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The formation of a contract under Polish law

The aim of the paper is to present rules on contract formation adopted in Polish law. The first part of the paper concerns basic rules on reaching a consensus between the parties. Next, the paper presents the methods of contract formation regulated in the Civil Code. Firstly, it focuses on provisions concerning offer and acceptance. Secondly, it examines the rules concerning negotiations. Thirdly, it analyses the rules on concluding a contract by auctions and tenders.

1. CONSENSUS

The rules on contract formation are regulated in the general part of the Polish Civil Code. The meaning of a contract is not defined in the provisions of the Civil Code. However, it is pointed out that a contract should be understood as a multilateral legal act consisting of concurring declarations of will made by all of the parties concerned¹. It is commonly accepted that a contract is concluded if the parties have reached a consensus². The parties attain a consensus if their declarations of intent have the same sense according to the rules on interpretation of declarations of intent stated in the Civil Code. The basic provision in this respect is Article 65 § 1 of the Civil Code according to which a declaration of intent should be interpreted in view of the circumstances in which it is made as required by the principles of community life and established custom. Hence, a consensus does not always mean that the will of both parties in a psychological meaning concurs because the rules on interpretation may give a declaration made by a party a different meaning than subjectively intended.

In order to conclude a contract, it is not necessary to attain a consensus on the entire content of the contract. Otherwise, it is sufficient that the parties reach a consensus on the essential conditions³ of the contract. The scope of the essential

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¹ S. Grzybowski, (in:) S. Grzybowski (ed.) *System Prawa Cywilnego*, vol. 1, Wrocław-Warszawa-Kraków-Gdańsk 1974, p. 547; Z. Radwański, (in:) Z. Radwański (ed.) *System Prawa Prywatnego*, vol. 2, Warszawa 2008, p. 318; A. Olejniczak, (in:) M. Gutowski (ed.) *Kodeks cywilny. Tom I. Komentarz. Art. 1 – 449*¹¹, Warszawa 2016, commentary on the Art. 66, no. 4.

² Z. Radwański, (in:) *System Prawa Prywatnego...*, p. 319.

³ „Essential conditions” of a contract should not be understood as “essentialia negotii” of a contract. The latter are taken into consideration in the process of determination of a type of a contract rather than in the assessment of whether a contract was concluded. See: Z. Radwański, (in:) *System Prawa Prywatnego...*, p. 324; M. Jasiakiewicz, *Zawarcie umowy w obrocie handlowym*, Toruń 1995, p. 21–22.

conditions that must be agreed by the parties making a contract is not generally defined. The range of the necessary conditions is determined by the type of a contract and by the level of detail of the applicable provisions of statutory law⁴. Therefore, although in general it may be said that the parties should agree on the subject-matter of the contract, which includes the description and the quantity of the goods as well as the requirements as to their quality, the price, or the scope of performance, for some types of contracts such an agreement is not necessary because the conditions may be ascertained on the basis of the relevant provisions of statutory law (for example the remuneration in a specific work contract and mandate – see: Art. 628 § 1 and Art. 735 § 2 of the Civil Code respectively)⁵.

Another requirement for an effective conclusion of a contract is the indication of the parties. The parties may be indicated in the content of the contract or by the circumstances of its conclusion⁶.

2. METHODS OF CONTRACT FORMATION

There are four ways of concluding a contract regulated in the Civil Code: (1) offer and acceptance; (2) auction; (3) tender; and (4) negotiations. Nevertheless, the parties are free to choose another way of making a contract as long as specific provisions of the statutory law do not state otherwise⁷. Furthermore, it is possible for the parties to change the originally chosen way of concluding a contract during the process (e.g. to renounce the offer and acceptance procedure and start negotiations instead)⁸.

2.1. Offer and acceptance

2.1.1. Offer or invitation to treat

An offer is a firm manifestation of intention (whether orally, in writing, or by conduct) by the offeror of a willingness to be bound by the terms proposed to the offeree (the addressee), as soon as the offeree signifies acceptance of the terms. However, a declaration of the intent to conclude a contract made to another party is deemed an offer only if it determines the essential provisions of the contract⁹. The rule is justified by the assumption that it is the offeror who determines the content of a contract and the role of the offeree is limited to an acceptance of the offeror's proposition¹⁰. Therefore, an offer must include all of the provisions necessary to conclude a contract, thus, all of the essential conditions of a contract.

