530 U.S., 147 L.Ed.2d 528 (2000), in which the so-called total or substantial breach is invoked.

tual breach has a purely objective character[21] and cannot be based on a subjective conviction or good faith of the other party that the contract will not be performed. Courts in Anglo-Saxon countries all assume that an anticipatory breach of contract can be justified even if the withdrawing party derived its entitlement from erroneous facts, while other, parallel and not earlier realized circumstances, did entitle the party to extinguish the contract.[22]

A direct outcome of the right to withdraw is the possibility of claiming damages. The scope of liability for damages has also evolved along with the body of rulings, and is subject to many factors. However, in contrast to liability for damages existing in the Polish legal system which is typically based on the principle of guilt, the Anglo-Saxon institution of repudiation is primarily independent of guilt, capacity or intention of the other party, whose intention not perform the obligation was manifested through its conduct or an explicit announcement.[23] The said factors, however, can affect the scope of liability for damages. Similarly, the scope of liability resulting from an earlier announcement of non-performance, can be affected by a prospective (subsequent) inability to perform of the party which has used its right to withdraw.[24] More controversial in this context, though, is the question whether in the case of an anticipated breach of contract the creditor has a duty to undertake necessary measures to mitigate losses incurred by the debtor. The Anglo-Saxon case law, which is clearly in favour of that,[25] can serve as a guideline for Polish jurisprudence, which is to determine liability for damages in case of anticipated non-performance.

2. INEVITABLE NON-PERFORMANCE UNDER INTERNATIONAL LAW

In the context of the presented considerations, the wording of art. 9:304[26] of the Principles of European Contract Law[27] is worth examining, which – being a sort

[21] See, among others, *Record Club of America, Inc. v. United Artists Records, Inc.*, 643 F.Supp. 925 (SDNY 1986).

[22] McCamus, "Anticipatory Repudiation," 695, and the literature cited therein.

[23] S. Willston, "Repudiation of Contracts," *Harvard Law Review* 14, no. 5 (1901):317 ff.

[24] See, for example, *Maredelanto Compania Naviera SA v. Bergbau-Handel G.m.b.H.* (*The MihalisAngelos*) [1971] 1 Q.B. 164 (C.A.).

[25] See, among others, *Sea Oil & General Corporation et al*. [1979] 1 S.C.R. 633 and in particular *White and Carter (Councils) Ltd v McGregor* [1962] 2 A.C. 413 (H.L.).

[26] "Where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it, the other party may terminate the contract."

[27] *The Principles of European Contract Law* 2002 [hereafter PECL], being the result of the work of the Commission on European Contract Law, accessed January 3, 2017, http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to. 3.2002/.

of *lex mercatoria* and a substitute for "European contract law" – are intended to harmonize trans-border trade and create a source of inspiration for European legislators, and to bridge the gap between the two markedly different systems: common law and continental law.[28] In accordance with the wording of the said precept, one party has a right to recede from a contract if it becomes evident before the obligation becomes due that the other party will breach the obligation (or fails to perform it), the breach being fundamental within the meaning of art. 8:103 of PECL. What is relevant to our considerations is that the European legislator has assumed that every type of conduct which constitutes a fundamental anticipated breach makes a withdrawal possible, not only an express announcement of non-performance. The use of the said entitlement can take place at any time during which the above-mentioned conditions are met. In contrast, if the creditor is doubtful as to particular circumstances, it can require the debtor to secure a proper performance of the obligation, and refrain from the performance of its own obligation.[29]

Similarly, anticipatory breach was regulated in the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles),[30] in art. 7.3.3,[31] which play a special role in the harmonisation of international private law. Being an example of a non-binding legal regulation in addition to PECL (*soft law*), it can be easily attributed the same properties and functions important for international trade and the status of a source of inspiration for legislators.[32] Due to a nearly identical formulation of its provisions, the conclusions pertaining to art. 9:304 PECL can be applied also to 7.3.3 UNIDROIT Principles 2010. The formulation of art. III-3:504[33]

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[28] P. Machnikowski, „Zasady Europejskiego Prawa Umów a przepisy Kodeksu cywilnego o zawarciu umowy," *Transformacje Prawa Prywatnego* 3–4 (2006): 77–9.

