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ON LEGAL INTERPRETATION OF BASIC CONSUMER RIGHTS

Abstract. The liability of an entrepreneur towards a consumer is the specific kind of contractual responsibility. The typical feature of this regime is weakness of two principles that are basic for market economy: freedom of contracts and *pacta sunt servanda* principle. This liability is regulated by specific acts of law. Its object is to intensify the legal protection of the consumer.

Nowadays in the Polish law, the form of legal provisions concerning protection of the consumer, is influenced by European Union law, especially consumerist directives. The Act on specific terms and conditions of consumer sale, on 27th July 2002, has huge practical significance. The basic premise of this liability is the fact of 'nonconformity of goods with the contract'. Therefore there is no need to prove any damage and other premises inseparably connected with damage liability. Moreover, it must be noticed that normally specific acts of law concerning protection of the consumer, do not entirely realize the compensatory function which is typical of general principles of contractual responsibility.

1. Introduction

The interpretation of legal provisions, which is most frequently identified with interpretation of the law, comprises an extensive area of scientific research requesting expertise in the field of the legal theory and dogmatics, ontology and hermeneutics in particular. Various classification criteria of legal provisions' interpretation are applied both to the needs of science and practice. (Morawski, 2006, p. 33 and next). Thus a large amount of different phenomena and processes that are heterogeneously cognitive in nature compose the establishment of the content of specific legal provisions.

The problem of the interpretation of consumer rights is particularly apparent in the practice of legal provisions' application, mainly due to the dynamism of social life connected with economic and system transformations that occurred in Poland after 1989. In connection with it, it is worth

paying attention to some aspects of the interpretation of legal provisions, particularly when it regards its meaning in the sphere of the content of fundamental consumer rights, that is of a person acting as a “final subject” in the chain of goods and services exchange, the final link in the economic chain. (Łętowska, 2004, p. 45). This issue appears even more interesting due to the fact that the legislator himself reserves non-symmetry of legal regime, that is in the case of consumer regulations, he departs from the basic principle of civil law – the principle of equality of legal positions of the parties to a legal relation. It is one of the ways of special and specific legal protection of a consumer. (Łętowska, 2004).

As far as the operative interpretation of the law, i.e. performed during the law application process, is concerned, the opinion approved of in science saying that the task of the interpretation is to establish the correct or appropriate meaning of legal texts, which may be reduced to appropriate “decoding” of possibly unequivocal norms contained in these texts, is of fundamental importance. Therefore the interpretation is a sequence of thought operations (based on adequate legal knowledge, the knowledge of legal writing, and the ability to use legalese) aiming at the extraction of legal norms from valid legal provisions. The object of legal interpretation is a legal text since state bodies do not formulate ready norms of procedure but issue legal provisions.

These establishments are of very significant meaning to the analysis of the detailed issue, that is the content and legal character of consumer rights¹ enlisted in the ustawa z dnia 27 lipca 2002 r. o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie kodeksu cywilnego (Dz. U. z 2002 Nr 141, poz. 1176, z późn. zm.) – hereinafter referred to as the Act on consumer sale. (Kańska, p. 2004, as well as the literature cited therein). The notion “consumer sale” comprises, most of all, sales agreement. Moreover, provisions on consumer sale by virtue of the reference (Art. 605¹ 770¹ and 627¹ of the kodeks cywilny – hereinafter referred to as Civil Code) are applied directly to supply agreements, consignment sale and respectively to a contract to perform a specified task concluded within the scope of the entrepreneurship’s activity whose subject is a “consumer good”. Therefore it is a specific legal separation of consumer sale because it is done not with regard to a buyer (consumer) but a seller and the object of sale.

After the above cited Act came into force, there appeared opinions in the legal literature which implied that we deal with an incomplete regulation evoking reservations as to its subject scope, the legal effects resulting from a lack of inter-temporary provisions, and the prerequisites of responsibility. (Kierzyk, 2004, p. 93; Gnela, 2012, p. 403; Puzyna, 2006, p. 109). A detailed

analysis of the Act's text allows to formulate other reservations as well.

