

SUMMARY

Buyer's position in a consumer sales contract – *de lege lata* and *de lege ferenda*

The aim of the dissertation is to analyse the position of the buyer-consumer who buys goods from professional sellers in order to assess whether consumers are adequately protected by the current legislation, both in the sphere of the rights and in the process of pursuing their legitimate claims against traders.

The Consumer Rights Act of 30 May 2014, in force since 25 December 2014, amended the provisions of the Civil Code that normalize the regime of seller's liability under warranty for defects in sold goods. The introduced changes fundamentally altered the relations related to the conclusion and performance of contracts between consumers and their professional counterparties - sellers. The Consumer Rights Act of 30 May 2014 repealed the Act of 22 July 2002 on Specific Terms of Consumer Sales and on the Amendment of the Civil Code, in force until 24 December 2014, transposing into our legal system Directive 99/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. This directive introduces into EU law a regime of seller's liability for non-conformity of goods with the contract.

As a consequence of the amendments to the Civil Code made by the Act of 30 May 2014 on consumer rights, the regulation of consumer sales is once again included in this basic legal act for civil law relations. In connection with the adoption of new solutions in such an important and sensitive to changes area of civil law as consumer law, the question arises about the position of the non-professional buyer on the grounds of the consumer sales contract. This thesis is devoted to this issue.

In order to assess the position of the buyer-consumer against the background of the sales contract, it is necessary to determine how the consumer sales contract should be understood. This issue is devoted to the first chapter of the work. The thesis proposes a definition of consumer sales, for the purpose of regulating this type of contract of a strictly consumer nature. Directive 99/44/EC understands consumer sales as an economic rather than a juridical concept. According to this act of European law, contracts for the supply of consumer goods to be manufactured or produced are also considered as sale – article 1 point 4 of Directive 99/44/EC. The Polish legislator, implementing this directive, has decided that the

provisions of a consumer sales contract be applied, implicitly or explicitly, to contracts structurally similar to a sales contract (i.e. a specific-task contract, supply contract, commission sale contract, contract of delivery of agricultural produce and lease agreement).

The second chapter of this work is devoted to the notion of the seller and the buyer, i.e. a natural person purchasing an item for a purpose not directly connected with his/her business or professional activity. When defining the parties to a consumer sales agreement, Polish lawmaker, as the only one among the countries implementing Directive 99/44/EC in their legal systems, used the concept of a buyer instead of a consumer one to define a non-professional contractual partner of the seller, synchronizing this concept with the definition of a consumer set out in Article 22¹ of the Civil Code.

The notion seller, being a party to a consumer sales agreement, refers in its scope to the definition of an entrepreneur contained in Article 43¹ of the Civil Code and the business activity conducted by him in his own name. Therefore, it seems justified to approximate the meaning of this notion in the context of their legal act of sale with consumers.

Determining the status of a buyer, being a consumer who purchases goods and services for private - non-business or professional - purposes, involves determining when a purchased item has a defect. This issue is the subject of the third chapter of the dissertation.

The fourth chapter of this work is devoted to the rights of a buyer who is a consumer under the regime of the seller's liability under warranty for defects of goods sold. The Act on Consumer Sales, following Directive 99/44/EC, introduced a sequence of the buyer's rights, hitherto unknown in Polish law. Under the first sequence, the buyer could demand that the goods be brought into conformity with the agreement by replacement or repair of the goods, while under the second sequence, the buyer had the right to reduce the price or termination of the contract. Transition to the second group of rights was allowed after the occurrence of strictly defined prerequisites, which were the impossibility of repair or replacement, failure to repair or replace the goods in a reasonable time, the excessive cost of repair or replacement, or a situation where the repair or replacement would cause considerable inconvenience to the buyer.

By virtue of the amendment of the Civil Code provisions made by the Act of 30 May 2014 on consumer rights, the legislator abandoned the concept of a hierarchical way of exercising consumer rights under the warranty. *De lege lata*, in the event of a defect, the consumer may make a statement to the seller about either reducing the price or termination of the contract. Alternatively, he may demand that the seller repair or replace the item. Chapter 4 assesses the functioning of the regulation of consumer sales in terms of the actual possibility

of exercising the granted rights by way of proceedings before a common court, as well as in the system of out-of-court settlement of consumer disputes.

Chapter 5 contains a summary of enquiries addressed to entities tasked with consumer protection (county (municipal) consumer ombudsmen, employees of consumer protection departments of the Trade Inspection, presidents of amicable consumer courts, consumer organizations, the European Consumer Centre) concerning the application of consumer sales regulations, together with proposals for solutions aimed at increasing consumer protection in legal and non-legal terms.

The observations and conclusions contained in the study will serve to improve the position of weaker market participants (consumers) purchasing things from professional traders. The postulates for changes in the regulations concerning consumer sales will contribute to this. The dissertation also raises the issue of the real use of substantive provisions in the pursuit by consumers of claims arising from defective goods. The conclusions of the above will have an impact on improving the effectiveness of consumer redress.