[29] H.J. van Kooten, "Particular remedies for non-performance. Termination of the contract," in *The Principles of European Contract Law and Dutch Law: A Commentary*, ed. D. Busch (The Hague–London–New York: Kluwer Law International, 2002), 374–5. Parallel solutions to these based on art. 9:304 of PECL are offered by Dutch law (Art. 6:80 BW). Ibid., 376.

[30] The Unidroit Principles of International Commercial Contracts, published in 1994 by the International Institute for the Unification of Private Law. See the latest revision (2010) at http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf [accessed January 3, 2017].

[31] "Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract."

[32] M. Pacocha, *Zastosowanie zasad międzynarodowych kontraktów handlowych UNIDROIT jako ogólnych zasad prawa oraz lex mercatoria. Wybór orzecznictwa*, in AMUR Repository, accessed December 20, 2016, https://repozytorium.amu.edu.pl/bitstream/10593/13559/1/14_PACOCHA.pdf.

[33] "A creditor may terminate before performance of a contractual obligation is due if the debtor has declared that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance, and if the non-performance would have been fundamental."

of Draft Common Frame of Reference (DFCR) is particularly noteworthy[34] as a project intended to unify private law in Europe.

An example of a multilateral, international agreement (so-called *hard law*), which unifies the rules of commercial transactions involving international sale of goods, and which was ratified by Poland along with other 75 states,[35] is the UN Convention on Contracts for the International Sale of Goods.[36] Under art. 72 of CCISG,[37] every type of conduct which constitutes a fundamental anticipated breach allows the other party to withdraw from the contract. However, in contrast to PECL and the UNIDROIT principles, art. 72 CCISG demonstrates also that if an anticipated breach is not based on an express announcement of an intention to do so, the receding party must issue a suitable notification saying that it is willing to use its right to withdraw.[38] Additionally, such a structure of the provision permits contractual stability to be protected against rash interpretation of specific circumstances while maintaining a broad legal basis for such a withdrawal. Just like in the said regulations, CCISG (art. 71) provides a possibility to suspend the performance).[39]

3. THE LEGAL CHARACTER OF AN ANNOUNCEMENT OF INTENDED NON-PERFORMANCE UNDER POLISH LAW

Drawing on regulations developed in the French or Russian legal systems, the Polish Civil Code adopted a remedy which has precedence should a breach of contract occur, namely a request for performance. To date, the Polish legislator has held a view that every form of even partial or delayed performance of an obligation

[34] *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (2008), accessed January 3, 2017, http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf.

[35] Government Statement dated October 25, 1996 on ratification of the UN Convention on Contracts for the International Sale of Goods by the Republic of Poland, made in Vienna on April 11, 1980, Journal of Laws of 1997, No. 45, item 287.

[36] UN Convention on Contracts for the International Sale of Goods by the Republic of Poland, made in Vienna on April 11, 1980, Journal of Laws of 1997, No. 45, item 286 [hereafter CCISG].

[37] "(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance. (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations."

[38] Cf. Napierała, *Odpowiedzialność*, 112–13.

[39] This institution is also present in the Polish legal system (art. 490 CC).

makes it justifiable to sustain an obligation and prevent it from easy extinguishment. Hence, in the Polish legal system, the value represented by a performance that is done in a timely fashion recedes into the background, and an unreliable trading partner in most cases deserves a second chance (setting another deadline) in case of default.

The said situation partly changed with the entry into force the amendment of May 30, 2014. The legislator, in consideration of international trends, decided to extend the basis for withdrawal from a bilateral contract,[40] and thereby addressed the needs of legal transactions and commercial dealings.[41] In the reality of the uniform system of Polish civil law, this is an institution which somehow precedes the applications of art. 491 CC.[42] While addressing the question of inevitable non-performance, the Polish legislator decided on the minimalistic variant of the solution in question. Namely, according to the majority of jurists, the right to withdraw from a bilateral agreement is fulfilled only when the debtor issues an explicit declaration about the non-performance (if a party to a contract explicitly states that it will not perform its obligation).[43] The variant of breach of contract, that is a case in which despite a lack of an explicit announcement but based on all objective circumstances the creditor may reasonably claim that the debtor will not deliver its obligation, has not been implemented in the Polish legal system. In the light of the above-mentioned international regulations, in addition to solutions approved of under common law, this indicates that the Polish legislator is still afraid to open to more flexible and progressive solutions. Therefore, consequences in both situations must be distinguished, and the creditor which, given the circumstances, invokes the mechanism of anticipatory breach of contract, has to obtain an express declaration from the debtor.