Hitherto existing provisions on warranty and guarantee as expressed by the Civil Code (Art. 556–581) have ceased to be binding in consumer relations (apart from the exceptions envisaged by the Act). It should be emphasized here that the introduction of a new legal regulation in the scope of consumer protection was justified, most of all, by the need to implement the Directive No. 1999/44 EC of the European Parliament and Council of 25th May, 1999 (Official Journal L 171, 07/07/1999 P. 0012 – 0016) on certain aspects of the sale of consumer goods and associated guarantees. (See more on this topic in: Żuławska, 2001, p. 230; Łętowska, 2004, p. 279; Gajek, 2003, p. 206). Thus, an amendment to the regulation became a necessity irrespective of the fact whether new provisions did improve the buying consumer's protection or not. (Kierzyk, 2004, p. 91). Despite other legal regulations, the economic relation between the entrepreneur and the consumer remains unchanged. For the entrepreneur, conducting a business activity is the essence of participation in the market whereas the consumer is interested in real satisfaction of an economic need existing at a given moment. (Łętowska, 2000, p. 123). It goes without saying that market mechanisms themselves do not provide protection of consumer's economic interests, thus protective legal regulations are necessary. Poland has decided to “move out” institutions serving consumer protection outside the frames of the kodeks cywilny by passing numerous acts and provisions of a lower degree regulating this issue in a fragmentary way. Without evaluating the adopted legislative technique, it should be added that we also lack a comprehensive regulation of consumer trade. For this reason we have the Act regarding consumer sale, tourist services ustawa z dnia 29 sierpnia 1997 r. – o usługach turystycznych (Dz. U. z 2004 Nr 223, poz. 2268 j.t.), consumer credit – ustawa z dnia 12 maja 2011 r. o kredycie konsumenckim (Dz. U. z 2011 Nr 126, poz. 715) and many other regulations.

2. A legal character of liability for non-conformity with the agreement in the background of the legal construction of warranty

An opinion has appeared in the subject literature according to which, within the frames of harmonization of Polish law with the European Union law, there have been introduced new principles of the seller's responsibility for consumer goods. (Puzyna, 2006, pp. 106, 109). It seems, however, that the analysis of the above quoted Act on consumer sale does not allow to

draw such an unequivocal and far reaching conclusion. It may be assumed, on the other hand, that the responsibility for non-conformity of consumer goods with the agreement is based on the known legal construction of warranty being only partially modified. Accountability for non-conformity of consumer goods with the agreement is based not on traditionally understood defectiveness of goods but on non-conformity of consumer products (goods) with the agreement.²

Pursuant to the previously binding regulation, the rights occurring from the warranty for defects regarded all things. The scope of the act on special conditions of consumer sale is narrower, since the act refers solely to the sale of consumer goods which definition is contained in Art. 1 thereof. Pursuant to this provision, a consumer good is a movable thing sold to a natural person who purchases this thing for the purpose not connected with a professional or business activity. The rights guaranteed under warranty as well as the rights under non-conformity of consumer goods with the contract are inherent by virtue of the law and depend neither on the seller's knowledge nor fault. As far as the liability under warranty is concerned. (Katner, 2004, p. 129), as well as liability for non-conformity of consumer goods with the contract, one cannot assume that we deal with the liability for risk. On the other hand, it may be reasonably acknowledged that both legal constructions should be classified as the objective liability. It is not the liability for risk. Both, in the case of the liability under warranty and liability for non-conformity of consumer goods with the contract, the seller does not risk the occurrence of defects but is liable for their occurrence.

