10
ADAM MICKIEWICZ UNIVERSITY LAW BOOKS

Agnieszka Pyrzyńska

Continuous Obligation

CONTINUOUS OBLIGATION

ADAM MICKIEWICZ UNIVERSITY IN POZNAN
ADAM MICKIEWICZ UNIVERSITY LAW BOOKS NO 10

Agnieszka Pyrzyńska

CONTINUOUS OBLIGATION

Translated by Stephen Dersley

WYDAWNICTWO NAUKOWE

POZNAN 2020

Reviewer: dr hab. Maciej Kaliński, prof. UW

Publication of this book has been co-financed
by the Rector of the Adam Mickiewicz University
and the Dean of the Faculty of Law and Administration, AMU in Poznań

Cover design: Ewa Wąsowska
Technical editor: Elżbieta Rygielska
Desktop publishing: Reginaldo Cammarano

ISBN 978-83-232-3767-9 (Print)
ISBN 978-83-232-3768-6 (PDF)
DOI: 10.14746/amup.9788323237686

WYDAWNICTWO NAUKOWE UNIWERSYTETU IM. ADAMA MICKIEWICZA W POZNANIU
61-701 POZNAŃ, UL. ALEKSANDRA FREDRY 10
www.press.amu.edu.pl
Sekretariat: tel. 61 829 46 46, faks 61 829 46 47, e-mail: wydnauk@amu.edu.pl
Dział Promocji i Sprzedaży: tel. 61 829 46 40, e-mail: press@amu.edu.pl

Wydanie I. Ark. wyd. 10,00. Ark. druk. 8,875

DRUK I OPRAWA: VOLUMINA.PL DANIEL KRZANOWSKI, SZCZECIN, UL. KS. WITOLDA 7–9

TABLE OF CONTENS

LIST OF ABBREVIATIONS

List of abbreviations

CC	–	The Polish Civil Code of 23 April 1964
DCFR	–	Draft Common Frame of Reference
KC	–	Kodeks cywilny (The Polish Civil Code)
LEX	–	The LEX Case-Law Database of Wydawnictwo Wolters Kluwer S.A.
MSiG	–	Monitor Sądowy i Gospodarczy
OSNC	–	Orzecznictwo Sądu Najwyższego Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych
OSNCK	–	Orzecznictwo Sądu Najwyższego Izba Cywilna i Karna
OSNC–ZD	–	Orzecznictwo Sądu Najwyższego Izba Cywilna – Zbiór Dodatkowy
OSNP	–	Orzecznictwo Sądu Najwyższego Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych
OSP	–	Orzecznictwo Sądów Polskich
OSPiKA	–	Orzecznictwo Sądów Polskich i Komisji Arbitrażowych
OTK–A	–	Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy Seria A
PECL	–	Principles of European Contract Law
SPP	–	System Prawa Prywatnego

Legislative acts

The Act on Banking Law of 29 August 1997 (consolidated text, Dziennik Ustaw of 2019, item 2357, as amended)

The Act on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau of 22 May 2003 (consolidated text, Dziennik Ustaw of 2019, item 2214, as amended)

The Act on Copyright and Related Rights of 4 February 1994 (consolidated text, Dziennik Ustaw of 2019, item 1231, as amended)

The Act on Electronic Identification and Trust Services of 5 September 2016 (consolidated text, Dziennik Ustaw of 2020, item 1173)
The Act on Housing Cooperatives of 15 December 2000 (consolidated text, Dziennik Ustaw of 2018, item 845, as amended)
The Act on Insurance and Reinsurance Activity of 11 September 2015 (consolidated text, Dziennik Ustaw of 2020, item 895, as amended)
The Act on Municipal Government of 8 March 1990 (consolidated text, Dziennik Ustaw of 2020, item 713)
The Act on the Ownership of Accommodations of 24 June 1994 (consolidated text, Dziennik Ustaw of 2020, item 532, as amended)
The Act on the Protection of Databases of 27 July 2001 (consolidated text, Dziennik Ustaw of 2019, item 2134, as amended)
The Act on the Protection of Rights of the Buyer of a Dwelling Unit or Single-Family Home of 16 September 2011 (consolidated text, Dziennik Ustaw of 2019, item 1805)
The Act on the Protection of Tenants' Rights, Municipal Housing Reserves and on the Change of CC of 21 June 2001 (consolidated text, Dziennik Ustaw of 2020, item 611)
The Act on Real Property Management of 21 August 1997 (consolidated text, Dziennik Ustaw of 2020, item 65, as amended)
The Act on Restructuring Law of 15 May 2015 (consolidated text, Dziennik Ustaw of 2020, item 814)
The Act on Supporting the Development of Telecommunications Networks and Services of 7 May 2010 (consolidated text, Dziennik Ustaw of 2019, item 2410, as amended)
The Bankruptcy Law of 28 February 2003 (consolidated text, Dziennik Ustaw of 2020, item 1228)
The Bonds Act of 15 January 2015 (consolidated text, Dziennik Ustaw of 2020, item 1208)
The Civil Code of 23 April 1964 (consolidated text, Dziennik Ustaw of 2019, item 1145, as amended)
The Code of Civil Procedure of 17 November 1964 (consolidated text, Dziennik Ustaw of 2019, item 1460, as amended)
The Code of Obligations – The Regulation of the President of the Republic of Poland of 27 October 1933 (Dziennik Ustaw No. 82, item 598, as amended)
The Commercial Companies Code of 15 September 2000 (consolidated text, Dziennik Ustaw of 2019, item 505, as amended)
The Constitution of the Republic of Poland of 2 April 1997 (Dziennik Ustaw No. 78, item 483, as amended)
The Consumer Credit Act of 12 May 2011 (consolidated text, Dziennik Ustaw of 2019, item 1083)

The Consumer Rights Act of 30 May 2014 (consolidated text, Dziennik Ustaw of 2020, item 287)
The Cooperative Law Act of 16 September 1982 (consolidated text, Dziennik Ustaw of 2020, item 275, as amended)
Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (Official Journal L 2002.271.16 as amended)
Directive 2011/83/UE of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Official Journal L 2011.304.64 as amended)
The Energy Law Act of 10 April 1997 (consolidated text, Dziennik Ustaw of 2020, item 833, as amended)
The Family and Guardianship Code of 25 February 1964 (consolidated text, Dziennik Ustaw of 2019, item 2086, as amended)
The Industrial Property Law Act of 30 June 2000 (consolidated text, Dziennik Ustaw of 2020, item 286, as amended)
The Labour Code of 26 June 1974 (consolidated text, Dziennik Ustaw of 2019, item 1040, as amended)
The Lost Property Act of 20 February 2015 (consolidated text, Dziennik Ustaw of 2019, item 908)
The Protection of Competition and Consumers Act of 16 February 2007 (consolidated text, Dziennik Ustaw of 2020, item 1076, as amended)
The Provisions Implementing the Civil Code of 23 April 1964 (Dziennik Ustaw No. 16, item 94, as amended)
The Telecommunications Law Act of 16 July 2004 (consolidated text, Dziennik Ustaw of 2019, item 2460, as amended)

INTRODUCTION

The concept of continuous obligation, or a similar construct, is used in many legal systems. However, it is rarely the subject of general statutory regulation, or of doctrinal considerations conducted in a systematic manner. The specific nature of obligations whose structure involves the element of time is widely recognised, but as yet no uniform conception has been developed.

The monograph contains a description of continuous obligation in the Polish civil law system. Reference to views expressed on the basis of other legal systems is made only to the extent necessary for achieving the adopted research objective, namely, a description of continuous obligation from a theoretical perspective. The choice of this research method is justified, firstly, by the current state of development of the construct under analysis. The lack of general regulations or, at best, their narrow scope, entails that the basis for reconstructing the essence of continuous obligation is primarily specific regulations. Their analysis requires that extensive research be conducted within individual legal systems. Secondly, one of the achievements of the Polish legal system was the introduction of a general regulation concerning continuous obligation as early as 1933 (see, in particular, Article 272 of the Code of Obligations). Thus, important issues concerning this legal construct were decided on almost ninety years ago. This established a basis for particular types of continuous obligation to be regulated, through the consideration of more common general assumptions.

Due to the limited scope of this publication, the analysis and considerations focus on four fundamental issues: (1) the essence of continuous obligation; (2) the possibility of distinguishing certain general types or models of continuous obligation, and then of identifying specific types of continuous obligation within the general framework; (3) the duration of continuous obligation; and (4) the termination of continuous obligation as an institution particularly suited to the expiration of a obligational relationship of a continuous nature.

The first chapter is devoted to an analysis of the essence of continuous obligation. Throughout the monograph, in accordance with the prevailing position adopted in Polish scholarship, the element of performance is considered to be

the sole, independent criterion for distinguishing this category of obligations. The amount of the performance is determined by taking the time factor into account. This leads to the conclusion that a continuous obligational relationship is an obligation in which at least one of the parties is obliged to provide continuous performance, periodical performance or successive performance, regardless of the source of this obligation (a law or a legal action). This conception makes it possible to assume that the time factor is a constitutive element for the category of obligations under consideration. It may affect both the level of specific performance (continuous and periodical performance) and the overall amount of the performance due under the obligational relationship (periodical and successive performance).

The second chapter addresses the issue of types of continuous obligation. The analysis of the Polish civil law system justifies the conclusion that continuous obligation does not constitute a uniform category. For this reason, the study distinguishes four types (general models) of continuous obligation: (1) a model distinguished by the source of the obligational relationship; (2) a model distinguished by the type of performance constituting an element of this relationship; (3) a model distinguished by the self-executing (independent) or non-self-executing (dependent) nature of the continuous obligation; and (4) a model distinguished by the method of determining the duration of the obligational relationship.

Within the above types (general models), the study attempts to make further distinctions between specific types of continuous obligation. In the case of the first model, this concerns distinguishing between the category of continuous obligations arising from legal acts (primarily from contracts) and the category of continuous obligations established by law (*ex lege*). Under the second model, a number of types of continuous obligation are distinguished according to the criterion of the type of performance (continuous performance, periodical performance, successive performance, taking into account the possible inclusion of one-off continuous performance in the construct of continuous obligation) and a subjective criterion (taking into account which party is the debtor, and which type of performance this party is obliged to provide, including whether the performance is divisible). Under the third model, the monograph proposes distinguishing two types of continuous obligation: continuous obligations of a self-executing (independent) or non-self-executing (dependent) nature. In the case of the fourth model, on the other hand, it is proposed that two types of continuous obligation should be distinguished: continuous obligations whose duration is determined directly (obligations of a non-fixed term and obligations with fixed terms), and continuous obligations whose duration is determined indirectly.

The third chapter of this monograph is devoted to one of the most important issues concerning continuous obligation, i.e. the duration of this legal relationship.

The conducted research justifies first distinguishing two general mechanisms for the expiration of a continuous obligation: a mechanism with a primary (main) function and a mechanism with an ancillary function. Reference to the basic (main) mechanism makes it possible to qualify a continuous obligation according to the criterion of duration, while in the case of a continuous obligation resulting from a legal act it is also possible to verify the content of the legal act in terms of respect for the principle of freedom (the principle of the limited duration of an obligational relationship). The reference to the mechanism of an ancillary nature, on the other hand, makes it possible to take into account the specificity of a given (type of) obligational relationship being binding in terms of time. The proposed distinction between expiration mechanisms may also apply to other obligations than continuous ones.

This is followed by a proposal to describe the duration of continuous obligations by means of two methods. The first involves the use of the constructs of a non-fixed term and fixed term, i.e. the determination of a precise expiration mechanism at the time the obligation is established. In the present monograph, this method is referred to as direct determination of the duration of a continuous obligation. The second method consists in determining the duration of a continuous obligation in relation to the duration of a specific situation, including the duration of another legal relationship or the occurrence of a random event. The specification of the expiry mechanism in this case takes place during the duration of the continuous obligation. This method is referred to in the study as indirect determination of the duration of a continuous obligation.

The third chapter also discusses the division of continuous obligations with regard to the criterion of terminability and non-terminability. The results of the research suggest that a continuous obligation concluded for a non-fixed term is an obligation where the basic (main) expiration mechanism is termination, which is, in principle, free for each party. A continuous obligation concluded for a fixed term is, on the other hand, an obligation where the basic (main) expiration mechanism for termination is linked to the occurrence of a fixed event, which, in principle, is the expiry of a deadline.

The last, fourth chapter of the monograph addresses the issue of the termination of continuous obligations. More detailed discussion of this issue is justified by the special function that the institution of termination fulfils in determining the duration of a continuous obligation. This concerns in particular a continuous obligation of a non-fixed term. In this case, a lack of the ability to terminate could lead to the creation of a perpetual obligation, which would be incompatible with the principle of freedom.

The considerations contained in this chapter relate, among other things, to the classification of termination as a legal act, the person entitled to make a declaration of termination, the issue of the grounds for termination, the differentia-

tion of the legal situation of the parties with respect to the right to terminate, the interpretation of the declaration of intent to terminate, the effect of termination, and, lastly, the invalidity of termination.

This publication is an abridged and modified version of the original book published in Polish, entitled *Zobowiązanie ciągłe jako konstrukcja prawna*, Poznań 2017, 613 pages.

Chapter I

CONTINUOUS OBLIGATION – THE ESSENCE OF THE CONSTRUCT

1. The significance of the element of time in civil law relationships

1. Being human is inextricable from being in time and space, which – according to some scientific theories – together create space-time.[1] This obvious fact is also respected by the legislator. A legislative act regulates the issue of time and space only to the extent necessary, acceding priority to the categories of space and time developed in the exact sciences, in particular in physics and chronometry.

The element of space primarily makes it possible to indicate the appropriate legal system. Then it serves, *inter alia*: to define the rules for fulfilling a legal relationship (see, for example, Articles 358 and 454 of the Polish Civil Code – henceforth referred to as CC); to demarcate the spatial boundaries for the exercise of a subjective right (see, for example, Article 143 of the CC); to define the rules for legal acts (see, for example, Article 70 § 2 of the CC); or to specify the content of a legal act (see, for example, Article 536 § 2 of the CC).

On the other hand, the element of time makes it possible to indicate the legal norm that was binding at the time when the law was applied.[2] However, the element of time has more far-reaching significance in the law of obligations and requires separate discussion – especially considering the subject matter of this work.

2. According to Kazimierz Ajdukiewicz, the term "time" has at least four meanings, namely as: 1) "a moment", "an exact date", a point in time; the moment is a feature of a point event; 2) "a period of time", "time segment", time interval – a dense and continuous set of moments located between any two distinct moments; this period can be indicated either by specifying the delimiting moments (for example the period between 12.00 and 13.00 today in Warsaw), or by mentioning the process that completes this period (for example the period during which Casimir the Great reigned in Poland); 3) "duration", the length of a period of time; two different periods of time may have the same duration (for example the period between 12.00 and 13.00 today is not the same as that between 13.00 and 14.00, yet both

[1] See, e.g. the three volume *Encyklopedia PWN*, chief editor A. Krupa, Warszawa 2006.
[2] See, e.g. J. Mikołajewicz (in:) *Problematyka intertemporalna*: 7 ff.: 103, 133–134, 182.

have the same duration); 4) "an all-encompassing time period", an unlimited time line – the set of all time moments.[3]

A legal norm, as a statement with a directival character, defines requirements of specific conduct.[4] The question then arises of the extent to which the above definitions of time – which have a descriptive function – are compatible with the specificity of the language in which legal norms are formulated. At the same time, it has to be considered at the same time that it is both the language of legal texts and the language in which the content of legal act is expressed.

First of all, it is reasonable to assert that legal norms do not regulate time in the sense of "an all-encompassing period of time" (the fourth meaning of "time" mentioned above). For time cannot be grasped in its entirety, at least not on the basis of the legal sciences. Furthermore, such a feat would be completely unnecessary, in terms of creating and applying the law. Even if the editors of a legal text should refer to unlimited time and thereby appeal to all eternity,[5] firstly such an appeal could concern only the future, because only future time is regulated by the legal system,[6] and secondly, it could only concern the future within a limited time frame, since a norm can only apply to future aspects of time.

However, these remarks may confirm the need to distinguish – at least on the basis of legal terminology – another meaning of "time", understood as a segment of time that is only limited at its starting point. In schematic terms, the equivalent of time understood in this way would be time as a geometric ray, the beginning of which is a specified moment (point in time). In this sense, the term "time" could be useful primarily in defining a prohibition on perpetual obligations.

The specificity of the language in which legal norms are formulated is revealed in particular with the use of the term "time" in the second sense given above. Since a legal norm is a statement with a directival character, when it comes to the application of the norm it may be important whether the designation of a time period – primarily by indicating the endpoint – takes place *ex ante* or *ex post*. For example, every tenancy contract lasts for a "period of time", "a time segment". In order to determine the scope of a particular relationship, it is important whether the moment at which the obligational relationship ends is specified when the contract is concluded (original or modifying), or whether it is specified as a result of subsequent events, in particular termination of the agreement. Another example is provided by legal relationships which are entered into for the duration of the life of the parties.

---

[3] See K. Ajdukiewicz, *Czas* (in:) Język i poznanie, vol. II: 384.

[4] See. Z. Ziembiński, *Problemy podstawowe*: 113–114.

[5] See, e.g. Article 15, section 6 of the Act on Electronic Identification and Trust Services in accordance with which "The obligation to maintin the confidentiality of the data necessary for the submission of an electronic signature or electronic seal is unlimited in time".

[6] See Z. Ziembiński, *Metodologiczne*: 127–128.

However, it should be pointed out that there are legal relationships which function in such a way that it is impossible to determine the endpoint of a given period when the legal relationship is entered into. For example, when creating an annuity relationship as a result of damages (for example Article 444 § 2 of the CC) or life annuitie (Article 908 ff. of the CC) there are no grounds for indicating the exact moment when the obligational relationship expires. In such cases, there may be grounds for concluding that the duration of the obligational relationship is determined indirectly (see Chapter III § 1. 1.3.).

With regard to the definition of time and the language in which legal norms are formulated, it should also be borne in mind that both abstract norms and concrete norms are expressed in this language. An abstract norm requires its addressees to conduct themselves in a certain way constantly or repeatedly, when the specified circumstances occur, while a concrete norm requires the addressee to act once in a certain way.[7] This difference must be reflected in the way in which the time factor is referred to, both in the legal text and in the content of the legal act. In particular, only the application of concrete norms may lead to the determination of a specific moment, a specific period or a specific duration.

3. An analysis of the Polish Civil Law system supports the assertion that the legislator does not use uniform terminology for determining time. On the basis of the Civil Code alone it is possible to find provisions in which the following terms are used: "term" (for example, Articles 365^1, 455 and 577 § 4 of the CC), "period" (for example Articles 700, 806 § 2 and Article 846 § 3 of the CC), "moment" (for example Article 358^1 § 1, Article 444 § 3 and Article 513 § 1 of the CC), or "time" (for example Articles 384^1, 456 and 659 § 1 of the CC). It is fair to conclude that these individual terms are used with a variety of meanings. However, it would seem that the word "term" is of fundamental importance for the civil law legislator, since this is the word used in the only general regulation of the CC that refers to time (Articles 110–115 of the CC).

Interpretation of Articles 110–115 of the CC leads to the conclusion that in these provisions the word "term" has been used to indicate the second meaning of time given above ("period of time", "time segment", "time interval"). On the basis of this regulation, a moment (point in time) has no independent legal significance. Its designation ("at the end of the day", "at the end of the next day") serves only to indicate a specific period (a time span). At the same time, the wording of Article 114 of the CC provides grounds for assuming that a period of time in civil law does not have to be continuous, but may be rather the sum of individual moments in a period of time.

It would seem that the regulation of Articles 110–115 of the CC reflects the general regularity of civil law. The above-cited examples of the use of the term

[7] See Z. Ziembiński, *Logika praktyczna*: 106–107.

"moment" seem to support the thesis that, as a civil law event, a point in time is always part of a broader temporal context, and serves only to determine the time segment. This is confirmed by the regulations regarding legal capacity, the duration of a legal relationship, and the acquisition or loss of a subjective right or obligation. This regularity seems to stem from the fact that for social relations regulated by civil law, a detached (isolated) point in time is too abstract, and thus it is not dealt with by this system.

4. Within the framework of civil law, "time" fulfils various functions. The basic one – in line with the function of time in general – is to determine a measure of passing events through reference to accepted units of time. This measure is then used to designate the moment or period in which certain legal effects are concluded, irrespective of whether their source is a law (for example, the birth of a person, obtaining legal capacity, the limitation of a claim) or a legal act (for example determining the duration of a subjective right, determining when performance is to be made, determining the period of prohibition on conducting competitive activity).

The effects of the passage of time have an uneven character. In the most general terms, it can be assumed that these effects can both nullify and strengthen (consolidate). In some cases, the subjective right is weakened over time (for example, the lapse of time triggers the right to invoke the statute of limitations arises), in some situations the longevity of certain relationships has an effect on the content of the law (for example the duration of a marriage may affect the extent of a divorced spouse's claims – see Article 60 of the Family and Guardianship Code[8]). Therefore, the longevity of a specific legal relationship cannot, as a fact in and of itself, be automatically combined with the strengthening or weakening of a subjective right. As a quality, longevity is not an independent characteristic. It should be considered in connection with the nature of a specific legal relationship, the type of subjective right that constitutes an element of its content, and general principles should be taken into account, such as the principle of the limited duration of an obligational relationship.[9]

5. The element of time is involved in every obligational relationship – as in every legal relationship. This element serves, at the very least, to determine the moment (point in time) at which the obligational relationship comes into being or expires. It is also evident that between the establishment and the expiration of an obligational relationship, a period (segment) of time passes. Obligational relationships belong to the category of social relationships, and the construct of social relationship is assumed when there is a "sufficiently significant or sufficiently permanent impact on the person or the affairs of the other entity", which means

[8] See, e.g. the judgment the Constitutional Tribunal of 25 October 2012, SK 27/12, OTK–A 2012, No 9, item 109.

[9] Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 289 ff. In this work, the principle of limited duration of an obligational relationship is a modified conception of the ban on perpetual obligations.

that "trivial and short-lived"[10] cases can be ignored. Considering this statement with regard to obligational relationships, it can be assumed that if the establishment and expiration of the obligation were simultaneous, the sense in accepting the construct of an obligational legal relationship would be dubious. An additional point is that the execution of every obligation lasts for some time. However, even if it were possible to adopt an "instantaneous" relationship, the act of establishing this relationship could not be limited to one instant.

The significance of the element of time for constructing an obligational relationship justifies the formulation of two conclusions that may be relevant to the definition of a continuous obligation. Firstly, since duration in time is a feature of all obligational relationships, it is not a useful criterion for distinguishing between any types (forms) of obligation, including continuous obligation. In this case, referring to the manner in which the obligation is to be fulfilled (the way that performance is made) may be particularly unreliable. Secondly, since each obligational relationship exists over time, this feature can be used in a variety of ways, both by the legislator and by civil law entities.

2. The concept of continuous obligation

2.1. Permanent legal relationships

1. It is probably no exaggeration to say that the terminology regarding legal relationships in which time is a key factor is in a state of considerable disarray.

In a preliminary effort to introduce some order, it can be pointed out that in the doctrine and case-law, a distinction is made between the category of permanent legal relations and "impermanent legal relations". The aspect of permanence or impermanence can therefore play a role in the classification of legal relations with regard to the element of time. This is confirmed by the fairly common determination of continuous obligations as "permanent obligations".[11] Given that the notion of the "permanence" of a legal relationship is more well-established, examination of the notion of continuous obligation can begin with a brief analysis of permanent legal relationships.

[10] See Z. Ziembiński, *Problemy podstawowe*: 318.

[11] This term came into widespread use due to Zbigniew Radwański– see idem, similarly *Uwagi*: 251. Radwański – referring to the views of Jan Gwiazdomorski – assumed that this term better reflects the character of this form of obligatory relationship, as it emphasizes the role of the time factor, and rules out the suggestion that the scope of term only covers obligations requiring continuous performance. See also, e.g. P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 670; M. Safjan (in:) *KC Komentarz*, vol. I, ed. K. Pietrzykowski, 2015: 1192; G. Tracz, *Sposoby*: 69–71; the resolution of the Supreme Court of 26 January 2005, III CZP 42/04, OSNC 2005, No. 9, item 149.

2. The term "permanent legal relationship" is not a statutory term in the Polish legal system. The notion of a "permanent legal relationship" is used in doctrine and case-law. It seems that the expression is used to describe at least three situations.

Firstly, the category of permanent legal relationship stands out when viewed in the context of intertemporal civil law. A proponent of this distinction – Zbigniew Radwański – regards legal relationships as permanent if "the ordinary element of time is also one of the factors determining the performance or action that the subject is entitled to. Hence, it is relatively easy to apply new legal norms to these relationships, in the course of their existence".[12] With regard to this category of legal relationships, "direct application of new legal norms is preferred. Permanent relationships are established for long periods, and therefore establishing their content according to new legal norms corresponds to the general requirement that a new law (…) should not start its regulatory function only in some distant future, or that a significant number of legal relationships should not be regulated by various systems of legal norms."[13]

The concept of permanent legal relationships in intertemporal private law seems to be appropriate and correct, but it requires more thorough development. Various civil law situations in which time plays a critical role are difficult to subsume under simplified general models. In determining the appropriate rules of intertemporal law, both the nature of the parties' obligations and the relationship between the parties' obligations, including the possibility of accepting the divisibility of the obligational relationship, can be of significance. Even if the parties' obligations are homogeneous, this does necessarily have decisive significance for the accepted classification.[14] Furthermore, when identifying the appropriate norms of intertemporal law, it is also necessary to take into account: the values protected in connection with the duration of the obligational relationship[15]; the nature of the legal norms contained in the new regulation[16]; the "long-term" nature of the relationship (see Article 127 (3) of the Act on Copyright and Related Rights); and finally "the essence of the legal relationship" (see Article XLIX § 1 of the Provisions Implementing the Civil Code).

For the following considerations, it seems important to state that the category of permanent legal relationship found in the field of intertemporal law is

[12] See Z. Radwański, *Prawo cywilne – część ogólna*, 2007: 59. See also P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 12–13; J. Mikołajewicz, *Prawo intertemporalne*: 90–91; T. Sokołowski (in:) *KC Komentarz,* vol. I, ed. A. Kidyba, 2012: 36–37.

[13] See Z. Radwański, *Prawo cywilne – część ogólna*, 2007: 58–59.

[14] See, e.g. the judgment the Supreme Court of 20 September 1996, III CZP 106/96, OSNC 1997, No. 1, item 5.

[15] See, e.g. J. Mikołajewicz, *Prawo intertemporalne*: 103 ff. Mikołajewicz states that the so-called intertemporal law does not create a homogenous whole, in terms of the axiological basis of decisions.

[16] See, fe.g. the judgment the Constitutional Tribunal of 17 July 2007, P 16/06, OTK–A 2007, No. 7, item 79.

not useful for formulating the definition of "continuous obligation". Regardless of how developed this concept may be, it is evident that it serves to indicate the law which is applicable to a relationship that was established under a previous law and is on-going under a new law. The aim of this concept is not to classify an obligational relationship as such.

Secondly, the category of permanent legal relationships exists outside intertemporal law, and is used to classify specific varieties or types of relationship as permanent. This applies in particular to legal familial relationships,[17] including marriage relationships,[18] property relationships between spouses[19] kindred and affinity relationships,[20] maintenance relationships,[21] membership relationships in a legal entity,[22] legal relationships in property law,[23] relationships within long-term contracts concluded for more than one year,[24] relationships within framework agreements[25] and civil law partnerships.[26]

These classifications are rarely accompanied by a definition of the term "permanent legal relationship".[27] However, it seems that the classification of a given type of relation in the category of permanent legal relationship is due to its special features. In this case, duration in time establishes the rights and obligations of the parties, whereas the legal effects occurring with the passage of time are not subject to repeal, due to, *inter alia*, the need to protect the interest of the entitled party, or third parties whose rights or obligations have been designated, taking into account the fact of them being bound by a given legal relationship. From this it is evident that the content of permanent civil law relationships is particularly vulnerable to variability. The content of a legal relationship is determined by a wide range of factors, including legal norms and the principles of social coexistence. At the same time, this content changes as a result of subjective rights being exercised. Therefore, a legal relationship is – within the limits set by the legal sys-

[17] See, e.g. T. Smyczyński (in:) *SPP*, vol. 11, 2014: 40.

[18] See, e.g. T. Smyczyński, *O stosunku prawnym*: 706.

[19] See, e.g. T. Smyczyński, *O stosunku prawnym*: 706.

[20] See Articles 61^7 and 61^8 of the Family and Guardianship Code and the judgment the Supreme Court of 22 February 1980, III CZP 6/80, OSNC 1980, No. 9, item 159, if it is accepted that kinship is a legal relationship.

[21] See, e.g. the judgment the Supreme Court of 4 December 2013, III CZP 85/13, OSNC 2014, No. 3, item 28.

[22] See, e.g. W. Chrzanowski, *Zarys prawa korporacji*: 18; K. Kopaczyńska-Pieczniak, *Ustanie członkostwa*: 112–113; K. Pietrzykowski (in:) *SPP*, vol. 4, 2012: 331–332; A. Szajkowski (in:) *SPP*, vol. 16, 2008: 55.

[23] See, e.g. the judgment the Constitutional Tribunal of 1 September 2006, SK 14/05, OTK–A 2006, No. 8, item 97.

[24] See S. Włodyka, M. Spyra (in:) *System Prawa Handlowego*, vol. 5, 2014: 57.

[25] See A. Olejniczak, *O koncepcji*: 77.

[26] See A. Herbet (in:) *SPP*, vol. 16, 2016: 761.

[27] However, see K. Pietrzykowski (in:) *SPP*, vol. 4, 2012: 331–332: "a permanent legal relationship is a relationship in which the action is not a one-off act or omission, but lasts over a certain time".

tem – a relationship of variable content. This is clearly illustrated by the example of legal familial relationships. The content of a legal relationship varies, depending on whether the relationship is one of marriage or kinship, in terms of both rights and obligations. However, the legal relationship endures and constitutes – in certain circumstances – the basis for the emergence of new rights and obligations.

The category of permanent legal relationships identified on the basis of the abovementioned features appears to be useful for describing some specific legal situations. However, it would require further and dedicated research, including a focus on the legitimacy of distinguishing permanent obligational relationships. At the same time, it should be noticed that the category of permanent legal relationships is primarily distinguished beyond the law of obligations. All this supports the view that it is not helpful in formulating a definition of continuous obligation.

Thirdly, the term "permanent legal relationship" is sometimes used to emphasize the stability of a legal relationship. For example, the lease of a flat for a specified period of time is classified in such a way.[28] Even if there are grounds for distinguishing the category of "permanent legal relations", which covers obligational relationships that are stable due to their duration in time, we have to conclude that the feature of "permanence" ("stability") is not a useful criterion for formulating the definition of a continuous obligation. This is because this feature is established by taking into account evaluative criteria that are not entirely clear. In addition, this criterion is not useful for cases in which the stability of the obligational relationship is not uniform for each of the parties (see, for example, Article 730 of the CC).

It also seems that it is more useful to distinguish the type of long-term contract. This is a statutory category,[29] analyzed in more detail in the doctrine[30] and case-law,[31] in which context specific legal problems arise. It is possible that in the context of this category of obligational relationship, the subcategory of permanent contracts may be considered.

3. Having recognised that the time factor serves as a criterion for the classification of legal relationships, it should be taken into account that time plays various roles in obligational relationships. Classification can therefore proceed by considering different aspects of duration in time. For example, a reference to

[28] See, e.g. the judgment the Supreme Court of 21 November 2006, III CZP 92/06, OSNC 2007, No. 7–8, item 102.

[29] See, e.g. Article 482 § 2 of the CC; Article 127 (3) of the Act on Copyright and Related Rights; Article 18 (2)(9)(c) of the Act on Municipal Government; Article 32 (2) of the Act on Insurance and Reinsurance Activity.

[30] See, e.g. J. Jickeli, *Der langfristige Vertrag*: 142 ff.; J.A. Strzępka, *Umowy długoterminowe*: 303 ff.

[31] See, e.g. the judgment the Supreme Court of 19 July 1994, I CRN 90/94, LEX No. 164839; the judgment the Supreme Court of 29 November 2001, V CKN 603/00, LEX No. 52647; the judgment the Supreme Court of 14 May 2004, IV CK 322/03, LEX No. 688693.

time may indicate: longevity (the long-term nature) or brevity (the short-term nature) of an obligational relationship (in terms of its duration in time); its permanence or impermanence (in terms of stabilizing the obligational relationship); the manner of fulfilling the obligation, with regard to the temporal aspect (see, for example, Article 450 of the CC), or the influence of the time factor on the scope of the performance.

An obligational relationship may belong to different categories which are distinguished according to the time factor, and consequently relationships that fall under the same type of obligation may be classified differently. For example, the lease relationship of non-residential premises concluded for a fixed period of two months (during the holiday season), without contractual extension to occurrences entitling termination (Article 673 § 3 of the CC), can be considered a permanent relationship or a short-term relationship. However, the lease of non-residential premises specified for a fixed period of five years may be classified as a long-term obligational relationship, while – if in the contract there is a broad description of occurrences entitling its termination (Article 673 § 3 of the CC) – this is a relationship to which the characteristic of permanence cannot be attributed. In a delivery contract, the performance of delivery may be both a one-off performance divided into instalments and a successive performance. Moreover, the relationship in a construction contract can be considered as belonging to the category of long-term obligational relationships in which the performance of each party is one-off.

It should also be borne in mind that in individual cases, classification which takes the time factor into consideration can be made both *ex ante* and *ex post*.

4. In the light of these considerations, it can justifiably be stated that continuous obligation should not be defined interchangeably with "permanent obligation". The latter expression suggests that the analyzed form of the obligational relationship has some permanent character. Meanwhile – although there are obvious doubts as to how the characteristic of "permanence" should be understood – even a cursory analysis of the legal system supports the view that there are continuous obligations which can even be characterised as impermanent (see, for example Article 673 § 2 of the CC). At the general level, the construct of continuous obligation does not exhibit either the characteristic of either permanence or impermanence.

It would seem that the term "permanent obligation" results from an imprecise translation of the phrase "das Dauerschuldverhältnis",[32] which refers not so much to the "permanence" of the obligational relationship, but rather to its duration over time.[33] It is difficult to accurately translate this phrase into Polish legal language.

[32] See also on the basis of the Swiss law system, the expression "le contrat de durée"/ "Dauervertrage" – e.g. I. Cherpillod, *La fin des contrats de dur*ée, Lausanne 1988, *passim*.

[33] Similarly, in *Uwagi*: 251, Radwański in fact states that the phrase "permanent obligation" emphasizes the characteristic feature of continuous obligations, due to the fact that "satisfying the creditor's interest takes place in them precisely because they last, and for how long they last".

However, it can be noticed that there is a difference between the meaning of the term "permanent obligation" and the phrase "obligation which is attributed with permanence" / "obligation associated with permanence". Thus, although the term "continuous obligation" ("obligation of a continuous nature") is not precise, it better reflects the essence of the structure being analyzed than the term "permanent obligation". The most important argument, however, is that "obligation of a continuous nature" is a legal term which has been used consistently for years by the Polish legislator. When amending Articles 365^1 and 384^1 of the CC, the legislator retained the expression "continuous obligation" ("obligational relationship of a continuous nature").

2.2. Continuous obligation in the light of Polish doctrine and jurisprudence

1. The expression "continuous obligation" ("obligation of a continuous nature") is a legal term (see Articles 365^1 and 384^1 of the CC). The legitimacy of distinguishing this form of obligational relationship cannot be doubted. At the same time, the classification of a specific obligational relationship (type of relationship) under the category of continuous obligation entails certain legal consequences.

The legislator does not introduce a definition of the legal expression "continuous obligation".[34] It could be assumed that in such a situation the interpreter should first determine the meaning of the term accepted in legal terminology.[35] However, there is also the view that the introduction of a specific abstract term into legal language (i.e. terms which are not designations in the normal sense, for things or persons) without the provision of a legal definition is one of the sources of decision-making leeway – or, more precisely, semantic leeway – for the interpreter in the process of applying the law.[36] Acceptance of this approach would mean that the definition of "continuous obligation" could remain open, at least to a certain extent.

2. In the Polish doctrine, the specific nature of the performance(s) which are the subject of the obligation is commonly recognized as the criterion for distinguishing the category of continuous obligations.[37]

---

[34] When formulating definitions, Article 39 (1) (12) of the Consumer Rights Act may be considered, according to which the company is obliged to inform the consumer about "the minimum period for which the contract for continuous or periodic performance is to be concluded". This is expressed slightly differently in Article 3 (1)(3)(b) of Directive 2002/65/EC concerning the distance marketing of consumer financial services.

[35] See Z. Radwański, M. Zieliński (in:) *SPP*, vol. 1, 2012: 521.

[36] See L. Leszczyński, *Zagadnienia teorii*: 42–43.

[37] See Z. Radwański, *Uwagi*: 251–254, according to which "among the various obligational relationships one can distinguish those in which the time factor plays a key role because it is a co-determinant of the performance and performances due".

There is also a clearly dominant view, in accordance with which the subject of a continuous obligation is continuous performance or periodical performances,[38] meaning that the scope of these performances is determined through reference to the time factor. Some authors thereby assume that it is sufficient for this kind of performance to apply to only one of the parties.[39] However, the issue of whether this concerns only the primary performance, or whether it is also sufficient for an accessory performance to have such a character is not considered.

Thus, the dominant view in the Polish doctrine combines the construct of a continuous obligation with situations in which the time factor designates (determines) the scope of the performance. Zbigniew Radwański's position can be regarded as representative in this respect, according to which, within the framework of obligational relations, "one can distinguish those in which the time factor plays an important role because it is a co-determinant of the scope of the performances or performances due. The role of this element is not only to determine the manner of in which the performance is to be provided (Articles 455–458 of the CC). It can therefore be said that these relationships are richer by virtue of the element of time, because typically the fulfilment of the performance requires the passage of a full period of time. It seems that the creditor's interest is fulfilled precisely because these performances last, and because of how long they last. This is in contrast to other obligations, where satisfying the creditor's interest generally coincides with the expiry of the obligation (*solutio*)."[40]

The definitions of continuous obligation formulated in the Polish doctrine are in principle convergent. The basis for distinguishing this category is the nature of the performance(s) constituting an element of the obligation. This allows us to assume that the term "an obligation of a continuous nature" is a legal term with non-statutory criteria for its application, in principle agreed on in the doctrine.[41] This far-reaching compatibility of viewpoints cannot be overlooked in further considerations.

3. The judicature quite consistently avoids formulating a definition of the expression "continuous obligation". This regularity can be seen both in the context of the application of general provisions (Articles 365^1 and 384^1 of the CC), as well as in the provisions regulating specific continuous obligations.

In the light of case-law, it is difficult in particular to determine whether courts connect the category of continuous obligation only with obligations with continuous performance or – following the prevalent view of the doctrine – also with

[38] See Z. Radwański, *Uwagi*: 251–254. Similarly, e.g. A. Klein, *Elementy zobowiązaniowego*: 135–136; R. Longchamps de Berier, *Zobowiązania*: 30; G. Tracz, *Sposoby*: 69–71; P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 670–671; A. Olejniczak (in:) *KC Komentarz*, vol. III, ed. A. Kidyba, 2014: 130.

[39] See, e.g. A. Klein, *Elementy zobowiązaniowego*: 136; G. Tracz, *Sposoby*: 70.

