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STATUTORY VERSUS CONTRACTUAL RIGHT OF WITHDRAWAL IN A CONSTRUCTION CONTRACT

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Abstract: *The right of withdrawal – as a unilateral right of a party to a contract – does not require the consent of the other party to have legal effect. As it is an exception to one of the most important principles of contract law, i.e. pacta sunt servanda, it must be interpreted strictly and therefore certain conditions from the law or the contract must be fulfilled. Also in the case of a construction contract, the investor and the contractor may exercise the statutory right of withdrawal as well as the contractual right of withdrawal, provided that the latter is provided for. The purpose of this article is to answer the question of how the contractual right of withdrawal relates to the statutory right of withdrawal. It is controversial whether, during the period in which a party has a contractual right of withdrawal, he may exercise his statutory right. A right of withdrawal may be introduced into a contract by way of freedom of contract and it cannot be assumed that this contractual provision excludes the right holder from invoking a right under the Act. It is also very important whether, since the specific provisions governing a construction contract provide for a right of withdrawal, the parties to that contract may withdraw from the contract under the general rules.*

Keywords: *construction contract; investor; contractor; contractual right of withdrawal; statutory right of withdrawal.*

Introduction

The right of withdrawal is one of the forms of exit from the contractual relationship (in addition to consensual termination by both parties and termination by one party). It is a declaration of intent made to

terminate the contractual relationship. It is a unilateral declaration, so the consent of the other party to the contract is not required in order to produce the indicated effect, if the prerequisites authorising the submission of the declaration occur. Irrespective of the right of withdrawal provided for in the Civil Code, as a rule, it may be reserved in all types of contracts, with the exception of those in which it is not permissible to include a condition, e.g. in a contract transferring ownership of real estate, i.e. a contract with material effect[1]. On the other hand, there is no obstacle to the right of withdrawal being included in a contract obliging to transfer ownership of the property, i.e. not having material effect. Obviously, such a reservation may be included in a construction works contract in which the contractor undertakes to deliver the object provided for in the contract, constructed in accordance with the design and principles of technical knowledge, and the investor undertakes to perform the activities required by the relevant regulations connected with the preparation of the works, in particular to hand over the site and deliver the design, and to accept the object and pay the agreed remuneration (Article 647 of the Civil Code). This also applies to subcontracts, the object of which may be a part of a construction object, including specific construction works.

Since a distinction is made between a statutory and a contractual right of withdrawal, it is crucial to determine the relationship between these rights, i.e. whether the party with this right under the contract can exercise the statutory right of withdrawal. This research question should be answered as follows: the contractual right of withdrawal does not exclude the statutory right. Similarly, the second research question must be answered positively, namely whether, since the specific provisions governing a construction contract provide for a right of withdrawal, the parties to that contract may withdraw from the contract on general principles. An analysis of the legal provisions leads to such a conclusion, while it cannot be overlooked that, in practice, the contractual right of

[1] See the judgment of the Supreme Court of the Republic of Poland of 8 December 2004, I CK 191/04.

withdrawal is exercised by the entitled party and, if the statutory right is exercised, it is usually on the basis of special provisions. This is due to the construction of the right, as it is usual for a contract to provide for a more favourable (for the right holder) solution than the one under the law, just as the right of withdrawal under the special provisions is more favourable for the right holder than the right under the general provisions. However, depriving the right holder a priori of the possibility to choose has no justification.

In view of the research problem thus outlined, the controversial issue of the divisibility of the non-monetary performance under a construction contract, among other things, was omitted, as it had no bearing on the application of the right of withdrawal in this regard.

Statutory right of withdrawal under general principles

The general rules for withdrawal from a contract are primarily provided for in Article 491 of the Civil Code. According to this article, if one of the parties is in default in the performance of an obligation under a reciprocal contract, the other party may set an appropriate additional period of time for performance with the threat that, if the set period expires ineffectively, it will be entitled to withdraw from the contract (§ 1, first sentence). If the performance of both parties is divisible and one party is in default only as regards part of the performance, the other party's right of withdrawal shall be limited, at its choice, either to that part or to the rest of the unfulfilled performance. That party may also rescind the contract in its entirety if the partial performance would not have been meaningful to it due to the nature of the obligation or due to the intended purpose of the contract known to the party in default (§ 2).
From the above, the following prerequisites for the exercise of the right holder (creditor1) (Klein, 1964, p. 145) of this right:

1/ mutuality of the contract;

[1] This refers to a creditor only in the context of unfulfilled performance, as in the case of reciprocal contracts, both parties are creditors.