A basic prerequisite for the liability under warranty is the product's defect. According to Art. 556 § 1 of the Civil Code, a seller is liable towards a buyer if a sold good has a defect lowering its value or usefulness with regard to the purpose stipulated in the contract or resulting from the article's designation if it does not have the properties about the existence of which the seller assured the buyer, or if the object of sale was offered to the buyer in an incomplete state. As far as the liability for non-conformity of consumer goods with the contract is concerned, a central notion (a basic prerequisite) of the liability is non-conformity of a consumer good with the contract, which results from Art. 4 par. 1 and Art. 4 par. 3 *a contrario* to the Act on consumer sale. Based on Art. 4 par. 3 thereof, it may be concluded that in the case of an individual agreement of consumer goods' properties, such goods are inconsistent with the contract if they cannot be used for the purpose that such kind of products are usually used for, or when their properties do not conform to those featuring in such kind of products, or when they do not conform to expectations regarding such type

of products based on a seller's, producer's or his representative's affirmation or assurance made in public, or if they do not conform to affirmation or assurance expressed in the good's marking or advertisements. Apparently, the legislator has applied different editorial techniques. In the meaning of Art. 556 of the Civil Code, the definition of a defect is based on the indication of features (particularly functional ones) a thing must have so that it could be defined as defective. This concept has also been accepted by judicature (III CZP 48/88). According to the provisions regulating the liability under warranty, this rule of defining defects refers to each and every thing. Whereas Art. 4 of the aforementioned Act allows to expound the notion of the non-conformity with the contract using *a contrario* method solely in the case of an individual agreement of consumer goods' properties. The subject literature debates whether the concept of non-conformity of goods with the contract is narrower or wider than the concept of a defect (Puzyna, 2009, p. 109).³ In the consumer sale's practice, we usually still deal with employing the notion of a product's defect. It should be assumed that similar to the product's defect, the content of the notion of non-conformity of consumer goods with the contract will be shaped by judicature and legal doctrine to a large extent.

Continuing the issue of principles the liability under non-conformity of consumer goods with the contract is based on, we should pay attention to the circumstances excluding the liability under warranty and under non-conformity of consumer goods with the contract. A seller is exempted from the liability under warranty if a buyer knew about the defect at the moment of the contract's conclusion, or, with regard to the things marked as to their kind and future things, at the moment the thing is offered (Art. 557 of the Civil Code). If the buyer knew about the defect, it may be assumed that we are dealing with the implied consent of the buyer for the purchase of a faulty good. If, however, the seller knew about the defect and failed to inform the buyer about it, then the seller is liable as the one who deceitfully concealed the defect from the buyer (Art. 558 § 2 of the Civil Code).

The issue of the circumstances exempting the seller from liability in the case of consumer goods is regulated in a way similar to the one described above. Pursuant to ustawa z dnia 27 lipca 2002 r. o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie kodeksu cywilnego, the seller is not held liable for non-conformity of consumer goods with the contract if the buyer knew about this non-conformity or, considering it reasonably, should have known about it. The same refers to non-conformity which resulted from the cause inherent in the material delivered by the buyer. We cannot derive the obligation to examine the object of purchase by a consumer from both

regulations, that is the Code's construction of warranty and the Consumer Law. The Act on consumer sale unequivocally obliges the seller to inform the buyer about consumer goods' properties or features (Art. 2 and 3 thereof).

From the point of view of the consumer, a favorable solution adopted in the Consumer Law seems to be the content of Art. 4 par. 1 thereof. According to this provision, the seller is liable before the buyer if at the moment the consumer good is offered, it does not conform to the contract; if the non-conformity is ascertained before the lapse of six months from the moment the product was offered, it is presumed that the non-conformity existed at the moment the product was offered. Nevertheless, it should be added that the expression "it is presumed" contained in this provision arouses serious interpretative doubts. It would be the easiest and most favorable for the consumer to accept that we are dealing here with legal presumption whose task is to strengthen the consumer's legal position and exempts him or her from the burden of proof. However, the opinions have appeared saying that the notion "it is presumed" contained in the aforementioned provision should be understood not as a legal presumption introduced by this term but as a statutory definition of non-conformity of goods with the contract. (Gajek, 2003, p. 177). Despite internal contradictions of the provisions of Art. 4 of the Act on consumer sale (in the same issue it contains "presumptions" protecting both the consumer and the seller), discussions about the content and purpose of this provision propose to assume that it introduces legal presumptions in situations when the seller would have deserved. (Gajek, 2003, p. 177). Nevertheless, it should be added that even if the existence of the presumption is to be acknowledged, it does not cause a change of the rule upon which the liability under non-conformity of consumer goods with the contract is based on.

