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Legal Mechanisms For Adapting Contracts To Changing Economic Conditions In Professional Dealings

*Karolina Szarszoń**

Keywords

valorisation, indexation clauses, principle of freedom of contract, professional trade, *rebus sic stantibus* clause, Article 439 of Public Procurement Law Act

Abstract

In accordance with the principle of freedom of contract, expressed in Article 3531 of the Civil Code, the parties may shape the legal relationship at their own discretion, inter alia, by including valorisation clauses. Many years of market stabilisation, especially the low inflation rate, led to almost unreflective contracting in business. A number of contracts concluded in recent years do not contain any mechanisms that would allow a change of remuneration due to the change of economic conditions, including in particular, increase of prices. Currently, due to the unstable economic situation and constantly rising inflation, indexation clauses should be widely used to protect parties' interests. This article focuses on such clauses and the options available to the contracting parties in the absence of incorporation of such reservations in contract. The first part of the article discusses the issue of the indexation clause itself, followed by the issue of protecting the parties from potential losses caused by uncertainty of trade. The following part of article will focus on the secondary action needed to mitigate losses caused by market instability and lack of prior inclusion of indexation clauses in the concluded contract.

* Final year student of a master's degree in law studies at the University of Wroclaw, Faculty of Law, Administration and Economics, Poland; E-mail: kszarszon@gmail.com; ORCID: 0000-0001-7853-350X.

I. Introduction

Over the last few years, there have been significant changes in the economic market that have destabilised the economic situation in the country. The prices of natural resources and energy have been increasing significantly, as well as the cost of labour and the inflation rate. Contracts concluded for many years or where the performance of the obligation is remote from the date of agreement may not reflect previously made assumptions. Losses caused by market instability can affect each party and expose them to unforeseen problems. There are many reasons for this. One of the most important is ever-increasing inflation, which reduces purchasing power and adversely affects the prices of goods and services. Price rises affect not only electricity or fuel, but also basic products such as food. Considering the statistics provided by the Central Statistical Office[1] in October 2021, inflation was estimated at 6.8% compared to the same month in the previous calendar year.[2] In 2017, this indicator was only 2%, and a year later it decreased to 1.6%.[3] These results are significantly smaller than current estimates. This clearly indicates that there is an increasing trend in this regard, and the projections of macroeconomic specialists are not optimistic. Since the beginning of 2021, the indicator has been constantly rising, starting from 2.7% in the first quarter of the year, through 4.5% in the next quarter, up to 5.4% in the third quarter.[4] Economists have no doubts and estimate that prices will continue to rise, and inflation will

1 'The Central Statistical Office (hereinafter, CSO) is a central organ of government administration; competent in matters of statistics is the President of the CSO who performs his tasks with the help of public statistical services' (definition indicated in accordance with Article 23 of Law on Public Statistics Act of 29 June 1995, Journal of Laws of 2021, item 955).

2 Data taken from Główny Urząd Statystyczny, 'Szybki szacunek wskaźnika cen towarów i usług konsumpcyjnych w październiku 2021 roku'. ['Rapid Estimate of the Consumer Price Index in October 2021'] and the value indicated in the consumer price index. <https://stat.gov.pl/obszary-tematyczne/ceny-handel/wskazniki-cen/szybki-szacunek-wskaznika-cen-towarow-i-uslug-konsumpcyjnych-w-pazdzierniku-2021-roku,8,66.html> accessed 3 November 2021.

3 My own elaboration based on the data of the CSO, taking into account the price index with the base for the previous year equal to 100 and the price index with the base for the analysed period equal to the value adopted by the CSO. The values are indicated in the consumer price index.<https://stat.gov.pl/obszary-tematyczne/ceny-handel/wskazniki-cen/wskazniki-cen-towarow-i-uslug-konsumpcyjnych-pot-inflacja-/roczne-wskazniki-cen-towarow-i-uslug-konsumpcyjnych/> acessed 3 November 2021.

4 My own elaboration based on the data of the CSO, taking into account the price index with the base for the analogical quarter of the previous year equal to 100 and the price index with the base for the quarter under review at the level adopted by the CSO. The values are indicated in the consumer price index <https://stat.gov.pl/obszary-tematyczne/ceny-handel/wskazniki-cen/wskazniki-cen-towarow-i-uslug-konsumpcyjnych-pot-inflacja-/kwartalne-wskazniki-cen-towarow-i-uslug-konsumpcyjnych-od-1995-roku/> accessed 3 November 2021.

slow down only in 2023.[5] This means that destabilisation is not temporary and will affect many areas of life, including contracts.

As already indicated, the unstable economic situation may significantly affect contractual provisions, making them inadequate over time. Hence, it is necessary to shape the legal relationship in a way to secure, as fully as possible, the interests of the concerned parties. In accordance with the principle of freedom of contract expressed in Article 353[1] of the Civil Code, the parties entering into a contract may arrange the legal relationship as they wish, as long as the content or purpose thereof does not contradict the nature of the relationship, the law, or the principles of social coexistence.[6] Including valorisation clauses in contracts allows the parties to minimise potential losses and reflects actual economic conditions more accurately, while at the same time ensuring the equality of the parties to the obligation. Thus, the purpose of such clauses does not contradict the principles of social coexistence, let alone the nature of the legal relationship.