2/ default of one of the parties;

3/ the setting of an appropriate additional period of time for the performance of the obligation with an appropriate threat;

4/ submission of a declaration of withdrawal from the contract (Stojek, in: Habdas, & Fras (ed.), 2018, p. 966)[1].

If either of these conditions does not occur, withdrawal from the contract is ineffective.

A contract is reciprocal when both parties undertake in such a way that the performance of one of them is to be equivalent to the performance of the other (Article 487 § 2 of the Civil Code). Such a contract is, among others, a construction contract. Contracts are usually reciprocal because – in the most general terms – such contracts consist in each party being obliged to provide a benefit (being a debtor as to that benefit) and entitled to receive the other party's benefit (as to which it is a creditor), and the benefits are exchanged (Machnikowski, in: Machnikowski (ed.), 2024, art. 487, thesis No. 1). It is about the legal coupling of benefits in such a way that the obligation of one party to perform is the legal basis for the obligation of the other party[2]. Whereby the criterion for considering the performance of one party as equivalent to the performance of the other party is, in this view, the subjective perception by the party concerned of the performance as equivalent to that of the other party (Gutowski, in: Gutowski (ed.), 2022, art. 487, side No. 2). In other words, in order for a contract to be deemed mutual, it is not necessary that the benefits of the parties are of the same economic value, determined according to objective criteria, but that the parties define them as equivalent (Radwański, & Olejniczak, 2018, p. 126), but that the content of the contract, which is objectively unfavourable to one of the parties, will merit a negative moral assessment and consequently lead to the contract being regarded as contrary to the principles of social

[1] Unless otherwise provided by the parties in the contract, this may be done in any form, including by implication.

[2] See e.g. the judgment of the Supreme Court of the Republic of Poland of 25 August 2016, V CSK 705/15.

co-existence if it has been shaped under the pressure of the de facto superiority of the other party, in which case the contract does not reflect a fully free and prudent decision[1].

It should be noted that the cited provision provides for the right of withdrawal only in the case of one 'mode' of non-performance of an obligation, namely default, i.e. failure to perform an obligation on time for which the debtor is liable (Article 476 of the Civil Code), and thus does not apply, for example, to inadequate quality of the works. In the case of a construction contract, in which contractual liability for damages is based on the principle of fault, it is therefore a matter of untimely performance through the fault of the debtor. The creditor's right to withdraw from the reciprocal contract is therefore dependent on the existence of a delay on the part of the debtor in fulfilling an essential contractual obligation, i.e. one that is necessary to realise the purpose of the contract and known to the debtor. A non-performance of a material contractual duty occurs when the non-performance of a contractual duty, due to the default of the counterparty, deprives the other party of what he or she could have expected under the contract, unless the other party, reasonably speaking, could not have foreseen such a result. A material breach of a contractual duty is determined in particular by its consequences. It is not only the non-performance of a performance which, according to the wording of the obligation, is due to the creditor, but it can also be non-performance of obligations even only functionally related to the debt. In particular, it is not only a duty of an actionable nature (performance), but also other breaches, e.g. the failure of a party to a reciprocal contract to perform other essential contractual duties, even if it is only his duty to cooperate in the performance of the obligation[2]. However, it is a legitimate view that, since Article 491 of the Civil Code is about delay in performing an obligation, it is about

[1] The judgment of the Supreme Court of the Republic of Poland of 15 September 2016, I CSK 611/15.

[2] The judgment of the Supreme Court of the Republic of Poland of 24 June 2014, I CSK 392/13.

counterperformance and not, for example, incidental performance (Zagrobelny, in: Gniewek, & Machnikowski (ed.), 2021, p. 1142; Kondek, in: Osajda, & Borysiak (ed.), 2024, art. 491, thesis No. 2.). In the case of a construction contract, the obligations referred to in this provision and to be performed within the time limit are: on the part of the contractor – the handing over of the object, on the part of the investor – the handing over of the construction site, the delivery of the design (unless this obligation has been assumed by the contractor), the acceptance of the object and the payment of the remuneration, possibly other activities related to the preparation of the works.