[40] Z. Radwański, *Uwagi*: 251.

[41] See Z. Radwański, M. Zieliński (in:) *SPP*, vol. 1, 2012: 521.

periodical performance. In decisions regarding continuous obligations, as a rule, the specificity of a continuous performance is emphasized, whereas in cases pertaining to relationships with periodic performances (see, for example an annuity contract – Article 903 ff. of the CC), the classification of the obligational relationship is omitted.

However, in the case-law one can find decisions in which the features of continuous obligation are indicated. In particular, it is assumed that recognizing the obligation as continuous is "due to the special nature of the performances in which the time factor determines the extent and content of the performance due"[42]; that one of the essential elements determining the nature of these relationships is their duration over a certain period of time[43]; or also that in the case of this category of obligation there are performances the fulfilment of which "cannot be erased".[44]

The approach of the judicature raises certain doubts. This way of indicating the features of continuous obligation, namely adopting a sporadic, *ad casum* approach, instead of providing a definite definition, can lead to the law being vague. The essential elements of the definition of continuous obligation have been agreed on in the doctrine. Hence there is no juridical basis for the judicature to neglect this agreement.

2.3. The author's stance on this issue

1. When formulating a definition of the term "continuous obligation" ("obligation of a continuous nature"), it would seem that at least three circumstances should be taken into account.

First of all, continuous obligation is one of the most general constructs employed in contract law. It finds application: (1) in nominate contracts (for example lease agreements, bank account agreements, annuity contracts); (2) as a result of the statutory type of a nominate contract being modified (for example performance of the ordering party in a contract of mandate[45]); (3) resulting from the conclusion of an innominate contract creating a continuous obligation (for example a bank vault contract); and (4) as a result of *ex lege* obligational relationship

[42] See the judgment of the Supreme Court of 23 January 2014, II CSK 251/13, OSNC 2014, No. 11, item 116.

[43] See, e.g. resolution (7) of the Supreme Court of 21 December 2007, III CZP 74/07, OSNC 2008, No. 9, item 95.

[44] This statement is generally restricted to cases of continuous performance – see, e.g. the judgment of the Supreme Court of 8 October 2004, V CK 670/03, OSNC 2005, No. 9, item 162; the judgment of the Supreme Court of 17 March 2010, II CSK 454/09, OSNC 2010, No. 10, item 142.

[45] In the typical case, the performance of the part accepting the order is a one-off performance, but the possibility that the performance may be periodical or continuous is not ruled out – see, e.g. L. Ogiegło, *Usługi*: 118.

of a continuous nature being established (see, for example Article 444 § 2 in conjunction with Article 907 of the CC). These relationships fulfil different functions, serve to protect various interests and respect different risk distributions.

Therefore, the definition of a continuous obligation should reflect the scope of application of this form of obligational relationship, and its diversity. This justifies the search for the simplest criterion for differentiating this construct.

Secondly, even on the basis of the narrow regulation of the general CC, certain features of continuous obligation can be reconstructed. Both the expiration (see Article 365^1 of the CC), as well as modification of this obligation (see, for example, Articles 384^1 and 685^1 of the CC), are effective in the future. The application of a different regulation only takes place in exceptional circumstances (see, for example Article 816 of the CC). In the case of this category of obligations, there must therefore exist special circumstances for such a solution to be adopted.

Thirdly, as a result of the wise decision of the pre-war legislator to introduce – in 1933 – Article 272 into the Code of Obligations,[46] the construct of continuous obligation was perpetuated in the Polish legal system. The doctrine – strengthened by the position of the chief clerk of the draft Code of Obligations, Roman Longchamps de Berier[47] – did not have to struggle with justifying the differentiation of the category of continuous obligation, or with the definition of the concept, nor with the issue of terminating a continuous obligation concluded for a non-fixed term. Even if this situation was not conducive to conducting in-depth research, terminological chaos and classificatory mayhem were avoided. This on-going state of affairs is a value having relevance for the definition of a continuous obligation.

At the same time, there are no grounds for multiplying doubts or excessively complicating the issue, especially since there is a tendency towards simplification nowadays. For example, Article 1211 of the French CC, Article 6.109 of the PECL and Articles IV.E.-2:302 (1) of the DCFR combine the right to freely terminate with the construct of indefinite period, while not deciding on the nature of a relationship shaped in such a way. Similar interpretation can also find application in the Polish legal system, through the application of Article 365^1 of the CC, by the process of analogy, to legal relationships not belonging to the category of continuous obligations, for which the element of time plays an essential role (see Chapter IV § 2. Subpoint 6).

2. The criterion of performance should be considered as the basis for distinguishing the category of continuous obligation. Such an approach not only takes

[46] This provision stated: "A continuous obligation unlimited in time expires upon being terminated by debtor or creditor with observance of contractual, statutory or customary notice periods, and, where there are no such periods, immediately after being terminated.".

[47] See R. Longchamps de Berier, *Zobowiązania*: 30, according to whom "[a] continuous obligation creates a permanent legal relationship, from which obligations of either continuous or periodical performance emerge".

into account the existing definition of the term "continuous obligation", but above all respects the wording of Article 353 of the CC,[48] according to which performance is one of the basic elements that characterize this obligational relationship.[49] This allows us to assume that the element of performance fulfils a basic function in the classification (typology) of obligational relationships.

In any case, it is difficult to identify another criterion that would enable the qualification of an obligational relationship as belonging to the category of continuous obligation. Appeal to the duration of the obligational relationship (see § 1) is particularly unreliable, since every obligation lasts for a period of time, and furthermore inclusion of the time factor in the construct may fulfil a variety of different functions.

With regard to recognizing the element of performance as a criterion for distinguishing continuous obligation, the question arises of the extent to which this construct may be applied to obligations that do not involve the exchange of goods or services. This doubt concerns primarily contractual relationships of an organizational nature, including multilateral relationships. These relationships do not correspond with the model of obligation specified in Article 353 of the CC, so the attempt to describe their content by means of the element of performance does not reflect the essence of the legal relationship.[50] An example of this is the deed of partnership specified in Article 860 of the CC.[51] Detailed discussion of this issue would require more extensive research, however, at the current stage of development of Polish civil law, it can be stated that typically the source of a contractual continuous obligation is a bilateral agreement on the exchange of goods or services. In addition, the structure of a continuous obligation can be sought in conjunction with another legal relationship, including the organizational (corporate) type of relationship. However, in such cases continuous obligation has a dependent character (not self-executing).

3. The criterion of the type of performance(s) should be considered as a further criterion for distinguishing the category of continuous obligation. With this type of performance, its scope is determined by taking into account the time fac-

[48] According to Article 353 § 1 of the CC: "An obligation exists where a creditor may demand performance from a debtor and the debtor should make the performance.".

[49] See. Z. Radwański, *Teoria umów*: 210.

[50] See, e.g. J. Frąckowiak, *Handlowe czynności kreujące*: 84 ff.

[51] This contract is classified, *inter alia*, as a contract of a complex, obligational-organizational nature, in which the obligational element is revealed first of all on the level of making contributions – e.g. A. Herbet (in:) *SPP*, vol. 16, 2016: 758 ff. In my opinion, the relationship established by the deed of partnership is of an organizational character, and the obligational elements only fulfil an auxiliary function in relation to it. For these reasons, I do not consider this relationship as a continuous obligation. Apart from the relationship of the company – as the main relationship – a continuous obligation of a non-self-executing and auxiliary character may also be established. This applies in particular to an obligation whose element is the performance of services by a partner as a contribution (Article 861 § 1 of the CC).

tor (is determined by it). This approach takes into account statutory regulations and the fixed standpoint of the doctrine, and also meets the criterion of being as simple as possible.

All the same, I consider an obligational relationship to have a continuous nature if it has an element of continuous performance,[52] periodical performance[53] or successive performance.[54] This means that in a continuous obligation the time factor is a constitutive element, and it may affect both the level of a particular performance (continuous and periodical performance) and also on the level of total scope of the performance due in a particular obligational relationship (periodic and successive performance).

The performance(s) whose scope is determined by taking into account the time factor significantly affects the entire obligational relationship, in particular the content, the manner of performance and expiration, to such an extent that to classify of an obligation as continuous it is sufficient that only one of the parties is bound to provide this kind of performance.[55] In the case of a contractual relationship, the construct of a continuous obligation applies irrespective of whether the contract is unilateral or bilaterally binding, or whether it is a reciprocal contract.

4. If performance is an element of an obligational relationship, the scope of which is determined by taking into account the time factor, the construct of continuous obligation should also be accepted if the element of this relationship is a one-

[52] As continuous performance, I classify performance consisting in the specific, permanent conduct of the debtor for the duration of the legal relationship. In this case, the description of the performance indicates two elements: the prescribed actions and the period during which these actions are to be undertaken. Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 142 ff., along with the sources and case-law referred to there.

[53] As periodical performance, I classify the performance consisting in the actions of a debtor, which according to the content of the obligational relationship should be repeated at specified intervals. Thus, the description of the debtor's obligatory action covers two levels: first, the level of specific periodical performance; second, the level of the obligational relationship. The influence of the time factor on the size of the performance also operates on two levels. On the first level, it includes the scope of a particular periodic performance, while on the second level it includes the total scope of all the performance due. Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 151 ff., along with the sources and case-law referred to there.

[54] As successive performance, I classify recurring, equal one-off performances that take place as part of one obligational relationship. The obligation to periodically make individual performances in a particular way satisfies the creditor's interest. In this case, reference to the time factor is made only at the second level of influence (indicating the general scope of the benefits). Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 163–164.

[55] However, this is not grounds for assuming that continuous performance, periodic performance or successive performance can be considered as a characteristic performance in the sense assumed in international private law. In particular, it may be argued that the principle of characteristic performance tends to indicate the performance characterizing the entire contract. This rule does not work for continuous obligation, at least for the reason that each party may be required to provide a approprite performance in this obligation.

off performance (not a successive performance).[56] However, such a relationship is has a distinct nature, due to the differences between a one-off performance and a continuous performance, and between periodical and successive performance.

It is reasonable to state that the inclusion, by parties, of a one-off performance (non-successive one) in the construct of a contractual continuous obligation in principle forces the application of the construct of a designated time frame which falls within the first subcategory of these obligations (see Chapter III § 1. 1.2. Subpoint 6). Only this construct makes it possible to indicate – at the time the contract is concluded – the scope of the proper performance(s) within a continuous obligation, and consequently to determine whether the performances of the parties remain in the specified relationship. This is important for the classification of obligational contracts, including the acceptance of a payable or reciprocal nature. In a broader sense, this issue is important for the protection of the interests of the counterparty making a one-off performance. This applies not only to relationships involving consumers, but also – under the framework of contractual legitimacy – all contractual obligations.

Departure from the construct of specified time is in principle possible only when one-off performance is to be fulfilled during the initial stage of an obligational relationship, which makes it possible to differentiate it from the stage of fulfilling the performance relevant to continuous obligation. An example of this is an agreement concerning a connection to a network, in which the one-off performances of the parties – i.e. connection to the network and the payment of the connection fee – are counterparts, and this stage can be distinguished from the further stages of the contract, in which on-going performances are fulfilled. Such a solution may also apply to the final stage of an obligational relationship, which ends the duration, if it can be distinguished from the stage wherein performances relevant to the continuous obligation are fulfilled.

5. With particular obligational relationships (types of relationships), difficulties may arise in the classification of a performance that takes the time factor into consideration. Distinguishing the categories of one-off performance (along with the category of successive performance), continuous performance and periodical performances occurs in the context of typical situations that do not always reflect the complexity of civil law transactions. For these reasons, I assume that the decisive criterion for accepting the construct of continuous obligation is the impact of the time factor on the scope of the performance(s). Identifying a particular performance as falling under the categories of continuous performance, periodic performance or successive performance is another matter.

[56] The performance is one-off, if its scope is designated by indicating the actions that the debtor's is obliged to fulfil, without reference to the time factor. Locating this service in time is related to the definition of its implementation, not the designation. Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 131 ff., along with the sources and case-law referred to there.

Defining continuous obligation by emphasizing impact of the time factor on the scope of the performance, rather than on the classification of a particular performance, means that the construct of continuous obligation remains open to performances of a complex (hybrid) nature and to new types of performance if they become distinguished. This approach corresponds to the specificity of contract law, which manifests itself through, *inter alia*, the openness of the construct of obligational relationship. Thus, Zbigniew Radwański fittingly began his reflections on continuous obligation by identifying this element, and only then analyzing the various types of performance, thereby justifying the adoption of the identified construct.[57]

6. In international scholarly sources, the view is sometimes expressed that the basis for classifying a contractual obligation as a continuous obligation (an obligation of a similar construct) is the primary performance.[58] This issue is not raised on the basis of the Polish legal system, however, due to its significance for formulating the definition of continuous obligation, it requires closer consideration.

The idea of only combining the concept of continuous obligation with the category of the main performance is interesting, because it takes into account the function that this type of performance fulfils. The confirmation of this is, for example, a cultivation contract, due to which a contracting party may be required to provide an additional performance which does not fall within the main performance (Articles 613 § 1 and 615 of the CC). However, the legitimacy of this concept can be called into question if the institution of interest is considered.

Interest payments are always a periodical performance.[59] It should further be assumed that interest in each case is a collateral performance[60] (see, for example, Article 317, second sentence, of the CC). There is also another argument in favor of classifying interest payments as collateral performance. In the case of excessive interest, the legislator does not apply the sanction of invalidity (Article 58 of the CC), but reduces the scope of the performance to the accepted level (see Article 359 § 2^1–2^3, Article 481 § 2^1–2^3 of the CC). In addition, in a consumer credit agreement, if the creditor violates certain statutory requirements, the consumer is entitled to restructure the agreement as interest free credit and other loan costs become due to the lender (see Article 45 (1) and Article 46 (1) of the Consumer Credit Act). No main performance is subject to such strong interference. Regardless of the economic function performed, in legal terms the performance of interest is treated in a special way by the legislator. It seems, therefore, that the principle

[57] See Z. Radwański, *Uwagi*: 251–254.

[58] See H. Oetker, *Das Dauerschuldverhältnis*: 105 ff. Similarly J. Ghestin, M. Billiau, *Traité de droit civil*, 1992: 151; H. Heinrichs (in:) *Paland, Bürgerliches Gesetzbuch*, 2006: 239.

[59] See resolution (7) of the Supreme Court of 26 January 2005, III CZP 42/04, OSNC 2005, No. 9, item 149.

[60] See T. Dybowski, A. Pyrzyńska (in:) *SPP*, vol. 5, 2013: 273, 277. Unlike capital interest, M. Lemkowski, *Odsetki cywilnoprawne*: 172 ff.

of the autonomy of the will also supports the classification of interest benefit as collateral performance.

It is reasonable to state that the performance of interest payment – belonging to the category of periodical performance – always constitutes an element of an obligational relationship of a continuous nature. There are no grounds for deviating from the previously adopted distinction criterion in this case. Every performance – including collateral ones – constitutes an element of an obligational relationship. If the time factor affects its scope, it also affects the form of the obligational relationship, regardless of whether it is a main or collateral benefit. The function fulfilled by a given performance is taken into account in the framework of a separate criterion, which is the basis for distinguishing other categories of contractual relationship, primarily obligations under reciprocal agreements (Article 487 § 2 of the CC). It is not, however, decisive for defining a continuous obligation.

The proposed criterion makes it possible to classify specific contractual relationships as continuous obligations, without the need to resort to dubious arguments. This applies in particular to credit agreements and loan agreements, and primarily to bank loans, in which the interest rate is *essentialia negotii* (Article 78, in conjunction with Article 69 (1) of the Act on Banking Law). However, the consequence of this view must be that a non-interest-bearing loan contract does not create a continuous obligation. This is because with this type of contract, it is not possible to indicate a performance the scope of which is determined by taking into account the time factor. The ability of the borrower to use the loan is not a manifestation of the performance being fulfilled by the provider, but the borrower's exercise of the right to ownership, which was acquired under the loan agreement.

The view that the performance of interest payment always constitutes an element of a continuous obligation does not justify blurring the differences that occur between individual cases. To simplify the issue somewhat, two groups of contractual relations can be distinguished with the performance of interest payments.

In the first group, I include obligational relationships in which the performance of interest payments reflects the economic goal of the contractual relationship. It is – as a rule – a case of obligation with ordinary (capital) interest payments. Constructing the obligation in this way allows us to assume that the obligational relationship takes the form of a continuous obligation. The basic examples are credit agreements, bank loan agreements, an obligational relationship between an issuer and a bondholder – if the bonds result in the performance of interest payments for the issuer (see Article 5 (1) and Article 6 (2)(1) of the Bonds Act), and non-bank interest bearing loans.

In the second group, I include obligational relationships in which the performance of interest payments arises through legislation (possibly concretised by

case-law or a decision of another competent body – see Article 359 § 1 of the CC), or through a legal act as a result of certain events occurring while obligations are being fulfilled. These are, in particular, events related to non-performance or improper performance of the obligation (for example Article 481 of the CC), with the payment of sums in the interests of another party (for example Article 713 in conjunction with Article 753 § 2 of the CC), or with the retention of sums in one's own interest (for example Article 741 of the CC). I also include in this group obligational relationships in which the payment of ordinary (capital) interest does not reflect the economic purpose of the contract (for example an instalment contact subject to ordinary interest).

I assume that in such a case the performance of interest payments is covered by a separate obligational relationship. It is a relationship that is functionally connected with the main relationship, having in relation to it a dependent and auxiliary character. Its duration is thus determined indirectly, via the duration of the main relation. This relationship is collateral and does not affect the classification of the principal relationship. At least two arguments support this view. Since the time factor affects the scope of the performance, then – following the previously accepted criterion – the construct of continuous obligation can be detected here. However, it should be taken into account that in this case the performance of interest payments does not reflect the economic function of the obligational relationship, and the emergence of the obligation to perform is often accidental. If interest of this type were to affect the classification of the obligation, a significant number of obligational relationships could take the form of a continuous obligation (see Article 481 of the CC). The usefulness of such a construct would be questionable.

7. Acceptance of the construct of continuous obligation is not conditioned by the possibility of determining a particular obligation as a relationship concluded for a non-fixed term. If the criterion of the type of performance is met, this construct should also be adopted in situations in which the obligational relationship can be formed only for a definite period of time.

The justifications for this stance are provided primarily by Article 365^1 of the CC. If the construct of continuous obligation were to cover only obligations concluded for a non-fixed term, it would not be necessary to indicate in the text of the provision that it concerns "time unlimited obligations". It can also be argued that the reference to the construct of an indeterminate time is connected with the issue of the mechanism of the obligation's expiry. At the same time, in order to apply a specific mechanism for the expiry of a continuous obligation, it must first be stated that the expiry applies to that form of the obligation. Defining a continuous obligation by reference to the mechanism of its expiry is therefore flawed. Another point is that none of the events leading to the expiry of a continuous obligation is applicable only for this construct. This also applies to the institution of termination.

It seems that the view that combines the notion of a continuous obligation (an obligation of a similar construct) only with a non-fixed term is only of historical importance. It was related to the development of this construct, and thus there is no distinction between the duration of the obligational relationship and the issue of the time of its performance.[61]

8. To sum up these considerations, I consider continuous obligation to be an obligation in which the time factor affects the scope of the performance(s). These performances are: continuous performance, periodical performance and successive performance. It is an independent and sole criterion for distinguishing this form of obligational relationship.

---

[61] See in particular F. Bydlinski (in:) *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch, Vierter Band, eds.* H. Klang, F. Gschnitzer, 1978: 193 ff.; R. Encinas de Munagorri, *L'acte unilatéral*: 6; H. Oetker, *Das Dauerschuldverhältnis*: 86–87.

Chapter II

TYPES OF CONTINUOUS OBLIGATION

1. General comments

1. The wide scope of application of the construct of continuous obligation, as well as its heterogeneous nature, justify attempting to distinguish specific types (general models), and within these frameworks, individual types of continuous obligation. This treatment may facilitate description of the construct and indicate the legal norms applicable in particular cases. At the same time, it will be noticed that the scopes of the types of continuous obligation thus distinguished overlap each other.

Within the category of continuous obligation, at least four types (general models) can be distinguished: (1) the model distinguished due to the source of the obligational relationship; (2) the model distinguished due to the type of performance which constitutes an element of this relationship; (3) the model distinguished due to the self-executing/non-self-executing nature of the continuous obligation; (4) the model distinguished due to the method for determining the duration of the obligational relationship.

In the first model, two types of continuous obligation can be distinguished: obligations arising from legal acts, and obligations established by legislation (*ex lege*). In the case of *ex lege* obligations, the content of the obligational relationship is usually specified by further legal events, such as a court ruling, a subsequent legal action or an administrative decision. This results from the character of an individual norm being determined on the basis of a general norm. A general and abstract norm – being an overly-general instrument – does not allow the content of a specific obligational relationship to be determined. The model distinguished due to the source of the obligational relation can be considered as the basic model for the whole category of continuous obligations. This is supported by the significant difference between obligational relationships established on a voluntary basis, through employing the principle of the autonomy of the will (obligation from a legal act), and obligational relationships established independently of the will of the parties.

In the second model, several types of continuous obligation can be distinguished, taking into account the particular types of performance relevant for this category of obligation (continuous performance, periodical performance and suc-

cessive performance), the fact of including a one-off performance in the construct of a continuous obligation, and the subjective criterion which specifies who is the debtor of a particular performance.

In the third model, two types of continuous obligation can be distinguished: continuous obligation of a self-executing nature and continuous obligations of a non-self-executing nature.

In the fourth model, two types of continuous obligation can be distinguished: continuous obligation whose duration is determined directly, including obligations for non-specified periods and obligations for specified periods, and continuous obligations whose duration is determined indirectly.

2. There are grounds for distinguishing within the category of continuous obligations, a group of obligations which are, in a certain way, related to another legal relationship (civil law) and a group of obligations that do not have such a relationship (the third model). The first group can be defined as continuous obligations of a non-self-executing (dependent) nature, the second group as continuous obligations of a self-execution (independent) nature.

The relationship between a non-self-executing obligation and another civil law relationship is most clearly manifested in the temporal aspect – the duration of this obligation is related to the duration of another legal relationship. This dependence, however, can reach further.[62] Since – through its influence on duration – a different legal relation affects (or may affect) the scope of the performance due under a continuous obligation, it is reasonable to state that continuous obligation reflects, at least to a certain extent, the features or function of another legal relationship. This influence is particularly strong when the continuous obligation fulfils an auxiliary function with regard to this relationship. However, even if there are no grounds for accepting such a function, it seems justified to state that in each case the content of another legal relationship affects, at least to some extent, the content of a continuous obligation of a non-self-executing nature.

Self-executing obligations are of fundamental importance in trade. The description of the construct of a continuous obligation, however, also requires consideration of the special case of non-self-executing obligations.

The different importance of each of the indicated groups justifies the use of varied description methods. In the description of self-executing obligations, one can refer to the criterion of the source of the obligational relationship, which is considered to be a basic criterion in studies. On the other hand, it seems that in the case of non-self-executing obligations, a more useful method of description is to refer to the type of relationship which the continuous obligation remains in. This would allow the specificity of continuous obligations of a non-self-executing nature to be grasped more clearly.

[62] See, e.g. A. Olejniczak, *Transakcje kompensacyjne*: 137 ff.

2. Continuous obligations of a self-executing (independent) nature

The Polish legislator regulates the basic institutions of contract law separately from the source of the obligation relationship (see, in particular, Articles 353, 354–357, 359 § 1 and 361–363 of the CC). Regardless of whether the source of the obligation is a legal act or a statute, the structure of the obligational relationship is the same. In both cases, a legal bond exists between the designated entities which entitles the creditor to claim performance (Article 353 of the CC). For these reasons, the effects of breaches of both legal acts and obligations made *ex lege* may be subject to one legal regime.[63] An exception to this principle is the regulation concerning obligations in reciprocal contracts.

Differences that occur between continuous obligations arising from a legal act and those whose source is statutory cannot be ignored. This justifies a separate discussion.

2.1. Self-executing continuous obligations resulting from the law

1. An analysis of the current legal situation leads to the conclusion that the category of continuous obligations of a self-executing nature which result from statutory regulations is not homogenous. Within it, at least three types of obligation can be distinguished: (1) obligations in which one of the parties is liable to perform (see Subpoint 2); (2) obligations in which both parties are liable to perform (see Subpoint 3); (3) obligations that, once established, have all (or almost all) characteristics of a contractual relationship (see Subpoint 4).

2. Within the framework of self-executing continuous obligations established *ex lege*, the basic group consists of obligations in which the obligation to perform lies only on one side. In particular, these include obligations that aim to compensate for legally relevant damage, spread over time.

These are primarily continuous obligations related to the compensation of damage caused by an unlawful act. Obligational relationships in which the performance serves to compensate for damage caused to a person have fundamental significance (see in particular Articles 444 § 2 and 3, and 446 § 2 of the CC, also in connection with Article 805 § 2 (1) of the CC). However, we cannot rule out situations in which the construct of continuous obligation serves to compensate for damage to property, primarily regarding lost profits.[64]

[63] See T. Pajor, *Odpowiedzialność dłużnika*: 45.

[64] See, e.g. the resolution of the Supreme Court of 5 December 2008, III CZP 123/08, OSNC 2009, No. 11, item 145.

This group may also include situations when another person's affairs are conducted without due authority, when the party performs a series of recurring activities and, consequently, incurs systematically justified expenditure and costs that may be claimed (Article 753 § 2, second sentence, of the CC).[65] However, the basis for adopting the construct of continuous obligation in this case must be a statement confirming that the performance to which the party is bound takes a form that is proper for the performance of that obligation. Another example is a legal relationship related to the entitlement of the grandparents of a bequeather to a means of subsistence from their heirs, if the performance of the heir takes the form of an proper performance in a continuous obligation (Articles 938 and 966 of the CC). I assume that this is an annuity with a typical maintenance function, with the obligation to pay deriving from law (Article 907 § 2 of the CC).

Some regularities can be observed within the group of cases indicated. First of all, it is quite common that the emergence of an event that creates an obligational relationship is spread over time, and only the co-existence of a set of specific elements leads to its establishment. Secondly, after establishment of an obligational relationship, there may be further elements of the original state of affairs, or other events related to the state of affairs that created the obligational relationship, that affect the scope of the performance(s) due under this relationship. The function of this group of obligational relationships affects the specific dynamics of their content. Thirdly, it cannot be ruled out that after the expiry of the obligational relationship (for example following compensation for damage, or settlement with regard to the performance of compensation) new effects of the original state of affairs come to light, or the specific legal situation arises again between the same parties. With regard to the expiry of the previous obligation, these situations should be considered as being part of a new (further) obligational relationship. However, due to the relationship which exists between the first and the second legal relationship, the substance of the previous legal relationship should in principle be taken into account when determining the content of the second relationship.

3. The second group of cases consists of obligations in which both parties are obliged to provide performance. The rationale for the use of this construct may be, in particular, the situation in which someone else's legally protected interest are used without the consent of the entitled party, but the legislator – for various reasons – also imposes the obligation to provide performance on the entitled party.

The basic example of this is the legal relationship between an owner (the former lessor) and a tenant entitled to a substitute or public housing, if the court has ruled that bringing about the vacation of the premises should be suspended until such alternative premises are provided (see Article 18 (1) and (3) of the Act on the

[65] See, e.g. the judgment of the Supreme Court of 19 July 2012, II CSK 724/11, LEX No. 1228442; the judgment of the Supreme Court of 24 January 2013, V CSK 133/12, LEX No. 1296720; the judgment of the Supreme Court of 5 December 2014, III CSK 37/14, OSNC–ZD 2016, No. A, item 14.

Protection of Tenants' Rights, Municipal Housing Reserves and on the Change of CC). This is an obligational relationship established *ex lege*, concretized by a court decision, in which each party is obliged to provide proper performance in a continuous obligation. The performance of the former tenant has the form of periodical performance (see Article 18 (1) of the Act on Act on the Protection of Tenants' Rights, Municipal Housing Reserves and on the change of the Civil Code), and the former landlord's performance takes the form of a continuous performance.[66] This relationship is a reflection of the previous lease relationship.

It would also seem that the relationship of storing lost property belongs to the group of continuous obligations analysed thus far. This relationship is regulated by the Found Objects Act and, respectively, the provisions of the CC concerning custody agreements (see Article 9 (1) of the Lost Property Act). The finder or custodian – by power of the law – executes a continuous obligation Although the custody is free, the person authorized to collect the item is required to pay costs, including those incurred in storing and maintaining the item(s) in due condition. It should be assumed that this is a one-off performance in virtue of expenditures or expenses, but the obligation to meet it arises only in connection with the collection of the item by the authorized person.

4. Within continuous self-executing obligations deriving from legislation, a third group can also be distinguished. These cover cases that are relatively rare, but which diverge significantly from other *ex lege* obligations. After its establishment – directly or later – an obligational relationship has all (or almost all) of the features of a contractual relationship. Establishing such a relationship can be the consequence of applying both general and abstract norms (for example Article 30 of the Act on the Protection of Tenants' Rights, Municipal Housing Reserves and on the change of the CC), as well as the consequence the concretization of these norms by a subsequent legal event, particularly an administrative decision.

An example of the latter situation is an obligational relationship regarding telecommunications access or an obligational relationship regarding access to technical infrastructure.[67] If an access agreement is not concluded, although there is a statutory prerequisite for this to be done, the President of the Office of Electronic Communications issues an administrative decision on access which substitutes for the access agreement, in terms of its scope. The outcome of the decision is to establish an obligational relationship which – due to the type of service – belongs to the category of continuous obligation. However, if the interested parties do conclude an access agreement, the part of the administrative decision covered

[66] See M. Olczyk, *Sytuacja*: 193 ff.; the judgment of the Supreme Court of 7 March 2014, IV CNP 33/13, LEX No. 1438649.

[67] See the Act on the Telecommunications Law of 16 July 2004, in particular Article 28, and the Act on Supporting the Development of Telecommunications Networks and Services of 7 May 2010, in particular Article 22.

by the contract expires by virtue of law. The *ex lege* obligational relationship thus becomes – in whole or in part – a contractual relationship.

The specific nature of the analyzed group leads to the conclusion that from the moment when the continuous obligation begins to show all (or almost all) of the features of a contractual relationship, this relationship can – as a rule – be treated as a contractual continuous obligation, taking into account the differences that occur in the context of individual legal situations. In particular, this applies to the expiry mechanism of these relations.

2.2. Self-executing continuous obligations resulting from legal acts

The basic legal act that creates a permanent obligation is a contract. The source of such a relationship may also be a unilateral legal act (for example a public pledge, in which the reward takes the form of the provision of proper performance in a continuous obligation), however, such cases have little practical significance.[68]

Contractual continuous obligations of a self-executing nature form the basic group of all continuous obligations. They are the most common obligations in trade and for this reason it would seem that they are often equated with the entire category of continuous obligations. This group has the highest degree of differentiation among all the groups of continuous obligation. This results both from the application of the principle of freedom of contract (Article 353^1 of the CC), and from the fact that it is primarily in the context of a contractual continuous obligation that each party is simultaneously a debtor and creditor.

The source of continuous obligations of a self-executing nature may be either a nominate contract or an innominate contract. The typical nominate contracts that create this type of relationship include the following: sales agreements for energy and water sales (Article 555 of the CC), a delivery contract for delivery by instalments (Article 605 ff. of the CC), contract farming in which contracts take a periodical form (Article 613 ff. of the CC), a rent agreement (Article 659 ff. of the CC), a lease agreement (Article 693 ff. of the CC), a leasehold agreement (Article 709^1 ff. of the CC), a lending agreement (Article 710 ff. of the CC), an interest-bearing loan agreement (Article 720 ff. of the CC), a bank account agreement (Article 725 ff. of the CC), a contract for the performance of services[69] (see, in particular, Ar-

[68] In these considerations, the issue of resolution was also omitted. The nature of the resolution, and in particular the manner in which it is adopted, requires that if it constitutes a source of a continuous obligation, it is only non-executing nature.

[69] Taking into account that the contract for the performance of services may also take the form of an obligational contract requiring only one-off performance(s).

ticle 750 of the CC), an agency agreement (Article 758 ff. of the CC), an agreement to restrain the competitive activity of an agent for a period after the termination of the agency agreement (Articles 764^6–764^8 of the CC), an insurance contract[70] (Article 805 ff. of the CC), a custody agreement (Article 835 ff. of the CC), a storage agreement (Article 853 ff. of the CC), an annuity contract (Articles 903 ff. of the CC), a life annuitie contract (Article 908 ff. of the CC), a credit agreement (Article 69 of the Banking Law Act), a contract for the provision of telecommunications services (Article 56 ff. of the Telecommunications Law Act), and contracts for the supply of gaseous fuels or energy (Article 5 ff. of the Energy Law Act).

3. Non-self-executing continuous obligations

3.1. General remarks

1. The view adopted in this work is that a non-self-executing continuous obligation is an obligation that remains in a specific relationship with a different legal (civil law) relationship. This relationship manifests itself primarily in the temporal aspect, but the dependence may extend further. The relationship on the temporal level allows us to assume that in each case the method of indirect determination applies to such obligations, at least as a method for determining the auxiliary expiration mechanism (see Chapter III § 1.).

The group of non-self-executing continuous obligations is not homogenous. As this group is distinguished through use of the criterion of there being a connection with another legal relationship, it would seem advisable that when describing the connection which causes the continuous obligation to be non-self-executing, reference should be made to its type. This provides grounds for distinguishing situations in which non-self-executing obligations remain connected to other obligational relationships from situations in which this connection involves a different civil law relationship.

When carrying out this description, it should also be taken into account that a connection between a non-self-executing obligational relationship and another legal relationship, including another obligational relationship, may manifest varying degrees of intensity. Simplifying somewhat, it can be assumed that in relation to another legal relationship, a non-self-executing obligational relationship may be derivative or auxiliary (ancillary). In the case of a continuous obligation of a derivative nature, the existence of another relationship (in which a subjective right constitutes its element) is the grounds for the existence of the obligation,

[70] The basis for the classification is the performance of the policyholder – the premium (see Article 813 § 2 of the CC).

but the obligational relationship fulfils an independent function. On the other hand, a continuous obligation of an auxiliary nature supports the functions that the other main legal relationship fulfils.

It is thus evident that the group of non-self-executing and auxiliary continuous obligations is heterogeneous. In a particular case, the existence of such an obligation may be necessary for the existence of the main legal relationship (for example the obligational relationship in Article 13 (1) of the Act on the Ownership of Accommodations, between the housing association and the landlord regarding the maintenance of the premises, is a necessary relationship with regard to the corporate relationship associated with membership in a housing association), or optional (for example the obligational relationship in Article 176 of the Commercial Companies Code). This distinction is important for determining the duration of a non-self-executing continuous obligation.

If the existence of a continuous obligation is not necessary for the existence of another legal relationship, it can be assumed that in the majority of cases the basic expiration mechanism of the obligational relationship is determined by means of the direct method, applied by both the construct of a fixed term and that of a non-fixed term. On the other hand, if the continuous obligation is auxiliary and necessary for the existence of a main relationship, the basic expiration mechanism of this obligation is usually determined by means of the indirect method. This does not preclude the use of the direct determination method, which takes the nature of particular legal relationships into account.

2. A specific type of non-self-executing continuous obligation are those which are non-self-executing for the period of time that another legal relationship lasts, but which become self-executing obligational relationships when the other legal relationship expires. Within this group, at least two cases can be distinguished. The first group includes obligations which, as a result of the expiration of another legal relationship, endure but lose the characteristics of a continuous obligation. An example is the obligation to pay interest due to a delay, when the principal payment has been made. These still belong to the category of continuous obligations, as a result of their obtaining an independent character, but they lose certain significant features. An example of this is a contract for a residential escrow account for a development project, which at the end of the project loses the status of a escrow account, but remains a bank account agreement (Article 5 of the Act on the Protection of Rights of the Buyer of a Dwelling Unit or Single-Family Home); or a license agreement which, after the expiry of the patent, continues on the basis of the contract of the parties and thus obliges the performance of proper payments in a continuous obligation, but is no longer a license agreement (see Article 76 (3) of the Industrial Property Law Act).[71]

[71] See, e.g. K. Szczepanowska-Kozłowska, *Umowy licencyjne*: 116–117.

3. The relationship between a continuous obligation and another legal relationship may be recognized on various levels. This influence may occur on the level of legally protected values. Whether such a case should be included in the category of non-self-executing continuous obligations, or whether it belongs to a separate category, is a separate issue, which can be considered open.

The connection on the level of protected values is particularly evident in the case of contractual continuous obligations which concern the use of personal interest, i.e. the value protected by the construct of absolute subjective right, which constitutes an element of a legal relationship effective *erga omnes* (Article 23 of the CC).

The principle of freedom of contract is not restricted to property[72]; it can form the basis for creating an obligational relationship in which the performance is related to personal interest. This can be an obligation of a continuous nature. Within the limits specified by this principle, personal interest may be subject to commercialization. If a contract is valid, I find no grounds for weakening its obligational force by granting the holder of the personal interest, by virtue of that personal interest, the ability to freely terminate a contract that was concluded for a fixed term.[73] The specific nature of the interest to which the performance relates does not entitle the debtor to change their mind freely in a way that has legal significance.[74] This would undermine the function of the obligational relationship. Therefore, in such a situation the right to withdraw consent regarding the use of a personal interest is subject to limitation on the basis of Article 353 of the CC.

However, the special features of the law on the subjective right to personal interests justify the assumption that the values protected by this legal construct affect the content of a continuous obligation both at the time the contract is concluded and throughout the duration of the obligational relationship. It can be assumed that in this aspect the continuous obligation is non-self-executing. Therefore, if there is a change of circumstance which would entail that the continuation of the obligational relationship would violate the legally protected, nonmaterial interest of the holder of the personal interests, I assume that he or she will be

[72] See the judgment of the Constitutional Tribunal of 29 April 2003, SK 24/02, OTK–A 2003, No. 4, item 33: "[…] it is necessary to see that the principle of the freedom of contract (…) belongs not only in the property dimension. It can be observed that the freedom of contract is also connected with the right to make decisions about your personal life and the protection of family life (Article 47 of the Constitution), because people also regulate their legal situation through concluded contracts in this way too.".

[73] These are the consequences of the position according to which the permission (consent) for the use of the personal interest can always be revoked by the holder of the personal interest. See, e.g. D. Flisak (in:) *Prawo autorskie*, ed. D. Flisak, 2015: 1145–1146. See also T. Grzeszak (in:) *SPP*, vol. 13, 2013: 693.

[74] See, e.g. J. Barta, R. Markiewicz, *Wokół prawa*: 30.

entitled to terminate the obligation.[75] The legal basis of this entitlement can be considered to be Article 746 § 3 of the CC, applied appropriately (Article 750 of the CC), or by *analogia legis*. Evaluation of the circumstances that constitute valid reasons for termination depends on the specific case at hand.

Concluding an agreement on the use of personal interest often also involves the protected nonmaterial values of the other party to the obligational relationship. For example, the use of the personal interests of another entity could serve to increase the beneficiary's own reputation. Thus, we can conclude that the right to terminate a contract for important reasons may arise for both the holder of the personal interest and the beneficiary of the holder's interest. An example of the first situation is the beneficiary undertaking – while the obligation continues – questionable or morally reprehensible activity (for example engaging in the practice of cheating consumers). An example of the second situation is the disclosure of facts about the holder of the personal interest which have a significant impact on the reputation of the beneficiary of the holder's interest (for example, if the holder is accused of driving under the influence of alcohol when his or her image is used to promote a specific car brand). I acknowledge that the party bringing about the termination is not liable in this case for damages incurred due to the premature termination of the obligational relationship. Such a solution is supported by the values that are respected by the subjective law on personal interest.