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[40] This is demonstrated not only by the location of art. 4921 in the Civil Code but also the essence of the anticipatory breach doctrine. In the literature, we also find arguments supporting the claim that the body of rulings concerning bilateral contracts and issued pursuant to Art. 491 of CC should be made relevant to the said precept. See, among others, the judgment of the Supreme Court dated February 11, file ref. no. V CSK 326/08, LEX nr 619669.

[41] See F. Zoll, „Wykonanie i skutki niewykonania bądź nienależytego wykonania zobowiązania," in *System Prawa Prywatnego. Prawo zobowiązań – część ogólna. Suplement*, ed. A. Olejniczak, vol. VI (Warsaw: C.H. Beck 2010), 137–8, margin no. 190.

[42] It must be borne in mind that the purposes of both provisions are different: art. 491 CC substantiates the *pacta sunt servanda* principle for its purpose is to enforce an obligation by a specific deadline (to redress the breach). Art. 4921 provides a means to evade the consequences of non-performance in the future.

[43] This position is not uniform though, which is proved not only by legal-comparative analysis but also by the permissibility of anticipated breach of contract in the light of objective assessment of the debtor's conduct under articles 610, 635 and 656 of CC.

In view of a great deal of controversy that has built up around the formulation of art. 492[1] CC, and also due to the specific character of the Polish system of civil law in the context of the above-mentioned solution, it would be worthwhile to give the basis for contractual withdrawal a more thorough scrutiny, bearing in mind that the grounds[44] for the law amending the Consumer Law of May 30, 2014 does not dispel fundamental doubts. The main issue is the legal character (form) of the debtor's declaration of non-performance, hence the question arises why this kind of notification constitutes a declaration of intent under CC. Most legal scholars offer a negative reply, claiming that the said declaration does not give rise to or extinguish or alter a legal relationship.[45] This is probably the only kind of manifestation of intent (will) of a debtor, which includes a declaration that a particular situation will not not take place and the creditor's entitlement is realised. Only a submission of the declaration constitutes a unilateral act in law which leads to the extinguishment of the obligation *ex tunc*.[46] What is more, the lack of reference in art. 491[1] of CC to the required form of such a declaration implies that this can be done in any manner. However, the doubt arises whether the legislator, despite the expression "declaration", will not allow an extended variant of the anticipatory breach. It can be argued that a conclusive announcement of non-performance also has this character, the declaration being inferred from attendant circumstances.[47] Here, jurists' opinions differ, but the lion's share of commentators assume that such a declaration cannot be presumed.[48] From a legal-comparative perspective, the opposite view seems valid, especially because the burden of proof in respect of the existence of circumstances which constitute the anticipated breach lies with the party entitled to withdraw.[49] Even if we depart from the actual *in natura* performance of an obligation – having a fundamental

[44] Statement of grounds for the governmental draft act on consumer rights (form no. 2076), http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2076 [accessed December 10, 2016].

[45] See Strugała, "Odstąpienie," 34; A. Olejniczak, "Anticipatory breach of the contract according to Article 4921 of the Civil Code," *Ius Novum* 2 (2015), 79–80.

[46] Except for contracts that constitute a source of continuing obligations (*ex nunc*). See, for example, the judgement of the Supreme Court of March 17, 2017, file ref. no. CSK 454/09, OSNC 2010/10/142, as well as the judgement of the Supreme Court of September 9, 2017, file ref. I CSK 696/10, LEX nr 989123.

[47] See W. Popiołek, „Komentarz do art. 4921," in *Kodeks cywilny. Komentarz. Art. 450–1088,* vol. 2, ed. K. Pietrzykowski (Warsaw: C.H. Beck, 2015), 114, margin no. 3.

[48] Hence the proposal to express this declaration using the term *protestatio*, which stands for a solemn and explicit announcement. See Lemkowski, *Zapowiedź*, 13; M. Gutowski, „Komentarz do art. 4921," in *Kodeks cywilny. Komentarz. Art. 450–1088,* vol. 2, ed. M. Gutowski (Warsaw: C.H. Beck, 2016), 140, margin no. 8.

[49] See Art. 6 CC. The burden of proof in respect of reasons justifying the breach of obligation lies with the debtor. See Strugała, "Odstąpienie," 47.

significance – the question of the extended variant of anticipated breach should be seen in a broader perspective, namely the *pacta sunt servanda* principle.