In practice however, despite the lack of doubt as to the benefits associated with including such clauses in the contract, in many cases these reservations are omitted or inappropriately drafted. This problem is common, particularly among smaller entrepreneurs, and most likely results from a long-standing market stability, which ensures certainty of relations and reduces the risk of unforeseen losses. In addition, the matter of indexation clauses itself is a legal institution, which the legislator has formulated quite commonly using general principles of law as a basis and giving the parties broad freedom in constructing their provisions. However, such extensive liberty has at the same time contributed to the greater disorientation of entrepreneurs while creating contracts and securing their own interests. Currently, the problem of proper construction of valorisation clauses in Polish law has been noticed by the legislator, who proposed a model clause under the Public Procurement Law, which allows to avoid possible construction errors and can serve as an inspiration for other entrepreneurs.

Considering the above, it can be concluded that the issue of contractual valorisation clauses is, despite appearances, a subject which raises many practical problems. Many entities on the market somehow got used to the status quo in trading and often unreflectively have concluded subsequent contracts without taking into consideration fluctuations and changes in the economy. This phenomenon is particularly alarming in the professional trade, which due to its nature should be characterised by a high level of competence and foresight.

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5 Michał Gniazdowski, Marcin Klucznik, and Jakib Rybacki, 'Miesięcznik Makroekonomiczny Polskiego Instytutu Ekonomicznego' [Macroeconomic Bulletin of the Polish Economic Institute] (10/2021) 3.<https://pie.net.pl/wp-content/uploads/2021/11/Miesiecznik-Makro_10-21.pdf> accessed 3 November 2021.

6 Article 353[1] of Polish Civil Code of 23 April 1964, Journal of Laws of 2020, item 1740. Hereinafter, CC Act.

Therefore, considering inflation predictions and market destabilization, indexation clauses should be widely used to provide greater certainty in trade, especially among professional entities, who should implement new solutions and benefit from the knowledge of experts in this field.

II. Contractual Valorisation: Practical Problems and Clause Construction

In contract law, the basic rule for the performance of monetary obligations is the principle of nominalism, which indicates that in the majority of cases performance is accomplished by the payment of a nominal sum[7] (i.e. such amount that was specifically indicated *ab initio* when the obligation relationship was formed.) However, it does not take into account the possibility of changes in the purchasing value of money over time, which may lead to a disproportion between the value of a good at the time of concluding a contract and the value of the same good at the time of performance. Such a phenomenon is a standard economic mechanism and usually involves a typical contractual risk, but not always. If the change in the purchasing power is so significant that it is likely to involve major losses in the performance of the contract, the parties may secure their interests for the future by appropriately arranging the legal relationship in accordance with the principle of freedom of contract.[8] In such a situation, the best solution would be to introduce into the contract. indexation clauses, which indirectly express the way in which the obligation is to be performed by reference to a measure of value chosen by the parties[9] so as to minimize potential losses and ensure the actual value of the performance without the need for a subsequent annexation of the contract. In this case, the subject of the performance will not be in fact a sum of monetary units, but a specific economic value, unchangeable over time and expressed in the appropriate sum of those monetary units.[10]

Modifications adapting the content of the contract to the actual conditions are of great practical importance and prevent potential conflicts between the parties. Above all, they ensure equality between contractors by securing their interests in the same way and by equalising the level and distribution of risk. The inclusion of a clause in the contract will not allow one party to improve its position at the expense of the other party, which will not receive an amount appropriate to

7 Article 358^1 § 1 of CC Act.

8 Article 353^1 of CC Act.

9 Article 358^1 § 2 of CC Act.

10 Judgement of Court of Appeals in Poznań [2015] IACa 1293/14. Legalis 1337954.

the one previously agreed upon. What is more, this mechanism will work both in the case of increasing and decreasing the amount of remuneration so each of the parties is protected in the same way. The contractual valorisation shall ensure performance of the obligation in accordance with its original content in a manner corresponding to its socio-economic purpose, principles of social coexistence, and established customs, if they exist in this respect.[11] A change in the purchasing power also alters the actual value of the obligation; hence the debtor fulfils the benefit with a different value than previously agreed and thus, does not comply with the principle *pacta sunt servanta*. At this point, it should be emphasized that performance of an obligation will not always satisfy the creditor, as was exemplified above.[12] In the case of significant changes in purchasing power, the payment of a nominal value will only constitute a fulfilment of a benefit and not a fulfilment of an obligation, precisely because the creditor and his interest will not be met.[13]

The valorisation mechanism may refer to various value measures, and the parties are free to construct it. One of the most commonly used is the gold clause,[14] in which the parties make the amount of the consideration dependent on the value of gold at the time of performance, due to the stability of its value. Gauges may also refer to foreign currencies as a measure of the value of an obligation expressed in Polish currency or another foreign currency,[15] or to specific goods or other commodities, whose value will constitute a desired reference to a given obligation, for example, the price of steel or coal (the index clause). Hence, contracts may contain, inter alia, the following provisions: 'for the rent, the debtor shall pay an amount equivalent to 10 euro at the average exchange rate of the National Bank of Poland on the day preceding the due date of the rent' or 'for the repayment of the loan, the Borrower shall pay to the Lender an amount equivalent to 300 ounces of gold in bars of a sample 333 at the selling price by the State Mint on the day preceding the due date of the claim for repayment of the loan'.[16] However, it should be borne in mind that the chosen indicator must be precisely described

11 Article 354 of CC Act.

12 Marek Antas, 'Kodeks Cywilny w Orzecznictwie. Tom 2' ['Civil Code in Case Law. Volume 2'] 1st edn (C.H. Beck 2017) 11–14.