⁴ P. Machnikowski, (in:) E. Gniewek, P. Machnikowski (eds.) *Kodeks cywilny. Komentarz*, Warszawa 2016, commentary on the Article 66, no. 9.

⁵ P. Machnikowski, (in:) *Kodeks cywilny. Komentarz*, Warszawa 2016, commentary on the Art. 66, no. 9.

⁶ Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warszawa 2015, p. 291.

⁷ P. Machnikowski, (in:) *Kodeks cywilny. Komentarz*, introduction to the provisions on the formation of a contract, no. 2; Z. Radwański, (in:) *System Prawa Prywatnego*, p. 319; A. Olejniczak, (in:) *Kodeks cywilny.....*, commentary on Art. 66, no. 6.

⁸ A. Olejniczak, (in:) *Kodeks cywilny.....*, commentary on the Art. 66, no. 6; P. Machnikowski, (in:) *Kodeks cywilny. Komentarz*, introduction to the provisions on the formation of a contract, no. 2.

⁹ Article 66 of the Civil Code.

¹⁰ A. Olejniczak, (in:) *Kodeks cywilny.....*, commentary on the Art. 66, no. 10.

Otherwise, a declaration of the intent to make a contract is only considered as an invitation to treat¹¹.

Even if comprising all of the essential conditions of a contract, announcements, advertisements, price lists and other information addressed to the public or to particular persons are not, in case of doubt, deemed an offer but an invitation to treat¹². Nevertheless, the rule has a limited meaning in the case of a sale contract. This is because it is expressly stated in the Civil Code that a public display of a thing in the place of sale with an indication of its price is deemed a sale offer¹³. The rule applies analogously to automatic vending machines¹⁴. Nevertheless, it does not apply to offers of sale made on the Internet¹⁵. The above rules have only an interpretative character¹⁶. Hence, an advertisement may constitute an offer if there is no doubt that it is a firm proposition of making a contract and a public display of a thing for sale may be qualified as an invitation to treat if the seller stipulates that it should be so understood¹⁷.

2.1.2. Revocation by the offeror

An offer is binding for the offeror at the moment it is made to the offeree, namely at the moment it reaches the offeree in such a way that she can acquaint herself with its content¹⁸. Hence, the offeror may revoke the offer only by making a declaration that reaches the offeree before or at the same time as she receives the offer¹⁹.

An offer that is already effectively made may be withdrawn in relations between entrepreneurs if a declaration of withdrawal is submitted to the offeree before she sends a declaration accepting the offer. However, an offer cannot be withdrawn if this follows from its content or a time limit for its acceptance is given therein²⁰.

As far as an offer made to the public (*ad incertas personas*) is concerned, the offer is binding to the offeror at the moment it is advertised. In such a case, the offeror may modify or withdraw an offer that has not yet been accepted as long as she did not specify the period for an acceptance²¹.

Special rules apply to an offer made electronically that is not addressed to a particular person²². Such an offer binds the offeror if the offeree promptly confirms receipt thereof²³. An entrepreneur²⁴ submitting an offer electronically must

¹¹ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 71, no. 1; decision of the Supreme Court from 20 October 1978, IV CR 402/78, OSNCP 1979 no. 7–8, pos. 154.

¹² Article 71 of the Civil Code.

¹³ Article 543 of the Civil Code.

¹⁴ Z. Radwański, (in:) *System Prawa Cywilnego*, p. 326; B. Gawlik, *Procedura zawierania umowy na tle ogólnych przepisów prawa cywilnego (66–72)*, Kraków 1977, p. 13, 14.

¹⁵ W. Kocot, *Wpływ internetu na prawo umów*, Warszawa 2004, p. 179.

¹⁶ B. Gawlik, *Procedura zawierania...*, p. 10, 11; Z. Radwański, (in:) *System Prawa Prywatnego*, p. 326.

¹⁷ P. Mikłaszewicz, (in:) K. Osajda (ed.) *Kodeks cywilny. Komentarz*, Warszawa 2016, commentary on the Art. 71, no. 3.

¹⁸ Article 61 § 1 of the Civil Code.

¹⁹ P. Mikłaszewicz, (in:) *Kodeks cywilny. Komentarz*, commentary on the Art. 66, no. 20.

²⁰ Article 66² of the Civil Code.

