Termination as a remedy for breach of contract - functional analysis of Polish regulation in light of Europeanisation of private law

Contracting parties expect that the exchange of products or services will produce certain benefits as agreed in the contract. Private law recognizes these reasonable expectations by ensuring the sanctity of contracts (*pacta sunt servanda*).

In light of this principle, a unilateral change of contract should be regarded as exceptional. This applies in particular to a unilateral cancellation of contract by means of a notice communicated to another party. If there were no limits to unilateral cancellation of contract, the sanctity of contracts would not have any legal force. That is why private law systems impose some limits. According to Polish civil law, a unilateral cancellation of contract has to be based on a legal provision or on a previous agreement of both contracting parties.

One of the legal mechanisms of unilateral cancellation of contract is a right to terminate it. There are many provisions in the Polish Civil Code and other legal acts that entitle one party to terminate a contract under certain circumstances. Additionally, Polish law explicitly provides for a possibility to reserve a right, for one or both parties, to withdraw from a contract but within a specified time limit. Termination of contract depends on various prerequisites and may produce different legal effects. Certainly it is not as uniform institution as could be sought-after.

The most interesting seems to be termination of contract for breach of contract. Should it really be treated as an exception to the *pacta sunt servanda* principle, or is it rather a reaction to a violation of this principle?

This question becomes essential in case of synallagmatic contracts that are based on equivalency (mutuality) of obligations. The vast category of such contracts includes as common contracts as sale contracts, specified works contracts or services. In synallagmatic contracts one party obliges himself to act in a certain way expecting the other party to perform an equivalent action. In theory, upon conclusion of the contract the interests of both parties are balanced. The proper performance of the contract (exchange of products or services) would make this balance definitive.

However, in process of performing the contract the balance might be disrupted. In this case, one of the functions of private law is to enable to restore this balance. If one party is breaching its obligations (e.g. by not delivering the product), law provides the other party with a set of remedies. Termination of contract is one of them.

In the field of private law a breach of contract equals to a violation of law. As set out by Code Napoleon of 1804, valid contracts have a force of law for who has concluded them. From this point of view, termination of contract as a remedy for breach seems to sanction the *pacta sunt servanda* principle rather than being an exception to it.

The project aims at analyzing the remedial and sanctioning potential of termination within the system of legal remedies for breach of contract. The research is directed at resolving important problems that exist in this matter under Polish law. To acquire a broad perspective on these issues the project includes, as a crucial element, a functional analysis of termination for breach on supranational level.

We can observe lately the increasing significance of termination for breach. It results from a general tendency of acceleration of legal relationships. It has its source in free market principles, globalization processes and increasing competition of products and services.

In the past, in case of breach of contract, the other party (the creditor) would more likely prefer to accept a late or defective performance for not to lose the contract (the exchange of goods). That was because obtaining the same products or services elsewhere on the market was not an easy and fast thing to do. Nowadays, in case of breach of contract, termination of contract may be an extremely useful and attractive tool in hands of the creditor. It enables him to “escape from a bad bargain” and to satisfy his interests by entering in a new legal relationship.

At the same time, termination of contract is the most radical tool in light of the *pacta sunt servanda* principle. The exchange of products or services that was planned upon conclusion of the contract will not happen. For this reason law should specifically regulate prerequisites, mechanism and legal effects of exercising a right to terminate a contract.

Termination of contract has been a subject of interest in Polish legal doctrine. It seems, however, that there is a lack of a complete analysis of termination as a remedy for breach. In foreign legal science the remedial nature of termination is much more exposed. In Poland the lack of legal analysis of the remedial potential of termination results in some doctrinal controversies. The problematic matters include the right to claim damages after termination of contract, the legal basis of obligations to return or the legal regime of express termination clauses. The project aims at resolving these issues. The project claims that remedial termination for breach has a specific regime, which reflects the functions of this institution. The aim of the project is to provide a complete analysis of this regime.

To better analyze the remedial termination of contract it is important to have a look on foreign legal systems. Such historical and comparative analysis will improve the understanding of this institution. Initial research shows that remedial

termination for breach plays an important role in many civil law systems. However, many terminological and constructive differences exist among them. The project aims at explaining them. In light of Europeanisation of private law, the knowledge about foreign systems and the ability to use foreign legal institutions is important both on scientific and practical level.

The comparative analysis will be presented by examining different models of termination for breach that exist in European legal systems. It is aimed at improving and broadening the Polish private law science in this field. The results should enable to take a critical view on modern theories on termination for breach that are being expressed in the context of harmonization of private law in Europe. Ultimately, as the recodification of Polish private law is under way, the analysis of termination for breach may provide hints for new legislative solutions.