The last issue concerns the creditor's setting of an appropriate additional period of time for performance to the debtor with the threat that if the set period expires without success, the creditor will be entitled to withdraw from the contract. This setting of a deadline can only take place when a delay has already occurred, and not in the case of a so-called unavoidable delay, i.e. a situation where the deadline for performance of the obligation has not yet arrived, but it is indisputable from the circumstances that the debtor will not be able to perform the obligation on time (Klein, 1964, s.73). As the time limit is to be 'additional' in order to perform the obligation, it is clear that it cannot run before the contractual time limit for the performance of that obligation has expired. Furthermore, the additional time limit must be set before the creditor makes his declaration of rescission. Making such declarations separately ensures that the right holder has the necessary time for reflection, which should precede the decision to terminate the contractual relationship in principle irreversibly, and to express it firmly vis-à-vis the other party, who should be warned of the possibility of the counterparty exercising this right[1]. This is therefore a reasonable regulation that favours the performance of contracts. It is therefore not possible to combine these declarations and thus to make a so-called

[1] See e.g.: the judgment of the Supreme Court of the Republic of Poland of 5 April 2013, II CSK 62/13; the judgment of the Appeal Court in Warsaw of 4 December 2015, I ACa 1079/15.

conditional declaration of rescission, i.e. to rescind the contract on the condition that the debtor fails to perform the obligation within an additional period of time. It is only when this additional period has expired that the creditor can make a (separate) declaration of withdrawal. In order to protect the debtor from being given an unrealistic deadline within which, even by exercising due diligence, he would not be able to fulfil his obligation, the legislator stipulates that this deadline should be 'appropriate'. In determining it, the principles of good faith and fair dealing should be followed, taking into account the interests of both parties. Above all, the type and content of the debtor's obligation and the degree of preparation for its fulfilment should be taken into account. It should be such a time limit, which objectively gives the possibility to fulfil the obligation, will be adapted to the specific circumstances of the given obligatory relationship. The time limit may not be too short[1]. In other words, an 'adequate' term is one which realistically, in an objective sense, taking into account the circumstances surrounding the performance of the contract in question, enables the debtor to fulfil the performance (Doliwa, in: Załucki (ed.), 2024, p. 1105), obviously already after the time limit set in the contract. The appropriateness of an additional time limit for the performance of an obligation under a reciprocal agreement shall be assessed by the court in the light of the facts. If the time limit set by the creditor is too short, the debtor may perform after the time limit, as long as he does so within an appropriate period of time[2]. It is problematic whether, if the time limit was inadequate, but the debtor also failed to perform after the expiry of the relevant time limit, the creditor may withdraw from the contract without setting a time limit once again (the need to re-set a deadline that no longer needs to be 'appropriate' was commented on by, among others, Kondek, in: Osajda, & Borysiak (ed.), art. 491, thesis No. 2; Gutowski, in: Gutowski (ed.), art. 491, side No. 9). It is reasonable to assume that if

[1] See the judgment of the Appeal Court in Katowice of 5 January 2000, I ACa 817/99.
[2] See also the judgment of the Supreme Court of the Republic of Poland of 10 May 2007, III SK 18/06.

a reasonable period of time has elapsed, the creditor may make a declaration of rescission. There is no provision obliging him to make a further call, what is important is that the appropriate additional period has elapsed. Obviously, the submission of a declaration of withdrawal before the expiry of that period shall have no legal effect.

When setting an additional period, the creditor must at the same time threaten the debtor that, if the additional period expires unsuccessfully, he will be entitled to rescind the contract. This is because the debtor must be informed that the summons is linked to a potential rescission of the contract. This is because the creditor can 'only' summon the debtor to perform and claim damages. Withdrawal is his prerogative and not his obligation, so that he does not have to make a declaration to this effect even after the expiry of the additional time limit set for performance. If the debtor performs within this additional period, in accordance with the contract and the creditor's legitimate interest, the creditor's right to withdraw from the contract expires. If the debtor performs only partially, the other party may withdraw from the contract for the remainder of the performance without granting a further additional period of time (Dąbrowa, in: Czachórski, & Radwański (ed.), 1981, p. 821), unless the situation described in Article 491 § 2 of the Civil Code arises – then the creditor may withdraw from the contract in its entirety. Since the additional time limit applies to the entire performance, the fulfilment of a part of the performance does not release the debtor from his obligation.