13 Resolution of the Supreme Court [1992] I PZP 19/92. Legalis 27652.

14 Zdzisław Gawlik, 'Umowne Klauzule Waloryzacyjne' ['Contractual Valorisation Clauses'] (1991) 4 'Rejent' 62.

15 Judgement of Court of Appeals in Katowice [2020] I ACa 769/19. Legalis 2292502.

16 Krzysztof Zagrobelny in Radosław Strugała (ed) *'Wykładnia umów. Standardowe klauzule umowne. Komentarz praktyczny z przeglądem orzecznictwa. Wzory umów.'* [Agreements interpretation. Conventional contractual clauses. Practical Commentary with case law. Model contracts.] 'Klauzule dotyczące waloryzacji.' [Valorisation clauses.]. 3rd edn (C.H. Beck 2020) 117 et seq.

and its value must be unambiguously identifiable, both at the moment when the obligation arises and when it is fulfilled. Mere reference is not sufficient; it must be specified in detail so that each party is fully aware of the accepted conditions. Most often while establishing clauses of this type, depending on their specification, the reference is made to indicators specified by other institutions, for example announced by the CSO or, in case of currency exchange rates, referring to the exchange rate set by the Central Bank.[17] Lack of sufficient specification, without appropriate references, may lead not only to a dispute between the parties, but above all, to the impossibility of proper performance of valorisation.

Practice has shown that adequate formation of an adjustment clause and its adaptation to a specific contractual relationship raises many problems. The issue of including provisions securing the interests of the parties seems to be an obvious matter, but not for all entrepreneurs. Many of them treat the negotiations in this respect as a waste of time and try to avoid or shorten them to the minimum. In practice, there are still traders who do not understand the importance of such provisions and the fact that they are drafted only as a precautionary measure, in case of unforeseen situations, and not for a period of stability and certainty. Also, frequently those precautionary clauses do not reflect the reality and provide little protection against potential losses. This state of affairs may result from, inter alia, misconceptions regarding the drafting of such reservations and not detailing them sufficiently or, possibly, from a lack of universality in use, which consequently contributes to less knowledge in this area. Currently, as already mentioned, during times of unstable market situations, such clauses should be commonly included in contracts, especially those of a long-term nature. This necessity, which responds to the needs of entrepreneurs in the market, has also been recognised by the legislature. At the beginning of 2021, the provisions of the new Public Procurement Law came into force,[18] in which the legislature decided to include a model valorisation clause in Article 439, Section 1, by using the example of a construction work contract or other service agreement concluded for a period longer than twelve months. This type of regulation can be an example for other market entities to create their own contractual provisions, which will prevent mistakes with great financial consequences.

17 Ibid 16.

18 Public Procurement Law Act of 11 September 2019, Journal of Laws of 2021, item 1129. Hereinafter, PPL Act.

III. Construction of the Valorisation Clause by the Example of Regulations of Public Procurement Law

The example of a model valorisation clause in the Public Procurement Law seems to be an appropriate one to analyse and use in a situation where an entity encounters certain problems while constructing clauses of this type for its own purposes. There are several reasons for this. First, this is a clause expressing the rationality of the legislator, who with knowledge of the entire legal system and the mechanisms it contains, creates new solutions that may be replicated within the indicated limits. It is assumed that the solutions proposed by him are the best possible proposals and are coherently connected with the entire legal system, despite its breadth and diversity. Therefore, it is certain that the regulations will apply to reality and will not be affected by any constructional errors. Also, the Public Procurement Law itself refers in its content to the provisions of the Civil Code in Article 8 § 1,[19] indicating that for unregulated matters, the provisions of the Civil Code shall apply. It is also impossible to ignore the purpose and legal justification for the existence of Article 439 of the above-mentioned act, which implicitly, in conditions of market destabilisation, allows the economic balance of each of the parties to be preserved and spreads the risk evenly by introducing an index that will update the amount of the consideration at the time it has to be performed. These objectives are the same as the justification for the existence of indexation clauses regulated in the Civil Code. The most important thing, however, is the way in which the legislator has constructed the valorisation clause in Article 439 of the PPL, ensuring a great flexibility in the content of the contract. The provision is not casuistic, which makes it possible to adjust its content to various contracts and their specifics. However, the freedom to create one's own valorisation provisions according to this regulation has been limited by the necessity to take into account the legally set obligatory elements, which are also constructed in a manner allowing for more or less individualisation of contractual provisions. Such a vast freedom allows for flexibility in the content of this provision in order to create one's own rules. Taking such guidance into account will benefit market practice, especially amongst smaller entrepreneurs, who quite often, when acting on their own, neglect key elements to safeguard their interests.

As has already been indicated, the obligation to include indexation provisions expressed in the PPL applies to construction work contracts or other service agreements concluded for a period longer than twelve months. The clauses incorporated in the contracts are to specify the principles that will be applied in the event of changes of the prices of materials or costs related to performance.

19 Article 8 of PPL Act.

Article 439, Section 2 of the PPL indicates obligatory elements that should be included in these types of provisions.

The first element is the necessity to indicate the level of change in the price of materials or costs, which will entitle the parties to demand a change in remuneration. Most often, it is expressed as a percentage, and not as a sum, for the sake of greater clarity and adequacy of such provisions.[20] In this article, there are two categories of terms: costs and materials. Here, the costs are considered to be those expenditures that were necessary and directly related to the performance of the contract, such as operating costs of equipment or costs related to the employment of staff.[21] The concept of materials will be understood broadly, since the legislator meant by this all those materials and resources which were used to perform, e.g. various construction, installation, or electronic materials.[22] Second, it needs to be determined by how much prices or costs have to increase for the clause to be applicable. The act does not specify a minimum threshold for the level of price change; hence it is assumed that the parties may adjust the remuneration even from the zero level.[23] The change of prices may concern both their increase and decrease, which puts the parties of the relationship in an identical situation and distributes the risk equally.