Moreover, it is absolutely clear that the issue of the loss of the rights by the buyer has been based on the same scheme. It results from Art. 563 § 1 of the Civile Code that the purchasing consumer loses the rights under warranty for physical defects of a product if he fails to inform the seller about the defect within a month from its detection. Whereas pursuant to Art. 9.1. of the Consumer Law, the buyer loses his rights if before the lapse of two months from the ascertainment of non-conformity of consumer goods with the contract, he fails to inform the seller about this fact.

Both the legal regulation of liability under warranty (Frąckowiak, 2004, p. 29; Koch, 2008, p. 32) as well as liability resulting from non-conformity of consumer goods with the contract contain heterogeneity of the rights the buyer is entitled to. The analysis of the literature on warranty indicates that among the rights the buyer is entitled to we should distinguish claims

and formative rights. It is an opinion absolutely prevailing in the literature and practice.⁴ As far as warranty is concerned, claims should also include the demand to remove the defect, the demand to deliver the product free of defects, and the demand to lower the price. Thus, the right emergent from the law is termination of the contract. And exactly such a line of interpretation of the rights under warranty has been adopted by judicature. (Koch, 2008, p. 32). It seems that there are neither thematic nor formal impediments to use the achievement of science and judicature within this scope in the sphere of the interpretation of a legal character of the rights under non-conformity of consumer goods with the contract. What is more, this respectively regards the conditions of initiating claims as well as conditions of enforcing the right to terminate the contract.

The aforementioned circumstances characterizing the basic constructive element of both institutions, that is warranty and liability under non-conformity of consumer goods with the contract, are generally based on the same rules, creating the objective liability that is guaranteed under the law and independent of the seller's fault. What distinguishes them is, above all, their subjective and objective scope, which nevertheless, does not shatter the constructive foundations of both legal institutions. In such a situation, a cautious analogy in the interpretation of the legal regulations analyzed here and regarding implementation of consumer rights is justified.

By all means, it should be emphasized here that the kind and intensity of the use of specific consumer rights depends not only on a legal regulation but various paralegal factors too. For example, consumer goods which, as a production rule, are unrepairable or possess features of disposable products, or their repair is uneconomic, are more and more often produced. Thus a possibility of initiating a claim to bring the thing into the state conforming to the contract through its free repair is necessarily out of the question. Moreover, it would be hard not to mention the role of demand and supply for a specific product and money's purchasing power as factors influencing consumers' decision on the kind of consumer rights being implemented.

3. The issue of sequentiality of the rights in the light of the Act on consumer sale

Pursuant to Art. 8 par. 1 of the Act on consumer sale, where the consumer good is inconsistent with the agreement, the buyer may require to have the good restored to the condition stipulated by the agreement through:

- free repair, or
- a replacement with a new item unless the repair or replacement are not feasible or entail excessive expenses.

Perceiving the problem of the interpretation of excessive expenses, the legislator indicates criteria which should be helpful to settle this issue. Characteristically, the criterion which clearly refers to the consumer is placed only at the end of the statutory enumeration. Namely, pursuant to Art. 8 par. 1 of the Act, while estimating what constitutes excessive expenses, the following factors shall be taken into account: the value of the good consistent with the agreement, the degree of discovered inconsistency, as well as any inconvenience the buyer would be forced to suffer if his claim was to be satisfied by other means. One cannot resist having the impression that while formulating this provision, the legislator omitted the basic idea of the Act and its protective character.

If the buyer, for the reasons specified above, can demand neither repair nor replacement, or if the seller is not able to satisfy such a request in due time, or if the repair or replacement expose the buyer to considerable inconvenience, he has to right to:

- demand an appropriate price reduction, or
- terminate the agreement (Art. 8 par. 4).

Unfortunately, the buyer cannot terminate the contract if the inconsistency of the consumer good with the agreement is irrelevant (Art. 8 par. 4).