4. I do not include in the category of non-self-executing obligations those continuous obligations which are established due to the expiration of a previous legal relationship. Examples of this are: the legal relationship between an owner (the former lessor) and a tenant entitled to a substitute or public housing, if the court has ruled that bringing about the vacation of the premises should be suspended until such alternative premises are provided; an agreement to restrain the competitive activity of an agent for a period after the termination of the agency agreement (Articles 764^6 § 2 of the CC); and an obligational relationship in which the parties abrogate the rule of Article 461 § 2 of the CC, by contractually granting the former tenant the right to retain the object of the lease, until their claims for reimbursement are satisfied.[76] These obligations belong to the category of continuous obligations of a self-executing nature. However, the description of these relations cannot overlook the fact that the reason for their establishment is the expiration of another legal relationship. The purpose of the new legal relationship may actually be to mitigate the effects of the expiry of the previous legal relationship.

[75] In a similar vein, J. Barta, R. Markiewicz, *Wokół prawa*: 30; T. Grzeszak (in:) *SPP*, vol. 13, 2013: 693–694.

[76] See, e.g. the resolution of the Supreme Court of 29 November 1991, III CZP 124/91, OSP 1992, No. 9, item 207.

3.2. Non-self-executing obligations in the law of obligations

1. Within the group of non-self-executing continuous obligations, the first that can be distinguished are sub-letting contracts/contracts for the free use of rented property. According to Article 668 § 2 of the CC, obligational relationships arising from these contracts expire at the latest when the rental contract ends. The nature of these relationships therefore derives from rental contracts (see Section 3.1. Subpoint 1). Due to the importance of the regulation of rental contracts in the Polish legal system,[77] this type of contract can be considered as a model solution for continuous obligations of a non-self-executing and derivative nature. Recognition of Article 668 of the CC as a model regulation opens the possibility of applying this provision by *analogia legis* to similar situations (for example a sub-license agreement[78]).

Structuring subletting as a continuous obligation with a non-self-executing and derivative nature allows the interests of three parties to be taken into account. The application of this construct in effect extends of the scope of subjective rights exercised by the tenant. The third party is protected against the landlord's claims other than claims related to the use of things which is not in accordance with the obligations arising from the tenancy contract (Article 668 § 1 of the CC) and claims for reimbursement (Article 675 § 2 of the CC). The use of this construct also safeguards the landlord's interests, because with the expiry of the tenant's subjective right, the subjective right of the next user also expires.

The character of the construct of non-self-executing continuous obligations entails that it can be considered as a special solution in the context of Article 353 of the CC. The tenant's performance of payment for the benefit of a third-party user is dependent on the tenant's right to lease. The provision of Article 668 § 2 of the CC does not only rule that the contract for subletting expires with the expiry of the lease, and that the subletting contract with the third-party requires the landlord's consent, but it also limits the principle of contractual freedom in terms of the ability of the parties to structure the duration of the obligation. Modification of the rule from Article 668 § 2 of the CC requires the landlord's involvement.

2. The law of obligations clearly defines a group of continuous obligations of a non-self-executing and auxiliary nature. The function of particular obligations may entail that their expiration takes place not with the expiration of the principal relation, but in connection with this expiration.

An example of a continuous obligation of a non-self-executing nature that performs an auxiliary function with respect to another obligation is the relationship

[77] See J. Panowicz-Lipska (in:) *SPP*, vol. 8, 2011: 9, according to which tenancy is distinguished by model solutions.

[78] See, e.g. K. Szczepanowska-Kozłowska, *Umowy licencyjne*: 161–163.

involved in a custody agreement. Both in case-law[79] and in the doctrine[80] there is the oft-expressed view that a custody obligation may arise in the context of contracts such as a contract of specific work, commissioned sales agreements or a sales contract. As a rule, it is assumed that custody is in this case a peripheral (additional) obligation under the main obligational contract. However, the construct of a separate obligational relationship is not ruled out, particularly as an auxiliary relationship to the contract for the performance of services.

In many cases, it is can be argued that in connection with the conclusion of a specific obligational contract, a separate custody agreement is also concluded, which is a source of a non-self-executing and continuous obligation which is auxiliary to the main contract. This approach helps organize the description of the legal state of affairs. Distinguishing two separate obligational (main and non-self-executing) relationships allows the rules establishing each of them to be determined separately. It should be borne in mind that establishing the custody agreement usually precedes the conclusion of the main contract, and is not conditioned by the conclusion of that contract (for example hanging a coat on the hairdresser's coat rack in anticipation of the price for a haircut being indicated). In addition, due to the real nature of the custody agreement (Article 835 of the CC), its conclusion is connected with the assumption that the thing or things will be given back. As a rule, this is not an element involved in the conclusion of the main contract. A custody agreement is always a source of a continuous obligation, while the subject of the main contract does not have to be a performance of this type. Finally, the distinction of two legal relationships allows the expiration rules for each of them to be determined separately (for example usually only after the contract with the hairdresser is completed is the coat taken from the coat rack).

The construct of a separate obligational relationship can be assumed primarily with the custody involved in connection with: a contract for the performance of services (for example the custody of a coat in connection with a learning contract); a contract for specific work, if the object being stored does not serve the performance of the main contract (for example the custody of a coat in connection with a contract for hair dyeing); or another contract the performance of which requires an authorised person to divest themselves of movable property which does not

[79] See, e.g. the resolution of the Supreme Court of 16 December 1977, III CZP 94/77, OSNC 1978, No. 8, item 134; the resolution of the Supreme Court of 27 August 1979, III CZP 46/79, OSNC 1980, No. 1–2, item 5; the judgment of the Supreme Court of 27 May 1983, I CR 134/83, OSPiKA 1984, No. 4, item 84; the judgment of the Supreme Court of 7 February 2007, III CSK 296/06, LEX No. 274193. See however, the judgment of the Supreme Court of 25 November 2004, V CK 235/04, LEX No. 148150.

[80] See, e.g. A. Kędzierska-Cieślak, *Komis*: 158–159; J. Napierała (in:) *SPP*, vol. 7, 2011: 771 ff.; A. Szpunar, *Obowiązek*: 15 ff.; M. Świderska-Iwicka, *Odpowiedzialność*: 36 ff.

serve to perform the main contract (for example, the custody of things in connection with the conclusion of a contract for the use of an indoor pool).

However, it seems that this construct can also be adopted in cases which involve the return of items in order for the main contract to be fulfilled, in accordance with Article 835 of the CC. This applies in particular to commissioned sales agreements (the item being the subject of this contract) and contracts for specific work (the item by which, or for which, the work is to be performed). The performance of the custodian does not really fit into the construct of an obligational relationship with only a one-off performance. However, there are no reasons to rule out the protection which results from the acceptance of the custody relationship in this situation. At the same time, it can be noticed that the construct of custody as a separate obligational relationship, of a non-self-executing and auxiliary nature with respect to the main contract, provides a sufficiently flexible instrument for determining the rights and obligations of the parties to this relationship.

Another example of a continuous obligation of a non-self-executing nature and with an auxiliary function in relation to another obligation is provided by the legal situation which arises with a sales agreement which is subject to the ownership of the items sold (Articles 589–591 of the CC). The use of this type of sale may be connected with granting the buyer the right to use the property before purchasing it (see Article 590 and 591 of the CC), and thus with the seller being obliged to provide continuous performance or other proper performance in a continuous obligation.[81] The rights and obligations of the parties concerning the use of items can be considered as part of a separate continuous obligation of a non-self-executing and auxiliary nature, in relation to the contract of sale. The specificity of the seller's performance supports the application of such a construction, which is not covered in the wording of Article 535 of the CC. In a typical case, this relationship expires with the payment of the price, or withdrawal from the sales contract due to the price not being paid, or with the destruction of the items sold.

3. In the law of obligations, continuous obligations of a non-self-executing nature may be created on the basis of freedom of contract. However, it should be borne in mind that the method of indirect determination of duration in time applies to this category of obligation, and thus involves specific risks.[82] In a particular case, respecting the limits of freedom of contract may therefore justify the stipulation in the legal act of the expiration mechanism according to the direct method, which constitutes at least an auxiliary mechanism.

---

[81] See, e.g. the judgment of the Supreme Court of 25 September 2014, II CSK 664/13, OSNC–ZD 2015, No. D, item 67.

[82] See A. Pyrzyńska, *Zobowiązanie ciągłe*: 567 ff.

3.3. Non-self-executing continuous obligations in other sections of civil law

1. It is also possible, within the group of non-self-executing continuous obligations linked to legal (civil law) relationships which are not obligational relationships, to distinguish cases in which the obligational relationship is derived from another legal relationship (see Subpoint 2). It seems, however, that this group is characterised by continuous obligations with an auxiliary (ancillary) function in relation to another (main) legal relationship (see Subpoints 3–5).

2. The construct of a non-self-executing continuous obligation with a derivative character is clearly visible in the context of a license agreement. The form of this agreement supports the statement that the subjective right in a continuous obligation is in this case derivative in relation to the subjective right in a different legal relationship.

I assume that license agreements belong to the category of obligational legal acts,[83] and the performance of the licensor – consisting in enabling the use of the right – is a continuous performance. The relationship created by the license agreement is therefore a continuous obligational relationship. In some cases, this obligation approaches the construct of a real obligation (see Article 78 of the Industrial Property Act).

It is reasonable to conclude that in every case the relationship from a license agreement has a non-self-executing nature in relation to a legal relationship an element of which is an absolute subjective right to intangible property rights.[84] A license agreement may only be concluded by the holder of the right (see, for example, Article 67 (1) of the Act on Copyright and Related Rights, and Article 66 (2) of the Industrial Property Law). This entails that the expiration of the right to intangible property also leads to the expiry of the license relationship.[85] Due to the expiration of the right, the authorization to use it becomes ineffective, which means that from then on subsequent performance is impossible. This would seem to be a manifestation of the statutory function of license agreements which

[83] The legal nature of license agreements is subject to controversy. Part of the doctrine suggests its obligational character, whereas part suggests it has a disposing nature, and part considers this type of contract to be a legal act of an enabling nature – see Z. Okoń, *Charakter prawny*: 33 ff.

[84] This is in particular the right to a work (see Articles 66–68 Act on Copyright and Related Rights), the right to an invention, the right to a utility model, the right to an industrial design, the right to a trade mark (see Articles 76, 79, 100, 118 (1) and Article 163 (1) Act on Industrial Property Law), the right to databases (see Article 6 (1) Act on the Protection of Databases), the right to business secrets or other confidential know-how, the right to the company.

[85] The position of Andrzej Kubas, expressed in the previous legal framework, has a broader value, according to which "a license, as the authorization to enter the sphere of designated exclusivity and protected by the law resulting from a patent, is closely related to it not only at the time the contract is concluded, but for the entire duration of the license relationship.". See idem, similarly *Skutki wpisu*: 344.

concern the dissemination of intellectual property[86] or, more broadly, intangible property rights. This principle is clearly confirmed by Article 76 (3) of the Act on Industrial Property Law, however it should also be applied to other license agreements, including copyright license agreements, license agreements on confidential know-how (see, for example Article 79 in conjunction with Article 76 (3) of the Act on Industrial Property Law), license agreements for the use of databases and license agreements for the use of companies. The non-self-executing nature of license agreements distinguishes these contracts from other contracts which concern the exercise of rights, including lease of rights (Article 709 of the CC).

Another issue is how to classify situations in which the licensor loses the right to an intangible asset covered by the license, as a consequence of this right being transferred, with no grounds for adopting the construct of a real obligation (similar construct). I assume that if the purchaser of the right did not enter into the licence relationship on the basis of a legal act (see in particular Articles 509 and 519 of the CC), a situation of the subsequent impossibility of performance arises, and the debtor is liable (Article 475 of the CC). The license relationship is transformed into an obligational relationship in which the existing licensor is obliged to satisfy the current licensee with performance of compensation payment.

The derivative nature of the license agreement makes it possible to use – along with the method of indirect determination, related to the existence of a right to an intangible asset – methods for directly determining the duration of an obligational relationship. Typically, this method determines the primary (main) expiration mechanism.

Within legal relationships involving the right to an intangible asset, it is possible to distinguish other cases of continuous obligations of a non-self-executing nature, which are derivative with regard to legal relationships that are not obligational relationships. An example of this is the situation of the so-called succeeding user (subsequent) (see Article 75 (1) of the Act on Industrial Property Law) and the obligational relationship of the compulsory license (see Article 82 (1), and Article 84 of the Act on Industrial Property Law).

3. The construct of a continuous obligation of a non-self-executing nature can be clearly seen in the context of corporate-type relations. The separation of the obligational relationship from the corporate relationship facilitates the description of the legal situation, serving in particular to identify the rights and obligations of a particular member which differ from the rights and obligations of other members of the corporation.[87] Isolating the separate relationships also facilitates description of the duration of specific obligations.

[86] See K. Szczepanowska-Kozłowska, *Umowy licencyjne*: 18 ff.

[87] See, e.g. K. Pietrzykowski (in:) *SPP*, vol. 4, 2012: 347–348, according to which the rights and obligations resulting from the membership of a housing cooperative are identical (equal) for all members of the cooperative, while derivative rights and obligations of are differentiated. I acknowl-

A corporate relationship is understood to be a civil law relationship that joins organizational units with legal capacity and the entities participating in these units.[88] The organizational units that are recognized as being party to this relationship are commercial law companies and cooperatives. However, there are grounds for stating that any normative subject of civil law can be party to this relationship, if there is a basis for distinguishing a membership relationship. This applies, for example, to housing associations and residential communities.

It is necessary to share the position according to which the rights and obligations of members are a consequence of them acquiring membership in a corporation, and which could not exist without this membership.[89] This takes into account the essence of the corporate relationship and respects the principle of freedom. Therefore, if the rights and obligations of a corporation member are in some way related to the construct of a continuous obligation, it should be assumed that this is a continuous obligation of a non-self-executing nature. This relationship extinguishes at the latest with the lapse of the corporate relationship which constitutes the main relationship for such an obligation. Yet it cannot be ruled out – as with other continuous obligations – that the obligational relationship can be transformed into a settlement phase – liquidation relationship. I consider the final phase of a legal relationship in which the settlement of the existing liability is settled – for example in terms of returning the item, overpayment, settlement of expenditures or expenses – as a liquidation relationship. At the same time, it seems justified to state that obligational relationships connected with a corporate relationship usually perform an auxiliary function to the corporate relationship.

The construct of a continuous obligation of a non-self-executing and auxiliary nature can be assumed on the basis of the Code of Commercial Companies. Examples of this are: the obligation of a partnership that has a limited obligation to provide recurrent non-pecuniary performances, combined with the company's obligation to pay remuneration to the shareholder (Article 176 of the Code of Commercial Companies); obligations related to registered shares, including the shareholder's obligation provide recurrent non-pecuniary performances, combined with the company's obligation to pay to the shareholder's remuneration (Article

edge that the equality/differentiation of rights and obligations may also be an auxiliary criterion in distinguishing non-self-executing continuous obligations with corporate relationships other than cooperative ones.

[88] See, e.g. Z. Banaszczyk (in:) *SPP*, vol. 1, 2012: 977 ff.; J. Frąckowiak (in:) *SPP*, vol. 1, 2012: 1157; K. Kopaczyńska-Pieczniak, *Ustanie członkostwa*: 47 ff.; K. Pietrzykowski (in:) *SPP*, vol. 4, 2012: 328 ff. A separate issue is whether this relationship is bilateral (member – corporation) or a multilateral (member – corporation – member). Even if we accept there is a bilateral position, the multilevel nature of this relationship needs to be taken into account. The corporation as a party to this relationship functions because of the membership relationship that links it to each of its members is taken into account.

[89] See, e.g. J.P. Naworski (in:) *SPP*, vol. 16, 2016: 424.

356 of the Commercial Companies Code); and the obligation of a partner who has a limited obligation to make additional contributions in situations in which the performance assumes the proper form of a continuous obligation (Articles 177–179 of the Commercial Companies Code). Each of the indicated obligational relationships expires at the latest with the lapse of the membership relationship.

The construct of a continuous obligation of non-self-executing nature which is subsidiary to the main, corporate relationship can also be assumed in the light of Article 13 (1) of the Act on the Ownership of Accommodations, to the extent to which owners are obliged to incur expenses related to the maintenance of their premises. This legal relationship is distinguished from a corporate relationship, including a relationship involving the owner's obligation to participate in the management costs related to the maintenance of jointly-owned property. It can be noticed that the corporate relationship itself is in this case non-self-executing and has an auxiliary function in relation to the legal and material relationship associated with the ownership of the premises. Therefore, a conglomerate of legal relationships is in fact created in connection with of the ownership of premises.

However, there are no grounds for assuming that any non-self-executing obligational relationship which is linked to a corporate relationship has an auxiliary nature with regard to this relationship. An example is the relationship of a housing cooperative's right to a housing unit. This is an obligational relationship[90] tied to membership of a housing cooperative (Article 9 (1) (4) of the Act on Housing Cooperatives), which extinguishes upon the expiration of this membership (Article 11 (1) of the Act on Housing Cooperatives). The function of the housing cooperatives's right to a housing unit rules out the assumption that the relationship, of which this right is an element, is auxiliary to the corporate relationship. It is a legal relationship which is derived from the membership relationship.[91]

4. The construct of a non-self-executing continuous obligation can also be found in property law.

Regardless of divergences in the issue of the significance of obligational contracts for contracts from the field of property law, in particular the nature of a legal action to establish a limited property right,[92] in the case of specific legal relationships related to property rights one can also notice legal relations of a relative type.[93] This applies in particular to: the relationship between the landowner and

[90] See, e.g. K. Pietrzykowski (in:) *SPP*, vol. 4, 2012: 356–357.

[91] See K. Pietrzykowski (in:) *SPP*, vol. 4, 2012: 344 ff.

[92] See, e.g. E. Gniewek (in:) *SPP*, vol. 4, 2012: 115–116, who advocates the view that when establishing a limited property right, the mechanism of a contract with double effect, obligational and dispositional, is applicable (Article 155 in conjunction with Article 245 § 1 of the CC) and E. Drozd, *Umowa zobowiązująca*: 874–876, according to which the existence of an obligation to establish a limited legal right does not constitute a prerequisite for its establishment.

[93] See, e.g. E. Gniewek (in:) *SPP*, vol. 4, 2012: 113; A. Klein, *Elementy stosunku prawnego*: 118–119, 129, 150–151; A. Kubas, *Rozszerzona*: 215; Z. Radwański, *Najem*: 208 ff.; the resolution of the

the perpetual usufructuary; the relationship between the owner of encumbered property and the holder of the limited property right; and the relationship between the co-owners.[94]

If it is possible to identify conduct that fulfill the characteristics of the performance (or similar conduct), in my assessment there is no basis for rejecting the construct of obligational relationship (Article 353 of the CC). This approach simplifies the description of the situation, without confusing the features of absolute and relative legal relationships. The advantage here is the possibility of employing the normative potential that the construct of obligational relationship contains within itself. If an element of this relationship is the provision of proper performance in a continuous obligation, this relationship is a continuous obligation.

A non-self-executing obligation in property law has – as a rule – an auxiliary character in relation to a specific legal and material relationship (the main relationship) and is connected with it in a necessary manner. Examples of this are: the relationship between co-owners in connection with their co-ownership of property and their use of it (Article 206 of the CC); the relationship between a land owner and the perpetual usufructuary involving annual fees (Article 238 of the CC); the relationship between the owner and the usufructuary concerning remuneration, if the use is to be paid for and the remuneration requires providing proper performance in a continuous obligation.

The construct of a non-self-executing and auxiliary continuous obligation may also be considered in the case of license agreements on the software necessary for the proper functioning of goods (for example a car or a washing machine). The function of this agreement is to ensure the proper functioning of goods, the duration of this relationship is therefore necessary to exercise the right of ownership of goods. This allows us to assume that Articles 66 and 68 of the Act on Copyright and Related Rights is applicable to such a license.

5. However, there are doubts as to whether there are grounds for distinguishing continuing obligations of non-self executing nature on the basis of family law.

It is assumed that family law is essentially the internal law of the family, which normalizes legal relations within the family group by means of a civil law method of regulation (legal familial relationships).[95] This feature has an influence on the specificity of the legal familial relationship.[96] In particular, it can be noticed that the impact of legal norms is in this case weaker than in other social relationships.[97]

Supreme Court of 12 April 1973, III CZP 15/73, OSNC 1973, No. 12, item 208, in which the co-owners' agreement specifying the use of things was classified as a continuous contract.

[94] However, see resolution (7) of the Supreme Court of 19 March 2013, III CZP 88/12, OSNC 2013, No. 9, item 103.

[95] See M. Nazar, *Problemy nowelizacji*: 88.

[96] See, e.g. J.St. Piątowski (in:) *System prawa rodzinnego i opiekuńczego*, 1985: 25 ff.

[97] See T. Smyczyński (in:) *SPP*, vol. 11, 2014: 28.

The relationship of family law is relative in nature,[98] however it does not belong to the category of obligational relationship. The basis for establishing and maintaining a legal familial relationship is a specific personal bond, usually a family bond.[99] Therefore, a legal familial relationship is derived from a specific social relationship, both in terms of its duration and content. This feature distinguishes it fundamentally from an obligational relationship.

Legal family relationships, i.e. relationships of kinship, marriage or affinity (and exceptionally with another legal relationship – see Article 141 of the Family and Guardianship Code), are associated with maintenance relationships. However, there are no grounds for considering this relationship as a non-self-executing continuous obligation in relation to one of the main legal family relationships indicated.[100] Even if a maintenance relationship (Article 128 of the Family and Guardianship Code) requires certain action to be taken for the obligee and to some extent corresponds to the features of periodical or continuous performance, this relationship would clearly exhibit specific features[101] that exclude it from the category of obligational relationship. This specificity results from being strongly determined by the main legal familial relationship. *Inter alia*, this entails that a maintenance relationship is unambiguously pecuniary,[102] that it can be established several times between the same persons,[103] that it is also possible to change the roles of the obligee and obligor, and even that the obligation can be evaded, if the request for maintenance is contrary to the principles of social coexistence (see Article 144^1 of the Family and Guardianship Code). Such a strong conditionality with specific legal familial relationships makes it evident that a maintenance relationship is an element of a complex family-legal situation.[104] Therefore, describing this situation under a separate legal relationship of a non-self-executing nature is well-grounded. However, there are no grounds for classifying this relationship as an obligational relationship, which also includes continuous obligations.

There are also no grounds for classifying the obligation of spouses to contribute to the needs of the family (Article 27 of the Family and Guardianship Code) as a continuous obligation. This is an element of the legal relationship of marriage or non-self-executing relationship of family law with an auxiliary function in relation to a marriage relationship or a relationship between a parent and a child.

---

[98] See, e.g. T. Smyczyński (in:) *SPP*, vol. 11, 2014: 39–40, which classifies the legal familial relationship as bilaterally individualized.

[99] See, e.g. T. Smyczyński (in:) *SPP*, vol. 11, 2014: 36.

[100] See, in particular, T. Smyczyński (in:) *SPP*, vol. 12, 2011: 758.

[101] See T. Smyczyński (in:) *SPP*, vol. 12, 2011: 758, 799, 802.

[102] See resolution (7) of the Supreme Court of 24 May 1990, III CZP 21/90, OSNC 1990, No. 10–11, item 128; J. Gwiazdomorski (in:) *System prawa rodzinnego i opiekuńczego*, 1985: 995 ff. Slightly differently T. Smyczyński (in:) *SPP*, vol. 12, 2011: 799.

[103] For a contrasting position, see T. Smyczyński (in:) *SPP*, vol. 12, 2011: 756–757.

[104] Similarly Z. Banaszczyk (in:) *SPP*, vol. 1, 2012: 973.

With regard to family law, it is not clear what purpose there would be in adopting the construct of continuous obligation. Recognizing maintenance relationships as a kind of legal family relationship does not rule out using, by *analogia legis*, provisions from the Book III of the CC to areas not regulated in the Family and Guardianship Code, taking into account the nature of the legal family relationship.[105] On the other hand, treating it as an obligational legal relationship would lead not only to the confusion between various categories of civil law relationships, but above all could threaten the function of the maintenance relationship.

However, on the basis of family law, it is possible to identify cases in which the construct of non-self-executing continuous obligation may be applicable. In particular, the institutions of the law of obligations can be employed to protect legal family relationships. An example is a suretyship contract, in which the surety commits to the creditor to perform an obligation if the debtor does not perform it.[106] At the stage when the guarantor provides performance, the guarantee takes the form of a continuous obligation, while the duration of the maintenance obligation determines the maximum duration of the surety relationship. Another example of a non-self-executing continuous obligation is provided by guardianship law with regard to the carer's remuneration for the care provided. According to Article 162 § 1 and 3 of the Family and Guardianship Code, this remuneration may take the form of periodical performance.

---

[105] See, e.g. resolution (7) of the Supreme Court of 24 May 1990, III CZP 21/90, OSNC 1990, No. 10–11, item 128.

[106] See, e.g. thesis IX of the resolution of the Full Civil and Administrative Chamber of the Supreme Court of 16 December 1987, III CZP 91/86, OSNC 1988, No. 4, item 42.

Chapter III

THE DURATION OF CONTINUOUS OBLIGATIONS

1. The division of continuous obligations according to the criterion of duration

1.1. General remarks

1. The nature of performances covered by the construct of a continuous obligational relationship (continuous performance, periodical performance and successive performance) entails that they can be fulfilled in an unlimited time range. There is no typical moment for an obligation requiring a one-off performance which would lead to a debt expiring (the automatic expiration of the obligational relationship[107]). The specific construct of these relationships, resulting from the incorporation of the time element, entitles us to assume that they are rather subject to being fulfilled than fulfilment; ongoing performance rather than fulfilled performance.[108] The construct of a continuous obligation must, therefore, include a mechanism for determining the time boundaries of this relationship, without recourse to a termination agreement. The lack of such a mechanism would signify the creation of a perpetual obligation. Therefore, the issue of being bound in time by a continuous obligation is inextricably tied to the problem of the expiration mechanism of this relationship.[109]

An obligation may lapse as a result of various mechanisms. On the general level, we can distinguish the mechanism that serves as the primary (main) expiration mechanism and the auxiliary mechanism. In the case of a continuous obligation, distinguishing the primary mechanism may provide a useful criterion for classifying the obligational relationship in accordance with the criterion of duration, as well as for verifying that the content of the legal act complies with the principle of limited duration. On the other hand, referring to the auxiliary mechanism

[107] See H. Oetker, *Das Dauerschuldverhältnis*: 323.

[108] This specificity can be justified by the nature of the legal norms covered by the construct of a continuous obligation. These are primarily abstract norms, i.e. standards that require us to act in some way continuously or repeatedly when certain circumstances arise (see Z. Ziembiński, *Logika praktyczna*: 107). "The abstraction of the norm is therefore reduced to the fact that its implementation does not in a way lead to its 'consumption' or 'cancellation" – see J. Mikołajewicz (in:) *Problematyka intertemporalna*: 84.

[109] See also Th. Delahaye, *Le facteur temps*: 63; H. Oetker, *Das Dauerschuldverhältnis*: 14 ff.

when describing the duration allows the specificity of a given type of obligation or a particular contractual relationship to be taken into account.

2. The previous considerations have shown that the duration of continuous obligation is not subject to uniform regulation.

The fact that the duration of continuous non-self-executing obligations are linked with the duration of another legal relationship means that this category is clearly distinguished from the category of continuous obligations of a self-executing (independent) nature. Significant differences also exist between continuous obligations arising from legal acts and continuous obligations made *ex lege*, which are usually concretized by further legal events, such as a court decision, a subsequent legal act or an administrative decision.

Under the current law, the division of continuous obligations into obligations for a non-fixed term and for obligations concluded for a fixed term is applicable only to contractual relations,[110] or to special obligational relationships arising *ex lege* and which, after being established, have the essential features of a contractual relationship (see Chapter II § 2. 2.1. Subpoint 4). However, this construct is not applied to typical continuous obligations resulting from law.[111] The duration of an obligational relationship is thus linked to the duration of a specific situation, which has, to a greater or lesser extent, a changeable nature.[112] Reference to the duration of this situation does not justify the use the construct of a non-fixed term or a fixed term. This has far-reaching consequences, which influence, *inter alia*, the issue of performance determination and the lack of grounds for applying the termination institution.

It should be noted, however, that within the scope of continuous obligations resulting from a legal act there are also no grounds for applying uniform rules of expiration. Apart from the case of non-pecuniary obligations already mentioned, there are situations in which the legal event leading to the expiration of the obligation does not justify the adoption or construction of either a non-fixed term or a fixed term.

These differences justify the assertion that a description of the duration of a continuous obligation can be made through the use of at least two methods.

The first method consists in determining the duration of a continuous obligation through applying the constructs of a non-fixed term or a fixed term. In further considerations, this is referred to as the method of direct determination. The use of this name is justified by the fact that at the moment the obligation is established (its modification by way of subsequent legal action or – in the case of a continuous obligation established *ex lege* – concretized by further legal events) the time frame is determined according to a precise mechanism that makes no

[110] See, e.g. Article 659 § 1, 693 § 1, 709^1, 710, 725, 764, 764^1, 764^2, 844 § 2, 859^4, 869 of the CC, Article 69 (1) of the Banking Law Act.

[111] See, e.g. Article 444 § 2 and 3 and Article 446 § 2 of the CC (also in conjunction with Article 805 § 2 (1) of the CC), Articles 938 and 966 of the CC.

[112] See, e.g. the resolution of Supreme Court of 12 June 1968, III PZP 27/68, OSNC 1969, No. 2, item 24; the resolution of Supreme Court of 17 September 2009, IV CNP 42/09, LEX No. 603794.

reference to a random element. This method usually defines the primary (main) expiry mechanism for continuous obligations arising from a legal act.

The second method consists in determining the duration of a continuous obligation by linking it to the duration of a specific situation, including the duration of another legal relationship, or the occurrence of a random event. In further considerations, it is referred to as the method of indirect determination. The use of this name is justified by the fact that when the obligation is established (its modification) the mechanism of expiration is in fact specified, but its clarification takes place while the obligation endures, with reference to external elements with regard to the obligational relationship. This method usually defines the primary (main) expiry mechanism for continuous obligations that do not result from legal acts, and for non-self-executing continuous obligations.

3. When describing a continuous obligation from the perspective of time, one must also take into account the criterion of termination/non-termination. This criterion, however, can be applied – as a rule – only to obligations whose duration is determined in a direct way. For obligations whose duration is indirectly determined, termination which is not linked to the breach of the obligation constitutes an atypical solution (see, for example, Article 5 (4) of the Act on the Protection of Rights of the Buyer of a Dwelling Unit or Single-Family Home).

Use of the criterion of termination/non-termination is justified at least because the mere reference to the construct of a non-fixed term/fixed term is insufficient to determine whether a given obligational relationship of a continuous nature ensures the stability of the parties' legal situation. In the current legal situation, the termination of a continuous obligation is not only connected with the model of a non-fixed term, and non-termination not only with the model of a fixed term. This is confirmed by, *inter alia*, Article 673 § 3 of the CC.[113]

The description of a continuous obligation with regard to the criterion of termination/non-termination is, however, not straightforward. Although the legal act of termination itself has a far-reaching consistency in terms of content and the effects it generates, the reasons for its implementation are so diverse that they are difficult to systematise at the general level. It would seem fair to say that by granting the right to terminate, whether directly[114] or indirectly[115], the legislator

[113] See resolution (7) of the Supreme Court of 21 December 2007, III CZP 74/07, OSNC 2008, No. 9, item 95.

[114] For example, the right to terminate may be granted regardless of any conditions in agreements concluded for a non-fixed term (see, e.g. Article 365^1 of the CC and Article 673 § 1 and 2, Article 746 § 1 and 2, Article 764^1 § 1 of the CC, Article 42 Consumer Rights Act, Article 4j (3) and Article 5a (4) of the Energy Law Act), and for a fixed term (see, e.g. Article 746 § 1 and 2 in conjunction with Article 750, Article 844 § 1 of the CC, Article 4j (3a) and Article 5a (4) of the Energy Law Act and Article 830 § 1 of the CC, taking into account the specific nature of contracts for the lifetime of the party – see section 1.4. Subpoint 2).

[115] This concerns primarily situations in which the parties have the competence to appropriately shape the content of a legal act – see in particular Article 673 § 3 of the CC.

is not concerned so much for the purity of the construct of obligational relationship in terms of its duration as much as for its function. This attitude is understandable. Continuous obligation is one of the most general structures of contract law. It is not possible to adopt a uniform, binding model through the consistent division of continuous obligations into freely terminable obligations concluded for a non-fixed term, and non-terminable obligations concluded for a fixed term. Termination – as an instrument which serves to shape of the duration of an obligational relationship directly – may apply regardless of whether the relationship was concluded for a non-fixed term or a fixed term. The effects caused by this legal act entail that it has a universal character.

This description is additionally complicated by the fact that in principle any continuous obligational relationship resulting from a legal act is subject to termination in the event of a breach of the obligation. This rule should be considered binding, irrespective of the difficulties in establishing the legal basis[116] for it and – in individual cases – the different requirements as to the degree of intensity of the breach which would justify the termination. On this basis alone it should be assumed that there are no non-terminable or even irresolvable[117] obligational relationships of a continuous nature, apart from exceptional situations.[118] This also applies to obligational relationships with a maintenance function.

The universality of the rule, according to which in the event of there being a breach of a continuous obligation, the other party is entitled to terminate (or take other actions to end the obligational relationship), means that it does not provide a useful criterion for distinguishing between continuous obligations in terms of their duration. In addition – and significantly for these considerations – termination due to a breach of obligation does not, in principle, determine the primary (main) expiry mechanism. This justifies omitting discussion of such cases in further considerations.

1.2. Continuous obligations whose duration is determined in a direct manner

1. The content of a legal act which constitutes a source of a continuous obligational relationship should specify the manner of expiration for such a relationship, or make it possible to make such a determination by using elements which define

[116] This rule can be derived both from the very essence of the obligational relationship (Articles 353 and 354 of the CC) and from specific regulations, among which the most important are Articles 491 and 492[1] of the CC. See also G. Tracz, *Sposoby*: 206 ff.; F. Zoll (in:) *SPP*, vol. 6, 2014: 1236–1238.

[117] Exceptions should be considered as derogations from the principle of the limited duration of the obligational relationship, see A. Pyrzyńska, *Zobowiązanie ciągłe*: 332 ff.

[118] In certain special situations, justified by the protection of a party, the legislature introduces the dissolution of the obligation by the court in place of termination – see Article 913 § 2 of the CC.

the content of the legal relationship (Article 56 of the CC; see, for example, Article 66 (1) of the Act on Copyright and Related Rights). In this case, it is not possible to appeal to the principle of automatic expiration as a result of performance (or performances) having been fulfilled. However, it should be recognized that the content indicated is a necessary element of the content of such a legal act; its lack implies that the legal act has not been executed.

For a continuous obligation which results from a legal act, it is necessary for its duration to be determined. At the same time, if it is a self-executing obligational relationship, as a rule this should be done in a direct way (i.e. the direct method of determination). In other words, a future event should be indicated that will lead to the expiration of the obligation, one falling within the group of events that determine the duration in a direct way (an obligational relationship for a fixed term), or a mechanism should be defined that enables the obligational relationship to be brought to an end by way of termination (an obligational relationship for a non-fixed term).

Nevertheless, this does not rule out the possibility that both mechanisms could be combined, with varying intensity, to determine the duration of a continuous obligation (i.e. indicating a future event and determining the termination mechanism). This combination may result from both a statute (for example Article 746 § 3, in connection with Article 750, of the CC) and a legal act, leading in particular to the creation of an obligational relationship which, in relation to different time periods, is at one time a relationship for a fixed term, and at another time a relationship for a non-fixed term. In the case of obligational relationships resulting from legal acts, it is also possible to extend the basis for termination by way of a contract. However, adoption of such a construct by the parties should make it possible to classify the obligation through application of Article 365^1 of the CC. In particular, contractual extension of the basis for terminating an obligation for a fixed term of time cannot lead to a situation in which the expiration caused by the occurrence of a specified legal event loses the status of being the primary (main) expiry mechanism. The issue here is not just the prohibition on combining a fixed term with the right to freely terminate, but also such determination of occurrences justifying termination (see, for example, Article 673 § 3 of the CC) which does not indicate the appropriate weight of the reason for termination.[119] However, in the case of a continuous obligation concluded for a non-fixed term, the restriction of the freedom of termination under Article 365^1 of the CC – if it is considered acceptable at all – must not lead to a disruption in the functioning of the primary (main) expiry mechanism.

2. In the case of continuous obligations resulting from a legal act, the duration of which is determined in a direct manner, the division between obligations

[119] See E. Rott-Pietrzyk, *Dopuszczalność*: 50.

for a non-fixed term and obligations for a fixed term does not coincide with the division between terminable obligations and non-terminable obligations. Such an approach influences the definition of a continuous obligation concluded for a non-fixed term and a continuous obligation concluded for a fixed term. When formulating these definitions, it is first necessary to emphasize the primary (main) mechanism for terminating the obligational relationship,[120] not the question of the duration (or lack thereof) of a specific legal relationship.[121] Whether the adoption of the structure of a non-fixed term/fixed term stabilizes the obligational relationship or not is another issue. Attempts to resolve it should take into account the regulation regarding the particular legal act in question, including the particular type of obligational contract or a specific innominate contract. It is only on this level that the norm determining the terminable/non-terminable nature of a given relationship can be interpreted.[122] In particular, general conclusions cannot legitimately be drawn after consideration of only one type of nominate contract.

At the general level, it is only legitimate to state that a continuous obligation for a fixed term typically creates a more a more lasting tie for the parties than an obligation for a non-fixed term. The criterion of the terminable/non-terminable nature of the relationship should be taken into account at a specific level, distinguishing at least eight subcategories of continuous obligation whose duration is determined in a direct manner.

This allows us to assume that a continuous obligation concluded for a non-fixed term is an obligation in which the primary (main) mechanism of expiration is termination, which as a rule means this can be done freely by each party. Freedom of termination means that no reason is required for it to be done (Article 365^1 of the CC).

However, a continuous obligation entered into for a fixed term is an obligation in which the primary (main) expiry mechanism is linked to the occurrence of a specified legal event. An important feature of this event is that the moment of its occurrence is designated in accordance with objective criteria at the stage when the obligational relationship is established. The event is, in principle, the expiry of the period (time limit).

3. The constructs of a non-fixed term and a fixed term may also apply to obligational relationships which do not belong to the category of continuous obligations. If the principle of automatic expiration of the obligation as a result of the performance having been fulfilled does not operate, or its operation in a particular case violates the principle of limited duration, it is necessary to use an alternative

[120] See, e.g. L. Domański, *Instytucje*: 313; Z. Radwański, *Uwagi*: 255.

[121] See resolution (7) of the Supreme Court of 21 December 2007, III CZP 74/07, OSNC 2008, No. 9, item 95.