Another mandatory element is the need to indicate a starting date, which will be a reference point for determining the change in remuneration. The selected time will be the date on which the change will enter into force. It is worth emphasizing, that despite the legislator's indication of a specific assumption in the provision that agreements shorter than a year should maintain their durability, it cannot be excluded that the need for valorisation may occur earlier and the obligation relationship may be modified within a shorter period of time.[24] In practice, the most common approach is that the initial date will be the date of concluding the agreement or the date of submitting offers. In this respect, there is a vast freedom in terms of adjusting the date to the specifics of the contract. However, the limitation is the situation specified in Section 3 of the article, which indicates that in the case of concluding a contract after 180 days from the deadline

20 Jerzy Bieluk Katarzyna Zadykowicz-Sokół, 'Umowa o Roboty Budowlane w Kodeks Cywilnym i Prawie Zamówień Publicznych. Komentarz Praktyczny z Orzecznictwem. Wzory Pism'. ['Contract for Construction work in Civil Code and Public Procurement Law. Practical Commentary with Case Law. Contract Templates'.] 2nd edn (C.H. Beck 2020) 439–65.

21 Marzena Jaworska, *Prawo Zamówień Publicznych. Komentarz.* [Public Procurement Law. Commentary.] 2nd edn (C.H. Beck 2021) art 439.

22 Ibid 21.

23 Paweł Granecki and Iga Granecka, 'Prawo Zamówień Publicznych. Komentarz*'.* ['Public Procurement Law. Commentary'.] 1st edn (C.H. Beck 2021) art 439.

24 Ibid 16.

for submitting tenders, the initial date shall be the date of opening tenders, with the reservation that the contracting authority may specify an earlier date.[25] However, this usually applies to large contracts whose tendering procedure is significantly protracted.[26]

The legislator also formulates the necessity to define a way how to determine the change in remuneration. The act proposes two gauges to assess the level of changes in the prices of materials or costs, which are necessary for the performance of the contract, and which alteration entitles the parties to demand a modification of the amount of remuneration. The first one is an index, which allows the parties to track price changes, such as the already mentioned consumer price index published in the announcements of the President of the CSO, which compares the prices of given materials and services on the market and how their value alters over time. The legislator also allows for the indication of another basis, which substantively demonstrates the level of modification in the prices. An example of such reference may be the catalogues of material expenditures, which specify unit billing outlays needed to prepare cost estimates or indexes published in periodically issued guides by commercial specialist publications, such as Sekocenbud.[27] Nevertheless, there is no single gauge common to all relationships; hence the parties are free to determine the reference that will best apply to the subject matter of the contract. It is important, however, that the yardstick has to be objective, unambiguous, independent from the parties, and readily available for them to verify.

Another requirement is to specify the manner in which the changes in the prices of materials or costs will affect the expense of performing the contract itself. This method must be objective so as to give a clear idea of how the final costs have been affected. In order to apply an indexation, a change in market prices alone is not sufficient; it is also necessary to establish how this modification of price affected the cost of performance because not every alteration of prices has an adequate impact on the amount of costs incurred in the performance of a contract.[28] An increase in fuel costs, for example, by 5% does not automatically mean that the remuneration must be increased in the same proportion, especially if fuel costs in a given case constitute only a small part of the contract execution costs.

25 Article 439 section 3 of PPL Act.

26 Karol Brózda, ‚O Niektórych Klauzulach Obligatoryjnych w Umowy o Pracy Budowlane'. [About Certain Compulsory Clauses in Contracts of Construction Work] [01/2020] 'Public Procurement Law', 71 et seq.

27 Ibid 21.

28 Ibid 20.

The article must also specify the periods during which the contractor's remuneration may be changed, which in practice means a necessity to regulate the frequency with which it will be possible to request a change in compensation. This will ensure the flexibility of the clause and allow for its real application, especially in case of multistage and long-lasting projects. For example, the parties may agree to change the remuneration after the completion of a part of the project, or during one of its stages, or for the future, in relation to those services which have not yet been performed.

The last set obligation is to determine the maximum number of changes in the remuneration. A properly determined amount should consider the duration of the contract and price fluctuations, including a prediction of their changes. These factors will effectively determine the maximum value of the contract modification, which is of great importance for the business of the contracting party, who has certain budgetary constraints and will have to acquire supernumerary funds to cover additional expenses caused by price changes.[29] Specific indication, either as an indication of a maximum percentage of the original value or as an amount with specified maximum quantity that can be added to the original value, guarantees certainty and stability to trading in which parties are fully aware of their obligations. The incorporation of this element into an indexation clause for public procurement contracts is entirely understandable. After all, we are dealing here with deals to which public contracting authorities are parties restricted by rules on the planning of public expenditure. This element does not have to be replicated in contracts concluded outside the public procurement regime.