Taking into account the most frequently applied classification of consumer rights worked out on the basis of the previously valid legal state and Art. 10 par. 2 of the Act on consumer sale, one may assume that we deal here with three claims:

- 1) for a free of charge repair,
- 2) for a replacement with a new item,
- 3) for a price reduction.

Moreover, the aforementioned claims are completed by one right which is law-formative in nature, that is the right to terminate the agreement.

The statutory right to terminate the agreement is not unconditional. Adopted restrictions of contract termination are a resultant of the seller's (a professional) and consumer's interests and economic risk. Evaluating the relation between the professional and consumer in the light of the Act on consumer sale, one should include a basic motif of this Act, that is its protective character directed at the protection of the consumer as the last and weakest link in the chain of goods trade.

The literature most frequently expresses the opinion according to which the Act provides the buyer with the choice of the rights. Nevertheless, it

remains limited, in the seller's interest, through the rights' sequentiality. It is indicated that while realizing the model of consumer protection adopted by the Directive 1999/44, the Act on consumer sale stipulates that the buyer may request, in the first place, the repair or replacement of a consumer good (Art. 8 par. 1), whereas only in the second place, if specific prerequisites occur, the buyer may demand price reduction, or he may terminate the agreement (Art. 8 par. 4). Moreover, the Act restricts the choice of the right by the buyer by a possibility of raising a charge by the seller that the repair or replacement would entail excessive expenses (Art. 8 par. 1) (Pisuliński, 2004, p. 188).

Nevertheless, one may as well consider the possibilities and arguments deviating from the interpretation of the law presented above. For this purpose, first and foremost, it should be reminded that the resolutions of the Directive determine a certain minimum threshold of consumer protection. In such a case, the domestic legislator has an open way to the regulations that are more favorable than the standard adopted in the Directives. It appears that on the basis of the provisions of the Act on consumer sale, it is admissible to depart from the adopted rigorous sequentiality of consumer rights, which lies in the consumer's interest.

The sequentiality of rights results not so much from the provisions of the Act on consumer sale but from the resolutions of the Directive No. 1999/44. It seems that there are arguments for the acknowledgment that the literal interpretation of the provision of Art. 8 par. 1, sentence 1 of the Act on consumer sale does not determine the sequence of claims enforcement: "Where the consumer good is inconsistent with the agreement, the buyer may require to have the good restored to the condition stipulated by the agreement, free of charge, i.e. to have it repaired **or** replaced by a new item, unless the repair **or** replacement are not feasible or entail excessive expenses." Focusing on the process aiming at determination of the meaning of the provision of Art. 8 par. 1 of the Act on consumer sale as well as the content of the legal norm contained therein, attention should be paid to the role of a conjunction "or". It results from the reading of the above quoted sentence (crucial for the entire provision of Art. 8 par. 1) that we are dealing with two equivalent rights formulated in the configuration of excluding alternative. It is beyond the question that either right may be realized.

Referring to the classification of goods into those marked as to their generic features (substitutable, mass- or series-produced) and those individually identified (e.g. Art. 561 of the Civile Code), we may assume that on the basis of the Act on consumer sale, in the case of generically featured things the consumer can generally demand to bring the object of sale into

the state conforming to the contract through the replacement by a new item. The seller may block the consumer's right to terminate the agreement solely by delivering a new consumer good.

Moreover, the above quoted provision provides a possibility of demanding the repair of the faulty product. Nevertheless, including the aforementioned classification of things, we may assume that the repair should regard solely the thing which is individually identified. In the case of the sale of consumer goods that are individually identified, the requirement to replace the thing by a new item is impossible and the seller may report a charge of impracticability of performance. Then the consumer's right to terminate the agreement may be blocked by the seller solely by bringing the thing into the state conforming to the contract through the free of charge repair of the thing.