A modification of the above principles is provided for in Article 492^1 of the Civil Code, according to which, if the party obliged to provide performance declares that it will not provide such performance, the other party may withdraw from the agreement without setting an additional deadline, also before the specified deadline for performance has passed. It is therefore concerned with situations in which – due to the position of the debtor himself – it would be unreasonable for the creditor to continue with the obligation relationship. The other party may either exercise this right or proceed in accordance with Article 491 of the Civil Code, i.e. set an additional time limit, but without the risk that, if it is

unsuccessful, it may withdraw from the contract and then withdraw on the basis of Article 492[1] of the Civil Code (Popiołek, in: Pietrzykowski (ed.), 2021, art. 4921, side No. 1). This provision provides a normative basis for the creditor to exit from an obligation under a reciprocal agreement with the debtor insofar as it is clear from an unambiguous and unmistakable statement of knowledge by the other party that it will not perform the performance charged to it as a whole[1]. If the debtor refuses to fulfil part of the divisible performance, Article 491 § 2 of the Civil Code applies by analogy[2].

The debtor's statement of intention not to perform need not be made directly to the creditor, it is sufficient that it reaches him/her (Lemkowski, 2015, pp. 13-14). The statement may be made in any form; what is important is that it is clear and firm. The reasons for making such a declaration are irrelevant.

A different situation is regulated in Article 493 § 1 and 2 of the Civil Code. If one of the mutual performances has become impossible as a result of circumstances for which the obliged party is responsible, the other party may, at its choice, either demand redress for the damage resulting from the non-performance of the obligation or withdraw from the agreement. This shall also apply to the partial impossibility of performance by one of the parties, if the partial performance would not be meaningful for the other party due to the characteristics of the obligation or due to the intended purpose of the contract known to the party whose performance has become partially impossible.

Therefore, what is at issue here is the subsequent (occurring after the contractual relationship has been established) impossibility of one of the mutual performances for which one of the parties is responsible, as a result of which the other party has the possibility of withdrawing from the contract. Only a state of permanent impracticability makes it possible to consider that the institution of impossibility of performance regulated by the above provision is applicable. In doing so, the impossibility of

[1] The judgment of the Appeal Court in Kraków of 5 December 2022, I AGa 146/21.
[2] The judgment of the Appeal Court in Poznań of 28 April 2022, I AGa 321/21.

performance must be of a definite nature, so that if future performance is possible, the impossibility of performance does not exist[1]. The impossibility of performance is objective in nature, meaning that such performance cannot be fulfilled not only by the debtor, but by any other person (a truly unenforceable performance) (Bujalski, & Zoll, in: Olejniczak (ed.), 2023, p. 1254)[2]. The creditor then has the choice between demanding damages or rescinding the contract, whereby he does not have to wait until the performance deadline arrives, but may also rescind the contract even if the performance that has become impossible was not yet due (Tracz, 2007, p. 249). Withdrawal from the contract does not exclude the possibility of claiming damages. However, it is clear that in the described situation the creditor cannot demand performance.

Statutory right of withdrawal based on special provisions

With regard to certain contracts, the Polish legislator has provided for special provisions regulating the right of withdrawal. One of them is a works contract, the provisions regulating which, inter alia, with regard to the consequences of a delay by the contractor with respect to commencement of works or completion of the object or performance of the works by the contractor in a defective manner or contrary to the contract, as well as with regard to the investor's right to withdraw from the contract before completion of the object, apply accordingly to a construction works contract (Article 656 § 1 of the Civil Code)[3]. In this connection, it is important to point out first of all two articles concerning the contract of work applicable to the construction contract:

1/ Article 635 of the Civil Code – if the contractor delays the commencement or completion of the work to such an extent that it is

[1] See the judgment of the Appeal Court in Białystok of 27 February 2014, I ACa 737/13.
[2] See the judgment of the Appeal Court in Warsaw of 16 January 2014, VI ACa 822/13.
[3] See also resolution of a panel of seven judges of the Supreme Court Supreme Court of the Republic of Poland of 11 January 2002, III CZP 63/01, „Orzecznictwo Sądu Najwyższego Izby Cywilnej" (OSNC) 2002, No. 9, item 106.

unlikely that he will be able to complete it in the agreed time, the investor may, without setting an additional deadline, withdraw from the contract even before the expiry of the deadline for completion of the work;

2/ Article 636 § 1 and 2 of the Civil Code – if the contractor performs the object in a defective manner or in a manner contrary to the agreement, the investor may call upon the contractor to change the manner of performance and set an appropriate time limit for this purpose, and if the set time limit expires ineffectively, the investor may withdraw from the agreement or entrust the rectification or further performance of the object to another person at the contractor's expense and risk; if the investor has supplied the material itself, the investor may, in the event of withdrawal from the agreement or entrusting the performance of the object to another person, demand that the material be returned and the commenced object be handed over.