Including the above elements will lead to the formulation of a clause that will remarkably protect the interests of parties in case of price changes. While the issues concerning the determination of the level of changes in the prices or the indication of the manner of how to determine their modification by making a reference to certain yardsticks are commonly taken into account, relatively rarely do parties have problems with their correct formulation. While the issues concerning the indication of initial dates as reference points or the firm determination of the manner in which such changes are to affect the cost of the contract are not such obvious elements and are often omitted or formulated in a blanket manner that may be interpreted differently. Following the statutory model created by the professional and adapting it to one's own needs will help to avoid the difficulties in application of the clause in reality. It will also help to effectively safeguard against those contingencies that non specialists may not foresee. The following clause, based on the previous discussion, may serve as an example of a provision drafted in accordance with the above principles:

29 Ibid 20.

The Ordering Party provides for the possibility to change the amount of remuneration specified in § 1 of the Agreement in event of a change in the price materials or costs related to their execution of the order by 20% in comparison to the level of prices of materials or costs determined on the day of submitting offers. The initial date for establishing the change of remuneration shall be the date when the prerequisite occurs, i.e. the price of materials or costs related to order completion increases by 20%. Any possible change in the Contractor's remuneration shall be based on a change in the price index for construction and assembly production, established by the President of the Central Statistical Office. A request for modification of the remuneration due to material price changes can be submitted not earlier than after 6 months from the date of conclusion of the agreement. Any subsequent changes to the remuneration will be possible with reservation that they are no more frequent than 3 months. The request shall set out the factual and legal grounds for the claim and shall contain a precise calculation of the amount of remuneration to be paid after adjustment, in particular showing the link between requested amount of remuneration increase and the impact of the price change. Total maximum value of the remuneration change, allowed by the Ordering Party as a result of the application of an indexation, is 4% of the remuneration. The adjustment shall apply exclusively to the subject matter of the agreement which has not yet been performed by the Contractor and has not been accepted by the Ordering Party before the date of submission of the application.[30]

Finally, it is also worth mentioning that the indexation clause from Article 439 is not the only provision of this kind included in the PPL. Another one, introducing the necessity to include indexation clauses, is the Article 436 Section 4 Letter b, which in the case of agreements concluded for a period exceeding 12 months, imposes an obligation to include rules regarding the modification of the amount of the contractor's remuneration, in the event of a change of the provisions of law influencing the costs and performance of the contract. The legislator mentions there that the changes may concern, among others, the rate of tax on goods and services, excise tax, the amount of the minimum remuneration for work, the amount of the minimum hourly rate, the rules of being subject to social insurance or health insurance or the amount of the contribution rate for such insurance, as well as the rules of collecting and the amount of payments to employee capital plans.[31] However, there is no specification as to the construction principles of such provisions, and the legislator focuses entirely on the issues

30 Inspired by the regulations of an exemplary contract associated with the PPL, see: <https://www.platformazakupowa.pl/file/get_new/2d77ad3c11e93cf0c4197f6529ea56e8.pdf> accessed 14 November 2021.

31 Article 436 section 4 letter b of PPL Act.

related to the grounds and mechanisms of its application; hence this article is not as relevant for the considerations carried out in this paper.

IV. Other Ways of Securing Own Interests in Professional Trading, in Case of Not Reserving Contractual Valorisation, Using the Example of the *rebus sic stantibus* Clause and Article 632 § 2 of the Civil Code

The above-mentioned analysis is based on considerations regarding the inclusion of an indexation clause in the contract in case of the occurrence of unforeseen changes in the market. However, quite often in practice, the parties are not so cautious and do not provide any contractual regulations that would allow for the modification of the relationship. This does not mean, however, that the contractors do not have other legal possibilities to restore the contractual balance and are nevertheless obliged to provide the performance that does not reflect the original assumptions. In the Civil Code, the legislator has provided certain clauses that allow judicial modification of the contractual relationship if the relevant prerequisites are met. Focusing strictly on the professional trade, the considerations in this respect will concentrate on the content of clauses under Articles 357^1 and 632 § 2 of the Civil Code. Such a narrow scope results from exclusions established by law with regard to the professional entities, which are supposed to have greater knowledge in this field and should also be more proficient, due to the activities undertaken in trade, and consciously reckon with potential consequences of their actions. In principle, among these types of entrepreneurs, mistakes in constructing contracts are less frequent due to their experience and knowledge in a given matter; however, this is not always the case. A significant difference in market practice can be observed, especially between large internationally operating entrepreneurs and smaller ones, who are often just entering the business and learning how to operate in a new environment. Hence, professionals have a noncontractual possibility to modify the performance, but it is limited due to their special position. Excluded in this case is the valorisation clause set out in Article 358^1 of the Civil Code, which allows the court to change the amount or manner of fulfilling a monetary performance in the event of a significant change in the purchasing power after the obligation has arisen.[32]

The first solution available to the entrepreneurs is to apply the *rebus sic stantibus* clause provided in Article 357^1 of the Civil Code. Pursuant to its content, four prerequisites must be jointly fulfilled in order to effectively seek judicial

[32] Article 358^1 of CC Act.