The study concludes that the position of the non-professional buyer in the light of the Code statutory warranty regulation has generally improved compared to the legal and factual situation that existed when the Act on Special Terms of Consumer Sales was in force. The return to a uniform regulation of warranty and guarantee of sales contracts for the entire economic turnover is already a value in itself deserving definite support. The manner in which consumer rights are regulated in the event of defective goods (non-compliance with the contract in the case of physical defects) contained in Articles 560 - 576 of the Civil Code is particularly positive.

The new rules rightly abandon the sequential nature of consumer rights under the Consumer Sales Act and Directive 99/44/EC. Under the repealed Consumer Sales Act, in the event of non-conformity of goods with the contract, the consumer could first claim against the seller to repair or replace the item. The right to reduce the price or termination of the contract came second, after a number of conditions were met that made it difficult for the consumer to use these means of protection. On the other hand, in the light of the provisions of the Civil Code, in the case of defective goods (non-compliance with the agreement), the consumer may use the whole "palette" of rights specified in Articles 560 and 561 of the Civil Code (repair, replacement, price reduction, termination of the contract). The gradual approach to the manner of exercising the rights by the buyer-consumer, which was provided by the act on

consumer sales, prefers such methods of remedying non-conformity of goods with the contract that maintain the contractual relationship between the parties.

This solution was advantageous for the seller, who has an interest in keeping the consumer contract in force as long as possible.

Preference for repair as a means of restoring the item to normal use should be given under the guarantee regulated in Article 577 et seq. of the Civil Code. As a rule, it is the manufacturers of goods or distributors who provide an appropriate after-sales service. Sellers do not have specialized technical facilities necessary to repair goods. This especially concerns small entrepreneurs, who due to lower business costs are reluctant to enter into appropriate agreements with service companies.

The current legislation, although granting the consumer a free choice of rights, also safeguards the economic interests of sellers. If the consumer wants to terminate the contract or exercise his right to reduce the price, the seller may block these consumer rights and uphold the contract by carrying out the replacement or repair of the defective item without delay and without excessive inconvenience to the consumer. Replacement or repair may be carried out by the seller once, unless the defect in the goods is minor. The possibility of blocking the buyer's right under the warranty by the seller's counter-right to repair or replace the item once and without undue inconvenience is a solution favorable to consumers, taking into account Polish economic reality and the practices of Polish entrepreneurs.

Some Member States transposing Directive 99/44/EC granted the consumer the right to exercise all four of his rights in the event of lack of conformity of an item with the contract. The European Commission did not accuse those Member States of incorrectly transposing the Directive, which allowed consumers to choose between the four rights provided for in the Consumer Sales Directive in the event of non-conformity of the goods with the contract. The Consumer Sales Act was enacted without any reflection on the need for their introduction from the point of view of the need for consumer protection. The statutory regulation based on the provisions of Directive 99/44/EC constituted a reduction of the buyer's rights compared to those granted to the buyer under the Civil Code. EU regulations may guide national law, provided that they are used carefully. Copying and pasting Community standards into national regulations, without adjusting them to the system of national law, contributes to the creation of a thicket of regulations that are difficult to assimilate, not only for the addressees of these regulations (consumers), but also for professionals. Leaving the right to termination of the contract in last place and introducing conditions for the permissibility of using this legal instrument implies that the consumer will be bound by an unwanted contract without the

possibility of taking account of his interest. It should be noted that in Polish market realities, sellers repeatedly make ineffective repairs to goods. The gradual way in which the non-professional buyer's rights are implemented in the Consumer Sales Act and Directive 99/44/EC undoubtedly serves the sellers' interests. The regulations stemming from Article 560 of the Civil Code, allowing under the warranty to demand from the seller a refund of the price paid in connection with the consumer's statement on termination the contract or demand to reduce the price, based on the conditions provided for in Article 560 § 3 of the Civil Code, should be viewed favorably. The inclusion of new regulations on consumer sales in the Civil Code made it necessary to adapt these provisions to the terminology used in the Civil Code. Thus, terminological errors occurring in the repealed Consumer Sales Act were rectified. The said act, remaining outside the structure of the Civil Code, was not conceptually coherent with this fundamental normative act for civil relations.

The consumer protection actors to whom questionnaires were sent regarding the application of the consumer warranty provisions were overwhelmingly positive about the new provisions introduced by the Consumer Rights Act of 30 May 2014.

The study comes to the general conclusion that although the applicable provisions of positive law, as a rule, provide an adequate level of consumer protection in the area of consumer sales, there is a deficit of such protection in the area of procedural consumer protection. Consumers are not sufficiently represented in court in disputes arising from defective goods sold. Both consumer organizations and county (municipal) consumer ombudsmen do not make use of their powers to bring actions on behalf of consumers, as well as to join, with the consumer's consent, court proceedings at every stage thereof. Moreover, the procedural instruments provided for collective consumer protection in the form of group proceedings are not sufficiently used in the enforcement of consumer rights.