Despite the fact that the Act on consumer sale lacks explicit dependence of the buyer's rights on the kind of consumer goods we are dealing with – featured only generically or individually identified – there are no legal impediments to include the rule of intensified protection of consumer interests while referring to the principles adopted in the legal interpretation of the buyer's rights under the liability under warranty (Art. 561 of the Civile Code). Sharing T. Kierzyk's way of thinking presented in the considerations on the rights under warranty,⁵ it seems that there are significant arguments for the interpretation of consumer rights which is more favorable to him than the line rooted in the rigorous sequentiality of the rights under non-conformity of consumer goods with the contract.

The seller cannot impose upon the consumer the repair of a consumer good that is generically featured within the liability and under non-conformity of the consumer good with the contract and this way block the consumer's possibility of using the right to terminate the agreement unless the inconsistency of the consumer good with the agreement is irrelevant (Art. 8 par. 4). The situation is different if the buyer was granted a guarantee (most frequently corresponding to the content of quality assurance of Art. 577 of the Civile Code). Then the repairs of the consumer good that is generically or individually featured are taken into account within the provided guarantee.

In practice controversies occur around the notion of irrelevant inconsistency of the consumer good with the agreement. Analyzing Art. 8 par. 4 *a contrario*, we should remember that the evaluation of the "relevance" of inconsistency of a consumer good with the agreement is very important from the point of view of the consumer right to effective termination of the agreement. Relatively rich achievements of doctrine and judicature in the

matter of settlement of the “relevance” of the product’s defect as far as the liability under warrant is concerned, may be suitably used here. (Kierzyk, 2000, pp. 56–57 and the literature cited therein). According to the prevailing opinion, while evaluating the relevance, we should take into account the assessment of the product’s usefulness and functionality with regard to the purpose envisaged by the contract, which is also made from the point of view of a subjective feeling of the buyer up to the limits specified by Art. 5 of the Civile Code. The “relevance” determined in such a way will allow complete realization of consumer rights with simultaneous assurance of the seller’s interests. (Kierzyk, 2000, pp. 56–57 and the literature cited therein).

It seems that the proposed realization of consumer rights is not violated by Art. 8 par. 4 of the Act on consumer sale, which entails that if the buyer, due to impossibility of the repair or replacement, or excessive expenses resulting from these rights, can demand neither the repair nor replacement, or if the seller is not able to satisfy such a demand in due time, or if the repair or replacement exposed the buyer to serious inconvenience, he has the right to demand appropriate price reduction, or to terminate the agreement; whereas he cannot terminate the agreement if non-conformity of a consumer good with the contract is irrelevant. While determining an appropriate time of the repair or replacement, the type of the good and the purpose of its purchase are taken into account. The impossibility to repair, as a prerequisite to terminate the agreement, should be referred to things that are individually identified. Impossibility of the replacement provides the bases for the enforcement of the agreement’s termination in the case of the sale of a thing that is generically featured. As a rule, impossibility to repair or to replace the consumer good allows the consumer to go to the second group of the rights, that is price reduction or agreement termination. The choice of the rights belongs to the consumer, nevertheless, he is statutorily limited. (Kierzyk, 2004, p. 103). The purpose of these restrictions is the protection of the seller’s (a professional) interest.

Finally, there remains the issue of the realization of the right to price reduction. The literature classifies it as the second group of the rights (Kierzyk, 2004, p. 102) fortified by additional conditions which must occur so that the enforcement of this right is possible. The seller is burdened with the obligation of the repair or replacement of a consumer good “in due time”. If the seller fails to do so, the consumer has the right to demand appropriate price reduction. It refers also to the situation when the repair or replacement expose the buyer to serious inconvenience. It seems that in practice this right will be used most frequently when the seller fails to perform the obligation of the repair or replacement “in due time”. The buyer

may do the repair himself or use the consumer good of lowered functional or esthetical qualities. Appropriate price reduction refers both to generically featured and individually identified things. This right is not restricted with regard to the kind of a consumer good and it does not seem that there exist any reasons for a normative limitation of the possibility of using price reduction in the case of all consumer goods (either generically featured or individually identified).