modification of a performance. In this case, specifications refer to the occurrence of an extraordinary change of relations, unforeseen by the parties, which will be causally connected with the occurrence of excessive difficulties in performing the obligation or connected with the threat of an abnormal loss for one of the parties.[33] The concept of an extraordinary change of relations is not defined by the law, but it is assumed that this is a rare, unusual, exceptional, and normally unprecedented event,[34] which the parties could not have foreseen while entering into the contract and which disturbs the normally accepted allocation of risk in contracting. This phenomenon has to be universal and independent of the will of the parties and their influence.[35] Above all, when assessing whether the prerequisites are met, the effects and impact of a given situation on the legal relationship are taken into account, and not that much attention is paid to the issue of the extraordinary nature of the change. The point of meeting this ground is, first and foremost, the determination of the extent to which it affects the contractual balance and later, confirming that it was not possible for the parties to foresee this type of situation in advance,[36] while complying with the requirement of due diligence,[37] in accordance with Article 355 of the Civil Code.[38] The lack of foreseeability of such a situation will to a large extent be connected, not with the occurrence of a given premise, but with its impact on the content of the relationship. Taking into account the above, such events may include, for example, changes of a macroeconomic nature, such as inflation that significantly affect the market situation and product prices, or sudden changes in legal regulations regarding tax rates, such as VAT,[39] but also the consequences of natural disasters or other social crises. Occurrences related to the individual situation of the entrepreneur and linked to his financial condition will not meet the requirements necessary to trigger the clause and will not allow a judicial modification of the relationship. A further prerequisite is the existence of a threat of abnormal loss or the existence of undue difficulty in meeting the obligation as a result of the above-mentioned extraordinary change in relations. Each of the indicated situations must be

33 Article 357[1] of CC Act.

34 Judgement of Supreme Court [2018] II CSK 303/17. Legalis 1799216.

35 Judgement of Court of Appeals in Gdansk [2017] V ACa 380/16. Legalis 1719952.

36 Jerzy Bieluk, 'Nadzwyczajna Zmiana Stosunków i Jej Wpływ na Zobowiązania (Klauzula rebus sic stantibus). Komentarz Praktyczny z Orzecznictwem' ['Extraordinary Change in Relations and Its Impact on Liabilities (*rebus sic stantibus clause*). Commentary with Case Law'.] 1st edn (C.H. Beck 2020) ch 2.

37 Rafał Morek in Osajda Konrad (ed), *Kodeks Cywilny. Komentarz. [Civil Code. Commentary.]* 'Księga trzecia. Zobowiązania. Tytuł I. Przepisy ogólne.' [Third book. Obligations. Title I. General provisions.] 29th edn (C.H. Beck 2021) art 357[1].

38 Article 355 of CC Act.

39 Judgement of Supreme Court [2007] II CSK 452/06. Legalis 121481.

assessed within the context of the obligation in question by comparing the present and original value of the benefit, as well as by evaluating the overall effect of the performance on the party's assets, while also taking into account the purpose of the obligation and what benefit the party could expect from its performance.[40] Abnormal loss may concern each of the contractors and will be associated with the significant changes in the costs of performance, in comparison with the parties' assumptions made on the day they entered the legal relationship. It should be stressed, however, that an abnormal loss is not the same as the loss of planned profit or income anticipated by the party at the time of signing the agreement,[41] but only the effect of an excessive breach of the contractual balance, which nullified the contracting parties' earlier calculations. On the other hand, an extraordinary change in relations may also lead to excessive difficulty in meeting the obligation. It is assumed that the problems in question are those difficulties connected with the existence of certain obstacles which, from a practical and reasonable point of view, would require the debtor to take measures that are dangerous or excessively burdensome for him.[42] The difficulties may be of a personal nature and involve risk to the debtor's life or health in the performance or of a material nature, which will result in the necessity to cover excessive expenditures while performing the obligation. There must be a causal link between the above circumstances, in which the extraordinary change of relations will lead to problems with the performance of the agreed contract. If the above-mentioned prerequisites are met, the court will be able to indicate a different way of performing the obligation, change the amount of the benefit, or even terminate the agreement between the parties.[43]

The application of the *rebus sic stantibus* clause is not the only judicial possibility to restore the contractual balance. In professional trade, demands for the modification of contract may also be based on Article 632 § 2 of the Civil Code, referring to the valorisation of a lump sum remuneration. By way of an exception, the code clause allows for the court modification of the performance by increasing the lump sum or terminating the contract in the event of an unforeseen change in relations that threatens the ordering party with an abnormal loss.[44] In order to be able to effectively use the clause, it is necessary that several prerequisites are simultaneously present and causally linked to each other, i.e.

40 Judgement of Supreme Court [2014] II CSK 191/14. Legalis 1180685.

41 Judgement of Supreme Court [2015] I CSK 901/14. Legalis 1360056.

42 Piotr Machnikowski in Edward Gniewek and Piotr Machnikowski Piotr (eds) *'Kodeks Cywilny. Komentarz'*. ['Civil Code. Commentary'.] 'Księga trzecia. Zobowiązania. Tytuł I. Przepisy ogólne.' [Third book. Obligations. Title I. General provisions.]10th edn (C.H. Beck 2021) art 357^{1}.

43 Ibid 33.

44 Article 632 § 2 of CC Act.

there must be a certain ordinary and logical connection that ties the two circumstances together, exactly as regulated by the *rebus sic stantibus* clause.[45] First, there must be a change in relations that was not foreseen by the parties beforehand, but which is not defined as extraordinary, which makes it a less stringent requirement to meet. The legislator does not define the notion of the change of relations directly; hence it is necessary to reconstruct it on the basis of other legal sources. A significant change of relations refers exclusively to an external event, independent of the parties, which they were not able to foresee precisely on the date of concluding the agreement[46] and which occurrence will be associated with an increased contractual risk. Such a situation shall not, therefore, be an event or an individual situation relating to the trader, for example relating to his difficult financial situation or a defect in his documentation resulting from an inadequate preparation for performance.[47] However, such an event may be deemed to be, inter alia, changes in the economic system or a sudden increase in prices of certain goods, such as diesel fuel or construction materials that the parties did not foresee when entering into the agreement.[48] Second, there must be a condition indicating that performance of the obligation in such circumstances could entail an abnormal loss for the ordering party. It is assumed that the concept of an abnormal loss in this case does not refer to the overall financial standing of the ordering party. It is only considered in relation to the specific legal relationship and the threat of losses that would be associated with this transaction if the lump sum agreed in advance were paid in this amount. In the academic literature, it is assumed that the scope of this concept is the same as the one defined earlier with reference to the *rebus sic stantibus* clause. Considering the above, if the indicated prerequisites are met, the court may increase the lump sum or terminate the agreement, invoking the clause of Article 632 § 2 of the Civil Code.