As far as Article 635 of the Civil Code is concerned, it is *lex specialis* in relation to Article 491 of the Civil Code. It is evident that withdrawal from the contract by the investor on the basis of Article 635 of the Civil Code is possible without setting an additional deadline for the contractor, if it is objectively unlikely that the contractor will be able to complete the object (works) within the agreed deadline. In such a case, the ordering party may withdraw from the contract without setting an additional deadline, even if the deadline for the completion of the work has not yet expired, although it is permissible to withdraw from the contract also after the expiry of the deadline for the completion of the object[1]. The right to withdraw immediately from the contract may also exist in the event of failure to complete individual stages of the works on time[2]. Significantly, unlike the previously described situations in which

[1] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 12 January 2012, IV CSK 182/11, OSNC 2012, No. 7-8, item 90; of 21 March 2013, III CSK 216/12; differently the judgment of the Supreme Court of the Republic of Poland of 21 January 2004, IV CK 356/02.

[2] See the judgment of the Supreme Court of the Republic of Poland of 15 November 2016, III CSK 397/15.

the investor may withdraw from the contract under the Act, the right to withdraw from the contract under Article 635 of the Civil Code does not depend on the fault of the contractor, so it may be both delay and delay for which the contractor is not responsible. On the other hand, withdrawal cannot take place if the delay was caused by the investor, who, for example, does not fulfil his duty to cooperate with the contractor[1].

Article 636 of the Civil Code, on the other hand, only applies during the execution of the object[2], because if the defects become apparent after its acceptance, the investor is entitled to claims under the ex contractu regime, in particular under the warranty for defects. Unlike the previous article, which deals with the time limit for performance, Article 636 of the Civil Code deals with the situation when irregularities arise as to the manner of performance of the object, i.e. defects or inconsistencies with the contract. The investor's rights are ordered chronologically, as he may first call upon the contractor to change – within a reasonable time – the manner of performance to the correct one, and upon the ineffective lapse of this time limit, he may choose between withdrawing from the contract or entrusting the rectification or further performance of the object to another person.

Characteristically, as long as the object has not been completed, the investor may withdraw from the contract at any time by paying the agreed remuneration, whereby the investor may deduct what the contractor has saved due to the non-performance of the object (Article 644 of the Civil Code). The necessity to pay the remuneration in such a situation is an expression of respect for the protection of the contractor's interest. Ultimately, the view emerged that withdrawal from the contract on the basis of this provision has effect from the moment it is made, and

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[1] See the judgment of the Supreme Court of the Republic of Poland of 21 September 2006, I CSK 129/06.

[2] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 4 April 1997, II CKN 65/97; of 3 November 2000, IV CKN 152/00, OSNC 2001, No. 4, item 63; of 25 June 2014, IV CSK 610/13.

simultaneous payment of remuneration is not a condition for the effectiveness of withdrawal[1]. This means that non-payment results in a claim on this account on the part of the contractor.

On the other hand, the contractor may withdraw from the construction works agreement - after setting an appropriate deadline for the investor with a threat that upon ineffective lapse of the deadline, the contractor will be entitled to withdraw from the agreement – if the cooperation of the investor is required for the performance of the object, and such cooperation is lacking (Article 640 of the Civil Code). In particular, this refers to making the construction site or the so-called frontage of works available, but also, for example, to making arrangements necessary for the continuation of the works, providing the necessary permits to conduct the works, etc. Irrelevant for the application of this provision to a construction contract is the 'difficult market for contractors and the necessity to search for investments to be carried out' (Gutowski, 2005, p. 70). This contract requires the cooperation of the investor in the vast majority of cases.

Contractual right of withdrawal

Pursuant to the first sentence of Article 395 § 1 of the Civil Code, it may be stipulated that one or both parties shall have the right to withdraw from the contract within a specified period of time. It is also permissible to reserve the right to partial rescission of the contract in favour of a party[2]. This contractual reservation is not complicated, as it requires the identification of two elements in particular: the party(ies) to whom the right of withdrawal is granted and the time limit within which the right may be exercised. In the case of a construction contract, the right of withdrawal may be reserved in favour of the contracting authority and/or

[1] See the judgments of the Supreme Court of the Republic of Poland: of 26 January 2001, II CKN 365/00, OSNC 2001, No. 10, item 154; of 22 May 2003, II CK 367/02.
[2] See the judgment of the Supreme Court of the Republic of Poland 16 November 2005, V CK 350/05, „Biuletyn SN" 2006, No. 3, item 11.