[122] See, e.g. the resolution of the Supreme Court of 11 October 2012, III CZP 52/12, OSNC 2013, No. 3, item 33.

mechanism that would bring about such an effect.[123] This also applies to relative relationships that are not obligational relationships. With respect to obligational relationships which do not constitute continuous obligations, the analysed constructs can be considered as being a consequence of the principle of limited duration, and recognized as supplementing the principle of the expiration of the obligation due to fulfilment. From a slightly different perspective, it is a mechanism that allows the normative (regulatory) function of a legal act to be repealed.[124]

The basic example of the use of this construct, apart from the category of continuous obligations, are obligational relationships in which willingness to make performance is present.[125] This willingness is connected with the element of time, but at the same time the bearing of the risk secured under this readiness cannot be prolonged indefinitely. Therefore, it is necessary to specify the expiration mechanism for these obligational relationships using the method of indirect determination,[126] or by using the construct of a fixed term or the obligation of a period (time limit) (see, for example, a guarantee of timely payment or suretyship with agreed maturity). If it does not violate the properties (nature) of the obligational relationship, the construct of a non-fixed term or an unlimited obligation is also applicable.[127] However, the consequence of the principle the limited duration of an obligational relationship must be that this construct be combined with the expiration mechanism by way of termination.[128] In the absence of a separate statutory regulation or a specific legal act – such termination is applicable through *analogia legis* to Article 365^1 of the CC.

The constructs of a non-fixed term and a fixed term may also be applicable to contracts regulating the cooperation of parties, including framework agreements, regardless of whether a particular contract belongs to the category of continuous obligations. The contract incorporates the time factor, but at the same time, in principle, the principle of automatic expiration as a result of performance having been

[123] Article 6.109 of the PECL and Article IV.E.-2:302 of the DCFR appear to follow a similar direction. In both provisions, the right to terminate a contract was connected with the construction of a non-fixed term, without resolving the obligational relationship. See also Article 1211 of the French CC.

[124] See A. Pyrzyńska, *Zobowiązanie ciągłe*: 113 ff., and the literature indicated there.

[125] For more detailed discussion, see A. Pyrzyńska, *Zobowiązanie ciągłe*: 109 ff. According to the standpoint adopted in this work, the mere fact that there is readiness to make performance (e.g. a surety, guarantor or insurer) does not justify the acceptance of the construct of a continuous obligation.

[126] This applies primarily to obligational relationships with a security function, which usually last as long as the legal relationship under which the secured claim arises (e.g. a suretyship – Article 876 § 1 of the CC). If, on the other hand, the obligational relationship which gives rise to the readiness to make performance is self-executing (such as a guarantee contract of an abstract character), the determination of the duration of that relationship only in an indirect manner is questionable.

[127] See, e.g. G. Tracz, *Umowa gwarancji*: 246.

[128] See also G. Tracz, *Umowa gwarancji*: 290–292; J. Pisuliński (in:) *Prawo bankowe. Komentarz*, ed. E. Fojcik-Mastalska, 2005: 343.

fulfilled (due to other action being taken) does not operate in this case. For these contracts, it is therefore necessary to specify the expiration mechanism. In a typical case, this mechanism is associated with the use of the direct method of determination.[129] The expiration of the contract regulating cooperation between the parties does not necessarily lead to the termination of this cooperation. If the cooperation formed the basis for the conclusion of further contracts (execution contracts), the expiration usually does not affect the binding nature of execution contracts.

4. Continuous obligational relationships whose duration is determined in a direct way, in the basic model distinguished according to the time criterion, are divided into obligational relationships concluded for a non-fixed term and obligational relationships concluded for a fixed term.

Taking into account the criterion of the ability to terminate/inability to terminate, further subcategories can be identified within this division. However, the complexity of the legal status connected with the universal use of the construct of continuous obligation requires that the following proposal should be treated only as a typology. At this point, mention could also be made of the previous assumption that in making this distinction the termination of a continuous obligation for reasons related to a breach of obligation was omitted.

Four subcategories of continuous obligational relationships concluded for a non-fixed term can be distinguished: (1) continuous obligations in which each party is entitled to unlimited (free) termination; (2) continuous obligations in which the entitlement to termination is limited for one of the parties; (3) continuous obligations in which the entitlement to termination is limited for each party; and (4) continuous obligations in which neither party is entitled to terminate.

Similarly, within the framework of continuous obligational relationships concluded for a fixed term, four subcategories can be distinguished: (1) continuous obligations when neither party is entitled to termination; (2) continuous obligations when the entitlement to termination is limited for one of the parties; (3) continuous obligations when the entitlement to termination is limited for both parties; and (4) continuous obligations when at least one of the parties is entitled to unlimited (free) termination.

5. Classification of a continuous obligation concluded for a non-fixed term according to the criterion of terminability/non-terminability is of primary importance for determining whether it falls under Article 365^1 of the CC. A closer analysis of this category of relationship leads to the conclusion that not every obligation for a non-fixed term can be freely terminated. Four subcategories can be distinguished here.

The first subcategory (continuous obligations for a non-fixed term in which each party is entitled to free termination) is of fundamental importance for this

[129] See also G. Domański, *Umowa ramowa*: 72; A. Olejniczak, *O koncepcji*: 77.

category of obligation. It corresponds to the traditionally distinguishable model of a continuous obligation for a non-fixed term. The second, third and fourth subcategories should be treated as special cases.

To obligations falling under this subcategory, Article 365^1 of the CC is applicable to the full extent. In addition, with these relationships, specifying a deadline is allowed, at which point the obligational relationship expires if it has not been terminated beforehand. It should be assumed that the freedom to terminate a relationship belonging to the first subcategory also includes the right to specify – in addition to termination – a second expiry mechanism,[130] of an auxiliary character. In the case of continuous obligations concluded for a non-fixed term, the simultaneous application of two expiry mechanisms is, however, an exceptional solution.

The second subcategory (continuous obligations for a non-fixed term in which the entitlement to termination is limited for one of the parties) is connected with a derogation from the principle of the limited duration of the obligational relationship, and is usually associated with the protection of specific groups of entities (for example consumers) or the conclusion of a contract for the realization of public tasks.[131] Due to the imperative nature of the norm reconstructed on the basis of Article 365^1 of the CC, the parties' use of this construct requires a statutory basis, and this regulation is usually imperative or semi-imperative (see, for example, Article 730 of the CC, Article 11 of the Act on the Protection of Tenants' Rights, Municipal Housing Reserves and on the Change of the CC, Article 256 of the Act on Restructuring Law). Since the entitlement to terminate is limited only for one of the parties, the other party – in accordance with Article 365^1 of the CC – is free to terminate. The provision in question is therefore applicable to this subcategory to a subjectively limited extent.

Also, the third subcategory (continuous obligations for a non-fixed term in which the entitlement to termination is limited for both parties) and the fourth subcategory (continuous obligations for a non-fixed term, in which neither party is entitled to termination) should be considered as derogations from the basic model (the first subcategory). However, with cases belonging to the fourth subcategory the question arises of whether they can still be included in the category of obligations for a non-fixed term. Termination here does not determine the primary (main) expiry mechanism. According to the traditional terminology, I include these obligations in the group of continuous obligations for a non-fixed term; however, I recognize that they escape the previously accepted classifications.

The distinction between the third and fourth subcategories is not merely theoretical. Under the existing legal framework, it is possible to indicate examples of continuous obligations resulting from a legal act concluded for a non-fixed term,

[130] See resolution (7) of the Supreme Court of 21 December 2007, III CZP 74/07, OSNC 2008, No. 9, item 95.

[131] For more detailed discussion, see A. Pyrzyńska, *Zobowiązanie ciągłe*: 50–51.

in which the entitlement to termination is limited for each party or in which neither party is entitled to termination.

The basic example is provided by the relationship between the issuer and the bondholder arising from non-redeemable bonds, i.e. perpetual bonds. The Bonds Act clearly determines that this is a relationship under which the bondholder is entitled to receive interest for a non-fixed term, while at the same time this relationship does not fall under Article 365^1 of the CC (see Article 23 of the Bonds Act). Perpetual bonds become exigible only in the event of a declaration of bankruptcy or if the issuer is placed in liquidation (Article 75 (1) (1) of the Bonds Act, see also Article 75 (1)(2) and (2) of the Bonds Act).

Application of the third and fourth subcategories of continuous obligations concluded for a non-fixed term should not be ruled out in other cases. A continuous obligational relationship may fulfil various functions, including the realization of public tasks or the performance of functions traditionally attributed to limited property rights. Perhaps the third or fourth subcategory of continuous obligations concluded for a non-fixed term may also serve to create specific subjective rights, the unlimited duration of which is in the public interest.[132] It should be noted that neither the third or fourth subcategory fall under Article 365^1 of the CC.

6. Continuous obligations concluded for a fixed term resist the criterion of terminability/non-terminability. This is for several reasons. While in the case of continuous obligations concluded for a non-fixed term as a rule only one expiry mechanism exists (expiration due to termination), in the case of continuous obligations for a fixed term there are often two expiry mechanisms, i.e. the occurrence of an event which is designated as the end of the relationship and expiration as a result of termination. Expiration due to the occurrence of a designated event is the primary (main) mechanism. In addition, for this category of obligation there is a greater variety of reasons justifying termination, and at the same time there is no general regulation which – following the model of Article 365^1 of the CC – would facilitate the description. However, it is possible to distinguish four subcategories of continuous obligation concluded for a fixed term.

The first subcategory (continuous obligations which no party is entitled to terminate) is of fundamental importance for the category of continuous obligations concluded for a fixed term. It fully corresponds to the traditionally distinguished model of continuous obligation for a fixed term. The occurrence of the designated event leads to the automatic expiration of the continuous obligational relationship. In addition, if the obligation is properly fulfilled, there are no grounds for its earlier expiration by termination. The specificity of this sub-category means that it can also be applied to continuous obligations concluded *ex lege*.

[132] Examples are the so-called free licenses in respect of which the right to terminate the contract under Article 365^1 of the CC is ruled out – see J. Barta, R. Markiewicz, *Oprogramowanie*: 112–113; P. Wasilewski, *Open content*: 116–118.

However, such a rigorous construct fails to meet the needs associated with trading. Moreover, excessive stabilization of the obligational relationship may violate the values respected by the legal system, in particular the principle of freedom, including freedom of economic activity. For these reasons, as part of the construct of a continuous obligation for a fixed term, the legislator introduces solutions corresponding to the second subcategory (continuous obligations for a fixed term, in which one of the parties has a limited entitlement to termination),[133] or a third subcategory (continuous obligations for a fixed term, in which each party has a limited entitlement to termination).[134] Within the limits defined by the principle of freedom of contract (Article 365^1 of the CC), such a construct may also be adopted by the parties.[135] However, significant doubts surround the contractual extension of statutory grounds for termination to situations where a given type of contractual obligation can only be formed for a fixed term, especially when one of the parties is required to make a one-off performance.

The fourth subcategory (continuous obligations for a fixed term, in which at least one of the parties is entitled to free termination) requires separate consideration. At the outset, it should be noted that this subcategory may overlap with the second subcategory of continuous obligations concluded for a fixed term in situations where one party has a limited entitlement to termination but the other is entitled to free termination (see, for example, Article 844 § 1, and the second sentence of § 2, of the CC). For the sake of simplicity, however, no separate subcategory has been distinguished in this regard. It is worth noting that the fourth subcategory is not homogeneous. From the point of view of stabilizing obligational relationships concluded for a fixed term, the situations are different when one person is entitled to free termination, and when each party is entitled. Despite these differences, however, it seems reasonable to combine these situations into one subcategory.

7. The distinction of a subcategory within the category of continuous obligations concluded for a fixed term, in which at least one of the parties has the right to freely terminate (the fourth subcategory of continuous obligations concluded for a fixed term) may raise doubts. This construct seems to be incompatible with the nature of a continuous obligation concluded for a fixed term, especially in situations in which each party is entitled to terminate freely. However, it finds application in the Polish legal system.

An obligation in which the primary (main) expiry mechanism is the occurrence of a designated legal event is in accordance with the previously established

[133] See, e.g. Article 859^7 of the CC, with regard to a warehouser's right to call upon the depositor to collect their goods for good cause.

[134] See, e.g. Article 764^2 § 1 of the CC, with regard to the entitlement of either party to terminate an agency contract if there are extraordinary circumstances.

[135] See, e.g. Article 673 § 3 of the CC, in conjunction with Article 694 of the CC, and e.g. J. Panowicz-Lipska, *Zastrzeżenie*: 238–242; E. Rott-Pietrzyk, *Dopuszczalność*: 50; resolution (7) of the Supreme Court of 21 December 2007, III CZP 74/07, OSNC 2008, No. 9, item 95.

definition of continuous obligation concluded for a fixed term. An important feature of such an event is that the designation of the moment of its occurrence takes place at the stage when a legal act is executed according to objective criteria. This event is – as a rule – the expiration of the deadline. The analysis of the fourth subcategory should be combined with the recognition of a continuous obligation for a fixed term, i.e. a situation in which, despite the stipulation of free termination, this basic expiry mechanism is maintained.

At the outset, it is evident that if free termination only means termination which can be executed irrespective of the existence of any causes, the combination of the construct of fixed term with such entitlement, especially when it is available to each party, gives rise to significant doubts. The expiration of an obligational relationship due to the occurrence of a designated legal event ceases to be the primary (main) expiry mechanism, and takes the form of a mechanism equivalent to the expiry mechanism due to termination. This leads to the blurring of differences between constructs, making it impossible to classify a continuous obligation resulting from a legal act according to the criterion of a non-fixed term/fixed term. For these reasons, it should be assumed that Article 353^1 of the CC does not grant the parties the power to shape relationships in such a way. The basis for the introduction of the indicated construct can only be law, but the legislator should only apply it in justified cases. For the same reasons, the regulations introducing such a construct can only be the basis for inferences by *analogia legis* in exceptional circumstances.

8. We need to expand on the statement that the basis for adopting the construct of a fixed term in combination with the right to freely terminate is law. In the existing legal framework, it seems that there are two groups of regulations in which the legislator introduces the construct of continuous obligation concluded for a fixed term, simultaneously granting at least one party the entitlement to freely terminate.

The first group is connected with situations in which termination is not associated with any cause, however the use of this entitlement entails negative legal consequences for the terminating party. The freedom to unilaterally shape the duration of an obligational relationship is therefore compensated for by the party bearing the consequences specified in the law or legal act, primarily in the form of an obligation to pay compensation in a fixed lump sum. An example of such a regulation is also Article 4j (3a) of the Energy Law Act, which assumes that the contract specifies the costs and compensation for termination.[136] Reference can also be made to Article 746 § 1 and 2 in conjunction with Article 750 of the CC,

[136] According to this provision: "The end consumer may terminate a fixed term contract under which the energy enterprise supplies the end consumer with gaseous or gaseous fuels or energy, without incurring any costs and compensation other than that resulting from the contract, by submitting a written declaration to the energy enterprise.".

with regard to contracts for the provision of services which establish a continuous obligation for a fixed term. In the light of this regulation, each party may terminate a contract concluded for a fixed term, if they at the same time they bear the consequences of termination specified in law or contract.

Shaping termination in such a way that the exercise of entitlement is free, which however entails negative consequences for the terminating party, allows us to assume that this expiration mechanism only has an auxiliary character. The purpose of introducing this mechanism is to make the construct of a continuous obligation for a fixed term more flexible. However, the occurrence of a designated legal event still determines the primary (main) expiration mechanism. Although the construct of fixed term is modified, its essential features are retained, which allows the obligational relationship to be classified according to the criterion of a fixed term/non-fixed term.

At the same time, it is evident that within the limits specified in Article 365^1 of the CC such an expiration mechanism may be introduced on the basis of a legal act. This mechanism may, in particular, consist in the stipulation of a lump sum for compensation due to the exercise of the entitlement to freely terminate.[137] At the level of general considerations, the shaping of termination as a real legal act should not be ruled out. Determining the category of continuous obligation concluded for a fixed term for which such an expiration mechanism may be applicable is another, separate issue.

The second group of situations in which the legislator introduces the construct of continuous obligation concluded for a fixed term, while granting at the same time at least one of the parties the entitlement to freely terminate, has a special character. In this case, freely terminating does not entail any negative consequences for the terminating party, which does not rule out the obligation to reimburse a prematurely terminated obligational relationship (see, for example, Article 813 § 1 of the CC).

Other examples are provided by: Article 830 § 1 of the CC, according to which in the case of personal insurance the policyholder may terminate the contract at any time; Article 844 § 1 of the CC, according to which the depositor may at any time demand the return of goods given for safekeeping; and Article 75a (2) of the Banking Law Act, granting the borrower the right to terminate the loan agreement with a three-month notice, if the parties have stipulated a repayment date longer than one year.

Each of these regulations seems to take into account the specific interests of the terminating party, and favours the possibility of free termination, despite the construct of a fixed term. However, it should be noted that within this group of cases there are also situations in which, on the basis of the parties' agreement

[137] See, e.g. resolution (7) of the Supreme Court of 6 November 2003, III CZP 61/03 OSNC 2004, No. 5, item 69, in which it was deemed acceptable to stipulate a contractual penalty in connection with the exercise of the right to shape.

or the principles of community life or established customs (Article 56 of the CC), early termination of the obligation may entail adverse consequences for the terminating party. Examples of this are provided by the termination of a bank loan agreement (Article 75a (2) of the Banking Law Act) which may result in the borrower being obliged to pay a fee or commission, or the request for the return of goods under a storage contract (Article 844 § 1 of the CC) which does not entail a reduction in the remuneration due to the keeper. With the content of the obligational relationship shaped in such a way, these situations should be included in the first group (free termination which occasions adverse legal consequences). This significantly reduces the number of cases classified in the second group. However, such situations do still occur.

The duration of obligational relationships which fall under the second group from the fourth subcategory of continuous obligations concluded for a fixed term can be considered as a manifestation of a particular construct that emphasizes the function of a given relationship. This function means that the law gives priority to termination at any time, usually by one of the parties, over the principle of stabilizing the contractual relationship. It would appear that these relationships contradict the thesis that the division of "continuous obligations whose duration is determined directly" into "non-fixed obligations" and "fixed obligations" is an exhaustive and disconnected division. At the general level, there are grounds for distinguishing a third category of continuous obligations – of a mixed nature and whose duration is determined in a direct manner. They combine the construct of a non-fixed term and a fixed term, and the combination occurs with varying degrees of intensity, depending on whether the entitlement to free termination without negative legal consequences is enjoyed by one party or all parties. It should be made clear that such a construct can only be adopted by the legislator. This is supported by the need for security of trading and the imperative nature of Article 365^1 of the CC.

1.3. Continuous obligations whose duration is determined indirectly

1. Within continuous obligations there is a group of obligations whose duration is related to the duration of a specific legal situation, which may include another civil legal relationship, or the occurrence of a specific legal event that does not belong to a group of events that can allow the duration to be determined directly. As a consequence, determining the duration of such an obligational relationship requires reference to this situation (event). This reference may take various forms. However, these cases are united by the fact that a continuous obligation expires at the latest with the cessation (or in exceptional cases due to the cessation) of the

specific situation (the occurrence of a specific legal event), or the duration of the continuous relationship begins to be determined by the direct method. This work assumes that the duration of such continuous obligations is determined using the indirect method of determination.

Since the method of indirect determination independently links the duration of an obligational relationship with the ongoing duration of a given legal situation or the occurrence of a designated event, it should be assumed that with this method the institution of termination is not applicable.

The method of indirectly determining the duration of a continuous obligation may be applicable both on a statutory basis (see, for example, Articles 444 § 2 and 905 of the CC, Article 76 (3) of the Act on Industrial Property) as well as on the basis of a legal act (for example an annuity contract for the term indicated by the lifetime of obligee or subject to the conditions of termination), including the use of the statutory model of duration (for example, Article 715 of the CC, regarding loan agreements). It can be used independently and in combination with the method of direct determination. The former case occurs when the continuous obligation lasts as long as the given situation lasts (or there is no designated legal event), while at the same time the duration of the situation (no event) is the sole basis for determining the duration of the continuous obligation (for example, annuity in Article 444 § 2 of the CC). The latter case arises when the duration of the continuous obligation is determined simultaneously in both an indirect and direct manner, where each of these methods can determine both the primary (main) and auxiliary expiration mechanisms. Examples of this are sublease agreements and license agreements in which the parties apply the construct of non-fixed term/fixed term (the direct method of determination), and at the same time the method of indirect determination applies on the basis of legislation, according to which the obligational relationship lapses at the latest with the expiration of another legal relationship (see Article 668 § 2 of the CC). Another example is an annuity relationship for a non-fixed term/fixed term, which expires at the latest with the death of the entitled (Article 905 of the CC).

The application of two expiration mechanisms to a single obligational relationship may in some cases cause difficulties in determining which one is the primary (main) mechanism. This issue may be relevant in the application of the principle of limited duration. However, since this principle only refers to civil law entities, and not to the legislator,[138] this problem can only arise in situations in which both mechanisms are determined by a legal act. If there are no grounds for indicating the primary mechanism, it should be assumed that both expiration mechanisms are subject to verification.

[138] For more detailed discussion, see A. Pyrzyńska, *Zobowiązanie ciągłe*: 319–321.

2. The basic group of continuous obligational relationships whose duration is determined indirectly are obligations established *ex lege*.

The expiration of obligational relationships resulting from law, including those which take the form of a continuous obligation, occurs according to different rules than those involved with obligational relationships whose source is a legal act. This relationship lasts as long as there is a legally protected interest that justifies its establishment. Importantly, this interest may undergo change throughout the duration of the obligational relationship.[139] Thus it can be concluded that the content of an obligational relationship established *ex lege* is of a more dynamic nature than the content of a relationship established through legal acts (Article 56 of the CC). Therefore determining the duration of this relationship at the stage of its establishment can only be hypothetical.[140] This entitles us to assume that the duration of a continuous obligation established *ex lege* is determined using the method of indirect determination method, and independently (i.e. without using the direct method).

For example, the annuity relationship specified in Article 444 § 2 of the CC lasts for the period of time during which the aggrieved party is unable to work – completely or partially – or for the period of time when he or she is in a state of increased need, or his or her future perspectives have diminished[141]; the maintenance relationship specified in the first sentence of Article 446 § 2 of the CC lasts for the likely duration of the maintenance obligation towards the aggrieved party[142]; the maintenance relationship specified in the second sentence of Article 446 § 2 lasts as long as the circumstances and principles of community life require[143]; the relationship involving the provision of a livelihood to the donor or the performance of the donor's statutory maintenance obligations (Article 897 of the CC) lasts as long as the donor's impoverishment endures, taking into account the scope of the donee's enrichment[144]; the relationship involved in keeping lost property lasts until the person entitled collects it or until the finder acquires ownership, as specified in Article 187 § 1 and 2 of the CC; the relationship described in Article 18

[139] This applies in particular to financial damage to the person (e.g. Article 444 § 3 of the CC) – see A. Szpunar, *Odszkodowanie*: 146.

[140] See, e.g. the resolution of the Supreme Court of 12 June 1968, III PZP 27/68, OSNC 1969, No. 2, item 24; the judgment of the Supreme Court of 7 October 1968, III PRN 67/68, LEX No. 13986; the judgment of the Supreme Court of 19 December 2013, II CSK 179/13, OSNC–ZD 2015, No. B, item 22. The decision awarding an annuity may only exceptionally specify the deadline if the circumstances of the case allow for such arrangements – see, e.g. the judgment of the Supreme Court of 21 January 1969, II PR 597/68, OSNC 1970, No. 2, item 30, taking into account Article 907 § 2 of the CC.

[141] See, e.g. A. Szpunar, *Odszkodowanie*: 158–159.

[142] See, e.g. the judgment of the Supreme Court of 17 September 2009, IV CNP 42/09, LEX No. 603794.

[143] See, e.g. A. Szpunar, *Odszkodowanie*: 179; resolution (7) the Supreme Court of 3 October 1966, III CZP 17/66, OSNC 1968, No. 1, item 1.

[144] See L. Stecki (in:) *SPP*, vol. 7, 2011: 346–347.

of the Act on Protection of the Rights of Tenants, Housing Resources of Municipalities and Amendments to the CC lasts until persons occupying a flat without legal entitlement vacate the premises (Article 18 (1) of the Act on the Protection of the Rights of Tenants, Housing Resources of Municipalities and Amendments to the CC); the relationship due to which a guardian receives periodical payment granted by the Family and Guardianship Court lasts until the day the custody ceases or the guardian is released from it (Article 162 of the Family and Guardianship Code).

It cannot be ruled out that there are situations in which the duration of a continuous obligation established *ex lege* is determined both indirectly and directly. The specificity of this category of obligational relationship, however, suggests that it should be a construct that is not connected with the right to free termination; the construct of a fixed term primarily falls within the first subcategory of continuous obligations concluded for a fixed term. An example of this is a compulsory license (Article 82 ff. of the Industrial Property Law Act).

Obligations arising *ex lege* are characterized by further distinguishing features. In such cases, there are no grounds for applying consequential performance impossibility (Article 475 of the CC). Neither the impossibility of natural remedy (Article 363 § 1 of the CC) nor the obligation to hand over benefits in kind (Article 405 of the CC) leads to the expiration of the obligational relationship, but only to the appropriate shaping of its content by limiting the demand to a cash payment. With regard to this form of performance, the impossibility of performance does not occur. This confirms the thesis that relations established *ex lege* endure until the interests of the creditor are met.

3. The specificity of continuous obligations established *ex lege* allows us to draw the conclusion that the principle of free termination (Article 365^1 of the CC) does not apply to them,[145] including *ex lege* continuous obligations that, once established, manifest the essential features of a contractual relationship. An alternative view[146] cannot be accepted. The basic argument in support of this position is that the duration of a continuous obligation is determined using the indirect method. However, further arguments could be brought to bear.

Obligational relationships whose source is statutory (usually concretized by subsequent legal events) arise independently of the will of the parties. This feature has a significant impact on their duration. Since when establishing an obligational relationship one cannot appeal to the principle of the autonomy of the will, the private legal context in which competence is exercised, it is doubtful that the parties to such a legal relationship, in particular the debtor, would be entitled to end it freely (meaning termination), which is a manifestation of the autonomy of civil law entities. Acceptance of a different position would lead to a breach of the symmetry between the establishment and the expiration of an obligational relation-

[145] See also M. Olczyk, *Sytuacja*: 377–378.

[146] See, e.g. G. Tracz, *Sposoby*: 143.

ship. It is not the same case that, at the level of specific regulations, the law does not grant the right to terminate a continuous obligation arising *ex lege,*[147] despite the fact that such a solution is applied to continuous obligations arising from legal acts (see, for example, Article 673 § 1 and 2, Articles 704, 764[1] § 1 of the CC). At the same time, it should be noted that the institution of recision does not apply to these relationships (see, for example, Article 395 and Article 491 ff. of the CC).

This issue can also be situated within the wider problem regarding the freedom to conduct unilateral legal acts. Although the approach to actions changing or ending a legal relationship is characterized by less rigor than is applied to the activities creating this relationship,[148] it would be inconsistent to question the admissibility of atypical unilateral legal acts that create a legal relationship (*inter alia* due to the prohibition on making anyone a debtor or even a creditor without his or her participation), while at the same time accepting the freedom to terminate an obligation established *ex lege*. A change or expiration of an existing legal relationship usually infringes the interest of a civil law entity (here a party to the relationship) to a greater extent than making someone a creditor without his or her participation.

It can also be assumed that termination is a legal action that renders an obligation determined by a legal norm obsolete.[149] It is not possible to accept the solution according to which a relationship which arose *ex lege*, i.e. following the application of a general and abstract norm, would expire as a result of a unilateral legal action that results in an individual and specific norm. Although such a construction is not completely ruled out, Article 365[1] of the CC provides no grounds for accepting it.

Finally, reference can be made to historical arguments. The provision of Article 365[1] of the CC constitutes an almost exact repetition of the content of Article 272 of the Code of Obligations. It seems, however, that the authors of the Code of Obligations only associated the free termination of Article 272 with contractual continuous obligations.[150]

From this it can be concluded that the binding nature of a continuous obligation established *ex lege* is subject to the autonomy of the parties' will to a lesser extent than a relationship resulting from a legal act. In the case of the first category of relationships, the feature of duration is clearly highlighted as a special way of satisfying the creditor's interest. Thus, in the analysed case the time element not

[147] See, in particular, Article 907 § 2 of the CC, according to which, if the obligation to pay an annuity follows from the law, each party may, in the event of a change in circumstances, demand that the court change the duration of the annuity. This provision does not stipulate the right of either party to terminate the annuity contract.

[148] See Z. Radwański (in:) *SPP*, vol. 2, 2008: 176 ff.; the judgment of the Constitutional Tribunal of 15 March 2005, K 9/04, OTK–A 2005, No. 3, item 24.

[149] Cf. Z. Ziembiński, *Kompetencja i norma kompetencyjna*: 25.

[150] See, e.g. L. Domański, *Instytucje*: 915; R. Longchamps de Berier, *Zobowiązania*: 30. See also *Uzasadnienie projektu kodeksu zobowiązań*: 429.

only affects the scope of the performance due, but also creates a special safeguard for the realization of the creditor's interest.

4. The method of indirectly determining duration may also apply to the obligational relationships arising from a legal act.

The basic group of continuous obligations to which this method is applicable are non-self-executing obligations, i.e. obligational relationships whose expiry occurs in connection with the expiration of another civil law relationship. For this group of relations, this method defines the primary (main) mechanism of expiration. At the same time, it should be assumed that the use of the indirect determination method is only a consequence of the statement that in a given case it is permissible to form a continuous obligation as a non-self-executing relationship.

A more complex issue concerns the admissibility of using the indirect method on the basis of a legal act to determine the duration of self-executing continuous obligations resulting from a legal act, if the law does not provide for an indirect model of determination (see, for example, Article 715 of the CC). Due to the self-executing nature of these, it should be assumed that in this case the use of the indirect method consists in linking the duration of the obligational relationship with the occurrence of a specific legal event, or linking it with the duration of a given situation – but one other than the continuation of another civil law relationship.

The use of the indirect method with this category of obligational relationship may raise some doubts. The function of the obligational relationship does not support it. The duration of a continuous obligation is not linked to the continuation of another civil law relationship, and neither does the situation lead to satisfaction of the interest determined by the law. At the same time, the application of this method – on the basis of a legal act – to self-executing continuous obligations resulting from a legal act creates a real threat of there being a breach of the principle of freedom and, as a consequence, the principle of limited duration in time. Importantly, this threat may not be recognized when the obligational relationship is established, especially by a party with less knowledge or experience.[151] It does not seem to be a coincidence that the method of indirect determination is

[151] See, e.g. Article 8 (7) of the Consumer Rights Act, according to which at the latest when the consumer expresses the intention to be bound by the contract, the company is obliged to inform him clearly and intelligible about the "duration of the contract or – if the contract is concluded for a non-fixed term or is to be extended automatically – about the manner and the basis for terminating the contract" (or more precisely, Article 5 (1) (f) of Directive 2011/83/EU, which imposes the requirement "in cases where this is applicable"). See, in addition, Article 12 (1)(16) of the Consumer Rights Act and Article 6 (1)(o) Directive 2011/83/EU. The wording of the provision may support the conclusion that it is prohibited to use the indirect determination method in self-executing contractual continuous obligations concluded with a consumer. Appeal to this method entails that it is not possible to indicate to the consumer in the pre-contractual phase – in a clear and understandable way – the duration of the contract, including the minimum time (see, e.g. Article 12 (1)(17) of the Consumer Rights Act and Article 6 (1) (p) of Directive 2011/83/EU).

primarily appropriate for obligations established *ex lege*, for which the principle of limited duration in time is not applicable.

The above circumstances demonstrate that caution is required when applying the method of indirect determination, on the basis of a legal act, to the duration of a self-executing continuous obligations resulting from a legal act. This applies primarily to situations in which the expiration mechanism, in accordance with this method, constitutes the primary (main) and, at the same time, the only mechanism for a given obligational relationship. If, during the execution of the obligation, it becomes apparent that the application of this mechanism infringes the principle of limited duration in time, the question will arise as to the manner in which the obligation will expire.

In the case of contractual continuous obligations of a self-executing nature, the admissibility of the indirect method of determining duration – on the basis of a legal act – should be considered by taking into account Article 353^1 of the CC.

The properties (nature) of a relationship, the law or the principles of community life can support the conclusion that the application of the method of indirect determination on the basis of a legal act is unacceptable, both with regard to the primary (main) expiration mechanism and the auxiliary mechanism. An example is a mortgage agreement concluded between a bank and a bank employee, in which it was stipulated that the agreement would be automatically terminated if the employment relationship between these parties should be terminated for any reason.[152] In my view, this stipulation is invalid, on the basis of Article 69 (1) of the Act on Banking Law, in conjunction with Article 58 § 3 of the CC. A loan agreement can only be concluded for a fixed term. The introduction of the method of indirect determination (as with the duration of the employment relationship between the bank and the borrower) infringes this regulation, allowing the credit relationship to expire in isolation from the construct of a fixed term, while allowing the bank to circumvent the provisions concerning termination of the loan agreement (see Article 75 (1) of the Act on Banking Law).

The properties (nature) of the relationship, the law or the principles of community life may also allow us to conclude that the application of the indirect method for determining the duration of a self-executing continuous obligation resulting from a legal act should be combined with the use of the method of direct determination (for example, a contract for a party's lifetime, concluded for a period not exceeding ten years). Such a conclusion is supported by the requirement to respect, at the stage of executing the obligational relationship, the principle of limited duration of the obligational relationship.

[152] See the judgment of the Warsaw Court of Appeal of 8 May 2009, VI ACa 1395/08, LEX No. 1120219. I assume that the indirect method has been used in conjunction with the method of direct determination method (fixed term), although this does not result from the factual situation.

1.4. The duration of continuous obligations – special cases

1. With the issue of the duration of a continuous obligation, it is reasonable to distinguish special cases. The aim is to describe the construct in a broader scope, i.e. taking into account situations in which duration is associated with the protection of certain special interests. Considerations can be limited to contractual relationships, because it is with them that particularly interesting legal problems arise. Within contractual continuous obligations one can distinguish at least four cases in which duration is determined in a special way.

2. Situations in which the duration of a contractual continuous obligation is determined by taking into account the duration of a party's lifetime occur in a variety of cases. Simplifying somewhat, they can be classified into three groups.

In the first group, we can include cases in which the contractual obligational relationship is concluded for the duration of the party's lifetime due to the application of a specific type (sub-type) of nominate contract. The basic examples are a life estate agreement (Article 908 ff. of the CC), and a life insurance contract which is concluded for the entire life of the insured person (Article 829 § 1 (1) of the CC). For these relationships, the primary (main) mechanism of expiration is the death of the party (or another designated person). The application of other mechanisms cannot be ruled out (see Articles 830 § 1 and 3 of the CC), but they have an auxiliary character and are subject to significant statutory restrictions aimed at protecting the person whose life span determines the duration of the obligation (see, for example, Articles 830 § 3, 913 and 914 of the CC). The specificity of these relationships is also manifested in other areas. In particular, the law introduces instruments which secure the provision of performance by a party whose life span determines the duration of the obligation.[153] The principle of limited duration applies to agreements falling within this group, however by taking into account their specific function, including their random character.

The second group includes cases in which the contractual obligational relationship is concluded for the duration of the lifetime of a party on the basis of an autonomous decision of the parties (Article 353^1 of the CC), with the party's death designating the primary expiration mechanism. Examples of this are a lease agreement for the duration of a tenant's life and a life annuity contract. A question arises as to the extent to which such shaping of the duration of a continuous obligation is acceptable.

In the legislation, there is a tendency to limit regulations related to contracts of this kind. The CC avoids this issue both in the provisions on lease contracts (con-

[153] Regarding life annuity contracts, see, e.g. Article 910 of the CC, and Z. Policzkiewicz-Zawadzka, *Umowa o dożywocie*: 113; Z. Radwański (in:) *SPP*, vol. 8, 2011: 765. In the field of life insurance contracts, see in particular Article 98 (2) (2) and Article 114 (1) of the Act on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau.

trary to Article 371 § 1 and Article 389 § 3 of the Obligations Code), and annuity contracts (contrary to Article 595 of the Obligations Code). Moreover, labour law legislation does not include any regulation regarding employment contracts for the lifetime of an employer or employee (contrary to Article 468 of the Obligations Code). However, in the light of Article 65 (1) of the Constitution of the Republic of Poland (see also Article 15 (1) and (2) of the Charter of Fundamental Rights) there is no doubt that such a construct is unacceptable. On the other hand, the Commercial Companies Code, which allows a general partnership to be formed for the lifetime of a partner, deems such a partnership to be formed for a non-fixed term (Article 61 § 2 of the Commercial Companies Code), which opens the possibility of a contract being terminated on general terms (Article 61 § 1 of the Commercial Companies Code).

This tendency can be seen as a kind of distancing on the part of the legislator from contracts concluded for the lifetime of a party, which were created on the basis of an autonomous decision of the parties. This approach should be accepted. Such agreements may interfere with the principle of freedom, and may also involve the risk of the debtor's insolvency in situations where the creditor is getting older.[154] It seems legitimate to conclude that constructing contracts for the duration of a party's lifetime should, in principle, be the domain of the legislator. Whether the regulation of lifetime contracts is sufficient in the Polish legal system is another issue.

The effectiveness of contracts creating the obligations belonging to the second group is in each case subject to evaluation on the basis of Article 353^1 of the CC. This evaluation should be made by taking into account, *inter alia*, the principle of the limited duration of an obligational relationship, including its concretization on the level of regulations applicable to a given type of contract, the function of a given relationship, the performance due from each party, including the scope of the performance already made, as well as the age of the entitled person at the time the contract is concluded, taking into account his or her health. Analysis of these circumstances may justify the statement that a contract concluded for the duration of the party's lifetime becomes – from a certain point – a contract for a non-fixed term, subject to termination on the basis of Article 353^1 of the CC.[155]

With cases in which the duration of the contractual continuous obligation is determined by taking into account the length of the party's lifetime, a third group can finally be distinguished. This group includes obligational relationships in which the expiration due to the death of a party constitutes a mechanism of an auxiliary nature, or of an equivalent nature. This group includes both obligational relationships whose expiration as a result of death results from law (see,

[154] See also J. Szachułowicz, *Glosa*, OSP 2004, No. 2, item 21, according to which, in bond relationships honouring unpredictable deadlines infringes the stability of legal transactions.

[155] See A. Pyrzyńska, *Zobowiązanie ciągłe*: 567 ff.

for example, an annuity contract for a non-fixed term/fixed term which expires with the death of the beneficiary – Article 905 of the CC; some contractual relations related to the provision of performance, which expire on the death of the contractor – Article 748 in conjunction with Article 750 of the CC), as well as the relationships in which such an expiration mechanism results from a legal act (for example a life insurance contract concluded for a fixed term[156]).

As in the case of the second group, adoption of the currently considered mechanism of expiration on the basis of a contract must not infringe the restrictions indicated in Article 353^1 of the CC. However, if a further expiry mechanism is introduced, alongside the primary mechanism, there is a reduced chance of the principle of limited duration being infringed as a result of the duration of the contractual continuous obligation being tied to the length of the party's lifetime. However, it should be noted that the adoption of such a solution may infringe other principles of contract law, including the principle of contractual equity. This applies in particular to cases in which one-off performance is included in the construct of a continuous obligation.

The variety of cases in which the life span of a party influences or may affect the duration of a contractual continuous obligation suggests that caution is recommended when formulating general conclusions. It seems, however, that the distinguished groups have at least two characteristics in common.