V. Contractual *versus* Judicial Valorisation: Conclusions and Evaluation of Solutions

Both solutions have their advantages and disadvantages. They should be assessed not only from a comparative perspective, contrasting the two clauses with each other, but also from a broader point of view by considering their

45 Łukasz Żelechowski in Konrad Osajda (ed), *'Kodeks Cywilny. Komentarz.'* [Civil Code. Commentary.] 'Tytuł XV. Umowa o dzieło.' [Title XV. Work contract.] 29th edn (C.H. Beck 2021) art 632.

46 Judgement of Supreme Court [2013] IV CSK 354/12. Legalis 719242.

47 Ibid 35.

48 Judgement of Court of Appeals in Warsaw [2016] VI ACa 569/15. Legalis 1714681.

relevance against the background of contractual agreements, pursuing the same objective of modifying inadequate performance.

The code institutions discussed above are characterised by considerable similarity. This coincidence is primarily due to the identical purpose of these institutions, which is to valorise the benefit in the event of changes in the market. The prerequisites indicated in the provisions themselves are outlined in a very similar way with only minor differences resulting from the level of details in the provision and the circumstances to which it is applied. Moreover, Article 632 § 2 of the Civil Code constitutes *lex specialis* in relation to Article 357^1 of the Civil Code.[49] This means that it is included in the content of the *rebus sic stantibus* clause as being narrower in scope than the general rule, which excludes its application in cases where these two rules coincide. Regulation of Article 632 § 2 of the Civil Code is expressed in a different approach to the change of relations and protected entities. In the case of an alteration of relations, the key concept is the term 'extraordinary', which appears only in the case of the clause of Article 357^1. Taking into account the rationality of the legislator, it may be indicated that the lack of such a term, in the clause of Article 632 § 2, is a deliberate procedure and is aimed at differentiating the grounds of these two regulations. Hence, in the jurisprudence, it is specified that both categories do not have to refer to catastrophic events, but certainly the event in the form of an 'extraordinary change of relations', should contain more elements of unusualness than a 'change of relations' within the meaning of Article 632 § 2.[50] This means that the requirements indicated in *lex specialis* are easier to meet and do not entail the occurrence of changes as drastic as the standard *rebus sic stantibus* clause. Another issue is the narrower scope of the provision's addressees, as it allows only one of the contracting parties to address the court, i.e. the creditor in a legal relationship. The issue of entitled entities is outlined differently in the general provision, where the legislator has not introduced such limitations, leaving an equal scope of protection for both parties. Also, the scope of the court's possibility to interfere in the contractual relationship is regulated differently, leaving a broader possibility of re-formation in the case of the *rebus sic stantibus* clause, which allows the court not only to increase the benefit or terminate the relationship, but also to change the way the obligation is performed by the party. This issue has not been regulated that widely in the case of modification of a lump sum, where it is only possible to increase its amount or terminate the contract.

Considering the above, it is not possible to unequivocally state which of the clauses more comprehensively allows the modification of the contractual relationship in professional relations in case of unpredictable changes in the

49 Judgement of Supreme Court [2012] I CSK 333/11. Legalis 526889.

50 Ibid 42.

market. Once the judicial valorisation is necessary, each case should be analysed separately in terms of the requirements of the regulations, so that the interests of the parties to the contract may be best protected.

On the other hand, when comparing court-imposed and contractual valorisation, the conclusions are in favour of the parties' own regulation in case of market changes. In principle, the main reason for formulating such a conclusion is the issue of the parties' freedom to shape contractual provisions and thus to adapt them to their own requirements and expectations. This aspect of freedom may be analysed from various perspectives that involve separate issues. First, a contract that is mutually constructed by the parties allows them to express their will as fully as possible and adjust the provisions to their preferences. The parties may, for example, independently determine the level of market changes, which will oblige modifications in the scope of the obligation relationship or set a measure of value, as a reference point, for establishing the amount of modified consideration. Such provisions may be of any nature whatsoever but, by no means, may contravene applicable law. In the case of court proceedings, however, the prerequisites are strictly outlined by the legislator, which means that it will be necessary to prove that there has been a very significant change in relations involving an abnormal loss that the parties did not foresee when entering into the agreement. Each of the code clauses regulates these prerequisites in a very similar way, but it is certain that from a practical point of view, these requirements are quite stringent and often difficult to fully meet and then prove during the court proceedings. Also, the attention should be brought to the issues relating to the resolution of the case. In the event of contractual clauses, the parties are the source of the solution to the problematic situation, as they shape the relationship at their own discretion and if certain conditions are met, they implement a specific solution that is certain for them. By contrast, a court judgement will not always meet the expectations of the parties. It is possible for the court to dismiss the claim or resolve the case in a manner that differs from that requested by the plaintiff (for example, increase the remuneration by a smaller amount than requested). In principle, in the case of the *rebus sic stantibus* clause, in conjunction with the adopted opinion of the Supreme Court,[51] it may be stated that the courts are not bound by the demand indicated in the statement of claim as to the manner of interfering with an existing legal relationship. This statement is quite debatable and raises many doubts. It results from the fact that the court, apart from being bound by the content of the provision indicating the potential resolution and the limits of the legal relationship, is also obliged to take into account the interests of the parties and the principles of social coexistence, so as to avoid a situation in which the claimant's situation is significantly improved at