the contractor or the contractor and the subcontractor (in the case of a subcontract). It is, however, practically uniformly accepted that the aforementioned provision is peremptory in nature (*ius cogens*) insofar as it provides that the contractual provision granting the party(ies) the right to withdraw from the contract must set a deadline within which such right may be exercised. This means that if no such time limit has been specified, the provision concerning the right of withdrawal is invalid (Article 58 § 1 and 3 of the Civil Code) (Drapała, in: Osajda (ed.), 2019, p. 1248; Machnikowski, in: Gniewek, & Machnikowski (ed.), 2021, p. 861; an isolated view was expressed by Warciński, 2005, p. 36 et seq., according to which the contractual right of withdrawal may be construed as a right of unlimited duration)[1]. This is important because the contractual right of withdrawal undermines the durability of the contract in which it is incorporated and therefore constitutes a limiting element of the *pacta sunt servanda* principle[2]. The invalidity of the provision obviously results in the impossibility to invoke the contractual right of withdrawal.

The law does not indicate whether, when introducing this right into a contract, the parties must specify the prerequisites (circumstances) upon the occurrence of which a party may withdraw from the contract. As indicated, it must be borne in mind that the possibility to withdraw from a contract is an exception to the principle of permanence of contracts, as well as that it is possible to reserve the right to withdraw for the payment of a specified sum – a withdrawal fee (Article 396 of the Civil Code), when it is certainly not necessary to specify the grounds for withdrawal. Therefore, in the case of Article 395 § 1 of the Civil Code, it is necessary to specify these grounds, but there is no need to develop this thread in this study, as in practice the parties reserve a contractual right

[1] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 6 May 2004, II CK 261/03; of 18 October 2012, V CSK 417/11; of 12 October 2018, V CSK 493/17.

[2] See the judgment of the Supreme Court of the Republic of Poland of 11 August 2005, V CK 86/05.

of withdrawal in strictly defined situations. It should only be emphasised that the circumstances entitling to exercise this right need not only be those for which the debtor is responsible; they may also be circumstances for which neither party is responsible. On the other hand, a provision which grants one of the parties the right to withdraw from the contract for a reason for which that party is responsible will be invalid – as being contrary to the principle of freedom of contract (Article 353^1 of the Civil Code).

Lex commissoria

A special regulation is included in Article 492 of the Civil Code, which gives the entitled party the right to withdraw from a mutual agreement without setting an additional deadline, if it was reserved for the case of non-performance of an obligation within a strictly specified deadline, or when performance of the obligation by one party after the deadline would not be significant for the other party due to the properties of the obligation or due to the intended purpose of the agreement known to the party in default. This is the so-called *lex commissoria* clause, which is one of the cassation clauses (Paśko, 2014, pp. 39 et seq). Although there is a dispute as to whether this is a modification of the statutory or contractual right of withdrawal (Lemkowski, 2012, p. 94; Lutkiewicz-Rucińska, in: Balwicka-Szczyrba, & Sylwestrzak (ed.), 2024, p. 989; Doliwa, in: Załucki (ed.), p. 1107; differently Wyżyn-Urbaniak, 1995, pp. 44-45)[1], is to be regarded as an institution that combines the features of the two rights. Although it must be reserved in the contract, it is distinguished from a statutory right by the fact that a time limit does not have to be reserved within which a party may exercise this right. However, it is impossible not to notice that the provision referred to refers to a derogation from the setting of an additional time limit, which

[1] The dominant view is the former – see e.g. the decision of the Supreme Court of the Republic of Poland 20 March 2014, I CSK 404/13; the judgment of the Appeal Court in Białystok of 10 June 2015, I ACa 97/15.

indicates a connection with Article 491 § 1 of the Civil Code. If, therefore, a right of withdrawal is reserved in the contract without specifying the period within which a party may exercise it, it must be considered whether this provision does not constitute a *lex commissoria*.

At the same time, there is no doubt that Article 492 of the Civil Code is of a peremptory nature[1] and should be interpreted strictly in accordance with the principle *exceptiones non sunt extendae*[2]. There is no justification for the view that such a provision does not have to be included explicitly in the contract, but can be interpreted from it in accordance with the rules of interpretation of declarations of intent (Wiśniewski, in: Bieniek (ed.), 2011, art. 492, thesis No. 4.). However, it has been accepted in case law that although the possibility of invoking Article 492 of the Civil Code. is obvious when there is a provision in the contract from which it follows unequivocally that in the event of one of the parties' delay in performing the service within a strictly specified period, the other party will be entitled to withdraw from the contract without the need to set an additional deadline, withdrawal from the contract on the basis of this provision is also possible when the parties have included provisions in the contract from which it can be established by way of interpretation that the deadline for performance has been strictly specified and that in the event of non-compliance with the deadline the other party may withdraw from the contract (Lackoroński, 2018, letter I)[3]. However, it cannot be overlooked that what was at issue was a situation in which the contract set a strictly defined deadline for the contractor's performance of the works, calculated from the strictly defined date of handover of the construction site, and the right to

[1] See e.g. the judgment of the Supreme Court of the Republic of Poland of 11 January 2017, IV CSK 161/16.