Firstly, expiration due to the death of a party is only one of the mechanisms determining the duration of an obligational relationship. Such a situation arises irrespective of whether the mechanism is the primary (main) expiration mechanism for a given obligation (the first group and some cases from the second group), or is the primary mechanism only at a particular stage in the duration of the obligational relationship (some cases from the second group), or only a mechanism of an auxiliary nature (the third group). Secondly, in each of the three distinguished groups, the death of the party leads to the termination of the obligational relationship. The contract is therefore maximally concluded for the lifetime of the party. This means that the duration of the obligation is – to a greater or lesser intensity – related to the situation of the party, in particular satisfying his or her needs, securing the risk associated with his or her death, or the party's having qualities important for performing the obligational relationship (an *intuitu personae* contract).

Due to the specific way that contractual continuous obligations are formed, a question arises regarding the classification of death as a legal event when it results in the expiration of an obligation. This applies in particular to situations in which the expiration of the obligational relationship as a result of the death of a party is both the primary (main) expiry mechanism and, at the same time, the only one.

[156] See, e.g. M. Krajewski, *Umowa ubezpieczenia*: 666.

If, however, the effect in the form of the expiration of the obligational relationship results from a legal act, there are no grounds for applying the provisions regarding a condition or deadline. It is not a situation in which, on the basis of a legal act, the cessation of the effects of this act depend on a future event, either uncertain (Article 89 of the CC) or certain (Article 116 § 2 of the CC). This also applies to contracts in which establishing an obligational relationship for the lifetime of a party results from the application of a specific type (subtype) of a nominate contract (the first group). In this case, the lifelong nature of the contract is only a consequence of applying a given type (subtype) of contract, along with a necessary element of its content, and not the consequence of including in the legal act a component classified as *accidentalia negotii* (the terms of a legal act nonessential for its qualification process). Death in this case should be considered as a specific legal event.

If, however, the effect of the expiration of the obligational relationship results from a legal act, in the light of general rules this component of its content may be considered as *accidentalia negotii*. This opens up the possibility of applying provisions on the condition subsequent and on the deadline. However, due to the certainty of human death, applying the provisions of condition subsequent should be ruled out, unless in a given case death, when connected with the term, can be treated as an uncertain event. Contrary to the widely held view,[157] it is also necessary to exclude the application of the provisions on the period (time limit). The feature of a period (time limit) is not only that its passing is a certain, future event, but also that the arrival of the period (time limit) can "be indicated" (evident in Article 110 of the CC, and see also Article 116 § 2 of the CC) by means of an objective measure of time (Articles 111–115 of the CC). The regulatory function of contracts strongly supports the view that this designation should occur at the stage of executing legal acts, not *ex post*, with the arrival of the events. An obligational contract the duration of which is determined by taking into account the lifetime of the party does not meet this requirement. The view that the death of a person does not constitute a period (time limit) under the meaning of the provisions of the CC is also supported by consideration of the stability of legal transactions.[158] Classifying an event as a period (time limit) when, at the time the legal action is executed, it is not known when this event will occur (*certus an, incertus quando*) suggests the determinability of that which is essentially indeterminable, and at the same time blurs the differences between the period (time limit) and the condition subsequent. Thus, also in situations in which a contractual obligation pursuant to a legal act ceases as a result of the death of a party, it should be assumed

[157] See, e.g. the judgment of the Supreme Court of 16 April 2003, II CKN 6/01, OSNC 2004, No. 7–8, item 114; Z. Radwański (in:) *SPP*, vol. 2, 2008: 278.

[158] See J. Szachułowicz, *Glosa*, OSP 2004, No. 2, item 21.

that death is a legal event, not falling into the category of condition subsequent or period (time limit).

The specific nature of death as an event leading to the expiration of a contractual continuous obligation entails that no agreement has been reached on the question of the classification of such contracts. Some consider these contracts to be concluded for a fixed term,[159] while some are of the view that they are concluded for a non-fixed term.[160] In view of the position adopted in this work, such an approach entails that contracts in which the lifetime of a party influences or may affect the duration of a continuous obligation may be classified as contracts whose duration is determined in a direct manner.

This approach raises doubts, however. Firstly, it can be seen that in the existing legal framework there are grounds for accepting that contracts concluded for the duration of the party's lifetime do not constitute contracts for a fixed term. This is confirmed by a group of contractual continuous obligations that can be concluded only for a fixed term (for example leasing agreements – Article 709^1 of the CC, agreements to restrict an agent's competitive activity for the period following the dissolution of the agency agreement – Article 764^6 § 2 of the CC, a credit agreement – Article 69 (1) of the Banking Law Act). In the case of these agreements, the conclusion of the agreement for the duration of the lifetime of the party does not meet the requirement of the construct of a fixed term. Here, the indeterminacy of such a way of shaping duration is revealed with great clarity. If it is assumed that the construct of a fixed term is of a general nature, and covers all contractual continuous obligations, there are no grounds for treating it in a different way in each type of contract.

In the existing legal framework there are also no grounds for accepting – apart from specific regulations – that contracts concluded for the duration of a party's lifetime are contracts for a non-fixed term. With these contracts, the primary (main) mechanism of the obligation's expiration is linked to the death of the party, and not to the free termination of relevant contracts for a non-fixed term. If in the case of these agreements the party is entitled to terminate, it is subject to regulation under a separate expiry mechanism (see, for example, Article 830 § 1 and 3 of the CC).

It is therefore justified to conclude that determining the time for which a contractual continuous obligation is binding by connecting it with the lifetime of a party cannot be treated as a form of applying the method of direct determination. In view of the assumptions made earlier, this means that with this group of obliga-

[159] See, e.g. the judgment of the Supreme Court of 16 April 2003, II CKN 6/01, OSNC 2004, No. 7–8, item 114; P. Machnikowski (w:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2017: 704–705; J. Panowicz-Lipska (in:) *SPP*, vol. 8, 2011: 55; A. Śmieja, *Najem*: 57.

[160] See, e.g. the resolution of the Supreme Court of 22 March 1999, II CZ 12/99, LEX No. 36480; D. Bucior, *Wypowiedzenie*: 52–53; J. Szachułowicz, *Glosa*, OSP 2004, No. 2, item 21.

tional relationships, a specific mechanism is used to indirectly determine the duration of the obligational relationship. Here, the time for which the obligation is binding reflects the lifetime of the party and the specific nature of the legal event which the death of a human being constitutes. Such a mechanism for determining duration can be used both independently from, and together with, the direct determination mechanism. It may constitute both the primary (main) mechanism of termination of the obligational relationship and the auxiliary mechanism that complements the basic mechanism. The function of a particular obligational relationship may also justify identifying this mechanism as primary.

3. A special case of the duration of a continuous obligation is an obligation that can only be concluded only for a fixed term. Examples of this are: leasing contracts (Article 709^1 of the CC), agreements to restrict an agent's competitive activity for the period following the dissolution of the agency agreement (Article 764^6 § 2 of the CC), credit agreements (Article 69 (1) of the Banking Law Act), and – in principle – compulsory insurance contracts. The distinction of this category of contracts is justified for at least a few reasons.

It should be assumed that with these contracts, the lack of a defined duration of the obligational relationship is equivalent to the parties failing to establish the necessary (minimal) content of the obligational relationship.[161] If, on the other hand, the parties apply the construct of non-fixed term, it must be assumed that the legal act is invalid (Article 58 § 1 of the CC).

A statutory requirement to use the construct of fixed term cannot be overlooked when the limits of the parties' freedom are determined. In the case of continuous obligations, the construct of fixed term fulfils a different function than a non-fixed term. A legal relationship concluded for a fixed term is usually characterized by greater stability, since the primary (main) expiration mechanism of the obligation in this case is connected with the occurrence of a designated legal event, i.e. one which is not a declaration (statement) of intent. With the group of contracts under analysis, however, something more is at stake. If, with regard to a specific type of a nominate contract, the legislator stipulates that only the construct of a fixed term can be used, we can conclude that the purpose of such a solution is to stabilize the obligational relationship in a particular way, at least for one of the parties. This in turn leads to the conclusion that the competence to contractually extend the statutory grounds for terminating such a relationship cannot be combined with the competence that is associated with contracts concluded for a fixed term, which may however also be formed as contracts for a non-fixed term. Extending the statutory grounds for termination by way of a contract leads to a change in the distribution of risks adopted by the legislator. If such a solution is permitted at all, it has to be applied only with extreme caution.

[161] In this regard, see Z. Radwański, *Teoria umów*: 70 ff.

In the case of contractual extension of the grounds for termination with contracts that can only be concluded for a fixed term, the application by analogy with Article 673 § 3 of the CC is questionable. This regulation concerns lease agreements, which in the statutory model may be concluded for both a non-fixed term and a fixed term (see Article 659 § 1 of the CC). With regard to the duration of lease contracts and contracts that can only be concluded for a fixed term, there are no similar elements which would justify the application of statutory analogy. Any possible contractual extension of the statutory grounds for termination must therefore arise through taking the special nature (properties) of these relationships into consideration.

Even greater doubts are connected to the contractual extension of statutory grounds for termination in situations in which one of the parties is required to make a one-off performance (see in particular leasing contracts, in Article 709^1 of the CC). In this case, the application of Article 673 § 3 of the CC by analogy must be ruled out. In addition to the previous arguments, it can be argued that this provision applies to contracts (leases) which do not oblige the parties to make one-off performance. At the same time, the inclusion of a one-off performance in the construct of a contractual continuous obligation essentially imposes the construct of a fixed term. The contractual extension of the grounds for termination weakens this construct.[162] If in such contracts the contractual extension of the statutory grounds for termination is to be allowed at all, then this can only be in situations wherein the termination does not burden the debtor of one-off performance with excessive risk, primarily due to the obligation to make a one-off payment for the entire sum owed, despite the counterparty only having fulfilled part of the performance which is due (see, in particular, Article 709^{15} of the CC).[163] However, a different position is also expressed in the doctrine.[164]

4. Separate consideration must also be given to contractual continuous obligations based on trust. There are grounds for assuming that a special bond between contractors may affect the duration of such a relationship.

While the distinction of the category of trust-based obligational agreements is not in doubt,[165] there is a lack of consensus concerning the criteria and the legal effects of the distinction. Irrespective of how these criteria are formulated, for these considerations an important issue is whether it is possible to distinguish contracts in which the trust between counterparties, or the trust of one counterparty with regard to another, is so significant that the loss of this trust may constitute

[162] Similarly, J. Brol, *Umowa leasingu*: 183–184.

[163] See also the judgment of the Warsaw Court of Appeal of 26 February 2014, V ACa 1175/13, LEX No. 1527287.

[164] See, e.g. J. Poczobut (in:) *SPP*, vol. 8, 2011: 313–314; G. Tracz, *Sposoby*: 236.

[165] See, e.g. the judgment of the Supreme Court of 28 September 2004, IV CK 640/03, OSNC 2005, No. 9, item 157; P. Machnikowski, *Prawne instrumenty*: 102 ff.

grounds for terminating the contractual obligational relationship. Therefore, this concerns situations in which the legal system – by taking into account the weight of the subjective element – eases the regulations regarding the termination of obligational relationships, thereby weakening the durability of binding obligations.

Our considerations can focus on the provisions concerning contracts of mandate, as such contracts are widely recognized as being trust-based.[166] In this context, Article 746 of the CC deserves close reading. According to regulation, both the mandator (§ 1) and the mandatary (§ 2) are entitled to freely terminate the mandate; however, they have no right to waive the right of termination for good cause in advance (§ 3). It is assumed from Article 746 § 1 and 2 of the CC that the parties are entitled to terminate at any time. This right is not excluded by the conclusion of mandate contract for a fixed term of time, unless this is supported by the interpretation of the parties' statements of intent.[167] Designating the duration of mandate contract is ruled out to an even smaller degree by the application of Article 746 § 3 of the CC. It is supported by both the function of the provision and its absolutely binding character.

When interpreting Article 746 of the CC, it should be borne in mind that contracts of mandate do not usually create continuous obligational relationships. However, by granting the right to terminate, the legislator assumes that with every mandate the legal effects arising throughout the duration of the contractual relationship will be maintained, irrespective of whether or not it is a continuous relationship. This entails that the duration of the mandate relationship constitutes – within the framework of the liquidation relationship – the basis for determining at least the expenses incurred, the partial remuneration due, and the extent of the damage suffered by each party (see Article 746 § 1 and 2 of the CC) to establish whether a substitute was effectively delegated (Article 738 of the CC), as well as to specify the obligations from which the mandator should release the mandatary (Article 742 of the CC). The application of termination – rather than cancellation or withdrawal – should therefore be considered as a regulation which is aimed at alleviating the effects of the freedom granted to the parties for terminating mandate relationships.

The end of an obligational relationship has been shaped in a special way in Article 746 of the CC. This assessment is not only supported by the possibility of using the institution of termination for each mandate, irrespective of the form of the obligational relationship adopted by the parties, but above all by the ease with which the obligation can be terminated under Article 746 § 1 and 2 of the

[166] See, e.g. the judgment of the Supreme Court of 20 April 2004, V CK 433/03, OSNC 2004, No. 12, item 205; the judgment of the Supreme Court of 28 September 2004, IV CK 640/03, OSNC 2005, No. 9, item 157; P. Drapała (in:) *KC Komentarz. Zobowiązania*, vol. III, part 2, ed. J. Gudowski, 2013: 593.

[167] See the judgment of the Supreme Court of 28 September 2004, IV CK 640/03, OSNC 2005, No. 9, item 157.

CC. However, in the Polish legal system it is possible to identify solutions that are similar to one another, to a certain extent. An example of this is Article 644 of the CC, according to which, as long as the work has not been completed, the orderer may withdraw from the contract at any time by paying the agreed remuneration. It can be assumed that the purpose of this regulation is to allow the contracting party to terminate the obligational relationship prematurely, due to a possible change in his or her needs.[168] A comparison of Articles 746 and 644 of the CC supports the conclusion that facilitating the termination of a mandate or order is not justified solely by the fact that the order is based on trust. The justification for such a regulation may also be the interest of the party, related in particular to the nature of the performance due from the party receiving the order. The result of this performance is immaterial, frequently unpredictable and uncertain, being dependent on third parties and connected with the specific situation of the mandator and with specific features of the mandatary (Article 738 § 1 of the CC). All these circumstances are particularly susceptible to variability over time, which provides further support for the solution adopted in Article 746 of the CC. This position, according to which the special ease of terminating the relationship of the mandate is not conditional solely on the element of trust, is confirmed by the interpretation of Article 746 § 3 of the CC. The meaning of good cause in this provision also covers circumstances that are not related to loss of trust, although this loss is always a valid reason for terminating the mandate.

The significance of Article 746 of the CC extends beyond contract of mandate. This provision finds appropriate application, or application by *analogia legis*, to other legal relationships, including contractual continuous obligations. Article 750 of the CC is of primary significance, since it states that the provisions on mandate apply to service contracts that are not regulated by other provisions.

The provision of Article 746 of the CC is located under the regulation for a mandate contract and is therefore applicable only to this type of contract without restriction. This regulation only applies to other contracts apply accordingly or by *analogia legis.*[169] This entails that at least two circumstances have to be considered.

Firstly, in mandate contract, the mandatary undertakes to perform a specific legal act for the mandator, acting on their behalf, as a rule (Article 734 of the CC). This feature distinguishes contracts of mandate from other contracts for the performance of services, which typically oblige the performance of factual acts. Appropriate application of Article 746 of the CC must therefore take into consideration that the trust underlying mandate contract, especially when it is combined with the power to act on behalf of the mandator, has a different degree of intensity than contracts for the provision of factual acts. Secondly, in a typical case, the only

[168] See, e.g. R. Szostak, *Glosa*, OSP 1999, No. 6, item 113.

[169] See J. Nowacki, *„Odpowiednie" stosowanie*: 370–371; idem, *Analogia legis*: 141 ff.; Z. Radwański, M. Zieliński (in:) *SPP*, vol. 1, 2012: 423–424.

element of mandate relationship is one-off performance. This shaping of contracts of mandate entails that they are concluded for the time until to the mandate is fulfilled (the principle of automatic termination of a responsibility following the performance of the service). Even if the parties stipulate a deadline for the obligation to be binding within, this does not affect the scope of the performance. The regulation of Article 746 of the CC should be referred primarily to such situations. This justifies the statement that the end of the relationship in which the debtor is obliged to perform proper performance in a continuous obligation may be subject to different rules.

It is my view that forming a continuous obligation, to which the provisions of mandate contract apply, for a fixed term of time, means that the intention of the parties is essentially that the relationship should acquire the features of durability. If, therefore, the interpretation of statements of the parties' intention does not provide grounds for stating that, despite the construct of a fixed term, the parties allow the use of Article 746 § 1 and 2 of the CC, the application of these provisions must take into account the rules of applying accordingly. The basis for their application – with or without modification – must be the identification of important features shared in both a particular service contract and mandate contract. The legal relationship is primarily characterised by its being based on trust. It should be borne in mind that various kinds of trust may form the basis of individual service contracts. Trust is subject to gradation,[170] from the trust that is typical for every obligational contract (for example a contract to tidy up a garden), to the trust approaching the level applicable for a mandate contract (for example contract for cleaning the premises of a legal entity, a childcare agreement), to trust which may even exceed the trust required in mandate contract (for example contract for the protection of a person who has received death threats, a contract with a speleologist for guidance through a poorly explored cave). Another common feature is the nature of the service to be performed by the mandatary. This applies in particular to the type of performance (one-off, continuous, periodical, successive), i.e. whether it involves making a legal transaction, a factual act, or both, and depends on the nature of the goods to which the performance relates.

It should also be taken into account that, in the light of Article 365^1 of the CC, the right to freely terminate a continuous obligational relationship is granted only in the case of permanent relationships (concluded for a non-fixed term).

The appropriate application of Article 746 § 3 of the CC is separate issue. The question is whether this provision can be applied – with or without modification – to other contractual relationships of a continuous nature. This concerns both obligational relationships with regard to which the statute allows the appropriate application of the provisions on the contract of mandate or the provisions on the

[170] See also the judgment of the Supreme Court of 14 July 1999, I PKN 148/99, OSNP 2000, No. 19, item 711.

termination of the mandate, as well as legal relationships for which such application accordingly is not provided for.

A broader discussion of this issue is beyond the scope of work. However, in the doctrine, there is a noticeable tendency to look for a legal basis for terminating a contractual continuous obligation in the event that important reasons arise, primarily related to a breach of obligation.[171] This tendency should be considered apposite. The provision of Article 746 § 3 of the CC can be considered as one of the basic regulations that confirms that the binding element of an obligation can be brought to an end if there are justifiable reasons accepted by the legal system. At the same time, it seems that if one of the parties has been disloyal or has broken trust, for example by questioning the legal validity of the contract, the burden of argument should be differently distributed. This would be not so much to seek grounds for terminating the contract, as the basis for maintaining the obligational relationship.

This approach opens the possibility of applying Article 746 § 3 of the CC – applying accordingly or by *analogia legis* – to other contractual obligation relationships, primarily those which establish continuous obligations.

5. Contracts executed with a consumer may also be considered a special case of duration in continuous obligations.

This group of obligational relationships is related to the consumer's right to withdraw from a contract, combined with the period of reflection during the initial phase of establishing a binding obligation (see, in particular, Articles 27 ff. of the Consumer Rights Act, Article 53 ff. of the Consumer Credit Act). Since this regulation is not in principle related to the type of performance, it can be omitted in subsequent considerations. However, it provides an important support for the position that in consumer contracts the binding force of the obligational relationship is not the same for each party.

This thesis is also confirmed by Article 385^3 (15) of the CC. According to this provision, in case of doubt, an unlawful contractual provision (Article 385^1 § 1 of the CC) is one that "entitles the consumer's contracting party to terminate a contract executed for a non-fixed term without giving good cause and without a relevant notice period". When interpreting this provision, two issues can be highlighted.

Firstly, if the provision under consideration is an unlawful contractual provision, it is not binding for the consumer (Article 385^1 § 1 and 2 of the CC). Such a classification means, for example, the provision that "each party may terminate the contract with a month's notice, effective at the end of the month" does not constitute a binding basis for the consumer to recognize the effective termination made by the consumer's contracting party. This provision does not entitle

[171] With regard to recent literature, see, e.g. G. Tracz, *Sposoby*: 206 ff.; F. Zoll (in:) *SPP*, vol. 6, 2014: 1236 ff.

the consumer's contracting party to terminate the contract. If, despite this flaw, the contract is nevertheless terminated, the termination is invalid. The sanction adopted in the first sentence of Article 385^1 § 1 of the CC supports the conclusion that this provision constitutes the basis for the consumer terminating the contract.

A flawed description of the termination mechanism for the consumer's contracting party does not mean, however, that the obligational relationship cannot be terminated by this party. The principle of limited duration – though partly overruled – is still applicable. This is confirmed by Article 385^3 (15) of the CC, in the light of which a contractual provision that is not agreed individually, and which reserves the consumer's contracting party the right to terminate by giving good cause and a relevant notice period, cannot be considered unlawful clause. Therefore, if a provision which gives the consumer's contracting party the right to terminate a contract is not binding for the consumer, the legal basis for the consumer's contracting party to terminate the contract – for good cause and giving relevant notice – can be Article 746 § 3 of the CC, by *analogia legis*.

Secondly, a question arises concerning the relationship between Article 385^3 (15) and Article 365^1 of the CC. Since in the light of the former provision, a contractual provision which entitles the consumer's contracting party to terminate the contract without giving good cause and a relevant notice period – in particular the right to freely terminate – is considered, in case of doubt, to be an unlawful provision, despite the conclusion of a contractual relationship for a non-fixed term[172] – how can we assess a situation in which a contractual continuous obligation is concluded with a consumer for a non-fixed term with provisions not agreed individually, yet neither these provisions nor individually agreed provisions regulate the issue of the entitlement to termination? Does it justify the termination of a contract by the consumer's contracting party in a free manner, in accordance with Article 365^1 of the CC?

Resolving this issue may raise doubts. However, it would seem that the specificity of consumer contracts concluded predominantly with the use of contractual provisions not agreed individually (Article 385^1 § 3 of the CC) supports the conclusion that the content of the obligational relationship is determined taking into account the restrictions set out in Article 385^3 of the CC, as long as the variant regulation is not contrary to good practice and does not violate the consumer's interests. In this respect, I consider Article 385^3 (15) in connection with Article 385^1 § 1 of the CC to be a modifier of Article 365^1 of the CC. This justifies the assertion that that the consumer's contracting party entitlement to free termination may, in principle, only be allowed on the basis of a contractual arrangement agreed individually, or on the basis of a specific statutory regulation (see, for example,

[172] See, e.g. the judgment of the Warsaw Court of Appeal of 13 November 2012, VI ACa 801/12, LEX No. 1289815, and the judgment of the Court for the Protection of Competition and Consumers (SOKiK) of 26 March 2012, XVII Amc 2118/10, MSiG 2013, No. 139, item 10377.

Article 42 of the Consumer Rights Act). If there is no such basis, the consumer's contracting party cannot terminate on the basis of Article 365^1 of the CC, unless this would contradict good practice or grossly violate the consumer's interests[173] (argument from the first sentence of Article 385^3 § 1 of the CC). If termination by the consumer's contracting party on the basis of Article 365^1 of the CC is ruled out, the basis for termination may be Article 746 § 3 of the CC, applied by *analogia legis*, with the consideration that termination may only take place after a reasonable period of time. It would also seem that in some cases the application of Article 746 § 2 of the CC accordingly or by *analogia legis*, cannot be ruled out.

In the light of the proposed interpretation, contractual continuous obligations concluded with consumers for a non-fixed term, predominantly through the use of contractual clauses not agreed individually, belong – in case of doubt – to the second subcategory of continuous obligations concluded for a non-fixed term (continuous obligations concluded for a non-fixed term in which the entitlement to termination is restricted to one of the parties). This means that the duration of a contractual continuous obligation with consumers can be subject to specific rules. These rules are applied primarily through consideration of subjective criteria. Circumstances which may allow the adoption of special rules may be, for example, that the consumer had a real influence on the content of the contract (Article 385^1 § 3 of the CC). If such influence is lacking in some cases, the law compensates for this by granting the consumer greater freedom in determining the duration of such a relationship than the counterparty.

Moreover, it seems justified to state that both in the interpretation of the statute and the interpretation of declarations of intent in the consumer contract, the specific status of the consumer should be taken into account. This interpretation should in particular aim to provide the consumer with the right to terminate the obligational relationship in a way that is at least symmetrical to the entitlement reserved for the counterparty (see Article 385^3 (14) of the CC).

2. The period (time limit) and condition as events affecting the duration of a continuous obligation

1. Among the events affecting the duration of a continuous obligation, it is necessary to distinguish the stipulation of a period (time limit) and – related to this – the stipulation of a condition subsequent. Devoting separate discussion to these institutions is justified by the role that these events play in determining the time frame of a continuous obligation.

[173] See also the judgment of the Tribunal of 21 March 2013, C-92/11, in the case RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen eV.

These considerations may be limited to stipulations of a period (time limit) and a condition in continuous obligations that result from a legal act. In continuous obligations resulting from the law even if the content of the relationship is co-regulated by means of a legal act, any stipulation of a period (time limit) or a condition is related to the effects caused by the legal act, and not to the effects resulting from the law. Thus, the impact of a period (time limit) or a condition on the duration of a continuous obligation established *ex lege* only takes place indirectly.

In the case of stipulation of a period (time limit) or a condition in continuous obligations resulting from a legal act, analysis may be performed by taking into account: the events creating the obligational relationship (see Subpoint 2), events taking place in its duration (see Subpoint 3), and events leading to the expiration of an obligation (see Subpoints 4–9).

2. In the case of continuous obligational relationships which result from a legal act, the execution of this act usually entails there is an obligation to make the performance, taking into account that the performance in this case is – as a rule – spread over time. This is a consequence of the general rule that the effect of a legal act takes place immediately on its execution.[174]

However, the obligation to make the performance may be postponed by the parties, primarily by stipulating a commencement date (Article 116 § 1 in conjunction with Article 89 of the CC) or a condition precedent (Article 89 of the CC). It would seem that in the case of long-term continuous obligation, postponement such as this – due to need to undertake preparatory activities –may have significant practical implications. The execution of these acts within an already existing legal relationship reduces the parties' risk.

Thus, a contractual regulation in accordance with which the obligation to perform arises after the expiration of a specified period from the conclusion of the contract, or from the occurrence of a specified event, can be considered useful for the construct of continuous obligation as applied by the legislator (see, for example, Article 7 (2a) of the Energy Law Act), and for the practice of trading.[175]

In the period between the execution of the legal act and the expiry of the commencement date (the fulfillment of the condition precedent), the parties are joined in a legal relationship.[176] However, due the obligational effect being postponed,[177] this relationship cannot be classified as obligational, and therefore not as a continuous obligational relationship. It is a legal relationship of a relative type, which is not an obligational relationship.[178] This supports, *inter alia*, the statement that

[174] See Z. Radwański (w:) *SPP*, vol. 2, 2008: 258.

[175] See, e.g. the judgment of the Supreme Court of 5 October 2012, IV CSK 244/12, OSNC 2013, No. 5, item 64; M. Szczepańska, *Zagadnienie rozliczenia*: 87 ff.

[176] See Z. Radwański (in:) *SPP*, vol. 2, 2008: 261, 276.

[177] See Z. Radwański (in:) *SPP*, vol. 2, 2008: 279–281, with the sources indicated therein.

[178] See A. Pyrzyńska, *Zobowiązanie ciągłe*: 76 ff.

when determining the maximum period for which the parties may be bound by a specific type of legal relationship (for example a fixed term tenancy contract – Article 661 of the CC; a fixed term lease contract – Article 695 § 1 of the CC), the duration of this initial legal relationship is not taken into account, unless a special provision regulates otherwise (for example Article 764^6 § 2 of the CC).

However, it should be borne in mind that the principle of limited duration in time also applies to relative legal relationships that are not obligational relationships. The duration of such a relationship, determined on the one hand by the moment when the legal act is executed, with the stipulation of the commencement date (the condition precedent), while on the other hand the expiration of this period (the fulfillment of this condition) is subject to verification, with regard to whether it is binding in terms of time. A legal act with the stipulation of a commencement date (the condition precedent) strongly affects the freedom of a civil law entity, especially when, by postponing the obligational effect, one of the parties is able to reserve performance without incurring a burden due to this. The obligational relationship does not fulfill its function (Article 353 of the CC), which justifies the statement that the legal situation related to the stipulation of the commencement date (condition precedent) should be transient (temporary), and the principle of limited duration in time should be strictly applied to it. If the stipulation of the commencement date (condition precedent) violates this principle, the period (time limit) or condition should be considered contrary to the act or principles of community life and, consequently, the legal act should be considered invalid (Article 94 of the CC, also in connection with Article 116 § 1 of the CC). The commencement date (condition precedent) in this case does not constitute an essential aspect (*accidentalia negotii*).

3. Within the limits established in Article 353^1 of the CC, the parties may adopt a regulation which enables the execution of a continuous obligation resulting from a legal act to be suspended, and consequently the suspension of the obligation to make performance. Such a solution makes it possible to give the obligation a more flexible form, especially when the relationship is long-term. This position is confirmed by Article 114 of the CC, according to which a period of time in civil law may be the sum of individual periods, and thus does not have to be continuous. In a typical case, the determination of suspension periods will be subject to a term condition (precedent or final) or a condition (suspending or resolutive).

Examples of this are: the suspension in executing a contract for the performance of services during the vacation period of the party providing the service; the right of the lessor to suspend a house lease contract in the forest for two weeks in a calendar year; or suspension of insurance coverage.[179]

In the cases indicated, the suspension of execution concerns an obligation already in progress. If, therefore, a law stipulates the maximum time specified for

[179] See M. Krajewski, *Umowa ubezpieczenia*: 279–280, 712–713.

the obligational relationship of a specific type (for example Articles 661 and 695 § 1 of the CC), it should be assumed that the suspension period should be taken into account when calculating it. This period is also considered when calculating the duration of the obligational relationship specified in the contract (for example a contract for a fixed period of five years), unless, within the limits specified in Article 353^1 of the CC, the parties ruled out the addition of suspension periods (see Articles 110 and 114 of the CC). It should be also considered admissible to make such an exclusion at the stage of suspending the obligation execution, in relation to such an obligation to which the CC indicates the maximum duration that an obligational relationship for a fixed term is binding for (for example Articles 661 and 695 § 1 of the CC). Making decisions at this stage, rather than when a contract is concluded, allows for a more liberal approach to the method for calculating the maximum period for which a contract for a fixed period is binding.

4. In the case of continuous obligations which result from legal acts, the event leading to the expiration of the obligational relationship plays a special role. They are in some way equivalent to the expiration of the obligation as a result of execution, since their occurrence leads to the automatic termination of the obligational relationship, with effect for the future (*ex nunc; pro futuro*). The basic legal events leading to the expiration of a continuous obligation are the stipulation of the period (time limit) and the condition.

The issue of a period (time limit) and – to a lesser extent – a condition is primarily associated with the construct of a fixed term. However, these institutions may also be applicable to obligational relationships which arise from legal acts concluded for a non-fixed term (for example a lease contract concluded for a non-fixed term with the stipulation that without termination the obligation expires after three years) and to obligations whose duration is determined in an indirect manner (for example a life insurance contract concluded for a fixed term). In principle, it is permissible for the parties to combine different mechanisms for the termination of a continuous obligation.

It should be borne in mind that the stipulation of a deadline by the parties cannot automatically lead to the constructs of a fixed term or continuous obligation being adopted (see, for example, Article 878 § 2 of the CC). In civil law, the function of the period (time limit) is not limited to determining the duration of an obligational relationship or to making the creation or termination of the effects of a legal act dependent on it. The variety of functions that the period (time limit) performs in civil law distinguishes it from the condition.

5. The stipulation of a deadline by the parties should be considered the primary (main) and – simultaneously – the preferred way of determining the duration of a continuous obligation concluded for a fixed term.[180] Reference to a cer-

[180] In the doctrine and case-law it is quite common to combine the construct of a continuous obligation for a fixed term of time with the stipulation of a deadline – see, e.g. W. Borysiak (in:) *KC*

tain event, determined on the basis of objective criteria, promotes secure trading, facilitates the interpretation of statements of intent, and simplifies application of the principle of limited duration in an obligational relationship.

With contractual continuous obligations, the passing of the specified deadline does not necessarily lead to the expiration of the obligational relationship (transforming it into a liquidation relationship[181]). In specific cases, the fact that an obligation may be continuous finds support in specific regulations (for example Articles 674, 764 and 859^4 of the CC) and in the general rule regarding the interpretation of declarations of intent (Article 65 of the CC), including both declarations of intent made when establishing a contractual relationship and declarations of intent – usually implied – which are submitted in connection with the passing of the deadline. Determining whether during this period the obligational relationship is concluded for a non-fixed or a fixed term is resolved by the interpretation of declarations of intent (for example Article 674 of the CC) or the application of a certain statutory rule (for example Articles 764 and 859^4 of the CC). Moreover, in some cases, the legislator adopts a special solution (see, for example, Article 28 (1) of the Act on Obligatory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau).

6. It is necessary to divide the position according to which the indication of a period (time limit) can be defined by indicating a calendar date, a reference to a specific holiday (i.e. the way of indicating the date characteristic of the Old Polish calendar – for example, "on Saint John's day"), or by reference to natural phenomena (for example on the first day of summer).[182]

However, it is questionable whether, in order to indicate the period (time limit) of a contract concluded for a fixed term, it is sufficient to refer to an event, "whose occurrence in the future is – according to reasonable human expectations – obviously certain",[183] and thus indicate the period (time limit) in such a way that at the time of executing the legal act it is unknown when the event will occur (*dies certus an, incertus quando*).[184] Examples of this are the conclusion of a contract for the period of another person's illness[185]; for the time to renovate specific business premises; or for the time while certain stocks last.

Komentarz, vol. II, ed. K. Osajda, 2013: 162–163; P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2017: 704–705; E. Rott-Pietrzyk, *Wygaśnięcie*: 242; R. Szmidt, *Wypowiedzenie*: 79; the judgment of the Supreme Court of 16 April 2003, II CKN 6/01, OSNC 2004, No. 7–8, item 114.

[181] On the issue of liquidation relationship, see, e.g. A. Pyrzyńska, *Zobowiązanie ciągłe*: 582 ff.; G. Tracz, *Sposoby*: 77 ff.

[182] See, e.g. Z. Radwański (in:) *SPP*, vol. 2, 2008: 278; the judgment of the Supreme Court of 6 July 1963, III CR 161/63, OSNC 1964, No. 7–8, item 152.

[183] For example, the judgment of the Supreme Court of 30 August 1990, IV CR 236/90, OSNC 1991, No. 10–12, item 125.

[184] See Z. Radwański (in:) *SPP*, vol. 2, 2008: 278. The author states that "this form of stipulating the resolutive time clause is closer to the resolutive condition than the exact (calendar) designation".

[185] See the ruling of the Supreme Court of 15 December 1956, IV CR 35/56, OSNCK 1957, No. 4, item 118.

In line with the previous considerations, the feature of the period (time limit) is not only that its elapse is a future and certain event, but also that it is possible to mark the arrival of this the period (time limit) (Articles 110 and 116 § 2 of the CC) using an objective measure of time (Articles 111–115 of the CC) at the stage of executing the legal act. For these reasons, a contract for the lifetime of a party does not constitute a contract with a fixed term limit (see Chapter III § 1. 1.4. Subpoint 2).

Similarly, in other cases, the classification of a contract, whose duration is marked by *dies certus an, incertus quando*, as a contract with a stipulated deadline which justifies the adoption of the construct of a fixed term, should be carried out with great caution.[186] This approach is supported by the normative construction of the period (time limit), consideration of trade security (see, for example, Article 678 § 2 and Article 709^{14} of the CC) and the principle of limited duration in time. Such a stipulation may be included in the category of the period (time limit) only when at the stage of executing a legal act there is a basis for indicating, using objective criteria, when this event may approximately occur, or if there is a statutory basis for recognizing such a contract as being concluded for a fixed term.[187] If this requirement is not met, the event should be considered a condition[188], taking into account that the stipulation of a condition is usually a manifestation of the indirect method of determination.

7. In the light of these deliberations regarding the period (time limit), the question arises about the classification of this institution, taking the components of the legal act into consideration.

In the case of contractual continuous obligations, which can be concluded only for a fixed term, it should be assumed that stipulating a period (time limit) is a necessary element of a legal act. The lack of such equates to the parties failing to establish the necessary content of the obligational relationship. In this case, the period (time limit) can also be regarded as an essential element (*essentialia negotii*), and thus as an element which expresses a constitutive feature of a given type of legal act.[189]

In the case of contracts that can be concluded both for a non-fixed term and for a fixed term (the direct method of determination), if the period (time limit) is not

[186] See also A. Olejniczak (in:) *KC Komentarz*, vol. III, ed. A. Kidyba, 2014: 131–132.

[187] See, e.g. a contract for paid use of premises included in the housing reserves of the municipality related to the employment relationship (Article 5 (1), Article 20 (3) and (4) and Article 21 (1) (2) of the Act on the Protection of Tenants' Rights, Municipal Housing Reserves and on the change of CC).

[188] The proposed approach aims to modify the commonly accepted definition of the resolutive condition. An uncertain event, within the meaning of Article 89 of the CC, covers not only events with which there is uncertainty of their occurrence, but also in relation to which there is – with appropriate intensity – uncertainty as to the time of their occurrence. This is primarily a consequence of narrowing the scope of the term "period (time limit)".

[189] See Z. Radwański (in:) *SPP*, vol. 2, 2008: 249–250.

specified, it cannot be treated as a lack of the necessary content of the obligational relationship. In such a situation, the legal consequences of the concluded agreement are determined by the legal system, which in a substantial number of cases recognizes contractual continuous obligations as being concluded for either a non-fixed term or for a fixed term. Thus, if the legal act has been executed, the parties' failure to specify the duration of the continuous obligation means we can conclude that the contractual continuous obligation was shaped as an obligation for a non-fixed term.[190] The unique nature of some legal relationships may support another position being taken on this issue, which can be supported in particular by the fact that the duration of such an obligation is determined using the indirect method of determination.[191] The established custom may also speak for such a position.

It is necessary to mention another view, according to which, with regard to the issue under consideration, specifying the period for which an obligational relationship is binding is not actually an essential element (*essentialia negotii*).[192] There are also no grounds for including the period (time limit) of a continuous obligation resulting from a legal act and concluded for a fixed term in the non-essential elements (*accidentalia negotii*). Indeed, if *accidentalia negotii* are those provisions of a legal act which are "somewhat 'random' from the point of view of the structure of a given type of legal act", provisions "indifferent to the process of its classification the determination of its legal consequences", performing a "neutral role in the structure of particular types of legal act",[193] the stipulation of a period (time limit) in the case under scrutiny does not correspond to this definition. This supports the conclusion that the stipulation of a period (time limit) in an agreement creating a continuous obligation, which may be concluded both for a non-fixed term and a fixed term, is either an insignificant element of the legal act (*naturalia negotii*), or an element that does not fall within the division of the acts into *essentialia*, *naturalia* and *accidentalia negotii*.