²¹ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 66², no. 4.

²² Thus, the rules do not apply e.g. to an offer made by an email or other means of direct distance communication.

²³ Article 66¹ of the Civil Code.

²⁴ An entrepreneur is defined as a natural person, a legal person, or an organizational unit not being a legal person which have been granted the legal capacity by virtue of statutory law, that carries on economic or professional activity on their own behalf – see: Art. 43¹ of the Civil Code.

unambiguously and clearly inform the offeree before concluding a contract of: (1) technical acts covered by the procedure of concluding a contract; (2) legal effects of the receipt of the offer by the offeree; (3) rules and methods of recording, securing and making the content of the contract available to the offeree; (4) technical methods and means for detecting and correcting errors in the introduced data that she is obliged to make available to the offeree; (5) languages in which the contract can be made; (6) codes of ethics that she applies and their availability in electronic form. The above-mentioned obligation to inform the offeree applies accordingly if an entrepreneur invites the other party to enter into negotiations, to make offers, or to conclude a contract in any other way. The requirements to inform the offeree about technical acts covered by the procedure of concluding a contract, legal effects of the receipt of the offer by the offeree, and rules and methods of recording, securing and making the content of the contract available to the offeree, do not apply to the conclusion of a contract by email, or similar means of individual distance communication. Neither do they apply in relations between entrepreneurs if the parties so agree. If an entrepreneur would not inform the offeree about the indicated issues the offer still would be binding. However, he or she would be liable to pay damages for any loss suffered by the offeree due to the infringement of the information duties²⁵.

2.1.3. Acceptance

In order to enter into a contract the offeree shall accept the offer made by the offeror. An acceptance is understood as an unequivocal expression of consent to the proposal contained in the offer and has the effect of immediately binding both parties to the contract. A declaration of intent constituting an acceptance of an offer should be communicated to the offeror in such a way that she could acquaint herself with its content²⁶. Nevertheless, the offer may require the offeree to comply with a particular method of acceptance; a purported acceptance that deviates from this may not bind the offeror²⁷.

The offeror may also indicate in the offer a period for a response. Otherwise, an offer made in the presence of the offeree or by means of direct distance communication ceases to be binding if it is not accepted immediately. An offer made in a different way, however, ceases to be binding when the time has passed in which the offeror could, in the normal course of business, receive a response sent without unreasonable delay²⁸. If a declaration on accepting an offer is received late but it follows from its content or from the circumstances that it was sent in due time, the contract is concluded unless the offeror immediately notifies the offeree that, due to the delayed reply, she considers the contract not concluded²⁹. Thus, it is the offeree who bears the risk of late acceptance³⁰.

²⁵ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 66¹, no. 25, 26.

²⁶ See: Art. 61 of the Civil Code; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 69, no. 1.

²⁷ A. Olejniczak, *Kodeks cywilny...*, commentary on the Art. 69, no. 1.

²⁸ Article 66 § 2 of the Civil Code.

²⁹ Article 67 of the Civil Code.

³⁰ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 67, no. 3.

An acceptance of an offer usually requires a declaration made by the offeree. The general rule is that an acceptance cannot be inferred from the offeree's silence. Nevertheless, if an entrepreneur has received an offer to conclude a contract within the scope of his activity from a person with whom she is in permanent business relations, the lack of immediate reply is deemed acceptance of the offer³¹. A silence of the offeree may also be interpreted as an acceptance if, according to the custom established in given relations or according to the wording of the offer, there is no requirement for the offeror to receive a declaration of acceptance from the offeree, in particular if the offeror demands that the contract be immediately performed. In such a case, the contract is concluded if the offeree starts to perform it in due time; otherwise, the offer ceases to be binding³².