[2] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 3 Fabruary 1997, I CKN 75/98; of 5 June 2002, II CKN 701/00, „Orzecznictwo Sądów Polskich" 2003, No. 10, item 124; the decision of the Supreme Court of the Republic of Poland of 20 March 2014, I CSK 404/13.

[3] See the judgment of the Supreme Court of the Republic of Poland of 19 June 2009, V CSK 454/08.

withdraw from the contract "in the event of performance not in accordance with the terms set out in the contract". However, the concept of a "strictly defined term" cannot be extended to include a condition[1]. At the same time, a *lex commissoria* cannot be reserved for mere delay (for which the debtor is not responsible) as well as for non-performance of a part of the obligation (e.g. a stage of the construction work).

Exercise of the statutory and contractual right of withdrawal

Two issues arise in relation to the interplay between the statutory and contractual right of withdrawal and the right of withdrawal on general principles and on the basis of special provisions.

As regards the former issue, the Polish Supreme Court has expressed the view that if a contractual right of withdrawal is reserved, as long as this right exists, the statutory right of withdrawal does not apply[2], without justifying this position. In other words, during the period in which a party is entitled to withdraw from a contract by invoking a contractual provision, it is not entitled to exercise its statutory right of withdrawal for the same reason. On the other hand, however, it has been pointed out in case law that the reservation of the contractual right of withdrawal does not affect the rights of the contracting parties to withdraw from the contract granted to them by law, and at the same time, these provisions (e.g. Articles 491 and 493 of the Civil Code) do not apply to the contractual right of withdrawal[3], although this position is also not substantiated; this would mean that the two rights, i.e. under the

[1] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 17 February 2011, IV CSK 405/10; of 24 June 2010, IV CSK 67/10; differently the judgment of the Supreme Court of the Republic of Poland of 26 January 2005, V CK 401/04.

[2] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 9 September 2011, I CSK 696/10; of 6 July 2016, IV CSK 687/15.

[3] See e.g. the judgment of the Appeal Court in Warsaw of 27 October 2016, VI ACa 1283/15.

law and the contract (if reserved in the contract), are independent of each other.

The right of withdrawal is introduced into the contract by the will of the parties. Usually, broader factual grounds for the right of withdrawal, more favourable than those provided for by law, are provided for in the contract. However, this is not a rule that has no exceptions in practice – on the contrary, it happens (although very rarely) that the parties provide in the contract for more far-reaching conditions that must be fulfilled in order to exercise this right. This does not mean, however, that the parties automatically exclude the mandatory provisions of the law governing the right in question. Irrespective of the fact that a provision of ius cogens cannot be contractually excluded (such a provision would be invalid), no legal or axiological considerations support the limitation of a right arising from the law by a right arising from the contract. These are two independent rights, and a party may choose which one it wishes to exercise. The following situations may be cited as examples: (i) the contract reserves the right of withdrawal (on the basis of Article 395 § 1 of the Civil Code, and not as a *lex commissoria*) without the need to give the debtor an additional period, whereas under general principles such a period would have to be given, but the creditor – for the sake of good cooperation – declares that it exercises its statutory right of withdrawal by giving the debtor an additional appropriate period for performance; (ii) the "weaker" party to the contract has been imposed a provision which entitles it to withdraw from the contract on much less favourable terms than those arising from the law - it cannot be considered that it does not have the right to exercise its statutory right of withdrawal. As regards the latter, the view has been expressed in doctrine that since Article 635 of the Civil Code is a special provision in relation to Article 491 of the Civil Code, it excludes the applicability of the latter article to situations covered by it (Kozieł, in: Kidyba (ed.), 2014, p. 338; Tanajewska, in: Ciszewski, & Nazaruk (ed.), 2019, p. 1131; Kondek, w: Osajda, & Borysiak (ed.), art. 491, thesis No. 11). It has been accepted somewhat differently in case law, namely that Article 635 of the Civil Code – as a special provision in relation to the general provisions on non-

performance of reciprocal contracts – excludes the conditions specified in Article 491 § 1 of the Civil Code for withdrawal from the contract in the form of the ordering party falling into default and setting an additional deadline for the ordering party to commence or continue and complete the work[1].