Recognizing the period (time limit) as belonging to *accidentalia negotii* is justified in situations where the parties combine different expiration mechanisms within one obligational relationship, of which the mechanism referring to the period (time limit) has no impact on the process of classifying the agreement (an expiration mechanism of an auxiliary nature). An example of this is a contract for a non-fixed term containing a stipulation, according to which in the absence of termination, the contractual relationship expires three years after the conclusion of the contract.

---

[190] See J. Panowicz-Lipska, *Zastrzeżenie*: 237; E. Rott-Pietrzyk (in:) *SPP*, vol. 7, 2011: 685; A. Śmieja, *Najem*: 56 and the judgment of the Supreme Court of 16 April 2003, II CKN 6/01, OSNC 2004, No. 7–8, item 114.

[191] See, e.g. K. Szczepanowska-Kozłowska, *Umowy licencyjne*: 78–79.

[192] See A. Śmieja, *Najem*: 73; the judgment of the Supreme Court of 4 August 2005, III CK 640/04, LEX No. 159119.

[193] Similarly Z. Radwański (in:) *SPP*, vol. 2, 2008: 251.

8. A contractual continuous obligation is indicated as an example of a legal act that allows the stipulation of the resolutive condition.[194]

This position should, in principle, be accepted. It would seem that this type of condition is particularly suited to continuous obligational relationships that can be concluded for both a non-fixed term and a fixed term. Taking into account the properties creating a continuous obligation (Article 89 of the CC), it should be assumed that in this case defeasance does not have a retroactive effect (Article 90 of the CC)[195] unless there are specific grounds for adopting retroactivity.[196]

Doubts concerning the admissibility of a defeasance clause arise in situations in which a continuous obligation resulting from a legal act can only be concluded for a fixed term and in situations where the party bound by a continuous obligation concluded for non-fixed term has a limited right to terminate (the second and third subcategories of continuous obligations concluded for a non-fixed term). The specific regulation regarding the duration of these relationships justifies the statement that the stipulation of defeasance is unacceptable.

If we accept the position according to which it is – in principle – permissible in contractual continuous obligations to stipulate a resolutive condition, this entails that we must question – with reference to these relationships – the view that the legal situation of the conditionally entitled party should be classified as a subjective temporary right (expectative).[197] Such a classification is not compatible with the description of the legal situation of a party to a continuous obligation arising from a legal act in which defeasance was stipulated.

However, at the same time, it can be seen that in the case of a defeasance clause in a contractual continuous obligation whose fulfillment determines the primary (main) mechanism for terminating an obligation, the regulation regarding the resolutive condition is in principle not applicable.[198] In this case, the resolutive condition is not – as with the period (time limit) for a continuous obligation concluded for a fixed term – a subjectively essential component (*accidentalia negotii*). At the same time, it seems justified to state that this institution assumes a special form, which escapes the regulation contained in Articles 89–94 of the CC.

9. If in the case of a specific continuous obligation resulting from a legal act, it is possible to stipulate defeasance, the question arises whether such an obligational relationship can be qualified as being concluded for a fixed term.

---

[194] See, e.g. E. Drozd, *Przeniesienie*: 87; Z. Radwański (in:) *SPP*, vol. 2, 2008: 264; B. Swaczyna, *Warunkowe*: 70, 148; the resolution of the Supreme Court of 16 January 2009, III CSK 233/08, LEX No. 511001.

[195] See, e.g. J. Zawadzka, *Warunek*: 273 ff.

[196] See, e.g. A. Pyrzyńska, *Zobowiązanie ciągłe*: 516 ff.

[197] See the review of positions made by B. Swaczyna, *Warunkowe*: 221–223.

[198] Only Article 89 of the CC containing the statutory definition of the conditio, and Article 93 of the CC, concerning the fiction of fulfilling or not fulfilling the condition, are applicable.

In the case of defeasance, the cessation of the effects of a legal act is dependent on a future and uncertain event. This uncertainty of the event entails that the duration of a continuous obligation which results from a legal act is not – in principle – subject to determination at the stage when the legal act is executed. This provides a strong support for the argument that in this case there is no basis for adopting the construct of a fixed term. In view of the position presented in this work, the method for determining the duration of an obligational relationship is the appropriate method of indirect determination.

Only in special cases can the stipulation of defeasance be tantamount to acceptance by the parties of the construct of fixed term. This concerns situations in which at the stage of executing a legal act it is possible to indicate to a good approximation the moment when the condition will be fulfilled. This approach assumes in essence a combination of the institutions of resolutive condition and the period (time limit). If this requirement is not met, the stipulation of defeasance should be considered as a manifestation of the indirect method of determination, or as a manifestation of a special expiration mechanism. If the fulfillment of defeasance condition determines the primary (main) mechanism of expiration of the obligation, the resolutive condition – like the period (time limit)– is not an additional element (*accidentalia negotii*).

Chapter IV

THE TERMINATION OF CONTINUOUS OBLIGATIONS

1. Characteristics of termination

1.1. General observations

1. The special function that termination has in determining the duration of a continuous obligation – primarily when using the direct method – justifies a broader discussion of this institution. However, analysis of termination is difficult, for at least two reasons. The statutory regulation of unilateral legal acts is narrow; hence it is difficult to indicate a general norm that provides a basis for learning about this category of acts. Also in the doctrine of civil law, the issue of unilateral legal acts is not a subject of a wide interest.[199]

Subsequent considerations here relate only to termination which results in the termination of a continuous obligation. Termination which changes the content of an obligational relationship (for example Article 685^1 of the CC) is associated with a different issue, concerning of the changeable nature of the content of a continuous obligation.

2. In civil law, termination is usually combined with the construct of a continuous obligation. Under the existing legal framework, however, this institution is also applicable to other forms of obligational relationship and can be applied outside the sphere of the law of obligation. For example, according to Article 746 of the CC, the right to terminate a mandate also applies if the mandate is not a continuous obligation (see Chapter III § 1. 1.4. Subpoint 4). According to Article 869 of the CC, it is permissible for a partner to terminate his or her participation in a civil law partnership, even though – according to the view presented in this work (see Chapter I § 2. 2.3. Subpoint 2) – this contract is not a source of a continuous obligation. Termination is applicable in corporate relations (see, for example, the termination of the articles of association in Article 61 § 1 of the Commercial Companies Code, the withdrawal by a member from a cooperative with a notice of termination in Article 22 of the Cooperative Law Act). This supports the asser-

[199] Among the few publications, one can single out primarily the monograph of G. Tracz, *Sposoby jednostronnej rezygnacji z zobowiązań umownych*, Warsaw 2007.

tion that the legislator's use of the term "termination" is not equivalent to the application of the construct of continuous obligation.

The wide scope of application of the institution of termination permits the assumption that it is useful when there are grounds for terminating the legal relationship[200] on the basis of a unilateral legal act, with effect for the future (the result of *ex nunc; pro futuro*). Termination is grounded in two values: respect for the autonomy of the will when the legal relationship is executed by granting the parties the entitlement to withdraw from a particular legal relationship,[201] while respecting the legal consequences that had existed until the withdrawal.

A separate issue – which is beyond the scope of work – is the admissibility of applying the institution of termination outside the structure of a continuous obligation under an agreement between the parties. However, it is justified to state that the right to terminate cannot be freely incorporated into obligational contracts which involve one-off performance, rather than successive performance.[202] The constitutive feature of termination is that it has an effect in and on the future, without violating past legal relationships. However, the majority of obligational relationships involving one-off performance, not successive performance, are not suited to expiration in this mode (see also Chapter I § 2. 2.3. Subpoint 4). This solution may lead to undermining the reciprocal or remunerated nature of an established legal relationship. Although this construct should not be completely ruled out, especially when the performance of the parties is divisible (Article 379 § 2 of the CC) or if the parties may consider it to be divisible (Article 353^1 of the CC), its application must not lead to violation of the nature (properties) of the terminated relationship and the legitimate interests of the parties.

Further considerations will only consider the termination of continuous obligations. However, a substantial part of the conclusions could also apply to the termination of other legal relationships.

3. The specific construct of a continuous obligation which results from the inclusion of the time element (see Chapter III § 1. 1.1. Subpoint 1) entails that a separate expiration mechanism is necessary for this form of obligational relationship.

In the case of a continuous obligation resulting from a legal act, especially when its duration is determined in a direct manner, the expiration mechanism is associated with the stipulation of an event, the arrival of which brings about the expiration of the obligational relationship, or with the institution of termination. However, termination fulfils a special function. It is applicable – albeit with vary-

[200] In the case of multilateral relations, this is a supervention by one of the parties, with the legal relationship between the other parties continuing.

[201] Since the exercise of the entitlement to shape the legal relationship is a voluntary act of the rightholder (see A. Bator, *Kompetencja*: 67), it must be assumed that the termination of an obligational relationship is also subject to the principle of the autonomy of the will. See also Z. Radwański, *Uwagi ogólne*: 264; M. Safjan (in:) *SPP*, vol. 1, 2012: 333.

[202] See, e.g. J. Rajski, *Właściwość (natura) umowy o dzieło*: 31 ff.

ing degrees of intensity – to all continuous obligations resulting from a legal act the duration of which is determined in a direct manner. Neither is the application of this institution ruled out in the case of a continuous obligation the duration of which is determined indirectly.

For continuous obligations resulting from a legal act and concluded for a non-fixed term, the institution of termination is a necessary element.[203] Its absence would lead to a situation in which the expiration of the obligational relationship – except for special situations, involving in particular the inability to make performance (Article 475 § 1 of the CC) and the expiry of the obligation due to the party's death (Article 922 § 2 of the CC) – could only take place by way of an agreement on termination or court ruling, if the competences of that body fall extend to such a ruling. There is no need to consider the negative and unnecessary effects this could have on trade. On the other hand, for continuous obligations resulting from a legal act and concluded for a fixed term, termination is at least useful, and to a certain extent also necessary. It enables early termination of the obligational relationship in atypical situations, including those involving a breach of obligation, while maintaining the performance (or partial performance) that was duly met.[204] Preference in such a situation for termination over withdrawal is justified by the nature of continuous obligational relationships.

The institution of termination may also be applied to continuous obligations resulting from a legal act the duration of which is determined indirectly. This primarily involves situations in which this method is combined with the direct method of determination, situations in which there is a breach of the obligation, and situations in which there is a violation of the principle of limited duration in time.[205] In addition, termination may be applied to continuous obligations established *ex lege*, which, once established, manifest the essential features of a contractual relationship (see Chapter II § 2. 2.1. Subpoint 4).

4. Termination is generally classified as a unilateral legal act of a right-shaping nature, which serves to end a legal relationship, with effect for the future (*ex nunc*; *pro futuro*).[206] In the most general approach, this allows us to assume that termination is a legal act which renders an obligation established by a legal norm

[203] See, however, the fourth subcategory of continuous obligations concluded for a non-fixed term – Chapter III § 1. 1.2. Subpoint 5.

[204] See also A. Klein, *Wykonanie umowy*: 268.

[205] See A. Pyrzyńska, *Zobowiązanie ciągłe*: 567 ff.

[206] Cf. *inter alia* S. Grzybowski (in:) *System Prawa Cywilnego, Część ogólna*, 1985: 231; R. Longchamps de Berier, *Zobowiązania*: 64; P. Machnikowski (in:) *SPP*, vol. 5, 2013: 162–163; A. Olejniczak (in:) *KC Komentarz*, vol. III, ed. A. Kidyba, 2014: 133; M. Pyziak-Szafnicka (in:) *SPP*, vol. 1, 2012: 814; Z. Radwański, *Prawo cywilne – część ogólna*, 2007: 96; G. Tracz, *Sposoby*: 18, 73–74; the judgment of the Supreme Court of 28 September 2004, IV CK 640/03, OSNC 2005, No. 9, item 157; the judgment of the Supreme Court of 8 October 2004, V CK 670/03, OSNC 2005, No. 9, item 162; the judgment of the Supreme Court of 29 April 2009, II CSK 614/08, OSNC 2010, No. 2, item 32.

obsolete,[207] which in the case of contractual continuous obligations is an individual norm. The effect of the termination entails that it is a legal act requiring that a declaration of intent be communicated to the party (the other parties) of the obligational relationship (Article 61 of the CC).[208]

In certain situations, termination may be combined with a procedural act, primarily with filing a lawsuit. However, due to the fact that the substantive law effect is derivative (secondary) in relation to the procedural effect, the premise for its occurrence is the effectiveness of acts performed on the basis of procedural law. However, the rules of substantive law can be omitted.[209]

Furthermore, we cannot rule out cases in which a law stipulates that an event, while not being itself termination, has the effect of termination (for example, Article 830 §2 of the CC, Article 46 (3) of the Act on Real Property Management). However, accepting the fiction (presumption) of a declaration of intent entails that this is a special solution, permissible only on the basis of law.[210]

5. Termination does not belong to the category of legal acts that are binding or dispositive.[211] Termination does not have the characteristics of a legally binding act, as its effect is not the obligation to make performance.[212] Neither does this act belong to the category of dispositive legal acts. Although termination may lead to a change in the subjective rights of the terminating party, firstly, such an effect does not necessarily have to occur, and secondly if it occurs, it does not have a direct character. Termination first of all affects the obligational relationship, and then only has an impact on the subjective right through this relationship. It is also important that this impact does not necessarily lead to changes in the subjective rights of the terminating party. For example, if the termination is effected by a lender, it is difficult to show that there is an effect involving a direct change in the subjective rights of the terminating party.

6. The function of the entitlement to shape a legal relationship supports the view that this entitlement has "in civil law a secondary significance in relation to the basic set of rights and obligations that are constructed on the principle of autonomy".[213]

This allows us to assume that the right to terminate by legal act must be shaped taking into account this feature. Thus, the right to terminate a continuous obliga-

[207] Cf. Z. Ziembiński, *Kompetencja i norma kompetencyjna*: 25.

[208] See Z. Radwański (in:) *SPP*, vol. 2, 2008: 286; P. Machnikowski, *Uprawnienia*: 270–271.

[209] See, e.g. the resolution of the Supreme Court of 11 September, III CZP 39/97, OSNC 1997, No. 12, item 191.

[210] See, e.g. the judgment of the Supreme Court of 23 September 1999, III CKN 353/98, LEX No. 1217908.

[211] Similarly P. Księżak (in:) *KC Komentarz*, vol. I, ed. K. Osajda, 2013: 377; P. Machnikowski, *Uprawnienia*: 273. For a contrasting position S. Sołtysiński, *Czynności rozporządzające*: 314, recognizing termination as a dispositive legal, aimed at the abolition of the subjective right.

[212] Cf. Z. Radwański (in:) *SPP*, vol. 2, 2008: 186.

[213] Similarly P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2017: 5.

tional relationship cannot be detached from the content of the said relationship, or from the legally relevant interest of the party linked to the content of that relationship. It is supposed to reflect, not modify the risk distribution adopted in this relationship.

7. Within the institution of termination it is possible to, *inter alia*, distinguish termination with immediate effect from termination employing a termination notice period.

In the first case, the terminated obligational relationship expires when the declaration of intent to terminate has reached the recipient in such a way that he or she could become familiar with its content (Article 61 of the CC). Thus, the general principle applies, according to which the effect of a legal act takes place immediately upon its execution.[214]

Termination that employs a termination notice period creates a more complex legal situation. Here there is a specific distribution of the effect of a legal act over time. The moment that the declaration of intent is made (Article 61 of the CC) is also when the process of termination commences.[215] To the full extent, the effect of termination consisting in the end (expiry) of a designated continuous obligation with effect in the future, occurs at the end of the termination notice period. In this case, the legal act causes effects in two stages, with the main and final effect –namely the expiration of the continuous obligation – taking place in the second stage. It is important, however, that the distribution of the effects of a legal act in time belongs to the essence of the construct of termination by means of a termination notice period.

The features of termination by means of a termination notice period support the formulation of two theses.

Firstly, it can be assumed that such a specific distribution of the effects of termination results from the nature of a continuous obligation. Since this obligation lasts over a period of time, its ending should also be a process spread over time. The features of a continuous obligation therefore translate, to some extent at least, into the way it expires.[216] This view provides an important argument for the thesis that termination with immediate effect should be applied – both by the legislator and the persons of civil law – only exceptionally, primarily as a special sanction. For these reasons, Article 365^1 of the CC should be evaluated critically to the extent that it stipulates – in the absence of other notice periods – the rule of expiration immediately after termination.

---

[214] See Z. Radwański (in:) *SPP*, vol. 2, 2008: 258.

[215] The termination may, however, entail that further results ensue, updating certain obligations of the party (e.g. a contractual obligation for the tenant to make the premises accessible in order to that prospective future tenants can get acquainted with its condition). On the basis of labour law, see T. Liszcz, *Nieważność*: 222–223.

[216] See also Z. Radwański, *Uwagi*: 257.

Secondly, the features of termination by means of a termination notice period support the conclusion that it is not a legal act the effects of which are to arise within a fixed term, within the meaning of Article 116 § 1 of the CC. It may additionally be pointed out that the reference in Article 116 § 1 of the CC to the application of the provisions on a suspending condition does not comply with the mechanism for determining an obligational relationship by termination.

1.2 Subjects with the right to terminate

1. The right to terminate is only granted to the parties to an obligational relationship. This standpoint is supported by at least two arguments.

Firstly, the right to terminate, as a right to shape the legal relationship, should be considered an element of the subjective right which results from the terminated obligational relationship that is being terminated.[217] Since this right refers to the sphere of conduct covered by subjective law, its execution is granted only to the holder of this right. Secondly, the party to the obligational relationship has a direct interest in shaping this obligational relationship and, significantly, the party thereof also bears the effects of this formation (impact *inter partes*). Granting of the right to terminate only to the parties to an obligational relationship is therefore a consequence of: the principle of the autonomy of the will under civil law; recognition of the relative nature of the obligational relationship; and recognition of termination as a dependent right.

The provision of a contract which grants a third party the right to terminate an obligational relationship is thus invalid (Article 58 § 3 of the CC).[218] Similarly, granting an irrevocable power of attorney to a third party in this respect can also be qualified as invalid (Article 101 § 1 of the CC).[219]

2. If there are several subjects represented in the terminating party, their joint action is required to perform the legal action,[220] unless a law introduces a special regulation in this respect (see, for example, Article 51a (2) of the Act on Banking Law and Article 691 § 4 of the CC). This follows as a consequence of the stance that the competence to shape an obligational relationship is only granted to a party to that relationship. This rule cannot be modified by a legal act of the parties, as this would undermine the nature of termination. However, the subject effecting the termination may also act as a representative of another subject of the same party.

---

[217] See Z. Radwański, *Prawo cywilne – część ogólna*, 2007: 90 ff.; M. Pyziak-Szafnicka (in:) *SPP*, vol. 1, 2012: 812 ff.

[218] See P. Machnikowski, *Uprawnienia*: 260.

[219] See, e.g. the judgment of the Supreme Court of 6 July 2012, V CSK 354/11, LEX No. 1554312.

[220] Similarly P. Machnikowski, *Uprawnienia*: 273–274. With regard to withdrawal from a contract, see resolution (7) of the Supreme Court of 19 October 2016, III CZP 5/16, OSNC 2017, No. 3, item 26.

An example of a situation where several subjects represent the same party is the case of spouses who are party to a contractual obligational relationship, such as when one of them attains the status of a subject acting as one of the parties by virtue of a law (for example, Article 680^1 of the CC). Such a situation may also arise as a result of the transfer of a claim (Article 509 § 1 of the CC) or the sale of an enterprise (Articles 55^2 and 55^4 of the CC).

If the termination is addressed to a multi-subject party, a declaration of intent to terminate should be submitted to each subject.[221] This is a consequence of recognizing termination as a legal act that requires communication with the parties to the obligational relationship. It is also possible in this case to use the institution of the power of attorney or a similar institution (see Article 109 of the CC).

For the application of the above rules, the moment when one of the parties begins to have more than one subject is irrelevant. However, if this occurs at a point in the duration of the obligational relationship, special regulations may apply (for example, Article 512, second sentence, of the CC). However, another debtor entering into an obligational relationship may be relevant for the assessment of nonperformance or improper performance of the obligation, and consequently for the right to terminate related to the occurrence of certain circumstances.

3. Granting a third party the right to terminate an obligational relationship may, however, arise from a law (see, for example, Article 870 of the CC, Article 62 § 2 of the Commercial Companies Code, Article 109 (1) and (3) of the Bankruptcy Law). The principle of autonomy of the will supports the thesis that the law is the sole basis for granting such a right.

However, even the legislator should only apply this solution in special cases, namely when the interests of a third party require stronger protection than the autonomy of the parties' will, while at the same time the use of other instruments (see, for example, Articles 59, 527 ff., 882 of the CC) is insufficient. It should be consistently assumed that the interpretation of the provisions authorizing a third party to terminate an obligational relationship should be restrictive. If the interest of a third party supports the expiration of a continuous obligation resulting from a legal act, the preferred model for the legislator should be the dissolution of the obligational relationship by a court. An example of this is Article 13 (1) of Act on Protection of the Rights of Tenants, Housing Resources of Municipalities and Amendments to the CC, according to which the tenant and the owner of the premises located in a given building are entitled to bring an action requesting the court to terminate the legal relationship which permits use of the premises and ordering its evacuation, if the tenant occupying this premises is grossly or persistently violating the household order, thereby making the use of other premises in the building cumbersome.

[221] A similar position is expressed by P. Machnikowski, *Uprawnienia*: 273.

4. Respecting the principle of autonomy of will with regard to termination, and the assumption that application of the competence norm which allows it to be executed constitutes a voluntary act on the part of the right holder, sometimes leads to results which are difficult to accept. It is in fact possible that the continuation of the obligational relationship is in the interest of the parties, but that it violates – from a certain point in time[222] – the legally protected interests of third parties or the public interest.[223] This situation can be most easily seen in the context of competition and consumer protection cases, but it is not unique to such relationships.

Since neither of the parties has an interest in the expiration of the obligational relationship, the question arises of whether there is a legal instrument which would enable the resolution of the indicated situation and take the interests of a third party into account. At the same time, it should be noted that while in some cases the legal system imposes an obligation to contract, it is difficult to indicate a regulation that would result in a private law subject being obliged to shape a legal relationship by terminating it. In this regard, the validity of the competence norm is not connected with the binding force of the norm. Furthermore, the third party's entitlement to terminate – in line with the previous considerations – arises quite exceptionally, if a restrictive interpretation is assumed.

It seem would seem that in order to resolve a situation in which the obligational relationship is not terminated by the parties, despite the fact that its duration violates the legally protected interests of other subjects, various legal instruments can be invoked. In certain cases, the sanction of invalidity may be adopted. This sanction is typical for civil law, operating automatically on the basis of objective criteria, which can be invoked by anyone who has a legal interest. Significantly, the action in this case (an action for establishment) may also be brought by the prosecutor (Article 7 of the Code of Civil Procedure).[224] Taking into account the nature of continuous obligational relationships, it should be assumed that the sanction of invalidity may also apply at the stage of executing the obligation, in particular from the moment when the legal act became contrary to the principles of community life.[225]

---

[222] If the mere performance of a legal act creating an obligational relationship infringes this interest, consideration must be given to the sanction of invalidity being applied to the whole legal transaction – see in particular Article 58 § 1 and 2 of the CC and Article 6 of the Protection of Competition and Consumers Act.

[223] In Polish case law, the best example of such a situation is probably the factual situation underlying the judgment of the Supreme Court of 26 March 2002, III CKN 801/00, OSNC 2003, No. 3, item 41. The contract between the health care team and the funeral undertaker was in the interest of the parties, however it violated the interests of another funeral undertaker and, perhaps, the closest relatives of the deceased in the hospital.

[224] See the resolution of the Supreme Court of 3 December 2014, IV CSK 365/14, LEX No. 1566730.

[225] Cf. A. Pyrzyńska, *Nieważność*: 59 ff.

1.3. The legal basis for termination

1. One of the most important issues with regard to termination is that of the legal basis for its implementation. The question concerns which the situations in which one of the parties may modify an obligational relationship – in this case leading to its termination – in a manner that is binding for all the parties, including those not participating in this act.

In the scholarly literature there is a widely held stance arguing that every unilateral modification clause requires a legal basis, derived from law or from a legal act, primarily a contract.[226] This position should be accepted. The consequence of recognizing the autonomy of the will as a fundamental principle of private law must be that unilaterally modifying the legal situation of the other party can only take place when the legal subject modifies the obligational relationship within the scope of competence established by the competence norm. It is only in this context that the binding force of the contract and the effectiveness of termination can be reconciled. An additional argument is provided by the definition of subjective right. Since the subjective right is determined by legal norms, and the right to shape a legal relationship is its distinctive feature, this right is also subject to determination by legal norms. Thus it can only be executed if there is a basis for it.

The *pacta sunt servanda* ("agreements must be kept") principle[227] may also support this position. It is recognized that the trust placed in a contract and the right to unilaterally terminate derived from the principle of freedom are mutually exclusive.[228] One of the ways to resolve this conflict between trust and freedom is to recognize as permissible only that unilateral modification of the obligational relationship (here in terms of its duration) which takes place within the limits of the granted competence.

It should be noted, however, that the requirement of having the necessary competence in order to unilaterally determine the legal position of another subject is a regularity which is inherent to the entire legal system. Despite fundamental differences between public and private law regulation, each of them – in its own right way – takes into account the rule that unilateral interference in another person's rights and obligations always requires a legal basis. This approach results

[226] Similarly *inter alia* A. Klein, *Problem*: 164 ff.; P. Machnikowski, *Uprawnienia*: 254; M. Pyziak-Szafnicka (in:) *SPP*, vol. 1, 2012: 813; Z. Radwański (in:) *SPP*, vol. 2, 2008: 346; R. Trzaskowski (in:) *KC Komentarz. Część ogólna*, ed. J. Gudowski, 2014: 320–321, 415.

[227] However, it should be taken into account that the Grotius principle of the obligation to uphold the contract is a fundamental principle of the natural law – see H. Olszewski (in:) K. Chojnicka, H. Olszewski, *Historia doktryn*: 103–104. At the same time, the view on the normative basis of the effectiveness of legal acts is widely held today – see in particular, Z. Radwański (in:) SPP, vol. 2, 2008: 5 ff. So if the principle *pacta sunt servanda* is referred to, then it can only be with the reservation that this is only one of the values protected by the legal system – see M. Safjan (in:) *SPP*, vol. 1, 2012: 344 ff.

[228] Similarly H. Oetker, *Das Dauerschuldverhältnis*: 249–250.

from the recognition of freedom as being the basic value protected by the legal system (Article 31 (1) and (2) of the Constitution of the Republic of Poland). Emphasis should therefore be placed on the fact of interference, not on its character (binding/non-binding). The specific nature of civil law is revealed primarily in the fact that the legal basis for such interference may be created by a contract (legal act).

Effecting termination without legal basis invalidates this act. This is a consequence of the position according to which the situation of exercising competences is substantially related to and serves the purpose of exercising the rights held by the person entitled by the competence.[229]

2. The issue of the basis for termination concerns both termination that is exercised freely and termination due to the occurrence of specific causes.

The most important difference between these forms of termination is the fact that effectively bringing about termination due to the occurrence of specific causes requires the prior fulfilment of the conditions specified by law or in the legal act constituting the basis (co-basis) for termination. The right to terminate arises only from this moment. On the other hand, with free termination, the right is vested for the duration of the obligational relationship, but in principle this is the case until one of the parties exercises this right.

3. A law may constitute the basis for the right to terminate an obligational relationship both in the case of free termination (see in particular Article 365^1 of the CC and, for example, Articles 673 § 1 and 2, 704 and 764^1 of the CC, Article 42 of the Consumer Rights Act in conjunction with Article 385^3 (15) of the CC), as well as termination related to the occurrence of specific circumstances (see, for example, Articles 384^1, 664 § 2, 667 § 2, 703, 709^{11} and 764^2 § 1 of the CC).

The law as the basis for the right to terminate is in fact a legal norm interpreted by the legal system in the process of interpretation, employing recognized rules of interpretation. This means that in the process of interpreting individual provisions, reasoning in accordance with *analogia legis* may be applied, including inference from the principles of law.[230] One of the basic principles which supports such inference is the principle of the limited duration of an obligational relationship.

Both in the case when a law grants the right to freely terminate, and when it binds this right to the occurrence of specific causes, it is possible that there could be situations in which the statutory basis for termination is co-regulated by contract (Article 353^1 of the CC) or standard contract (Article 384 of the CC). This applies above all to the stipulation of termination periods other than statutory ones (for example, Articles 365^1, 673 § 1, 709^{11} and 764^1 § 2 of the CC, Article 42 of the Consumer Rights Act) or the stipulation of circumstances justifying termination (for example, Articles 672, 703, Article 709^9 in conjunction with Articles 709^{11} and 730 of the CC).

[229] See A. Bator, *Kompetencja*: 113 ff.

[230] See, e.g. Z. Radwański, M. Zieliński (in:) *SPP*, vol. 1, 2012: 499–500.

4. The basis for the right to terminate may also be a legal act. This is primarily a contract (primary or modifying). The right to terminate a continuous obligation may also, as a rule, arise from the provisions of the standard contract of the binding party (Article 384 of the CC).

In this context, the issue of the effectiveness of the provision granting the right of termination arises.

Under the existing legal framework, it is a rule that each party to a continuous obligation unlimited in time, arising from a legal act, is entitled to free termination (Article 365^1 of the CC, see also, for example, Articles 673 § 1, 704 and 764^1 § 1 of the CC, and Article 42 of the Consumer Rights Act in conjunction with Article 385^3 (15) of the CC). Within the limits stipulated in Article 353^1 of the CC, the parties may co-regulate this statutory basis for termination, but the law remains the source of the right to terminate. This allows us to assume that the issue of a contract as a source of the right to terminate a continuous obligation resulting from a legal act concerns, in principle, only relationships concluded for a fixed term.

In the case of a relationship for a non-fixed term, a contract being the basis for the right to terminate may be considered only in situations in which the right to terminate is restricted by law (the second and third subcategories of continuous obligations concluded for non-fixed term). However, since the duration of these relations is, in principle, determined by imperative and semi-imperative norms, contractual extension of the basis for termination seems unacceptable in this case. This would undermine the purpose of statutory regulation, which excludes a certain group of continuous obligations – in part or in whole – from the scope of the application of Article 365^1 of the CC. For example, the parties are entitled to contractually co-regulate (using a standard contract) the statutory basis for a bank terminating a bank account agreement (Article 730 of the CC), by indicating situations considered to be "good cause". However, they are not entitled to adopt a basis for termination other than good cause.

Granting the right to terminate a continuous obligation resulting from a legal act may be effected under condition (suspending or resolutive) or subject to the stipulation of a time clause (initial or final). In each case, however, it should be considered whether this stipulation respects the nature of the continuous obligation, including the obligation for a non-fixed term/ fixed term.

5. The issue of the legal basis for termination is connected with the question concerning the admissibility of shaping each party's rights differently through legal acts. In particular, this concerns the stipulation of varying termination notice periods, the determination of different grounds for termination, or the granting the right to terminate to only one party. This problem mainly concerns cases in which a legal act is the basis for termination, but it may also arise in situations in which the statutory basis for termination is co-regulated by contract (using a standard contract).

This issue is basically not regulated by law. The few provisions that refer to it support the conclusion that the differentiation of the parties' situation with regard to their right to terminate a continuous obligational relationship is not ruled out (see, for example, Article 764^1 § 2 of the CC). However, it is noticeable that statutory termination notice periods are generally uniform for each party,[231] and there are regulations in the legal system aimed at guaranteeing the weaker party with at least the same scope of rights as the counterparty (see in particular Article 385^3 (14) and Article 764^1 § 2 and 4 of the CC). It should be mentioned that in civil law relationships, the right to modify is secondary to the basic set of rights and obligations. Therefore, the right to terminate a continuous obligational relationship cannot be isolated from the content of that relationship. It is supposed to reflect, not modify the risk distribution adopted in this relationship.

Considering the issue of the admissibility of different modification by legal act of each party's right to terminate, it should first be pointed out that this divergence cannot result in the inability to classify an obligational relationship under Article 365^1 of the CC. It is unacceptable to shape the obligational relationship in such a way that for one of the parties it is a relationship for a non-fixed term, and for the other a fixed term. This position is mainly supported by the imperative nature of Article 365^1 of the CC.

Subsequently, the division of continuous obligations into obligations for a non-fixed term and for a fixed term needs to be taken into account.

For an obligational relationship concluded for non-fixed term, the basic model is an obligation in which each party – in accordance with Article 365^1 of the CC – has the right to freely terminate (the first subcategory of continuous obligations for a non-fixed term). Limiting the right to terminate to one party (the second subcategory), granting the right to both of the parties (the third subcategory) or excluding the right to either party (the fourth subcategory) can only take place by law (see Chapter III § 1. 1.2. Subpoint 5). This supports the conclusion that with an obligation relationship concluded for a non-fixed term, differentiating the legal situation of the parties with regard to termination cannot lead to the application of another subcategory of a continuous obligation concluded for non-fixed term other than the first. Such differentiation may not, in particular: lead to the elimination of one of the parties' right to terminate; or the stipulation this right only comes into being if certain conditions are met (for example good cause[232]); or the introduction of another significant restriction on the right to freely terminate, including the link between the right to freely terminate and the obligation of the

[231] See, in particular, Articles 673 § 2, 688, 704, 764^1 § 1, 816 of the CC. Differentiation of notice periods occurs, e.g. in the case of open-end credit agreements (Article 42 of the Consumer Credit Act), storage contracts – see Article 859^5 of the CC, which applies to warehouse owner and Article 844 of the CC which is applied, by analogy, to the depositor.

[232] A similar position is expressed by J. Panowicz-Lipska (in:) *SPP*, vol. 8, 2011: 62.

terminating party to pay a contractual penalty. It should be remembered that an obligation of a continuous nature concluded for non-fixed term does not serve to stabilize the legal situation. The source of a divergent rule can only be a law.

However, a more far-reaching conclusion seems justified. The principle of freedom, the function of termination (shaping an obligational relationship through terminating it) and the non-self-executing character of this legal act support the position that the scope of the right to terminate a continuous obligation concluded for a non-fixed term should in principle be the same for each party, and the differentiation of this scope can only occur when it can be justified. Due to the nature of a continuous obligation concluded for non-fixed term, it should at the same time be assumed that this distinction should only concern the length of the termination notice period.

Circumstances that justify differentiating the legal situation of the parties should, in principle, be related to the content of the obligational relationship. The right to terminate is an element of this relationship, being derived from its content. For example, this permits the assumption that if a tenant has improved rented property, and in accordance with the contract, these expenditures are not settled at the end of the contract, the termination notice period for the lessor may be longer than for the tenant. A similar solution can find application in the case of a license agreement. If termination of the contract requires the licensee to enter into another agreement or the introduction of a complex process to deploy work (for example, a computer program), the period of notice for the author may be longer than for the licensee.

In some cases, the differentiation of the parties' right to terminate may also be justified by circumstances that are not related to the content of the obligational relationship, if the significant interest of the party justifies this. These circumstances may in particular be related to: the pre-contractual phase (for example, when establishing an obligational relationship requires that the party terminate cooperation with another subject); or with the economic risk caused by the termination of the obligational relationship (for example, due to non-competition during an agency contract, the agent renders service only for the principal); or with the special status of one of the contractors (for example, a consumer, a patient, a parent of a young child as a party to a childcare contract). A party that is at greater risk due to the termination of the obligational relationship, or a party that is subject to stronger legal protection, may be granted a shorter notice period than the counterparty.

For obligational relationships concluded for a fixed term, the basic (primary) expiration mechanism is the occurrence of a designated legal event that is not a declaration of intent. If, within the limits specified in Article 353^1 of the CC, the parties extend the grounds for terminating the obligational relationship, or co-regulate the statutory basis for termination by means of a contract (using a stand-

ard contract), the possible differentiation of the parties' rights cannot lead to this rule being set aside.

Regardless of this, the question arises of whether also with this group of obligational relationships the differentiation of the parties' rights should be allowed only if reasonable circumstances justify this, and only with regard to the length of the termination notice period. The difference in approach may be justified by the differences between continuous contractual obligations concluded for a fixed term and those concluded for a non-fixed term.

These differences already appear on the basis of the principle of the limited duration of an obligational relationship. This principle primarily serves to determine whether the basic expiry mechanism of the obligational relationship has been established in accordance with its content.[233] This means that the verification of the duration of a continuous obligation for non-fixed term focuses on the manner of modifying the right to terminate, whereas the continuous obligation for a fixed term is focused on the event leading to the expiry of the obligational relationship. This leads to the conclusion that the principle of freedom – which underpins the principle of limited duration in time – does not make it possible to settle the question of the admissibility of differentiating the parties' rights to terminate a relationship concluded for a fixed term.

Differences also occur with regard to the distribution of risks associated with the duration of an obligational relationship. In the case of a contractual continuous obligation concluded for non-fixed term, the parties' decision to apply the basic expiration mechanism (expiry due to termination) takes place at the stage of performing the contractual relationship, depending on the development of events. In addition, except for exceptional situations resulting primarily from the use of general clauses (for example, Article 58 § 2 and Article 5 of the CC), the use of this mechanism is not subject to evaluation due to the changing nature of the parties' situation over time. In the case of a contractual continuous obligation concluded for a fixed term, the decision regarding the mechanism of expiration of the obligational relationship (the occurrence of the designated event) is taken at the stage of executing the legal act. Thus, the parties seem to be relying on the future development of events that they can only make probable predictions concerning. The unfolding of these events does not have to be equally favorable / unfavorable to each of them.

Both the nature of a continuous obligation concluded for a fixed term and the specific distribution of risks connected with this seem to support adopting a more liberal approach to the differentiation of the parties' right to terminate an obligational relationship than that which is appropriate for a relationship for a non-fixed term. Since each party may bear various risks related to the adoption

[233] Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 321–322.

of the construct of fixed time, it is admissible not only to differentiate the right in terms of the length of the termination notice period, but also in the circumstances justifying the termination.

However, in this case it should also be assumed that differentiating between the parties' rights is justified by the circumstances. The function of the right to terminate a continuous obligation does not undergo change. It is still of secondary importance to the basic set of rights and obligations, so it should reflect – and not modify – the distribution of risks involved in a given contractual relationship. There are no grounds for considering the right to terminate as a special privilege, or as an instrument that allows one party to be burdened with the risk connected with changes taking place.

1.4. The content of a declaration of intent to terminate

1. The termination of an obligational relationship is a unilateral legal act. Therefore, obviously, only one declaration of intent, which exclusively defines the content of the legal act, is its element, which exclusively defines the content of the legal act.

Termination belongs to the category of rights to shape. Since its essential function is to modify a legal relationship, the required element of the content of a declaration of termination is the intent to end (expire) the designated continuous obligation, with effect for the future. This is the minimum and, in principle, exclusive content of the declaration of intent to terminate that is sufficient for the act have legal effect. The justification for such poor content of the declaration of intent is a function of the right to modify, which amounts to modifying the obligational relationship, in this case terms of its duration.

However, if the termination is linked to the occurrence of specific causes, it should be assumed that the terminating party is burdened with the obligation to justify termination. This justification should result from the content of the termination, taking into account the circumstances in which the declaration of intent has been submitted (Article 65 § 1 of the CC) and special regulations (see, for example, Article 11 (1), second sentence, of the Act on the Protection of Tenants' Rights, Municipal Housing Reserves and on the change of CC). The fulfillment of this requirement enables the addressee of the termination to determine whether the performed legal act entails legal effects and, consequently, whether to adapt his or her behavior to that effect. If the requirement of justification is not fulfilled, there may be grounds for concluding that the termination has been effected freely, which may be unacceptable under the given obligational relationship. The general, broad wording of Article 65 § 1 of the CC makes it possible to take into account the features of specific situations.