Another practical uncertainty is associated with the lack of a formulation saying that "the declaration should be made to the other party." For that reason, it is hard to decide whether a refusal to perform can be addressed to any person, expressed *ad in certas personas*, or made public. If we rely on a literal reading of this provision and search the roots, i.e. the doctrine of *anticipatory breach*, we should argue for the broadest circle of direct recipients or ways of communicating the intent of a debtor.[50] What is significant in this context is also the question of revocability of this declaration, which is subject to divergent appraisals.[51] Leaving aside the question of a possible, even proper application of art. 61 CC,[52] the situation is considered in which a debtor, despite an earlier announcement, delivers the contractual obligation. As emphasised above, before a creditor decides to exercise the right to withdraw he is fully bound by the contractual relationship and by not accepting the debtor's service incurs liability for damages himself. Interestingly, though, a debtor who performs a service, having made an initial declaration, may be held liable for the loss which the creditor incurred while undertaking to avoid the effects of the anticipated non-performance.[53] In contrast, the scenario in which a creditor uses his right to withdraw at the last moment (immediately before accepting a service) seems controversial. In extreme cases we might speak of abuse of law (art. 5 CC), which in fact is a risky defence due to the inconsistent approach presented by courts.

An analysis of the literal wording of art. 492^1 CC (the phrase "also prior to the due date") permits a proposition that the material scope encompasses both obligatory and non-obligatory services. The essence of the doctrine of anticipatory breach, the legal comparative analysis,[54] and the position of some commentators suggest that the wording of the Polish provision can be misleading. An intermediate solution would be interesting, that is one permitting withdrawal from a contract after

[50] See Lemkowski, *Zapowiedź*, 13–14.

[51] The idea of keeping the debtor's declaration revocable until the creditor uses the right to withdraw is supported by, among others, Popiołek, "Komentarz do art. 4921," 114, margin no. 4. For a different interpretation, see P. Katner, "Komentarz do art. 4921," in M. Namysłowska and D. Lubasz, *Ustawa o prawach konsumenta* (Warsaw: Wolters Kluwer, 2015), 387, who presume that the creditor's entitlement can be extinguished only by the performance of the contract or by a waiver of this right.

[52] Cf. art. 486 §2 CC, which referrs to a declaration not to accept a contractual service, M. Gutowski, "Komentarz do art. 486," in *Kodeks cywilny. Komentarz. Art. 450–1088,* vol. 2, 116–17, margin no. 21.

[53] Katner, "Komentarz do art. 4921," 387.

[54] PECL, UNIDROIT *Principles* and the Vienna Convention use the phrases "prior to the date/the time for performance".

the due date on condition that the circumstances justifying the right to withdraw (the effectiveness of the declaration) existed before that moment. However, nothing prevents us to accept the view that art. 492[1] CC, as *lex specialis*, to some extent derogates from art. 491 CC, making withdrawal possible without setting an additional time limit also after the due date. What follows from the core of the doctrine of anticipatory breach of contract is that the application of this provision must not be associated with non-performance of accessory services. As it has been explained above, the essence of the entitlement to withdraw from a contract stems from the so-called fundamental non-performance/fundamental anticipatory breach, so this must be a material breach and affecting at least the principal obligation. In view of the scope of the said institution of anticipatory breach, it would be useful to consider whether besides a declaration of non-performance a declaration of improper performance of the obligation should not be taken into account (which becomes evident when articles 471 and 492[1] of the Civil Code are juxtaposed). The literal meaning of both the provision and the international regulations, which employ the term "non-performance" rather than "improper performance", suggest a negative answer.[55] However, the overall body of cases involving anticipatory breach and a frequent impossibility of assessing the severity of imminent defects requires that the application of the said institution as broadly as possible be justified as an exception. The same conclusions can be drawn in respect of a breach of an obligation in whole or in part, and thereby assessing the scope of refusal to perform.[56] For the last case, a comprehensive legal foundation for contractual withdrawal should be based on art. 491§2 in connection with art. 492[1] CC, which raises doubts among some commentators.[57]

4. APPLICATION OF ART. 492[1] CC AND THE EFFECTS OF AN ANTICIPATORY BREACH

Moving on to the central question, i.e. conditions for using the entitlement in compliance with art. 492[1] CC, several factors should be addressed. Firstly, inclusion

[55] In the Polish Civil Code, improper performance of a contract is regulated by separate provisions, which do not always permit an unreliable contractor to be abandoned. See Lemkowski, *Zapowiedź*, 12.