It is a fact that the exercise of the right of withdrawal on the basis of special provisions is much more favourable to the right holder, as can be seen from the preceding arguments, and in practice this problem does not usually arise. Nevertheless, we do not have here a relationship of the *lex specialis derogat legi generali* type, but with a right governed by different provisions. It should be noted that the general and special provisions discussed above do not overlap, they regulate different situations, i.e. they provide for different (at least in part) prerequisites for their application. The special provisions therefore do not exclude the applicability of the general provisions.

The prevailing view in the case law is that in determining the grounds for withdrawal (legal qualification of the declaration of will to withdraw), the court should take into account - in the light of the circumstances stated in the declaration – both whether it is effective on the basis of the contractual right of withdrawal, if the parties have reserved it in the contract, and if necessary, whether it is effective in view of the statutory provisions providing for a right of withdrawal in certain situations. The party making the declaration of will to withdraw from the contract is not obliged to indicate in its content whether it is exercising its contractual or statutory right to withdraw, and the possible indication in the content of the declaration of will of its legal basis does not determine the limits within which the court carries out its legal assessment[2]. Therefore, the mere faulty indication of the grounds for withdrawal,

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[1] The judgment of the Supreme Court of the Republic of Poland of 14 November 2008, V CSK 182/08.

[2] See e.g.: the judgment of the Supreme Court of the Republic of Poland 12 September 2019, V CSK 328/18, OSNC-Zbiór Dodatkowy 2021, No. 1, item 8; the decision of the Supreme Court of the Republic of Poland of 30 September 2022, I CSK 2145/22.

where the party indicates as a ground the facts supporting the application of Article 635 of the Civil Code, does not nullify the effects of withdrawal when the provisions of the contract are merely referred to in support of the factual grounds[1].

This view should be shared, but with a caveat. The independence of the statutory and contractual right of withdrawal implies that where these rights coincide, the holder may choose whether to exercise the statutory or contractual right of withdrawal, indicating the grounds for withdrawal so that they can be verified. If he expressly indicates that he is exercising his statutory or contractual right of withdrawal, the court hearing the case shall be bound by such an unequivocal declaration of intent and there shall be no grounds for concluding that it should qualify it differently, i.e. on the basis of the contractual or statutory provisions, as the case may be, if the party has expressed its will expressly. The issue here is not the legal basis for the claim, but the manner in which the declaration of will was made, with the existence of the substantive prerequisites for making the declaration being demonstrated[2]. However, this does not imply, as a matter of principle, that in the event of the invalidity of a contractual reservation, the relevant substantive law provisions could not be applied, although this depends on the circumstances of the individual case and does not apply if the party has expressly indicated that it is exercising its contractual right of withdrawal[3]. On the other hand, it is not possible for a party to withdraw from a contract on a 'mixed basis', i.e. partly invoking the law and partly a contractual provision. If, however, when making a declaration of withdrawal, the right holder only invokes the ground for withdrawal and thus indicates the reason for the declaration (e.g. inadequate quality of the works, failure to meet the deadline), the court should consider both grounds for withdrawal – first the contractual provision, if the provision on this issue is valid, and then the statutory one.

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[1] The judgment of the Appeal Court in Kraków of 21 January 2014, I ACa 1435/13.
[2] See the judgment of the Appeal Court in Warsaw of 24 April 2018, VII AGa 244/18.
[3] The judgment of the Appeal Court in Łódź of 31 December 2021, I ACa 639/21.

Conclusions

The purpose of this study was to consider the extremely important issue of the interrelation between the statutory and contractual right of withdrawal and the statutory right of withdrawal on the basis of specific and general provisions. The analysis of the legal norms has led to the conclusion that the reservation of the contractual right of withdrawal does not exclude the possibility of exercising the statutory right of withdrawal, and this on the basis of both general and special provisions. Even if the right of withdrawal is not reserved in the construction contract, the parties have this right under the general and special provisions. Although we are talking about the same right in all situations, the exercise of which, regardless of the basis, has the same effect of terminating the legal relationship[1], the prerequisites for the application of this right in individual situations are different. This gives broader protection to the creditor, bearing in mind that it is a power that the creditor can exercise, but is not obliged to do so.

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[1] Whether there is an *ex tunc* effect or an *ex nunc* effect was not at issue.

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