Conclusion

On 1st January, 2003, ustawa z dnia 27 lipca 2002 r. – o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego (Dz. U. z 2002 Nr 141, poz. 1176) came into force. It changed the position of the consumer with regard to the seller of goods and services. The introduction of this Law was justified by not merely the need dictated by market mechanisms but, first and foremost, by the need to implement the Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees. Previously binding provisions on warranty and guarantee did not harmonize with the Directive's content. It does not mean, however, that these provisions automatically and unquestionably protected the consumer's rights worse than the Directive's resolutions.

From the point of view of the consumer, a favorable solution is a statutory prolongation of special legal protection up to two years from the moment the good was offered. Nevertheless, adopting such establishment, we should remember that special consumer protection is a price-creating element. Thus, sooner or later, it will be "fixed" in the price of a consumer good.

Together with development of modern technologies and various instruments shaping the market, there are more and more mass-produced and "unrepairable" goods. Undoubtedly, this fact influences the kind of consumer rights being realized. The consumer requires the repair more and more rarely, which is also connected with more explicit shaping of the consumer market and a large availability of consumer goods.

Despite the change of the legal regulation in the sphere of consumer's legal status, there are no impediments to suitably use the achievements of science and judicature referring to the principles of realization of the rights under warranty to the liability for non-conformity of consumer goods with the contract. The need to depart from the interpretation of consumer rights leading to their rigorous sequentiality seems justified. Commonly adopted

division into things that are generically featured and individually identified may be useful here. The content of Art. 8 of the Act on consumer sale does not exclude the possibility of appropriate application of the mechanism envisaged in Art. 561 of the Civile Code.

In the case of the mass-produced consumer goods the possibility of using the right to terminate the agreement by a consumer may be blocked by the seller through the replacement of the product by a new item unless the inconsistency of consumer goods with the contract is irrelevant. Moreover, the repair of a merchandise belongs to the essence of the institution of guarantee and not the liability under non-conformity of consumer goods with the contract. In such a context, termination of the agreement on the sale of a product that is individually identified may be blocked by the seller by the product's repair. The right to the repair or replacement by a new consumer item cannot mean that the seller has the right to impose on the consumer the realization of the good's repair within the liability under non-conformity of consumer goods with the contract if this good is only generically featured. Unfortunately, the practice indicates that sellers most often offer to restore the commodity to the state consistent with the contract through the free of charge repair of such an item. As far as goods sold at lowered prices are concerned, e.g. in the system of out-of-season sales, consumers are often unlawfully informed by sellers about the lack of legal protection under non-conformity of consumer goods with the contract, which consumers consent to. It proves still insufficient awareness of consumers as to the scope of the rights they are entitled to. Even though legal awareness of the provisions' recipients remains outside the sphere of the provisions' interpretation, it is a crucial factor shaping the effectiveness and assumed purpose of specific legal regulations.

N O T E S

¹ As for the normative term of a "consumer" see, most of all, Art. 221 of the Civil Code.

² To read more about the legal construction of liability under non-conformity of consumer goods with the contract see: Pisuliński, J. (2004). In J. Rajski (Ed.), *System Prawa Prywatnego. Volume 7. Prawo zobowiązań – część szczegółowa*, (p. 164). Warszawa: C.H. Beck.

³ On the matter of the evaluation of the legal regulation of consumer sale see also: Gnela, B. (2008). Uwagi o regulacji umowy sprzedaży konsumenckiej. In M. Pazdan, E. Rott-Pietrzyk & M. Szpunar (Eds.), *Europeizacja prawa prywatnego. Volume I* (p. 259). Warszawa: Oficyna Wolters Kluwer business.

⁴ A different opinion on this matter was expressed by Skąpski, J (1976). In S. Grzybowski (Ed.), *System Prawa Cywilnego. Prawo zobowiązań – część szczegółowa* (p. 116). Wrocław–Warszawa–Kraków–Gdańsk: Ossolineum. The author treats all rights the buyer is entitled to as the ones shaping the law.

⁵ The original interpretation of the buyer's rights resulting from warranty was proposed and justified by Kierzyk, T. (2000). Reklamacje wad pojazdu – wybrane zagadnienia (ochrona konsumentów). *Rejent*, 5, 54.

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