2.1.4. Correspondence of acceptance with offer

The regulation of offer and acceptance in the Polish Civil Code is based on the mirror image approach which means that an offer must be accepted exactly with no modifications³³. The offer accepted with a stipulation of changes or supplements to its content creates a counter-offer and, as such, terminates the original offer³⁴. Nevertheless, there is an exception concerning business relations, namely, in relations between entrepreneurs a response to an offer made with a stipulation of changing or supplementing it in a way that does not change its content substantially shall be deemed its acceptance. In this case, the parties shall be bound by the contract with the content determined in the offer taking into account the stipulations made in the reply thereto³⁵. Whether the response to an offer changes its content substantially is assessed on the basis of the circumstances of the case³⁶. A modification may concern any condition stated in the offer, including the essential conditions of a contract³⁷. It is pointed out that a change should be considered substantial if it influences the rights or obligations of the parties in such a way that the economic outcome of a contract for one of the parties significantly decreases or the performance of a contract becomes considerably more difficult³⁸. In case of doubt, one should assess whether a normal party would reasonably expect the offeror to accept the modifications³⁹. The above exception to the mirror image approach does not apply if the content of an offer states that it may be accepted only without stipulations; or if the offeror has immediately objected to the inclusion of the stipulations in the contract; or if the other party, in the reply to the offer, made

³¹ Article 68² of the Civil Code.

³² Article 69 of the Civil Code. See also: Z. Radwański, *Teoria umów*, Warszawa 1977, p. 80–81; B. Gawlik, *Procedura zawierania umowy...*, p. 109; M. Jasiakiewicz, *Ofertowy system zawierania umów w polskim prawie cywilnym*, Toruń 1993, p. 40 ff.

³³ Z. Radwański, (in:) *System Prawa Cywilnego*, p. 334; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 68, no. 1.

³⁴ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 68, no. 1.

³⁵ Article 68¹ of the Civil Code.

³⁶ P. Machnikowski, (in:) *Kodeks cywilny. Komentarz*, commentary on the Art. 68¹, no. 8; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 68¹, no. 6.

³⁷ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 68¹, no. 6.

³⁸ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 68¹, no. 6; Z. Radwański, (in:) *System Prawa Prywatnego*, p. 336; P. Machnikowski, (in:) *Kodeks cywilny. Komentarz*, commentary on the Art. 68¹, no. 8.

³⁹ See: M.A. Zachariasiewicz, *Procedura zawierania umów według znowelizowanych przepisów k.c.*, KPP 2004 vol. 4, p. 949; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 68¹, no. 6.

its acceptance conditional upon the offeror's consent to include the stipulations in the contract and did not receive such consent immediately⁴⁰.

Special rules apply to the situation of the 'battle of forms' which arises between entrepreneurs where the parties purport to conclude a contract by exchange of forms containing incompatible terms. In such a case, a contract does not include those provisions of the forms which are contradictory. However, a contract is not concluded if, after having received an offer, a party immediately informs the other party that it does not intend to enter into a contract on such terms and conditions⁴¹.

2.1.5. Time and place of the conclusion of a contract

In case of doubt, a contract is deemed concluded at the moment when a declaration of acceptance reaches the offeror in such a way that she can acquaint herself with its content, or – if there is no requirement for the offeror to receive a declaration of acceptance – at the time when the other party starts to perform the contract⁴². In general, a contract is deemed concluded in the place where the offeror receives a declaration of acceptance. However, if there is no requirement for the offeror to receive a declaration of acceptance or the offer is made electronically, a contract is deemed concluded in the place of residence or in the registered office of the offeror at the time when the contract is made⁴³.

2.2. Negotiations

Another method of the formation of a contract regulated in the Civil Code is negotiation. Negotiation is understood as a dialog between the parties intended to reach a consensus. Conversely to the offer and acceptance mode, a negotiation does not consist in a firm manifestation of intention of a willingness to enter into a contract and it does not need to fulfil such strict requirements as to its content⁴⁴. If the parties hold negotiations in order to conclude a specified contract, the contract is concluded when the parties reach the agreement on all provisions that were the subject of negotiations⁴⁵.

The parties should conduct negotiations in good faith and with the intention to conclude a contract⁴⁶. A party who enters into or conducts negotiations in breach of good custom, in particular, without intending to make a contract, is obliged to compensate any loss that the other party has suffered by the fact that she was counting on the contract being made⁴⁷. Furthermore, the parties are obliged to non-disclosure of confidential information given in the process of negotiations. The Civil Code expressly states that if, during negotiations a party makes information

⁴⁰ Article 68¹ § 2 of the Civil Code.

⁴¹ Article 385⁴ of the Civil Code.

⁴² Article 70 § 1 of the Civil Code.

⁴³ Article 70 § 2 of the Civil Code.

⁴⁴ Z. Radwański, (in:) *System Prawa Prywatnego*, p. 347–348.

⁴⁵ Article 72 § 1 of the Civil Code.