[56] The idea of applying art. 4921 CC only when a party refuses to fulfil an obligation in whole is advocated by, among others, Gutowski, "Komentarz do art. 4921," 139–40, margin no. 7.

[57] The view that art. 4921 CC constitutes *lex specialis* with respect to art. 491 CC has both a practical and significant meaning, which has far-reaching consequences. See ibid. For more on the relationship between the two provisions, see Olejniczak, "Anticipatory breach," 76–79.

of the anticipatory breach institution in the Civil Code and its relationship with art. 387 CC (primary impossibility to perform) and art. 493 and art. 495 CC (subsequent impossibility to perform) permits a claim that inevitable performance of an obligation concern a service that is possible to deliver as soon as the debtor makes his declaration.[58] Secondly, the phrase "prior to the due date" is relevant, which implies that the entitlement to withdraw does not arise in the case of services with no term stated. The term should be specified in an obligation itself or in the provisions of the law rather than inferred from the properties of the obligation or particular circumstances.[59] However, we can safely assume that we may speak of a "specified term" also when – under an obligation with no term stated – a creditor calls upon the debtor to perform the obligation under art. 455 CC.[60]

In the opinion of doctrine representatives, what causes the greatest difficulty is the assessment if an anticipatory non-performance should be intentional for the creditor to become entitled to withdraw from the bilateral contract. An argument which is welcomed by the majority of commentators is one that assumes the rationality of the legislator and that the new provision concerns situations in which in the normal course of events a debtor would fall into default. Accordingly, the provision covers only cases where the debtor's liability is based on fault,[61] and his liability for damages is as much greater as the delay in notification of non-performance is longer.[62] By granting the right to withdraw in every case, i.e. also by anticipating non-performance which happens through no fault, we risk a considerable systemic inconsistency. Commentators emphasise the general goals of the directive,[63] general principles of civil law, and the placement of art. 492^1 CC in the section on "effects of non-performance of obligations". Further, this view justifies the simultaneous introduction of art. 543^1 and art. 636^1 CC, with reference to art. 492^1 CC in case when an anticipated breach occurs through no fault.[64] Advocates of the less prevalent view, however, stress the general purpose of the anticipatory breach institution, opting for

[58] For a different interpretation, see Gutowski, "Komentarz do art. 4921," 140, margin no. 10.

[59] Lemkowski, *Zapowiedź*, 15.

[60] Popiołek, „Komentarz do art. 4921," 114–115, margin no. 5.

[61] Therefore, only when a declaration concerns reasons which lie with the debtor and which the debtor is liable for. See, for example, Katner, "Komentarz do art. 4921," 388. For a different interpretation, see Popiołek, "Komentarz do art. 4921," 115, margin no. 7; Olejniczak, *Anticipatory breach*, 77.

[62] This also transpires from a debtor's duties arising from the principle of due care under art. 472 CC.

[63] Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights.

[64] Otherwise the indicated provisions, which result from the transposition of the consumer rights directive, would be superfluous.

the application of art. 4921 CC also in the case of unintentional non-performance of a service,[65] which is further demonstrated by the objective nature of this institution under common law.

From the essence of the doctrine of anticipatory breach it transpires that a declaration of non-performance gives mainly rise to an entitlement to modify a legal relationship – the non-breaching party may regard such a refusal as a direct breach of the contract and claim damages on general terms.[66] According to art. 494 §1 sentence 2 CC: "The party withdrawing from a contract may demand that not only all that it provided be returned but also that any damage caused by non-performance of the obligation be remedied." Following a common law-oriented approach, some authors argue that even in this case it is not necessary to create legal fiction (notional breach) by equating an anticipatory breach with an actual breach,[67] because the maintenance of readiness to perform an obligation results from the broadly interpreted contractual duties. In the light of the above, a creditor who is withdrawing from a contract is obliged to demonstrate the three classic facts: the event, damage and causal link, which may not always guarantee a compensation in full value. Yet this is precisely the purpose of the regulation contained in art. 492^1, which on no account forces the creditor to exercise his right to withdraw, but in essence is to prevent damage or to offset the effects of an anticipated non-performance.