2. The basis for modifying an obligational relationship is the competence norm. The scholarly literature assumes that while the application of this norm is a voluntary act on the part of the entitled party, it is in essence only a freedom to take a given action, and not freedom with regard to the effect to be achieved as a result of this action. This effect is limited in scope, that is, no obligation arises on the side of the addressee of the termination, only an obligation defined by a competence norm.[234]

This means that the content of the declaration of intent to terminate can be enriched with additional elements only if this results from the content of the competence norm. The granting of the right to terminate cannot therefore be combined with the granting of the right to choose the manner of modification. In addition to the preceding considerations, it should be stated that the exercise of right to modify not only requires a legal basis, but also takes place within the limits specified by this basis. However, this is another aspect of the same issue.

The competence norm thus determines whether the expiration of the obligational relationship is to take place immediately after termination, or after the elapse of the termination notice period. If latter is applied, the competence norm indicates the length of the notice period. It can be noticed that in the existing legal framework, the expiration mechanism is determined by the competence norm in a strict manner. Granting a party the competence to stipulate the notice period (see, for example, Article 4j (4) of the Energy Law Act), or making the effectiveness of termination conditional upon a specified future event (see, for example, Article 11 (12) of the Act on the Protection of Tenants' Rights, Municipal Housing Reserves and on the change of CC) rarely finds application. Analysis of contractual practice leads to similar conclusions.[235]

In this context, a certain distinction is evident in the regulation of Article 365^1 of the CC. According to this provision, in the absence of contractual and statutory notice periods, the terminating party should observe the customary notice period. If there is no customary period, the obligation expires immediately after termination. The CC thus imposes the obligation on the party bringing about the termination – in the absence of other notice periods – to determine whether a custom has developed with regard to the termination notice period, and if so, to apply this custom, or risk the sanction of defective termination.

This allows us to assume that stipulating the time at which the obligational relationship expires as a result of termination (Article 56 of the CC) in principle derives from the law, or from a previous legal act (taking into account situations

[234] Similarly A. Bator, *Kompetencja*: 67, and the literature indicated therein.

[235] In the case-law of the courts I was unable to find the facts in which, by way of legal act, the terminating party was granted the right to determine the date on which an obligation expires. I have not encountered such records in practice. Such a solution should not be ruled out, however, due to the role of the right to shape the legal relationship, it should be used with caution.

in which the parties regulate together, through legal act, the statutory termination basis. If the terminating party indicates the time at which the obligational relationship expires, the party only confirms the binding content of the parties' legal relationship.[236] A separate issue is the classification of situations in which the terminating party attempts to modify the legal relationship in a way that violates the competence norm (see 1.7. Subpoint 5).

In principle, it is correct that the right to freely terminate should be combined with an appropriate termination notice period,[237] whereas when the termination is related to the occurrence of special causes, the effect of termination should be immediate.[238] This rule is consistently applied by the Polish legislator.[239] However, it should be borne in mind that termination due to special circumstances is not always related to a party's breach of obligation.[240] Therefore, in the case of this form of termination, there may be grounds for a termination notice period. The effect of immediate termination can be treated as a special sanction in contract law.

3. Under an obligational relationship which refers to the same subject, different termination notice periods may apply (for example, a landlord may terminate a rental agreement under Article 672 of the CC and on the basis of Article 673 § 1 and 2 of the CC). Such a situation does not, however, entitle the terminating party to stipulate the date on which the obligational relationship expires. Possible modification of the effects of termination may in this case occur only indirectly, by choosing the circumstances constituting the basis for termination (for example, circumstances falling within the scope of application of Article 672 or Article 673 § 1 and 2 of the CC), if it is assumed that there is a basis for such a choice. The choice of circumstances therefore determines the mode of termination.

4. The issue of the possibility of enriching the content of the declaration of intent to terminate with additional elements (other than the expression of the intent to terminate the specific relationship with future effect) is connected with the question of the admissibility of termination subject to the resolutive condition or time clause.

The special function of the right to shape the legal relationship calls into question the admissibility of effecting termination under a condition or with the stipulation of a period (time limit). This stance is supported by need to protect the

---

[236] See also Z. Radwański, M. Zieliński (in:) *SPP*, vol. 1, 2012: 376.

[237] Similarly H. Oetker, *Das Dauerschuldverhältnis*: 273.

[238] See H. Oetker, *Das Dauerschuldverhältnis*: 262.

[239] With regard to termination with immediate effect, see, e.g. Article 664 § 2, Article 667 § 2, Article 672, 698 § 2, Article 764^2 § 1 of the CC, while the law sometimes introduces the requirement of additional notice (see, e.g. Articles 68 and 703 of the CC), or clearly states that the parties may agree on the termination notion – this is primarily the regulation on leasing contracts (see, e.g. Article 709^{11} and 709^{12} § 2 of the CC). With free termination, however, the legislator is not consistent – see in particular Article 365^1 of the CC.

[240] See, e.g. J. Panowicz-Lipska (in:) *SPP*, vol. 8, 2011: 64–65; G. Tracz, *Sposoby*: 144 ff.

addressee of the acts, who "should immediately have certainty as to their legal situation".[241] Thus, the properties of a legal act may preclude termination with such a stipulation (Article 89 and Article 116 in conjunction with Article 89 of the CC). However, it can be noticed that termination is sometimes also ascribed ancillary functions, which in particular involve motivating the addressee of a termination notice to make performance,[242] or providing them with the opportunity to take specific actions.[243] These functions should not be completely omitted from consideration

As yet, no agreement on this matter has been reached.[244] It seems that it will be more fruitful to look at termination with postponed effect (the commencement date, the suspending condition).[245] This construct does not pose such a threat to the security of trading. However, even in this case, it is necessary to opt for termination which is effected exclusively under the suspending condition and with the stipulation of the initial term, since the condition can be determined according to objective criteria (for example I terminate a specific lease agreement, unless within fourteen days from the date of delivery of this notice, you pay me rent in arrears, amounting to PLN 1000). The function of the right to modify supports the requirement of such a combination.

Significant doubts accompany the possibility of terminating with a resolutive condition or resolutive time clause. This also applies to situations in which termination is effected with a termination notice period. In the event of termination – or broader modifying powers – there is a difference between the postponement of a legal act and the situation in which the effects of this act are to cease. While it is possible to defend the thesis that the permissibility of postponing the effect of termination can be deduced from Article 89 of the CC (Article 116 in conjunction with Article 89 of the CC), the admissibility of cessation (and, in principle, revoca-

---

[241] Z. Radwański (in:) *SPP*, vol. 2, 2008: 269. A similar position is expressed by M. Piekarski (in:) *KC Komentarz*, vol. 1, eds. Z. Resich et al., 1972: 226; the judgment of the Supreme Court of 29 April 2009, II CSK 614/08, OSNC 2010, No. 2, item 32.

[242] See, e.g. the facts underlying judgment of the Supreme Court of 29 April 2009, II CSK 614/08, OSNC 2010, No. 2, item 32.

[243] See, e.g. the facts underlying the judgment of the Supreme Court of 20 September 1991, IV CR 842/90, LEX No. 1633818.

[244] The view is quite widely held, according to which unilateral legal acts do not, in general, allow the stipulation of a condition – such as the judgment of the Supreme Court of 29 April 2009, II CSK 614/08, OSNC 2010, No. 2, item 32; A. Janiak (in:) *KC Komentarz*, vol. I, ed. A. Kidyba, 2012: 586; M. Pazdan (in:) *KC Komentarz*, vol. I, ed. K. Pietrzykowski, 2015: 400. The position is expressed according to which conditional unilateral legal acts are admitted to a limited extent – see, e.g. P. Drapała (in:) *KC Komentarz. Zobowiązania*, vol. III, part 2, ed. J. Gudowski, 2013: 593; P. Machnikowski, *Uprawnienia*: 271–272; B. Swaczyna, *Warunkowe*: 96 ff.; the judgment of the Supreme Court of 13 June 2013, V CSK 391/12, OSNC 2014, No. 2, item 22.

[245] See, e.g. D. Bucior, *Wypowiedzenie*: 102 ff.; P. Machnikowski, *Uprawnienia*: 272; B. Swaczyna, *Warunkowe*: 98–100.

tion) of the effects of such modification raises fundamental doubts. This contradicts the nature of unilateral acts that shapes a legal relationship.

5. Alongside these deliberations regarding the content of the declaration of intent, the interpretation of this declaration requires a brief analysis. This problem is usually overlooked by the doctrine,[246] most probably due to the fact that the problem of interpreting the declaration of intent as an element of a unilateral legal act has less practical significance than in the case of a contract. However, this does not mean that the application of Article 65 of the CC to termination is straightforward.

The meagre content of the declaration of intent to terminate means that in this case the issue of interpretation usually focuses not so much on determining the content of the declaration, but rather on determining whether the conduct in question can be considered a declaration of intent at all. In many cases, determining that it is in fact a declaration of intent to terminate thereby ends the process of interpreting the declaration. The effects of termination are usually determined by the other elements specified in Article 56 of the CC, and by prior legal action. The process of interpreting the declaration of intent is simplified in such cases.

Explicit examples of this are provided by employment law with regard termination of an employment contract by a declaration of one of the parties (with or without a notice period – see Article 30 § 1 (2) and (3) of the Labour Code)[247], however this problem is not alien to civil law.[248] What is more, it seems that it applies to any unilateral legal act that shapes a legal relationship.[249] Therefore, the question arises of whether in the case of a declaration of will to terminate an obligational relationship, the declaration of intent "sufficiently" (Article 60 of the CC) should be understood in the same way as the submission of a declaration of will in connection with other legal acts, in particular contracts.

---

[246] For example, this topic is quite consistently neglected by Z. Radwański, *Wykładnia oświadczeń woli składanych indywidualnym adresatom*, Wroclaw-Warsaw-Cracow 1992, *passim*.

[247] For the sake of clarity, it should be mentioned that Article 65 of the CC in labour law follows Article 300 of the Labour Code. For example, in the Supreme Court judgment of 13 October 1999, I PKN 303/99, OSNP 2001, No. 4, item 117, it was assumed that the employee's intention to accept another job does not mean termination of the employment contract; in the Supreme Court judgment of 15 July 2008, III PK 9/08, OSNP 2009, No. 23–24, item 313, it was deemed that the employee's use of the phrase "please terminate the employment contract" did not meet the requirement to submit a declaration of intent to end the employment contract by termination.

[248] For example, in the facts underlying the judgment of the Supreme Court of 23 September 1999, III CKN 353/98, LEX No. 1217908, the lessee treated the lessor's demand to set a date for the return of the leased property as a notice of termination of a lease agreement concluded for a non-fixed term. See below the judgment of the Supreme Court of 22 May 2014, III SK 50/13, LEX No. 1493240, concerning, *inter alia*, the effects of stopping the enforcement of the agreement restricting competition to the existence of the agreement.

[249] See, e.g. the judgment of the Warsaw Court of Appeal of 26 March 2009, VI ACa 1278/08, *Monitor Prawa Bankowego* 2011, No. 6: 9 ff. The Bank stated that the declaration of set-off had been submitted to the holder of the bank account by sending a bank statement.

With regard to unilateral legal acts that have a legal effect, this issue – until now – has been discerned with regard to set-off declarations (Article 499 of the CC). Due to the security of trade and the effects caused by this legal act, it is assumed that the set-off declaration should – as a rule – be made explicitly.[250]

This position should be accepted. The special function of acts having legal effect (modifying the legal relationship), implemented through a unilateral legal act, provides a strong argument for the requirement to state (declare) intent by means of an unambiguous communication which is easily recognizable to the addressee in the circumstances.[251] However, it should be assumed that it is not so much the issue of the specifically significant legal effects of the unilateral legal act shaping the legal relationship in comparison with contracts that shape a legal relationship, as it is the issue of the specific unilateral shaping mechanism. It is this mechanism that dictates that a declaration of intent should be denied the status of a declaration if its meaning is vague and requires careful interpretation. There are no grounds for obliging the addressee to accept such a declaration of intent, especially if the declaring party did not observe due diligence in this regard.

For the proposed interpretation of Article 60 of the CC, it may be important to counteract the situation in which subjects submitting a potential termination could later, depending on the circumstances, ascribe this meaning or another meaning to their conduct, or indicate another justification for termination, the effectiveness of which is related to the occurrence of specific events or circumstances. A sensible participant in civil law proceedings should clearly communicate the intent to end cooperation, endeavoring to keep this intent free from momentary emotions which often appear in long-term relationships. The counter party may have reasonable confidence that the intention to unilaterally modify the contractual relationship will be expressed in a manner recognizable to him or her. This can be confirmed by trading practice, where there is often the requirement that the act of terminating a contractual continuous obligation be made in writing, or the act will be deemed invalid (Article 76 of the CC).

However, this does not entail that combined methods of interpretation cannot be applied to unilateral legal acts that cause legal effects. Such an approach would be contrary to the well-established interpretation of Article 65 of the CC, and would also omit the essential value of this method, namely the flexibility to take into account the character of all declarations of intent. However, the use of a combined method of interpretation for unilateral legal acts is in practice related to the consideration of a broader range of objective elements (Article 65 § 1 of the CC), than is the case with declarations of intent which constitute a component

[250] See L. Stępniak, *Potrącenie*: 125; K. Zawada (in:) *KC Komentarz*, vol. II, ed. K. Pietrzykowski, 2015: 135. For a contrasting position M. Pyziak-Szafnicka, *Potrącenie*: 216–218.

[251] Similarly, e.g. the judgment of the Supreme Court of 13 March 2015, III CSK 206/14, LEX No. 1710360.

of a contract (Article 65 § 2 of the CC).[252] Even if one adopts a broader interpretation of Article 65 § 2 of the CC, acknowledging that this provision applies to all declarations of intent addressed individually, it can be noticed that with termination, as with any unilateral legal action, it is much harder to appeal to the addressee's knowledge of the actual intentions declared. However, it is significant that the parties are already connected by a contractual tie. The fact of cooperation may influence the interpretation of the declaration of the intent to terminate.

Recognizing the difficulties in determining whether certain conduct constitutes a declaration of intent to terminate an obligational relationship, it seems advisable to refer to Article 8 of the Vienna Convention of 11 April 1980 (Convention on Contracts for the International Sale of Goods). Although this provision applies only to contracts for the international sale of goods, the directives expressed therein – consistent with Article 65 of the CC – are sometimes referred to alongside the rules formulated in Article 65 of the CC.[253] This position should be accepted, recognizing that the regulation contained in the Convention captures, in a more modern way, the same method for interpreting the declaration of intent referred to by the Polish legislator.

1.5. The effect of termination

1. The basic feature of termination is that it has an effect on the future (*ex nunc; pro futuro*),[254] and, crucially, only for the future.[255] This means that at the moment when the termination triggers all the effects, the continuous obligational relationship ceases to exist (see Article 365^1 of the CC, which in this regard expresses the general rule), but remains in force with regard to the earlier period. In this respect, termination has an effect similar to the expiration of the period (time limit), or the occurrence of another event determining the duration of the continuous obligation.

Termination makes it possible, however, to determine the duration of a continuous obligation, and consequently to specify the extent of the final performance due, at the stage when this relationship is initially executed. Determining the duration of the obligation in such a manner also constitutes the basis for determining other rights and obligations of the parties, for example, associated with the

[252] A similar position is expressed by E. Rott-Pietrzyk, *Wykładnia*: 34.

[253] See, e.g. Z. Radwański (in:) *SPP*, vol. 2, 2008: 66; E. Rott-Pietrzyk, *Wykładnia*: 22 ff.

[254] See, e.g. A. Klein, *Problem*: 164; P. Machnikowski (in:) *SPP*, vol. 5, 2013: 162–163; Z. Radwański, *Uwagi*: 256; M. Safjan (in:) *KC Komentarz*, vol. I, ed. K. Pietrzykowski, 2015: 1193; the judgment of the Supreme Court of 28 September 2004, IV CK 640/03, OSNC 2005, No. 9, item 157; the judgment of the Supreme Court of 17 March 2010, II CSK 454/09, OSNC 2010, No. 10, item 142.

[255] It is assumed that the clause stipulating the possibility of terminating a fixed obligation with retroactive effect is itself invalid – as for example the judgment of the Supreme Court of 23 June 2005, II CK 739/04, LEX No. 180871.

settlement of expenditures or expenses (for example Article 706 of the CC). If the legal relationship between the parties continues, it is related to the settlement (for example, overpaid performance, outlays, expenses, compensation) or the return of the object of the performance, yet the features of the continuous obligation are no longer present. It is, in principle, an liquidation relationship.[256]

A declaration of intent that does not lead to the termination of the contractual relationship only with effect for the future either does not constitute termination,[257] or is invalid (Article 58 § 1 of the CC).[258]

The effect of termination with effect "from now on" (*ex nunc*) would seem to confirm the thesis that a specific way of terminating a continuous obligation may be – at least in a sense – identified with the fulfilment of an obligation. Following a certain convention, it can be assumed that fulfillment of an obligation through making one-off performance leads to the expiration of the obligation with effect for the future. First of all, there are no grounds for accepting the fiction of the retroactive effect (*ex tunc*) in this case. Secondly, the expired obligational relationship is the basis for the assessment of the beneficial effect or, more broadly, the assessment of the performance in terms of provisions on undue performance. It seems reasonable to conclude that in fact every obligation duly performed expires "from now on" (*ex nunc*).

2. The act of termination with effect for the future distinguishes this act from other unilateral legal acts leading to the termination of an obligational relationship. As far as effects are concerned, none of these other acts shows such a far-reaching homogeneity. It can be seen only in the case of a statement on deduction, with the proviso that it works retroactively (*ex tunc*) (Article 499, second sentence, of the CC), and its effect does not have to be the expiration of the obligational relationship(s). This feature refers to both free termination and termination due to specific reasons or circumstances.

The act of termination with effect for the future affects the scope of application of this institution. Since, as a result of fulfilment, the binding force of the obligational relationship is not waived with regard to the period prior to termination (in the scope of the obligation to make performance), including this institution in the construct of the obligational relationship is permissible with greater scope than in the case of withdrawal.

3. It is correctly assumed that the act of termination with effect "from now on" (*ex nunc*) finds justification in the nature of a continuous obligation. However,

---

[256] Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 582 ff.

[257] See R. Trzaskowski, *Skutki sprzeczności umów*: 413, who accepts the conversion of the right to withdraw from a contract, contrary to the nature of a permanent relationship, to the right to terminate it.

[258] See, e.g. the judgment of the Supreme Court of 8 October 2004, V CK 670/03, OSNC 2005, No. 9, item 162.

this is not the only argument for such a construct. It is based on the principle of the binding force of a legal act. Acceptance of the retroactive effect of termination would undermine the legal significance of legally submitted declarations of intent, questioning the principle of irrevocable declaration of intent (Article 61 § 1 of the CC). Such an approach is unacceptable, first of all, in the case of obligations concluded for non-fixed terms, belonging to the first subcategory, and to a certain degree the second subcategory in which – on the one hand – the power to terminate an obligational relationship is a necessary element, and on the other – the exercise of this right is free (Article 365^1 of the CC). However, in the case of termination due to specific causes, the retroactive effect is also difficult to accept. The basic argument in favor of this approach is – in this case – the nature of the obligational relationship. The act of termination with effect for the future is therefore termination that takes into account, with varying intensity, the principles of the autonomy of the will and the binding force of a legal act, woven in a specific way into the construct of a continuous obligation.[259]

Nevertheless, this does not mean that ending a continuous obligation with retroactive effect is ruled out. This can only happen, however, through the application of an institution for which this effect is appropriate. Such an institution would be, above all, withdrawal, taking into account the divisibility associated with the passage of time, which is typical for continuous obligations. With a view to future law (*de lege feranda)*, it may be worth considering whether instead of the current regulation of Article 491 § 2 of the CC, it would be better to introduce a solution wherein the termination of a continuous obligation would take place with effect from the moment when there is a need to protect the rights of the terminating party,[260] in particular from when a breach of obligation occurs. This construct seems clearer and more comprehensible. Regardless of further changes in Polish legislation, I accept, however, that it is not acceptable to blur the differences between the termination of a continuous obligational relationship and that of a relationship in which only one-off performance is an element. The source of this distinction is the fundamental dissimilarity of the performances constituting an element of these relations, which is transposed into the manner in which the obligation is terminated.

4. The modification of a legal relationship through termination is in principle final. This stance results from the law-shaping nature of this act. Thus, the "nature" of termination (Article 89 of the CC and Article 116 § 2, in connection with Article 89 of the CC) rules out its execution being subject to the resolutive condition or resolutive time clause. However, after the termination, the final character

[259] See also H. Oetker, *Das Dauerschuldverhältnis*: 260 ff., according to whom the right to self-determination requires an instrument that works only for the future. The characteristic of withdrawal with effect in the past would exceed the need set by this law.

[260] In a similar vein, J. Jickeli, *Der langfristige Vertrag*: 146.

of the modification does not rule out the conclusion of a contract that terminates the legal relationship, in particular a dissolution contract or settlement. The admissibility of concluding such an agreement within the termination notice period, and therefore when the continuous obligation has not yet expired, should not be doubted. The precedence of contractual modification of the obligational relationship over unilateral modification can be derived from the principle of the autonomy of the will.

Such an agreement should not be ruled out after the termination notice period has elapsed. This primarily concerns the conclusion of a settlement, the content of which can include, *inter alia*, modifying a legal relationship,[261] which is particularly important when there is a dispute between the parties over the effectiveness of the termination. The settlement may also, within certain limits, subsequently regulate the non-contractual stage. It is reasonable, however, to assert that in such a case the conclusion of the contract should take place shortly after the termination notice period has elapsed.

5. The effects of termination may extend beyond the expiration of the continuous obligational relationship in which this right was exercised. If the termination was made in connection with a breach of the obligation, it may result in an obligation to repair the damage. However, it should be assumed that this effect does not characterize the institution of termination, as it is not connected with it in a necessary manner.

1.6. The non-self-executing nature of termination

1. The function of termination consists in the creation of a mechanism that allows an obligational relationship to expire. This has a significant impact on the characteristics of the institution under analysis. It means, above all, that termination is non-self-executing, as it only constitutes an element of a specific legal situation. Thus, the right to terminate an obligational relationship cannot constitute an independent object for trading, particularly by way of transfer.[262] This entitlement is not included in the category of transferable rights.

2. Since that which is modified is a legal relationship, the effectiveness of termination depends on the duration of the relationship at the time when the right is exercised. An obligational relationship cannot be terminated (modified) if it has already expired, *inter alia* due to fulfilment.

[261] Cf., e.g. the judgment of the Supreme Court of 30 September 2010, I CSK 675/09, LEX No. 784899.

[262] See, e.g. P. Machnikowski, *Uprawnienia*: 267; J. Mojak (in:) *KC Komentarz*, vol. II, ed. K. Pietrzykowski, 2015: 155–156.

It should also be mentioned that this concerns legal relationships which have been effectively established, and primarily relationships that were created on the basis of a valid legal act.[263] Otherwise, termination "would be in vain".[264] In addition, the purpose of termination is not – crucially – to override the flawed nature of a legal act. This supports the conclusion that termination is a legal act to which the *ex nihilo nihil fit* principle applies.[265]

In some cases, though, the termination of a continuous obligation may be considered permissible despite the defective nature of the legal act that constitutes its source. However, the basis for applying such a solution must be that the termination of the obligational relationship with the effect *ex nunc* (from now on) does not violate imperative norms. Combining termination with the sanction of defectiveness may, for example, occur on the basis of Article 59 of the CC. It is assumed that the judgement as to the ineffectiveness of a contract ensues only to the extent that the contract makes it impossible to satisfy the plaintiff's claim. The sanction of relative ineffectiveness has both subjective and objective limits.[266] This means that the judgement of ineffectiveness may refer to a part of the contract. With regard to continuous obligations, this opens up the possibility of identifying the ineffective part of the contract, taking into account the time criterion and, as a consequence, applying – to the remainder – the institution of termination.

1.7. The invalidity of termination

1. The fact that termination belongs to the category of legal acts means that it may be affected by the sanction of defectiveness, including invalidity. On the basis of the Polish legal system, this viewpoint is not open to doubt.[267] We are entitled to conclude that invalidity is a typical sanction for a defective unilateral legal act. This is confirmed both by individual legal regulations (see, for example, Article 14 § 2, Article 19, Article 39 § 4 and Article 104 of the CC, Article 37 § 4 of the Family and Guardianship Code), and by the nature of the act itself. The fact that a subject of private law can unilaterally modify a legal relationship justifies the adoption of stricter requirements for the effective performance of a legal act. Invalid termina-

[263] See, e.g. the judgment of the Supreme Court of 17 October 1978, II CR 352/78, OSNC 1979, No. 7–8, item 153; the judgment of the Supreme Court of 17 July 2009, IV CSK 117/09, OSNC–ZD 2010, No. A, item 18.

[264] Similarly H. Oetker, *Das Dauerschuldverhältnis*: 449; see also: 443–444.

[265] Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 508 ff.

[266] See the judgment of the Supreme Court of 10 March 2011, V CSK 284/10, LEX No. 951034; the judgment of the Supreme Court of 7 November 2014, IV CSK 77/14, OSNC 2015, No. 11, item 131; Z. Radwański (in:) *SPP*, vol. 2, 2008: 461.

[267] See, e.g. the judgment of the Constitutional Tribunal of 15 March 2005, K 9/04, OTK–A 2005, No. 3, item 24.

tion does not have legal effects, and as a result the legal relationship continues.[268] The request for invalidity to be established takes place on the basis of Article 189 of the Code of Civil Procedure.[269]

However, this does not mean that invalidity is the only form of defectiveness that applies to termination. The application of the sanction of suspended ineffectiveness may also be admissible.[270] Neither does the application of the sanction of mutability give cause for doubt (Article 88 of the CC). As a rule, this will be a consequence of the application of the provisions on deceit (Article 86 of the CC) or threat (Article 87 of the CC). However, there are doubts as to whether the provisions on error may apply to termination. Since a legally significant error concerns the content of a legal act (Article 84 § 1 of the CC), it is difficult to apply this regulation to the poor content of termination. At the same time, it is difficult to be convinced by the position that the term "an error in the content of a legal act" can encompass both an error as to the content of a legal act and the content of a legal relationship.[271] It contradicts the well-established interpretation of Article 56 of the CC, according to which the term "the content of a legal act" is distinguished from the term "content of a legal relationship".[272] I cannot see grounds for deviating from this interpretation in Article 84 § 1 of the CC.

It would seem, however, that the sanction of relative ineffectiveness is not be applicable. The provision of Article 59 of the CC applies only to contracts, and the regulation of the Pauline action (Article 527 ff. of the CC) refers to legal acts which combine features of disposition and granting of benefit.[273] Termination is not such an act. However, it may be possible to verify this position in the context of special cases of termination. If, by virtue of a legal act, the termination of a continuous obligation for a fixed term is connected with the obligation to pay a lump sum compensation, there would be grounds for applying the provisions on the protection of the creditor in the event of the debtor's insolvency (see Article 527 ff. of the CC and Article 131 of the Act on Bankruptcy and Reorganisation Law). However, this matter requires a separate study.

2. The issue of the invalidity of termination is connected above all with the problem of the legal basis for its implementation.

As was previously assumed, modifying an obligational relationship by way of termination may only take place within the scope of the competence norm. Unlike obligational contracts (Article 353^1 of the CC), the law does not grant the free-

[268] See also T. Liszcz, *Nieważność*: 203.

[269] See, e.g. the judgment of the Supreme Court of 10 June 2011, II CSK 568/10, OSNC–ZD 2012, No. B, item 40.

[270] See A. Pyrzyńska, *Zobowiązanie ciągłe*: 492–493.

[271] This can be considered the dominant view – see, e.g. B. Lewaszkiewicz-Petrykowska (in:) *KC Komentarz*, eds. M. Pyziak-Szafnicka, P. Księżak, 2014: 993 ff.; Z. Radwański (in:) *SPP*, vol. 2, 2008: 399.

[272] This distinction is especially made by Z. Radwański himself (in:) *SPP,* vol. 2, 2008: 224–225.

[273] Similarly M. Pyziak-Szafnicka (in:) *SPP*, vol. 6, 2014: 1635–1636.

dom to arrange obligational relationships by means of a unilateral legal act. This means that a law-shaping act without a legal basis is invalid.[274] This is due to the fact that it is not a conventional act constructed by the legal system. This applies both to cases in which there is no legal basis for termination, and cases in which the grounds for applying the competence norm have not been realized.

A special case in which there is no legal basis is the invalidity of contract provisions from which the right to terminate the contractual relationship is derived (Article 58 § 3 of the CC).[275] The invalidity of termination is a consequence of the invalidity of the clause included in the previously performed legal act. This means that applying the sanction of invalidity to termination requires the prior confirmation of the invalidity of that part of the legal act which is the source of the continuous obligation (modifying this obligation). The invalidity of the termination is, therefore, non-self-executing in nature, being derived from the invalidity of the clause stipulating the right to terminate.

3. The invalidity of termination also takes a self-executing form, unrelated to the legal basis for the termination. In this case, the invalidity of termination is similar to the invalidity of other legal acts. For example, the invalidity of termination may arise from a situation in which the terminating party does not have the required legal capacity, for example when a bankrupt party terminates, which constitutes a legal act concerning property belonging to the bankruptcy estate (Article 77 (1) of the Act on Bankruptcy and Reorganisation Law in conjunction with Article 44 of the CC); or when a declaration of intent made in a state which precludes a conscious decision, or freely made decision, and conscious declaration of intent (Article 82 of the CC); or when an ostensible declaration of intent made to another party with its consent (Article 83 § 1 of the CC).

4. Article 58 of the CC may also constitute the basis for the invalidity of termination. This provision refers to legal acts in general, so its scope also includes unilateral legal acts. Nevertheless, both in the statements of the doctrine[276] and the case-law,[277] the issue of the invalidity of a unilateral legal act arises only marginally. Neither does this provision – by way of Article 300 of the Labour Code – play a significant role in unilateral legal actions in the field of labour law. With regard

[274] A similar position is expressed by P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 671; R. Trzaskowski (in:) *KC Komentarz. Część ogólna*, ed. J. Gudowski, 2014: 461.

[275] See in particular the case-law relating to contractual clauses which stipulate the possibility of terminating a continuous obligation with retroactive effect. It is assumed that this provision is invalid, consequently the termination made on its basis is also invalid (Article 58 § 1 of the CC) – see, e.g. the judgment of the Supreme Court of 8 October 2004, V CK 670/03, OSNC 2005, No. 9, item 162; the judgment of the Supreme Court of 17 March 2010, II CSK 454/09, OSNC 2010, No. 10, item 142.

[276] Among the few authors discussing this issue, see M. Gutowski, *Nieważność*: 200–202, 231 ff.; R. Trzaskowski (in:) *KC Komentarz. Część ogólna*, ed. J. Gudowski, 2014: 460–461.

[277] Cf., e.g. the judgment of the Łódź Court of Appeal of 22 April 1992, I ACr 132/92, LEX No. 5552; the judgment of the Supreme Court of 6 March 2002, V CKN 852/00, LEX No. 56024.

to the termination of an employment contract by way one of the parties' notifying (see in particular Articles 32 ff. of the Labour Code), it is widely accepted that unilateral legal acts of an employer are only revoked by way of an appropriate pleading. There are no grounds for considering them invalid on the basis of Article 58 of the CC.[278]

Lack of wider interest in this area seems justified. The poor content of termination entails that it is possible to indicate only a few situations in which the contradiction between the content of the termination and the law leads to the invalidity of this legal act (Article 58 § 1 of the CC). The basic example is termination subject to conditions, contrary to the nature of this legal act (Article 89 in conjunction with Article 58 § 1 of the CC). Due to the non-self-executing nature of termination, it should be assumed that determining whether the properties of termination allow this act to be executed should also take into account the properties of the legal act that creates the obligational relationship in question.

In the light of Article 58 § 1 of the CC, the invalidity of termination should not be ruled out due to its being executed in order to circumvent a law. However, it is not clear how, under this provision, the phrase "a legal act aimed at circumventing an act" should be understood. The doctrine really only sheds light on this with regard to the purpose of the contract,[279] assuming that this purpose should be common to both the party making the declaration and the addressees, or at least should involve the intent of one party and the awareness of the other.[280] However, in practice the acceptance of such an approach leads to a significant reduction in the application of the institution of circumventing the law to unilateral legal acts.

It is not easy to take a position on this matter. On the one hand, the function of Article 58 of the CC should be borne in mind, as it consists in refusing to recognize the effectiveness of a legal act made in violation of the principles which are fundamental to the legal system. On the other hand, the issue of the security of trading cannot be overlooked, as this covers the trust that the addressee of termination extends to a declaration of intent. If this party does not know and, with due diligence, is not able to know that the termination is made to circumvent the law, there are no grounds for accepting the sanction of invalidity. Taking into account both these aspects seems to support the position that, in the case of a unilateral legal act as defined in Article 58 § 1 of the CC, the term "a legal act to circumvent the

[278] See, e.g. the judgment of the Supreme Court of 7 March 1997, I PKN 33/97, OSNP 1997, No. 22, item 431; the judgment of the Supreme Court of 17 November 1997, I PKN 351/97, OSNP 1998, No. 17, item 501; T. Liszcz, *Nieważność*: 220 ff.

[279] As, e.g. M. Gutowski, *Nieważność*: 203 ff.; R. Trzaskowski, *Skutki sprzeczności umów*: 207 ff.; W. Wąsowicz, *Obejście*: 69 ff. This goal is defined as the state of affairs to be implemented as a result of the legal act – e.g. Z. Radwański (in:) *SPP*, vol. 2, 2008: 76.

[280] This view dominates when defining the purpose of the contract – see, e.g. the judgment of the Supreme Court of 26 March 2002, III CKN 801/00, OSNC 2003, No. 3, item 41.

law" should be understood in the same way as in the case of a contract. The issue is then whether the purpose of the terminating party is known to the addressee of the declaration, or at least whether there is a purpose that should be known to him or her (for example, in connection with enforcement against receivables).[281]

On the basis of Article 58 of the CC, the invalidity of termination may also result from the act being contrary to the principles of community life, both because of its content and purpose (Article 58 § 2 of the CC). It would seem that in this respect Article 58 of the CC has the greatest significance for termination. The poor content of termination seems to support the conclusion that, in a typical case, its invalidity is associated with the execution of a legal act the purpose of which is contrary to the principles of community life. At the same time, it should be assumed that in such situations the purpose of the legal act might only be known to the terminating party. This is supported by the function of Article 58 of the CC.

Although this construct is rarely applied in case-law,[282] it is particularly important for the institution of free termination (for example, Article 365^1 of the CC). Appeal to invalidity on the basis of Article 58 § 2 of the CC is in this case the basic means for protecting the addressee. However, invalidity should also not be disregarded in the case of termination due to the occurrence of specific causes, at least due to limitations in the application of Article 5 of the CC. Every legal act is subject to control from the point of view of compliance with the principles of community life.

On the basis of the Polish legal system, the assessment of termination may alternatively be carried out by taking into account the regulations on the fulfilment of the obligation (Article 354 of the CC). Since the purpose of termination is to end a legal relationship, i.e. end its performance, the termination is also – to some extent – subject to assessment through consideration of the regulations concerning fulfilment of the obligation. Although this position departs from the fixed interpretation of the term "fulfilment of obligation",[283] it allows the specificity of subsequent legal acts to be taken into account.

---

[281] Similarly, the recent Supreme Court judgment of 8 November, III CSK 36/16, LEX No. 2153695.

[282] See, e.g. the judgment of the Supreme Court of 6 March 2002, V CKN 852/00, LEX No. 56024, in which it was assumed that the termination of a lease agreement contrary to the principles of community life is invalid (Article 58 § 2 of the CC); the judgment of the Supreme Court of 8 November 2016, III CSK 36/16, LEX No. 2153695, in which it was assumed that the termination of the lease agreement contrary to the principles of community life is not valid, according to which the termination of the obligation may constitute a manifestation of abuse of a dominant position within the meaning of Article 9 of the Protection of Competition and Consumers Act. The judicature, however, more willingly applies Article 5 of the CC.

[283] See, e.g. P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 616. Sometimes, however, when evaluating the termination, the application of Article 354 of the CC is not ruled out – e.g. the judgment of the Supreme Court of 24 September 2015, V CSK 698/14, LEX No. 1805901.

5. At the end of these discussions, the question arises of whether Article 58 § 3 of the CC can be applied to termination (see also Article 9 (3) of the Protection of Competition and Consumers Act). Although the wording of the above provision refers to all legal acts, there are doubts concerning the extent to which unilateral legal acts, in particular law-shaping acts, are subject to the institution of the invalidity of part of a legal act. The basic premise for applying Article 58 § 3 of the CC is for the remaining (valid) part of the legal act to meet the requirements accepted in the legal act.[284] At the same time, due to the poor content of the declaration of intent to terminate, it is questionable whether the valid and invalid parts of the legal act can be separated in such a way that this valid part meets the minimum requirements for termination.

It should be assumed that Article 58 § 3 of the CC only has a narrow range of application to termination. The basic content of the declaration of intent to terminate can be reduced to expressing the intention that the specified obligational relationship should expire with future effect. It is minimal content, which is at the same time necessary, not being subject to division according to any criteria. If this is also the only content, the question of the invalidity of a part of the legal act does not arise at all. A similar position should be taken in the case of termination executed under a condition which is contrary to the nature of a legal act (Article 89 of the CC). The interference of the condition in the content of the legal act is so deep that there are no grounds for applying Article 58 § 3 of the CC, since the whole legal act is invalid.

However, application of Article 58 § 3 of the CC can be considered in situations in which the terminating party seeks to modify a legal relationship in a way that violates the competence norm, indicating in particular a different termination notice period.[285] The rule is that in such a case the effect of termination will occur in accordance with the content of the competence standard. Application of Article 58 § 3 of the CC can, however, support the conclusion that the termination is invalid in its entirety. Such situations are exceptional, however.

1.8. Termination as an abuse of right

1. Termination is a form of entitlement. It is therefore a distinguished element of subjective law, in this case law of a relative type. As a consequence, exercising the right to termination may be considered as belonging to the category of exercising subjective rights, and is therefore subject to assessment on the basis of Article 5 of the CC.[286] In particular, it is an established view that the allegation of abuse

[284] See P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 140.

[285] See also P. Machnikowski, *Uprawnienia*: 274; F. Błahuta (in:) *KC Komentarz*, vol. 2, eds. Z. Resich et al., 1972: 1468.

[286] See in particular T. Justyński, *Nadużycie*: 74–75, 78 ff.

of right may be raised in connection with the termination of a loan agreement. If this allegation is effective, it nullifies the effects of the termination.[287]

Indeed, there are no grounds for excluding legal acts from the scope of Article 5 of the CC. What is more, it seems that unilateral legal acts carried out within an existing legal relationship can be a good example of when the institution of abuse of right can be applied. In this case, both the prerequisite of the existence of the right is fulfilled (the right to modify is granted by virtue of a legal act or law), and the prerequisite of the exercise of a right (termination of the obligational relationship).

