Magdalena Gałązka "The liability for *culpa in contrahendo* in civil code"

Summary

The dissertation discusses the issues governing the *culpa in contrahendo* liability in polish civil code and in contemporary civil law - in its international conceptualisation and by means of comparison to polish regulation.

The paper elaborates on the principles, necessary conditions and results concerning the liability of the contracting party for disloyal behaviour during the negotiations. Emphasised were aspects, which are still controversial issues and those, which regulation results from distinctive feature of the legislation.

The dissertation consist of 8 chapters. First chapter describes general issues. The questions are following: the origins of *culpa in contrahendo* theory, their enunciation and justification by Rudolf von Ihering in his iconic dissertation from 1861. Then, problem with terminology was outlined: in practice different terms are used, which emphasise various aspects of that liability. The paper relates to the question, which term is the most accurate. The techniques of the regulation of *culpa in contrahendo* were described in this chapter as well. They involve: general provision creating general basis for the liability of contracting party, regulation only single cases of disloyal behaviour of negotiators or exploitation of legal article, which was not originally dedicated to protect the contracting parties, but the aim of protecting can be achieved by means of innovative approach in interpretation.

In the first chapter the concept of precontractual liability is thoroughly discussed as well. This type of liability is specific for *common law* countries. The roots of this liability are completely different in these countries. It is the result of disparate approach (in comparison with the continental system) to the risk of negotiation and to the need of protection of contracting parties. Additionally, the means for protecting the negotiating parties under precontractual liability in the common law countries are reported in detail, including such concepts as unjust enrichment, misrepresentation (in the form of tort of deceit and tort of negligence) and promissory estoppel.

Second unit describes general issues concerning the *culpa in contrahendo* liability in polish law. I pointed out special articles of polish civil code (further: PCC) pertaining to the

disloyal behaviour during the negotiations. Then, I ascertained which of them belong to the *culpa in contrahendo* regime. The notion of negotiation in the article 72 § 2 PCC was detailed as well. Additionally, the question of liability for *culpa in contrahendo* in concluding contracts using different procedure than negotiation was mapped out, such as offer - acceptance mode and auction (tender). I concentrated on the determination, whether the mode of concluding contract should even be relevant for the analyzed liability. In case of positive answer to that question, possibly undesirable consequences resulting from that view were presented as well.

Third chapter sets out the frames of the liability under *culpa in contrahendo* in 72 § 2 PCC. It concentrates on the start point and the end point of that liability and how they were defined in above mentioned article. Additionally I discussed the question, whether only contractors can be responsible for disloyal behaviour in negotiations. I considered the german's concept of third - party's liability for *culpa in contrahendo* (so called *Dritthaftung*).

The fourth unit relates to the legal qualification of the liability in question. Possible legal basis were outlined here, deriving either from the breach of a general obligation to negotiate in good faith (or in obedience to good manners) or from tort (delict). It was the ground for describing the source of the analyzed liability in polish law to evaluate, whether the *culpa in contrahendo* liability is contractual, tortious (delictual) or even autonomous. The significance of fault was discussed as well.

The next two chapters pertain to the good manners as a liability basis of contracting parties in 72 § 2 PCC. In the fifth chapter I present the general remarks on that clause in contemporary and historical catch. I considered construction and essence of that requirement, as well as the meaning of duty to obey the good manners in negotiation and which concrete duties are imposed on contracting parties. This is the content of the sixth unit. I elaborated on the informational duties and duties predating the collapse of negotiations, like ban on instilling the trust in the contracting party that the agreement will be achieved, or duty to negotiate in a constructive way. Finally, I described the loyal bargaining practices which are listed in legal writing: negotiations with serious intention of concluding a contract, refraining from making unreasonable and unacceptable proposals during the negotiations, restraining parallel negotiations and avoiding questioning as well as renegotiating consensual findings. I evaluated, whether such practices are justified in the polish law.

Chapter nr 7 is fully dedicated to the possible consequences of liability for *culpa in contrahendo*. I considered the compensation, most frequently in the form of monetary payments, but also in the form of restitution (*restitutio in integrum*). The last concept derives from Germany and means the right to demand the rescission of the contract which does not fulfill the expectation of the party (so called *unerwünschter Vertrag*). I pointed out the relevant consequences of liability in question in 72 § 2 PCC.

The dissertation includes discussion on the liability for the so called negative bargain of the contract and all controversial consequences related to this type of liability. In continental law systems, *culpa in contrahendo* is traditionally perceived as representing this kind of liability. Important point is, whether compensation involves lost profits from the possible contract with the third - party (not concluded because of the lasting negotiations). Using the examples from polish and foreign court's decisions I indicated as well, how severe could be the loss suffered by the contracting party. It arises from the increase of costs of precontractual phase in contemporary negotiations. This in turn results from the fact, that contemporary contracts become complicated nowadays.

Basing on examples from judicature, I proposed brand new qualification of the losses specific for the negative bargain of the contract. I suggested to classify the losses as: losses connected with preparations to conclude the contract, losses connected with preparations to perform the contract and losses connected with beginning of the execution of the contract. In my opinion, this new classification better describes the scope of possible losses during the negotiations than previous laconic term "costs and expenditure".

In the last unit I discussed the alternative liabilities, which can be also caused by disloyal behaviour in negotiations. This institution is called "confluence of liabilities". This is about unjust enrichment, breach of contract, defect in the declaration of intent, liability for guarantee and legal sanctions resulting from the particular provisions in polish civil code pertaining to the disloyal behaviour during the negotiations (different from the general basis in 72 § 2 PCC). I put emphasis on the explanation of workable results of such a confluence *culpa in contrahendo* liability with other types of liability to ascertain, whether in such a case there is even a space for application of *culpa in contrahendo*.