SUMMARY

Overall, art. 492^1 of the Polish Civil Code constitutes an unquestioned, independent means of protection of creditors in the Polish legal system. It introduces a great deal of flexibility in the contract law since it allows the party which is awaiting a service to modify its current circumstances in a number of ways. A withdrawal from a contract and holding the other party liable for damages is but an alternative to active encouragement of the other party to perform the contractual obligation or

[65] Unintentional anticipated breach of contract does not produce liability for damages under Art. 494 CC but only a duty to return the services received. However, art. 495 CC has a full application in this case as it regulates unintentional impossibility to perform.

[66] The obligation remains within the discretion of the creditor – there are no direct consequences for the existence of a contractual relationship between the parties. The doctrine maintains that such an announcement can be treated as an improper acknowledgement of debt, which interrupts a potential period of limitation. See Katner, „Komentarz do art. 4921," 386–87.

[67] Cf. Strugała, „Odstąpienie," 44; Napierała, *Odpowiedzialność*, 29.

passive anticipation.[68] A creditor is to assess all possible scenarios and choose the most profitable alternative, bearing in mind that it is not always possible to receive due compensation should the contractual relationship continue. However, an anticipatory breach on the part of a debtor may provide an incentive to quickly extinguish the relationship of obligation if the creditor is to maintain readiness to perform, and every failure to fulfil his obligation under the contract may affect negatively the debtor's contractual liability. Similarly, future events may render the the debtor's performance unfeasible for other reasons, which are beyond his responsibility.[69]

As it has been explained above, the *ratio legis* of the provision under discussion is the assumption that in the majority of cases an extension of a time limit to ensure performance would be a factor hindering economic activity and reducing creditors' reactivity to economic circumstances. On the other hand, the dispositive character of art. 492^1 CC (the possibility to exclude its application)[70] causes that implementation of this solution is not burdensome for those contractors who attach the greatest importance to the *in natura* enforcement of a particular obligation.

While the very legislative intent reflected by art. 492^1 CC deserves a positive appraisal, we should accept the claim that the wording of this provision is not free from defects and, as it is, departs from trends visible in other countries in the world, which permit a much wider application of the doctrine of anticipatory breach. Hence we may postulate an amendment of the existing structure of the said provision, or hope that courts, in their practice, take care of specific legal flaws to address the real demands of legal transactions (by accepting the variant involving a conclusive announcement of non-performance). The scope of the right to withdraw in connection with an anticipated breach of contract, delineated in art. 610, 635, and 656 CC, proves that the institution of anticipatory breach in its broader form does not pose a threat to contractors. The case law so far confirms that this institution makes it possible to have an alternative service rendered sufficiently early and before the creditor suffers from far-reaching consequences.

[68] In order to urge the contractor, the creditor may even voluntarily set an additional time limit (as provided by art. 491 of CC), but we need to note that in such a situation the right to withdraw will take effect only after the time limit expires. See Lemkowski, „Zapowiedź," 15; Strugała, *Odstąpienie*, 37.

[69] See Avery v. Bowden, 119 E.R. 647 (1856).

[70] See Lemkowski, *Zapowiedź*, 16–17.

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THE INSTITUTION OF ANTICIPATED NON-PERFORMANCE UNDER POLISH LAW IN THE CONTEXT OF THE DOCTRINE OF *ANTICIPATORY BREACH OF CONTRACT* – ON THE STRUCTURE OF ART. 492[1] OF POLISH CIVIL CODE (A COMPARATIVE LEGAL ANALYSIS)

Summary

Various aspects of the anticipated (expected) breach of obligations under a contractual relationship have long been the subject of discussion with respect to the Polish Civil Code of 1964, which does not provide a general legal basis entitling the creditor to terminate the contract before it becomes due. This situation has changed with the entry of the amendment of May 30, 2014, as the introduction of Art. 492[1] of the Civil Code was an important legislative step, which requires a comprehensive comment. A comprehensive linguistic and functional analysis of the said provision, regulating an inevitable non-performance, however, requires a broader view, especially from the perspective of the common law system (as an institution of Anglo-Saxon origin) or other international regulations (which are a source of inspiration for the Polish legislator). Both legal and comparative verification not only facilitates a fuller understanding of the nature of the anticipatory breach institution itself, but above all, allows one to realize the consequences and a number of contentious issues involving the practical application of the institution of art. 492[1] of the Civil Code from the perspective of participants of the legal and economic market.

Key words: anticipatory withdrawal; protection of the creditor; breach of contract; non-performance; announcement of non-performance; repudiation.

Translated by Tomasz Pałkowski

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