However, the above approach is problematic. It is widely held that Article 5 of the CC does not apply in the case invalid legal acts.[288] Although the arguments invoked for its justification are not valid for law-shaping acts,[289] this view should be divided. The manner in which the sanction of invalidity works, in particular its definitive nature and the *erga omnes* effect, entails that this sanction precedes application of Article 5 of the CC. Thus, appealing to the abuse of right in termination may only refer to situations in which the termination was made in a valid manner, including in a manner consistent with the principles of community life.

First of all, a legal act is subject to assessment at the stage of its implementation, including taking into account the principles of community life (Article 58 § 1 and 2 of the CC). Only when this assessment is positive is it then possible to verify whether exercising the subjective right created by this act does not violate Article 5 of the CC. An invalid legal act is no longer analyzed in terms of exercising the right. This in turn casts doubt on the possibility of applying the institution of abuse of right to termination, due to it being contrary to the principles of community life.[290]

2. However, application of Article 5 of the CC is not ruled out in situations where termination is contrary to the socio-economic purpose of this right. This is due to the fact that this contradiction does not lead to the invalidation of the termination under Article 58 § 2 of the CC, which opens the possibility of assessment being made at the level of exercising the right. An example of this may be a situation in which a party, though entitled to terminate due to a breach of obligation by the other party, exercises this right a long time after the emergence of circumstances which entitle termination.

A separate issue is the consequences of applying Article 5 of the CC to termination. From a broader perspective, this is connected with the interpretation of the

[287] See, e.g. the judgment of the Supreme Court of 20 July 1987, IV CR 195/87, OSNC 1989, No. 1, item 16; the judgment of the Supreme Court of 23 May 2013, IV CSK 679/12, OSP 2014, No. 11, item 104.

[288] See, e.g. the judgment of the Supreme Court of 22 September 1987, III CRN 265/87, OSNC 1989, No. 5, item 80; T. Justyński, *Nadużycie*: 157 ff.

[289] It is assumed that there are no premises in the form of "exercisng your right"– see, e.g. T. Justyński, *Nadużycie*: 159; M. Pyziak-Szafnicka (in:) *SPP*, vol. 1, 2012: 915–916. However, modifying an existing legal relationship through a unilateral legal act is precisely exercising your right.

[290] See also K. Pietrzykowski (in:) *KC Komentarz*, vol. I, ed. K. Pietrzykowski, 2015: 54.

phrase "Acting or refraining from acting by an entitled person is not deemed an exercise of that right and is not protected" in situations where the act considered an abuse of right consists in executing a legal act. Since legal acts attain legal significance and are consequently legally binding on the basis of legal norms,[291] the statement that given conduct "is not deemed an exercise of that right and is not protected" supports the conclusion that the legal act is invalid.

1.9. Waiving the right to terminate

1. On the basis of general regulations, the possibility of waiving the right to terminate a continuous obligational relationship should not be ruled out. Individual statutory regulations confirm that entitlements or pleas of an ancillary nature can be waived (see, for example, Article 101 § 1, Article 117 § 2, Article 746 § 3 and Article 758^2 of the CC), and even elements of specific legal constructs can be subject to waiver (Article 373 of the CC).

At the outset, two situations should be distinguished: waiving the right to terminate a given relationship in general, and the waiving of that right in relation to a specific situation, *ex post*, after the reasons for termination have emerged.[292] At least in the light of Article 117 § 2 of the CC it can be concluded that waiving the right to terminate in relation to a specific situation (*ex post*) involves a lower risk for the terminating party than waiving the right to terminate in general, which justifies its use in a wider scope. This is clearly confirmed by Article 746 § 3 of the CC, which prohibits waiving the right to terminate "in advance".

2. Waiving the right to terminate may in no case violate the principle of limited duration of an obligational relationship, or other imperative norms and semi-imperative norms. At the same time, the non-self-executing nature of the right to terminate requires us to accept that the admissibility and scope of a contract is determined by the content of the relationship being modified. In the determination of this content, general norms should be taken into account (see, for example, Article 58 § 2, Article 353^1, Article 365^1 and Article 385^1 in conjunction with Article 385^3 (14) of the CC), along with the norms pertaining to specific types of contracts (see, for example, Article 746 § 3, Article 764^1 § 1, Article 716 of the CC).

Taking into account – in the model approach – the differences between a contractual relationship concluded for a fixed term and one concluded for non-fixed term, it should be stated that in relation to latter, waiving the right to terminate is subject to significant restriction. Due to the mandatory nature of the norm expressed in Article 365^1 of the CC, a waiver with an unlimited time range should be

[291] Similarly Z. Radwański (in:) *SPP*, vol. 2, 2008: 5–6.
[292] Similarly H. Oetker, *Das Dauerschuldverhältnis*: 460.

considered unacceptable.[293] However, a temporary waiver is also questionable. If the declaration to waive is made by both parties, it is first of all justified to determine (Article 65 of the CC) whether during the period covered by the waiver the obligational relationship may be qualified as being concluded for a non-fixed term. If, however, the declaration to waive is made by only one party, it is necessary to determine whether this shapes the obligational relationship in such a way that for one of the parties it is a relationship for a non-fixed term, while for the other party it is for a fixed term. At least on the basis of the norm expressed in Article 365^1 of the CC, this construct should be considered unacceptable. However, if the waiver does not shape the relationship in such a way, this would seem to support the conclusion that only a short-term waiver is allowed, justified by the content of the legal relationship(s) between the parties.

3. Assessing the effectiveness of waiving the right to terminate a continuous obligation may depend on the conditions under which the waiver is declared and on whether it is effected by only one party, or by all the parties. This, in turn, is connected with the extent to which in the context of a given obligational relationship it is permissible to shape the right to terminate differently for each of the parties. In this respect, the considerations regarding the differentiation of the parties with regard to termination remain valid. It should be recalled that the function of the right to terminate is derived from the basic system of rights and obligations. This means that the right to terminate should reflect, and not modify, the distribution of risks adopted in a given contractual relationship.

2. The function of Article 365^1 of the CC

1. According to Article 365^1 of the CC: "A continuous obligation unlimited in time expires upon being terminated by debtor or creditor with observance of contractual, statutory or customary notice periods, and, where there are no such periods, immediately after being terminated.".

This provision is almost an exact repetition of Article 272 of the Code of Obligations.[294] It was added to the CC as of July 10, 2001 on the basis of the Act on the Protection of Tenants' Rights, Municipal Housing Reserves and on the Change of CC as of 21 June 2001.[295] According to Article 27 (1) of this act, the specified regulation also applies to legal relationships created prior to the date of its entry into force.

However, it should also be noted that while the CC does not explicitly express the general right to freely terminate an unlimited obligational relationship

[293] See, e.g. J. Panowicz-Lipska (in:) *SPP*, vol. 8, 2011: 62.

[294] This provision was in force between 1 July 1934 and 31 December 1964.

[295] Dziennik Ustaw No. 71, item 733.

of a continuous nature, in doctrine and case-law it was assumed that this norm would be applied by *analogia legis*, through appeal to the principle of freedom.[296] The addition of Article 365[1] to the CC should therefore be treated as a normative change, but only as the basis instructing to treat this norm as binding.

2. The norm expressed in Article 365[1] of the CC is absolutely binding.[297] It can be assumed that this reflects the imperative nature of the norm expressing the principle of the limited duration of an obligational relationship,[298] and its primacy over the norm reconstructed on the basis of Article 365[1] of the CC. This character of the norm means that the parties do not have the necessary competence to rule out the right to terminate provided for in Article 365[1] of the CC.

A separate issue is whether the right to freely terminate a continuous obligation unlimited in time granted in Article 365[1] of the CC may be limited by way of a legal act. In the light of conclusions drawn earlier in this work, this issue may be connected with determining the extent to which the parties may co-regulate the statutory grounds for termination by way of a legal act (a standard contract).

Recently, in the case-law[299] and in the doctrine[300] the view has been expressed that the rights granted under Article 365[1] of the CC may be limited by means of a legal act. This view gives cause for serious doubt. The difference between the construct of a non-fixed term and the construct of a fixed term comes down to the difference in the basic (primary) expiration mechanism of the continuous obligation. Accepting the position that allows the parties may limit the right to freely terminate which is provided for in Article 365[1] of the CC in fact leads to the blurring of this difference. The obligational relationship still belongs to the category of continuous obligations concluded for a non-fixed term, since the expiry mechanism resulting from the occurrence of a designated legal event does not apply to it, while the basic (primary) expiration mechanism – free termination – is weakened. Thus, it leads to the creation of a vague legal construct, which is conducive to violation of contractual equitability and threatens trading security.

Proponents of the view that the rights regulated by Article 365[1] of the CC may be limited on the basis of a legal act refer to the autonomy of the will of the par-

[296] See in particular Z. Radwański, *Uwagi*: 256–257. Similarly T. Dybowski (in:) *System Prawa Cywilnego*, vol. III, part 1, 1981: 107; A. Ohanowicz (in:) A. Ohanowicz, J. Górski, *Zarys prawa zobowiązań*: 224; the judgment of the Supreme Court of 6 April 2000, II CKN 264/00, OSNC 2000, No. 10, item 186; the judgment of the Supreme Court of 7 December 2000, II CKN 351/00, OSNC 2001, No. 6, item 95.

[297] See, e.g. A. Olejniczak (in:) *KC Komentarz*, vol. III, ed. A. Kidyba, 2014: 132–133; P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 673; G. Tracz, *Sposoby*: 121–122, 224–225 and, in principle – the judgment of the Supreme Court of 13 June 2013, V CSK 391/12, OSNC 2014, No. 2, item 22.

[298] See A. Pyrzyńska, *Zobowiązanie ciągłe*: 318–319.

[299] See the judgment of the Supreme Court of 13 June 2013, V CSK 391/12, OSNC 2014, No. 2, item 22.

[300] See, e.g. M. Safjan (in:) *KC Komentarz*, vol. I, ed. K. Pietrzykowski, 2015: 1192–1193; R. Strugała, *Umowne*: 73 ff.

ties and the principle of freedom of contract (Article 353[1] of the CC). However, we cannot overlook the fact that, in a substantial number of cases, the parties can stabilize their legal situation by adopting the construct of a fixed term. At the same time – within an appropriate subcategory of continuous obligations – this structure can be made more flexible. Similarly, in most cases, the parties may choose the construct of a non-fixed term, specifying the length of the termination notice period in an appropriate manner. In each of these situations the basic (primary) mechanism of expiration is retained, so the effects of its possible deformation are easier to remove.

The above arguments support the view that the competence norm, the basis of which lies in Article 365[1] of the CC, entitles the parties to terminate freely. The restriction of this right can only take place by varying the length of the termination notice period to the extent permitted.

3. The right to freely terminate provided for in Article 365[1] of the CC refers to "continuous obligation unlimited in time". This phrase requires further explanation.

The wording of the provision indicates that it applies to obligational relationships of a continuous nature. However, the meaning of the term "unlimited" [*bezterminowy*] is not straightforward. In Book Three of the CC, this adjective is only used once outside of Article 365[1], and then in reference to a contract which does not create a continuous obligation.[301] On the other hand, when regulating individual obligational relationships of a continuous nature, the legislator uses the term "non-fixed term" [*czas nieoznaczony*] or "fixed term" [*czas oznaczony*].[302] The adjective "unlimited" and "limited" is a term used in legal language in connection with the issue of stipulating the deadline for making performance (Article 455 of the CC).[303] This supports the conclusion that the phrases "unlimited obligation" and "obligation for a non-fixed term" are semantically identical. *De lege ferenda* (with a view to the future law) however, it is recommended that the legislator use the phrase "continuous obligation for a non-fixed term".

The provision of Article 365[1] of the CC thus applies to continuous obligational relationships concluded for a non-fixed term. In the light of previous considerations, this structure – like the construction of a fixed term – is connected with the method of directly determining the duration of a continuous obligation. This also applies if the method is used together with the method of indirect determination. The provision does not apply to continuous obligations the duration of which is determined exclusively in an indirect manner.

[301] See Article 878 § 2 of the CC regarding suretyship for a future debt. However, if the principal relationship is a continuous obligation and the surety is obliged to perform the service due to the default of the debtor, the suretyship may also take the form of a continuous obligation. However, for such suretyship Article 365[1] of the CC does not apply because its duration is determined indirectly.

[302] Cf., e.g. Article 659 § 1, Article 693 § 1, Article 710, 725, 764, 844 § 2 of the CC.

[303] See, e.g. W. Popiołek (in:) *KC Komentarz*, vol. II, ed. K. Pietrzykowski, 2015: 18–19; the resolution of the Supreme Court of 26 November 2009, III CZP 102/09, OSNC 2010, No. 5, item 75.

4. The provision of Article 365[1] of the CC regulates the basic (primary) expiration mechanism of a continuous obligation concluded for non-fixed term. It applies to the full extent to the first subcategory of continuous obligations concluded for a non-fixed term, that is, to obligations wherein each party has the right to freely terminate.[304] Therefore, if the obligational relationship belongs to this subcategory, the right to terminate it should be deduced from Article 365[1], without the need to reach for analogy.

In addition, within a subjectively limited scope Article 365[1] of the CC is applicable to the second subcategory of continuous obligations concluded for non-fixed term, that is, to obligations in which the right to terminate is limited for one of the parties.

The sources of obligational relationships falling within the scope of application of Article 365[1] of the CC are primarily contractual obligations. However, the application of this provision to the obligational relationships arising from unilateral legal acts is not ruled out, if they are the source of an unlimited obligational relationship of a continuous nature belonging to the first subcategory of continuous obligations concluded for a non-fixed term.

A separate issue is whether Article 365[1] of the CC may be applicable to obligational relationships arising from other legal acts. The resolution of this issue depends on whether there are situations in which the source of an unlimited continuous obligation may be a legal act other than a contractual obligation or a unilateral legal act. Although it is possible to defend the position that the source of a continuous obligational relationship may be, for example, a commercial company agreement, including a contract specified by a resolution of the company's governing body, there are no grounds for accepting that a party has the right to freely terminate the obligation. This relationship is dependent and auxiliary in relation to the primary relationship (corporate relationship) (see Chapter II § 3. 3.3. Subpoint 3), therefore its duration is determined indirectly. However, if the time that this relationship becomes binding is simultaneously determined in a direct manner by means of the construct of a non-fixed term, the application of Article 365[1] of the CC should not be ruled out.

5. The regulation of Article 365[1] of the CC does not, as a rule, apply to continuous obligations which result from law (see, however, Chapter II § 2. 2.1. Subpoint 4). There are at least two arguments that support this position. First, the duration of an obligational relationship concluded *ex lege* is determined by the indirect method. Secondly, recognizing the admissibility of terminating an obligational relationship resulting from legislation by means of a unilateral legal act, which is effected in

[304] This view can be regarded as established in Polish doctrine and case-law – see, e.g. P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 673; A. Olejniczak (in:) *KC Komentarz*, vol. III, ed. A. Kidyba, 2014: 132; M. Safjan (in:) *KC Komentarz*, vol. I, ed. K. Pietrzykowski, 2015: 1192; the judgment of the Supreme Court of 13 June 2013, V CSK 391/12, OSNC 2014, No. 2, item 22. A somewhat different view is expressed by G. Tracz, *Sposoby*: 120 ff.

principle against the will of the parties, would lead to asymmetry in the sources of rights and obligations. The obligation to perform imposed by law would be subject to repeal by way of a legal act, and be of a unilateral nature. There are no grounds for interpreting such a competence norm on the basis of Article 365^1 of the CC.

At the same time, it should be assumed that – in part or in full (Article 58 of the CC) – an agreement establishing or modifying a continuous obligational relationship established *ex lege*, which would grant a party the right to terminate an agreement, both freely and due to specific reasons, would be invalid. While in some cases the parties or the court may determine the duration of the obligational relationship established *ex lege*,[305] there are no grounds for assuming that they can shape this relationship as being concluded for a non-fixed term.

6. The role played by Article 365^1 of the CC justifies consideration of whether this provision can be the basis for conclusions by *analogia legis*. If it is accepted that the right to terminate is a manifestation of the general right to self-determination,[306] it is possible to indicate the values that would support the search for such an analogy.[307]

In the light of previous considerations, Article 746 § 3 of the CC may be considered as the basis for such an analogy (see Chapter III § 1. 1.4. Subpoint 4). Although this provision combines the right to terminate (a mandate) with the prerequisite of good cause, it does not seem that the effects of its application by *analogia legis* would lead to results significantly different from the application of Article 365^1 of the CC, according to the same conclusions. Excessive binding of the contractual relationship in the temporal aspect leads to an infringement of the principle of autonomy of will, which is fundamental for civil law, and of the principle of freedom underlying it. This excessive binding may be an important reason for terminating an obligational relationship which derives from a legal act. An advantage of conclusions based on Article 746 § 3 of the CC is the fact that this provision also applies to obligational relationships which only involve one-off performance (not being successive performance). A certain limitation for *analogia legis* is, however, the specific features of the mandate relationship.

It seems, however, that in many cases Article 365^1 and 746 § 3 of the CC may together form the basis for conclusions by *analogia legis*.[308] Although these pro-

[305] This applies at least to annuity relationships established by law (argument from Article 907 § 2 of the CC). It should be noted, however, that determining the duration of an annuity resulting from the law cannot be equated with using the construct of a fixed term. The duration of a statutory annuity relationship depends on the actual state of affairs – see Article 907 § 2 of the CC and the resolution of the Supreme Court of 12 June 1968, III PZP 27/68, OSNC 1969, No. 2, item 24.

[306] See. H. Oetker, *Das Dauerschuldverhältnis*: 272 ff. The author formulates this in reference to ordinary termination, which he distinguishes.

[307] Cf. J. Nowacki, *Analogia legis*: 163 ff.

[308] It seems reasonable to state that in a large number of cases, there will be no competing analogies between Article 365^1 and Article 746 § 3 of the CC – in this respect, see J. Nowacki, *Analogia legis*: 176 ff.

visions regulate different situations, each of them seems to be based on the same principle, which gives parties the unilateral right to free themselves from an obligational bond if it leads to the parties being excessively bound, including in terms of time. It is a question of interpreting in which cases this principle may apply – other than an unlimited continuous obligation and a contract of mandate (a legal relationship to which the rules of mandate apply accordingly).

According to the stance adopted in this study, Article 365^1 of the CC grants a party the right to freely terminate an obligational relationship of a continuous nature resulting from a legal act (or concluded *ex lege*, but after the conclusion of a legal relationship displaying all or almost all of the features of the relationship resulting from a legal act), concluded a non-fixed term, and the expiry of which is not subject to special regulation. I assume that the basis for conclusions by *analogia legis* can only be a norm with such content.

Acceptance of the position according to which the problem of time limitations concerns basically every civil law relationship supports the conclusion that Article 365^1 of the CC – taking into account the principle of freedom which is fundamental for the legal system (Article 31 (1) and (2) of the Polish Constitution) – may provide a useful basis for conclusions by *analogia legis* in relation to legal relations, the duration of which leads to an excessive limitation of the autonomy of the will of the parties.

First of all, this makes it possible to assume that Article 365^1 of the CC may be applied by *analogia legis* to obligational relationships resulting from legal acts which are not continuous obligational relationships, the duration of which is connected with the time element and has been shaped in a manner similar to the duration of a continuous obligation for a non-fixed term. If, on the other hand, the formation of the legal relationship is similar to the construct of a fixed term, the application of Article 365^1 of the CC by analogy must be preceded by a determination of the defectiveness of the legal act, in so far as it leads to an excessive binding of the obligation in terms of time. An example of an obligational relationship which falls within this category is a relationship where there is a willingness to make performance that is not a continuous obligation (for example a surety, a warranty relationship).

The provision of Article 365^1 of the CC may subsequently apply by *analogia legis* to a relative relationship that is not an obligational relationship. The principle of limited duration also applies to this category of relationships. This means, in particular, that an unlimited contractual right of pre-emption and an unlimited guarantee may be terminated on the basis of Article 365^1, applied by *analogia legis*.

Since the principle of freedom forms the basis of Article 365^1 of the CC, respect for this principle may justify the application of Article 365^1 also to civil law relationships resulting from other legal acts which have the characteristics specified

above. An example is the ruling of the Supreme Court, in which, applying Article 365^1 of the CC by *analogia legis*, *inter alia*, it was assumed that the articles of association of a water company may not limit a member's right to withdraw from the company if the membership in the company is voluntary.[309]

However, in any case, before granting a party to a civil law relationship resulting from a legal act the right to terminate a contract on the basis of Article 365^1 of the CC by analogy, the function of the relationship needs to be considered. This involves, in particular, determining whether the content of the relationship is a subjective right with special protection in terms of time. It is also necessary to determine the extent to which the duration of the legal relationship has already satisfied – or could satisfy – the legal interest underlying it. The right to terminate may be granted only from the moment when that interest is satisfied or can be satisfied in accordance with the values respected by the legal system. The legitimate interest of the party concerned may also be safeguarded by the appropriate organisation of a termination notice period.

However, I cannot find any grounds for the application of Article 365^1 of the CC by *analogia legis* to obligational relationships resulting from law (except for obligations which, once established, show all or almost all the features of relationships resulting from a legal act). If there are special circumstances justifying the early termination of a specific contractual relationship of this type, the grounds for the analogy should be sought in provisions which authorize the court to shape and determine the duration of the contractual relationship. Article 907 § 2^{310} and Article $357^{1\,311}$ of the CC may be singled out in this regard. These provisions can be applied in combination. In any case, however, the application of *analogia legis* must take into account the function of the given relationship, and the fact that it was established independently of the will of the parties.

A separate issue is the application of Article 365^1 of the CC in situations where the determination of the duration of the continuous obligation was made in violation of statutory regulations. An action aimed at maintaining the validity of a legal act may lead to the conclusion that the obligational relationship – at least for a certain moment – is a relationship subject to free termination in accordance with Article 365^1 of the CC. Therefore, this regulation provides one of the basic instruments enabling the maintenance of a defective legal act creating a continuous obligation.[312]

---

[309] See the resolution of the Supreme Court of 29 June 2010, III CZP 46/10, OSNC 2011, No. 2, item 18. See also W. Chrzanowski, *Zarys prawa korporacji*: 37.

[310] See A. Pyrzyńska (in:) *KC Komentarz*, vol. II, ed. M. Gutowski, 2016: 1331–1332.

[311] The application of Article 357^1 of the CC by analogy to non-contractual relations, however, it is in principle questionable – see, e.g. P. Machnikowski (in:) *KC Komentarz*, eds. E. Gniewek, P. Machnikowski, 2016: 623–624, along with the literature indicated therein.

[312] Cf. A. Pyrzyńska, *Zobowiązanie ciągłe*: 543 ff.

BIBLIOGRAPHY

1. Ajdukiewicz K., *Język i poznanie*, Tom II, Wybór pism z lat 1945–1963, Warsaw 1985
2. Barta J., Markiewicz R., *Wokół prawa do wizerunku*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej 2002, No. 80
3. Barta J., Markiewicz R., *Oprogramowanie open source w świetle prawa. Między własnością a wolnością*, Cracow 2005
4. Bator A., *Kompetencja w prawie i prawoznawstwie*, Wroclaw 2004
5. Brol J., *Umowa leasingu*, Warsaw 2010
6. Bucior D., *Wypowiedzenie umowy agencyjnej*, Lublin 2010
7. Cherpillod I., *La fin des contrats de durée*, Lausanne 1988
8. Chojnicka K., Olszewski H., *Historia doktryn politycznych i prawnych*, Poznań 2004
9. Chrzanowski W., *Zarys prawa korporacji. Część ogólna*, Warsaw 1997
10. Delahaye Th., *Le facteur temps dans le droit des obligations*. Tome 1 – *La temporalité du contrat*, Bruxelle 2013
11. Domański G., *Umowa ramowa (na tle prawa niektórych państw EWG i Polski)*, Warsaw 1989
12. Domański L., *Instytucje Kodeksu zobowiązań. Komentarz teoretyczno-praktyczny, Część ogólna*, Warsaw 1936
13. Drozd E., *Przeniesienie własności nieruchomości*, Warsaw 1974
14. Drozd E., *Umowa zobowiązująca jako podstawa prawna dla umów z zakresu prawa rzeczowego* (in:) Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana, eds. L. Ogiegło, W. Popiołek, M. Szpunar, Cracow 2005
15. Encinas de Munagorri R., *L'acte unilateral dans les rapports contractuels*, Paris 1996
16. Frąckowiak J., *Handlowe czynności kreujące. Zagadnienia wybrane* (in:) Zaciąganie i wykonywanie zobowiązań. Materiały III Ogólnopolskiego Zjazdu Cywilistów (Wrocław 25–27.9.2008), eds. E. Gniewek, K. Górska, P. Machnikowski, Warsaw 2010
17. Ghestin J., Billiau M., *Traité de droit civil, Les obligations, Les effets du contrat*, Paris 1992
18. Gutowski M., *Nieważność czynności prawnej*, Warsaw 2012

19. Jickeli J., *Der langfristige Vertrag: Eine rechtswissenschaftliche Untersuchung auf institutionen-ökonomischer Grundlage*, Baden-Baden 1996
20. Justyński T., *Nadużycie prawa w polskim prawie cywilnym*, Cracow 2000
21. Kędzierska-Cieślak A., *Komis (zagadnienia cywilnoprawne)*, Warsaw 1973
22. Klein A., *Elementy stosunku prawnego prawa rzeczowego*, Wroclaw 1976
23. Klein A., *Wykonanie umowy i odpowiedzialność* (in:) Instytucje prawne w gospodarce narodowej, ed. L. Bar, Wroclaw-Warsaw 1981
24. Klein A., *Problem jednostronnego ukształtowania czasu trwania zobowiązaniowego stosunku prawnego o charakterze ciągłym* (in:) Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa ofiarowana Profesorowi Józefowi Skąpskiemu, eds. A. Mączyński, M. Pazdan, A. Szpunar, Cracow 1994
25. Klein A., *Elementy zobowiązaniowego stosunku prawnego*, Wroclaw 2005
26. *Kodeks cywilny. Komentarz*, vol. 1, Księga pierwsza i druga, eds. Z. Resich, J. Ignatowicz, J. Pietrzykowski, J.I. Bielski, Warsaw 1972
27. *Kodeks cywilny. Komentarz*, vol. 2, Księga trzecia – zobowiązania, eds. Z. Resich, J. Ignatowicz, J. Pietrzykowski, J.I. Bielski, Warsaw 1972
28. *Kodeks cywilny. Komentarz. Część ogólna*, eds. M. Pyziak-Szafnicka, P. Księżak, Warsaw 2014
29. *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, Warsaw 2016; 2017
30. *Kodeks cywilny. Komentarz. Część ogólna*, ed. J. Gudowski, Warsaw 2014
31. *Kodeks cywilny. Komentarz. Zobowiązania*, vol. III, part 2, ed. J. Gudowski, Warsaw 2013
32. *Kodeks cywilny. Komentarz*, vol. II. Art. 450–1088, ed. M. Gutowski, Warsaw 2016
33. *Kodeks cywilny. Komentarz*, vol. I, Przepisy wprowadzające. Część ogólna, Własności i inne prawa rzeczowe, ed. K. Osajda, Warsaw 2013
34. *Kodeks cywilny. Komentarz*, vol. II, Zobowiązania, ed. K. Osajda, Warsaw 2013
35. *Kodeks cywilny. Komentarz*, vol. I. Część ogólna, ed. A. Kidyba, Warsaw 2012
36. *Kodeks cywilny. Komentarz*, vol. III. Zobowiązania. Część ogólna, ed. A. Kidyba, Warsaw 2014
37. *Kodeks cywilny Komentarz*, vol. I. Art. 1– 449[10], ed. K. Pietrzykowski, Warsaw 2015
38. *Kodeks cywilny Komentarz*, vol. II. Art. 450–1088, ed. K. Pietrzykowski, Warsaw 2015
39. *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, Vierter Band, zweiter Halbband, §§ 1045–1089, herausgegeben von H. Klang, F. Gschnitzer, Wien 1978
40. Kopaczyńska-Pieczniak K., *Ustanie członkostwa w spółce z ograniczoną odpowiedzialnością*, Cracow 2002
41. Kordela M., *Zasady prawa. Studium teoretycznoprawne*, Poznań 2012
42. Krajewski M., *Umowa ubezpieczenia. Art. 805–834 KC. Komentarz*, Warsaw 2016
43. Kubas A., *Rozszerzona skuteczność wierzytelności*, Studia Cywilistyczne 1969, vol. XIII–XIV
44. Kubas A., *Skutki wpisu licencji do rejestru patentowego*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej 1973, No. 1

45. Lemkowski M., *Odsetki cywilnoprawne*, Warsaw 2007
46. Leszczyński L., *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Cracow 2004
47. Liszcz T., *Nieważność czynności prawnych w umownych stosunkach pracy*, Warsaw 1977
48. Longchamps de Berier R., *Zobowiązania*, Poznań 1999 (wydanie anastatyczne, Lwów 1939)
49. Machnikowski P., *Uprawnienia kształtujące w zobowiązaniowych stosunkach prawnych* (in:) O źródłach i elementach stosunków cywilnoprawnych. Księga pamiątkowa ku czci prof. Alfreda Kleina, ed. E. Gniewek, Cracow 2000
50. Machnikowski P., *Prawne instrumenty ochrony zaufania przy zawieraniu umowy*, Wroclaw 2010
51. Mikołajewicz J., *Prawo intertemporalne. Zagadnienia teoretycznoprawne*, Poznań 2000
52. Nazar M., *Problemy nowelizacji prawa rodzinnego*, Rejent 2005, No. 9
53. Nowacki J., *„Odpowiednie" stosowanie przepisów prawa*, Państwo i Prawo 1964, No. 3
54. Nowacki J., *Analogia legis*, Warsaw 1966
55. Oetker H., *Das Dauerschuldverhältnis und seine Beendigung. Bestandsaufnahme und kritische Würdigung einer tradirten Figur der Schuldrechtsdogmatik*, Tübingen 1994
56. Ogiegło L., *Usługi jako przedmiot stosunków obligacyjnych*, Katowice 1989
57. Ohanowicz A., Górski J., *Zarys prawa zobowiązań*, Warsaw 1970
58. Okoń Z., *Charakter prawny umowy licencyjnej*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej 2009, No. 105
59. Olczyk M., *Sytuacja prawna byłych stron stosunku najmu w razie dalszego zajmowania lokalu mieszkalnego przez byłego najemcę*, Warsaw 2015
60. Olejniczak A., *O koncepcji umów ramowych*, Państwo i Prawo 1990, No. 4
61. Olejniczak A., *Transakcje kompensacyjne w handlu międzynarodowym. Studium cywilnoprawne*, Poznań 1994
62. Pajor T., *Odpowiedzialność dłużnika za niewykonanie zobowiązania*, Warsaw 1982
63. *Palandt, Bürgerliches Gesetzbuch*, München 2006
64. Panowicz-Lipska J., *Zastrzeżenie wypowiedzenia w umowie zawartej na czas oznaczony (Uwagi na tle art. 673 § 3 KC)* (in:) Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu, ed. A. Nowicka, Poznań 2005
65. Policzkiewicz-Zawadzka Z., *Umowa o dożywocie*, Warsaw 1971
66. *Prawo autorskie i prawa pokrewne*, ed. D. Flisak, Warsaw 2015
67. *Prawo bankowe. Komentarz*, ed. E. Fojcik-Mastalska, Warsaw 2005
68. *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza i funkcje*, ed. J. Mikołajewicz, Warsaw 2015
69. Pyrzyńska A., *Nieważność czynności prawnej – uwagi na tle art. 6 ustawy o ochronie konkurencji i konsumentów*, Państwo i Prawo 2016, No. 5
70. Pyrzyńska A., *Zobowiązanie ciągłe jako konstrukcja prawna*, Poznań 2017
71. Pyziak-Szafnicka M., *Potrącenie w prawie cywilnym*, Cracow 2002

72. Radwański Z., *Najem mieszkań w świetle publicznej gospodarki lokalami*, Warsaw 1961
73. Radwański Z., *Uwagi o zobowiązaniach trwałych (ciągłych) na tle kodeksu cywilnego*, Studia Cywilistyczne 1969, vol. XIII–XIV
74. Radwański Z., *Teoria umów*, Warsaw 1977
75. Radwański Z., *Wykładnia oświadczeń woli składanych indywidualnym adresatom*, Wroclaw-Warsaw-Cracow 1992
76. Radwański Z., *Uwagi ogólne o autonomii woli* (in:) II Kongres Notariuszy Rzeczypospolitej Polskiej. Referaty i opracowania, Poznań-Kluczbork 1999
77. Radwański Z., *Prawo cywilne – część ogólna*, Warsaw 2007
78. Rajski J., *Właściwość (natura) umowy o dzieło a wygaśnięcie wynikającego z niej stosunku zobowiązaniowego*, Przegląd Prawa Handlowego 1997, No. 6
79. Rott-Pietrzyk E., *Wygaśnięcie umowy agencyjnej*, Rejent 1999, No. 9
80. Rott-Pietrzyk E., *Dopuszczalność zastrzeżenia wypowiedzenia umowy agencyjnej na czas oznaczony*, Przegląd Prawa Handlowego 2003, No. 10
81. Rott-Pietrzyk E., *Wykładnia oświadczenia woli (studium prawnoporównawcze)*, Studia Prawa Prywatnego 2007, No. 3–4
82. Smyczyński T., *O stosunku prawnym opartym na więzi rodzinnej* (in:) W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Maciej Zielińskiego, eds. A. Choduń, S. Czepita, Szczecin 2010
83. Sołtysiński S., *Czynności rozporządzające. Przyczynek do analizy podstawowych pojęć cywilistycznych* (in:) Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego, eds. J. Błeszyński, J. Rajski, Warsaw 1985
84. Stępniak L., *Potrącenie w systemie polskiego prawa cywilnego*, Wroclaw-Warsaw 1975
85. Strugała R., *Umowne ograniczenie prawa do wypowiedzenia bezterminowego zobowiązania o charakterze ciągłym. Uwagi na tle wyroku Sądu Najwyższego z 13 czerwca 2013 r. (V CSK 391/12)*, Przegląd Sądowy 2015, No. 4
86. Strzępka J.A., *Umowy długoterminowe w obrocie gospodarczym*, *Annales Universitatis Mariae Curie-Skłodowska*, Sectio G, Ius, vol. XXIII, 1976
87. Swaczyna B., *Warunkowe czynności prawne*, Warsaw 2012
88. *System Prawa Cywilnego*, vol. I, *Część ogólna*, ed. S. Grzybowski, Wroclaw-Warsaw 1985
89. *System Prawa Cywilnego*, vol. III, part 1, *Prawo zobowiązań – część ogólna*, ed. Z. Radwański, Wroclaw-Warsaw 1981
90. *System Prawa Handlowego*, vol. 5. *Prawo umów handlowych*, ed. S. Włodyka, Warsaw 2014
91. *System Prawa Prywatnego. Prawo cywilne – część ogólna*, vol. 1, ed. M. Safjan, Warsaw 2012
92. *System Prawa Prywatnego. Prawo cywilne – część ogólna*, vol. 2, ed. Z. Radwański, Warsaw 2008
93. *System Prawa Prywatnego. Prawo rzeczowe*, vol. 4, ed. E. Gniewek, Warsaw 2012
94. *System Prawa Prywatnego. Prawo zobowiązań – część ogólna*, vol. 5, ed. E. Łętowska, Warsaw 2013

95. *System Prawa Prywatnego. Prawo zobowiązań – część ogólna*, vol. 6, ed. A. Olejniczak, Warsaw 2014
96. *System Prawa Prywatnego. Prawo zobowiązań – część szczegółowa*, vol. 7, ed. J. Rajski, Warsaw 2011
97. *System Prawa Prywatnego. Prawo zobowiązań – część szczegółowa*, vol. 8, ed. J. Panowicz-Lipska, Warsaw 2011
98. *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, vol. 11, ed. T. Smyczyński, Warsaw 2014
99. *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, vol. 12, ed. T. Smyczyński, Warsaw 2011
100. *System Prawa Prywatnego. Prawo autorskie*, vol. 13, ed. J. Barta, Warsaw 2013
101. *System Prawa Prywatnego. Prawo spółek osobowych*, vol. 16, ed. A. Szajkowski, Warsaw 2008; 2016
102. *System prawa rodzinnego i opiekuńczego*, vol. 1, ed. J.St. Piątowski, Wroclaw-Warsaw 1985
103. Szachułowicz J., *Glosa do wyroku SN z 16 kwietnia 2003 r., II CKN 6/01*, OSP 2004, No. 2, item 21
104. Szczepanowska-Kozłowska K., *Umowy licencyjne w prawie własności przemysłowej*, Warsaw 2012
105. Szczepańska M., *Zagadnienie rozliczenia składki za okres karencji*, Wiadomości Ubezpieczeniowe 2013, No. 1
106. Szmidt R., *Wypowiedzenie zobowiązania – uwagi na tle wykładni art. 365[1] KC*, Studia Prawa Prywatnego 2008, No. 2
107. Szostak R., *Glosa do wyroku SN z 14 października 1998 r., II CKN 5/98*, OSP 1999, No. 6, item 113
108. Szpunar A., *Obowiązek przechowania przy umowach o świadczenie usług*, Nowe Prawo 1979, No. 6
109. Szpunar A., *Odszkodowanie za szkodę majątkową. Szkoda na mieniu i na osobie*, Bydgoszcz 1998
110. Śmieja A., *Najem zawarty na czas oznaczony w świetle przepisów kodeksu cywilnego*, Rejent 1996, No. 2
111. Świderska-Iwicka M., *Odpowiedzialność cywilna przechowawcy*, Toruń 1996
112. Tracz G., *Umowa gwarancji ze szczególnym uwzględnieniem gwarancji bankowej*, Cracow 1998
113. Tracz G., *Sposoby jednostronnej rezygnacji z zobowiązań umownych*, Warsaw 2007
114. Trzaskowski R., *Skutki sprzeczności umów obligacyjnych z prawem. W poszukiwaniu sankcji skutecznych i proporcjonalnych*, Warsaw 2013
115. *Uzasadnienie projektu kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu*, w opracowaniu głównego referenta projektu Prof. Romana Longchamps de Berier, vol. I, art. 1–293, Warsaw 1936
116. Wasilewski P., *Open content. Zagadnienia prawne*, Warsaw 2008
117. Wąsowicz W., *Obejście prawa jako przyczyna nieważności czynności prawnej*, Kwartalnik Prawa Prywatnego 1999, No. 1
118. Zawadzka J., *Warunek w prawie cywilnym*, Warsaw 2012

119. Ziembiński Z., *Kompetencja i norma kompetencyjna*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 1969, No. 4
120. Ziembiński Z., *Metodologiczne zagadnienia prawoznawstwa*, Warsaw 1974
121. Ziembiński Z., *Problemy podstawowe prawoznawstwa,* Warsaw 1980
122. Ziembiński Z., *Logika praktyczna*, Warsaw 2002

The aim of the study is to describe continuous obligation as a legal construct which is common to the law of obligation in many systems. On the basis of the analysis of the Polish civil law system, the monograph attempts to create a theoretical construct of continuous obligation. The result of the research is, among other things, a formulation of the definition of continuous obligation, the distinction of different types of continuous obligation, and the description of continuous obligation in terms of duration over time. The study also discusses termination as an institution particularly adapted to ending continuous obligational relationships. The conception proposed in the study provides a theoretical basis for further research on the construct of continuous obligation, in particular concerning nominate contracts or innominate contracts which are sources of continuous obligations.

ISBN 978-83-232-3767-9