51 Resolution of Supreme Court [1998] I CKN 972/97. Legalis 338656.

the expense of the defendant's interest.[52] For this very reason, the court may resolve the case differently because it finds a different solution which is believed to be more adequate for the parties and their interests. For example, it may be decided to change the manner of performance, rather than reduce its value as requested by the plaintiff, because it is perceived that lower remuneration may unduly affect his financial situation. Such actions in practice are not always beneficial for the parties.

Another, very obvious, premise in this respect is the temporal issue, which speaks unequivocally in favour of contractual indexation clauses. Code solutions explicitly refer to settling a case through court proceedings, which are, as a rule, a longer and more expensive way. The court, in the event of either party bringing an action against the other for modification or termination of an obligation, must analyse the case and its relevant circumstances and, at the same time, consider the interests of each party and the principles of social coexistence. The more complicated the case is, the longer the proceedings will take. Moreover, each procedure involves additional costs related to, inter alia, attorney's fees and the need to complete all formalities, which may prove time-consuming. Having to wait a long time for the case to be resolved may entail losses on the part of the trader and adversely affect his financial liquidity. Contractual relationships are characterised by timeliness in their execution and the date of their realisation is also not accidental, since it is often chosen because of the need to fulfil other obligations or to finalise certain stages of an assumed plan, which, in the absence of particular elements, may not be realised. The lapse of time in this case works to the disadvantage of the parties and their situation. Unlike a court valorisation clause, the contractual provisions in this respect operate automatically and affect the amount of remuneration as soon as circumstances defined by the parties arise. The reaction to the change is immediate, as its terms have been agreed upon in advance and the solution meets the parties' objectives and at the same time stabilises their situation in the contractual relationship.

VI. Summary

Contractual adjustment clauses should be widely used while contracting, particularly in conditions of market destabilisation and growing inflation, which we are currently witnessing. Despite this obviousness and the many advantages resulting from the use of clauses, this is not a common practice for all entrepreneurs in the market. Contracts quite often lack pertinent formulations that would more appropriately protect the interests of the parties. Contractual provisions adjusting the value of benefits are of great practical significance and ensure the certainty

52 Ibid 45.

and stability of trade. In terms of basic issues, it may be pointed out that they update the legal relationship in the case of changes that make the parties' provisions outdated, thus helping to avoid potential conflicts in the future and allowing for a quick, predetermined reaction to changes, which is not guaranteed by the court valorisation provided in the Civil Code in Articles 357^1 and 632 § 2. Introducing a valorisation clause into the concluded agreement makes it possible to comply with the principle of equality of the parties by securing their interests on an equal basis and taking into account the fact that losses may occur on either side. A legal relationship shaped in this way, including a clause in the event of changes in the future, allows for a more complete implementation of the *pacta sunt servanta* principle, as it contains mechanisms that update and thus allow the fulfilment of the benefit in the exact amount agreed by the parties.

The valorisation clauses should be drafted in a way that is clear to the parties and allows for a straightforward reference to reality. Without these features, the clauses would be of a blank nature and impossible to use in practice. Because of the systematic nature of the law and the numerous links between its branches, it is permissible to adapt from other provisions in drafting one's own contractual provisions. An appropriate model in this case would be the discussed clause from Article 439 of the PPL Act, which contains a catalogue of obligatory elements of an indexation clause, which needs to be included in contracts for construction works or other services concluded for a period longer than 12 months. This regulation is relatively new and in force for only one year, which suggests that the legislator saw a legitimate need to regulate this matter on a statutory level. Taking this into account, it can be argued that the previous lack of regulation was ineffective, and the mere invocation of the principle of freedom of contract did not sufficiently solve practical problems related to the use of valorisation clauses. Therefore, due to the validity of the problem in the proper drafting of the contractual provisions, the content of this provision should be taken into account especially in professional trade, which will prove a high degree of reliability of entities and allow for safer execution of the contract.

Practice has repeatedly shown that the lack of valorisation mechanisms may cause contractors to abandon investments due to the excessive costs of their implementation and a lack of ability to adapt them to market realities. On the other hand, it contributes also to the increase in the number of companies declaring bankruptcy, especially in the construction sector, due to their inability to fulfil their obligations. In addition, it can be noted that it is much more beneficial for the ordering party to adjust the remuneration rather than to conduct a new tender procedure because the previous contractor did not meet his obligation. Moreover, in this respect, the additional costs of a court procedure to obtain compensation for a lack of performance of a concluded contract must be taken into account, which, undoubtedly, will take a lot of time and resources. The same reasons speak

in favour of using indexation clauses outside the public procurement system. The correct market practice of properly drafting clauses and then incorporating them into the text of the contract is irreplaceable. In view of the above, the widespread inclusion of indexation clauses in contracts could significantly reduce negative phenomena of this kind, which will favour the market and trading certainty and also will have a positive impact on the overall economic situation.

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