⁴⁶ Z. Radwański, (in:) *System Prawa Prywatnego*, p. 350.

⁴⁷ Article 72 § 2 of the Civil Code. See also: S. Rogoń, *Problemy negocjacyjnego trybu zawarcia umowy po nowelizacji kodeksu cywilnego*, PPH 2003, no. 4, p. 6.

available with a stipulation of confidentiality, the other party cannot disclose it to other persons or use it for her own purposes unless the parties agreed otherwise⁴⁸. In the case of non-performance or improper performance of this duty the entitled party may demand that the other party compensates any loss suffered by her or hands over any benefits which she has obtained⁴⁹.

2.3. Auctions and tenders

2.3.1. The general rules

Apart from the offer and acceptance and negotiations processes, a contract may be concluded through an auction or tender⁵⁰. A conclusion of a contract through both an auction and a tender embraces three stages: (i) the announcement of an auction or tender; (ii) taking offers; (iii) choosing the most profitable offer. A contract is concluded at the end of the third stage or, if there are further requirements – especially concerning the form of a contract – after the fulfilment of the requirements⁵¹.

An announcement of an auction or tender constitutes a declaration of intent⁵². It may be addressed to an unlimited number of individuals (*ad incertas personas*) as well as to a limited group of persons (at least two)⁵³. The provisions of the Civil Code do not specify the way an auction or tender shall be announced. Hence, unless specific provisions concerning particular types of transactions do not state otherwise, the announcement does not have to be public and it can be made by any means of communication, thus, by a traditional post, by email, on the Internet, in the press or in any other way chosen by the organizer of an auction or tender⁵⁴. The announcement should specify the time, place, subject as well as the terms and conditions of an auction or tender or, eventually, should indicate how the terms and conditions are made available to participants of the auction or tender⁵⁵. The terms and conditions of an auction or tender are understood as detailed rules concerning the procedure on the basis of which the best offer is being selected and the requirements that an offer needs to fulfil in order to be admitted to an auction or tender⁵⁶. It is pointed out that an announcement of an auction or tender does not constitute an offer but merely an invitation

⁴⁸ Article 72¹ § 1 of the Civil Code.

⁴⁹ Article 72¹ § 2 of the Civil Code. See also: Z. Radwański, (in:) *System Prawa Prywatnego*, p. 351–352.

⁵⁰ The scope of application of the provisions of the Civil Code concerning the conclusion of a contract through an auction or tender is limited by a large number of specific regulations on certain kinds of transactions, in particular, transactions involving the public interest. In this respect, one should mention above all the following regulations: (i) ustawa z 20.10.1994 r. o specjalnych strefach ekonomicznych (t.j. Dz. U. z 2015 r., poz. 282) – Arts. 17 – 17a; (ii) ustawa z 30.8.1996 r. o komercjalizacji i prywatyzacji (t.j. Dz. U. z 2015 r., poz. 747 ze zm.) – Arts. 33 – 35 and 48 – 49; (iii) ustawa z 21.8.1997 r. o gospodarce nieruchomościami (Dz. U. z 2015 r., poz. 1774 ze zm.) – Arts. 37 – 42; (iv) ustawa z 28.2.2003 r. – Prawo upadłościowe (t.j. Dz. U. z 2015 r., poz. 233 ze zm.) – Arts. 320 – 322 and 325; (v) ustawa z 29.1.2004 r. – Prawo zamówień publicznych (t.j. Dz. U. z 2015 r., poz. 2164); (vi) Art. 52 ff of the ustawa z 2.7.2004 r. o swobodzie działalności gospodarczej (t.j. Dz. U. z 2015 r., poz. 584 ze zm.).

⁵¹ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 5.

⁵² A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 7.

⁵³ Z. Radwański, (in:) *System Prawa Prywatnego*, p. 361; A. Olejniczak, (in:) *Kodeks cywilny. Tom I. Komentarz*, commentary on the Art. 70¹, no. 7.

⁵⁴ Z. Radwański, (in:) *System Prawa Prywatnego*, p. 361; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 9.

⁵⁵ Article 70¹ § 2 of the Civil Code.

⁵⁶ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 15.

to treat⁵⁷. Therefore, it does not have to indicate all of the essential conditions of a contract. It is sufficient that it specifies a type of a contract (e.g. a sale contract, a lease, or an insurance contract) and a subject matter of the contract (e.g. an immovable property, a car, an enterprise)⁵⁸. The announcement as well as the terms and conditions of an auction or tender cannot be changed or cancelled unless their wording so provides⁵⁹. In any case, a modification of the rules of an auction or tender is not permitted after an auction has started or the time for making offers in a tender has passed⁶⁰. Furthermore, even if the organizer stipulated the right to cancel or modify the announcement or the terms and conditions of an auction or tender, a cancellation or modification may be considered as an abuse of right and therefore not permitted⁶¹.

The organizer, from the time the terms and conditions are made available, and the bidder, from the time the bid is made in accordance with the announcement of the auction or tender, are obliged to proceed in accordance with the announcement and the terms and conditions of the auction or tender⁶². In case of a breach of the rules stated in the announcement and in the terms and conditions of the auction or tender the innocent party can claim damages for the loss suffered as a result of the non-conclusion of a contract⁶³. It is usually accepted that damages are, in such a case, limited to the negative contractual interest⁶⁴. In general, such interest includes the expenses and a lost opportunity to conclude another contract with a third party if the opportunity was sufficiently certain.

2.3.2. Bid made during an auction

An auction leads to a conclusion of a contract by bids that are made by participants against one another with each subsequent bid required to be higher than the previous bid. Thus, a bidding in fact concerns only one of the conditions of the contract (usually the price or remuneration). An auctioneer may set a minimum sale price in the announcement or in the terms and conditions of the auction. In such a case, if the final bid does not reach the price the item remains unsold. The bids are made openly in order to give the other participants an opportunity to make a higher bid and each participant can bid repeatedly. Sometimes the terms and conditions of an auction set a minimum amount by which the next bid must exceed the current highest bid. In general, bidders may call out their bids themselves or have a proxy call out a bid on their behalf. It is accepted that a bid constitutes a declaration of intent to make

⁵⁷ Z. Radwański, (in:) *System Prawa Prywatnego*, p. 361–362; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 11.

⁵⁸ Z. Radwański, (in:) *System Prawa Prywatnego*, p. 361–362; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 11.

⁵⁹ Article 70¹ § 3 of the Civil Code.

⁶⁰ R. Szostak, *Zagadnienia konstrukcyjne przetargu w świetle znowelizowanych przepisów kodeksu cywilnego*, KPP 2004 vol. 1, p. 81, 82; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 22; P. Machnikowski, (in:) *Kodeks cywilny. Komentarz*, commentary on the Art. 70¹, no. 13; Z. Radwański, (in) *System Prawa Prywatnego*, p. 362.

⁶¹ See: Art. 5 of the Civil Code; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 23; P. Machnikowski, (in:) *Kodeks cywilny. Komentarz*, commentary on the Art. 70¹, no. 13.

⁶² Article 70¹ § 4 of the Civil Code.

⁶³ See: the decision of the Court of Appeal in Poznań from 23.5.1996, I ACR 212/96, OSA 1998, no. 4, pos. 15; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 20.

⁶⁴ See: the decision of the Court of Appeal in Poznań from 23.5.1996, I ACR 212/96, OSA 1998, no. 4, pos. 15; A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70¹, no. 20.

a contract⁶⁵ and, unless the terms and conditions of the auction provide otherwise, is binding for the bidder until another bidder makes a more favourable offer. The auction ends where no participant is willing to bid further, at which point the highest bidder pays her bid. A contract is concluded in an auction at the time a bid is knocked down⁶⁶. Unless the terms and conditions of an auction do not state otherwise, the auctioneer is bound by the outcome of the auction and is obligated to accept the highest bid⁶⁷. If she evades making a contract by not knocking down the bid, the bidder may demand the conclusion of the contract in the court. In such a case, a final and non-revisable decision of the court stating the duty of the auctioneer to make a specified declaration of intent replaces that declaration⁶⁸. If a validity of a contract depends on the fulfilment of specific requirements provided for by law, both the auction organizer and the participant whose bid has been accepted may demand that the contract be concluded⁶⁹.

2.3.3. Bid made during a tender

A tender leads to a conclusion of a contract by making a comparison between bids after the time for making the offers has passed. The assessment comprises all of the offers that fulfil the requirements stipulated in the announcement and the terms and conditions of the tender. Conversely to an auction, the assessment is not limited to just one of the elements of a contract but comprises a broader range of aspects, such as the price, quality, quantity, time, and location⁷⁰. The announcement or the terms and conditions of the tender may indicate the criteria that are taken into consideration and its significance for the final outcome. Contrariwise to an auction, the offers are usually made in writing and they are not open⁷¹. A bid made during a tender ceases to be binding if another bid is chosen or if the tender is closed without a bid being chosen unless the terms and conditions of the tender provide otherwise⁷². The organizer is obliged to immediately inform the participants of the tender in writing of the outcome of the tender or of the tender being closed without a bid being chosen⁷³. The time at which the contract is concluded by way of a tender is determined according to the rules on offer and acceptance unless the terms and conditions of the tender provide otherwise⁷⁴. If a validity of a contract depends on the fulfilment of specific requirements provided for by law, both the organizer and the participant whose offer has been chosen may demand that the contract be concluded⁷⁵.

2.3.4. Tender bond

Terms and conditions of an auction or tender may provide that a party intending to participate in the auction or tender should, in order to be admitted, pay the

⁶⁵ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70², no. 3.

⁶⁶ Article 70² § 2 of the Civil Code.

⁶⁷ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70², no. 6.

⁶⁸ See: Art. 64 of the Civil Code; Art. 1047 § 1 of the Code of Civil Procedure.

⁶⁹ Article 70² § 3 of the Civil Code.

⁷⁰ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70³, no. 2.

⁷¹ A. Olejniczak, (in:) *Kodeks cywilny...*, commentary on the Art. 70³, no. 2.

⁷² Article 70³ § 1 of the Civil Code.

⁷³ Article 70³ § 2 of the Civil Code.

⁷⁴ Article 70³ § 3 of the Civil Code.

⁷⁵ Article 70³ § 3 and 70² § 3 of the Civil Code.

organizer a fixed fee or establish appropriate security measures for its payment⁷⁶. If the participant of an auction or tender whose bid is chosen evades the conclusion of a contract whose validity is conditional on the fulfilment of specific requirements provided for by law, the organizer of the auction or tender may either retain the amount collected or claim satisfaction from the object of security. In other cases, the tender bond should be immediately returned and the security established is extinguished. If the organizer of the auction or tender evades the conclusion of the contract the participant whose bid is chosen may demand that double the tender bond be paid or that damage be compensated.

2.3.5. *Invalidation of a contract*

An organizer or a participant of an auction or tender may demand that a contract be invalidated if a party to the contract, another participant, or a person acting in agreement with them influenced the outcome of the auction or tender in breach of law or good custom⁷⁷. If the contract is concluded on another person's account, its invalidation may also be demanded by the person on whose account the contract was concluded or by the mandatary. The right to demand invalidation of a contract expires one month after the day the entitled person received the information of the existence of the reason for the invalidation, however, not later than one year from the day when the contract was made.

Słowa kluczowe: prawo zobowiązań, zawarcie umowy, oferta, przetarg, formułowanie umowy, konsensus, unieważnienie umowy

Summary

Katarzyna Kryla-Cudna, *The formation of a contract under Polish law*

The paper presents the rules on the formation of a contract adopted in Polish law. The first part of the paper concerns basic rules on reaching a consensus between the parties. The paper discusses the general requirements for establishing a consensus. Furthermore, it examines the conditions that need to be agreed by the parties in order to consider the contract concluded. Next, the paper presents the methods of the formation of a contract regulated in the Civil Code. Firstly, it focuses on provisions concerning offer and acceptance. It analyses the differences between an offer and an invitation to treat, the possibility to revoke an offer by the offeror, the requirements for an effective acceptance of an offer, the issue of correspondence of an acceptance with an offer, as well as the rules on establishing the time and place of a conclusion of a contract. Secondly, the paper presents the rules concerning negotiations. Finally, it analyses the rules on concluding a contract by auctions and tenders. In this respect, it examines the general rules of the formation of a contract through auctions and tenders, the specific rules on a bid made during an auction and a bid made during a tender, the issues related to the tender bond, and the possibility to invalidate a contract concluded through an auction or tender.

Keywords: law of obligations, conclusion of a contract, offer, tender, the formulation of the agreement, consensus, invalidation of the contract

⁷⁶ Article 70⁴ of the Civil Code.

⁷⁷ Article 70⁵ of the Civil Code.