SOŁTYSIŃSKI KAWECKI SZLĘZAK

IS A BREACH OF REPRESENTATIONS&WARRANTIES ("R&W") A BREACH OF CONTRACT (UNDER POLISH LAW)?

Dr. hab. Andrzej Szlęzak
Of Counsel
Professor of SWPS University in Warsaw

2017

Is a Breach of R&W a Breach of Contract (under Polish Law)?

(1) ASSUMPTIONS/DISCUSSION

- Under *common law,* and regarding warranties – generally, **yes**.
  Under Polish law – **yes/no**, depending on the wording of the contract.

- **Basics under Polish law**:

  - breach of contract (claim *ex contractu* under Art. 471 of the Civil Code for non-performance or improper performace of an obligation):

  debtor's non-performance/improper performance of an obligation + damage sustained by creditor as a result thereof; a necessary feature of an "obligation" (*zobowiązanie)* is the debtor's "performance" (*świadczenie*), denoting what the debtor is obligated to do/not to do;

  - burden of proof:

  creditor: non-performance/improper performance by debtor; damage; causal nexus;

  debtor: non-performance/improper performance due to reasons for which debtor is not liable. Unless otherwise stated by law/contract, debtor is liable for failure to act diligently (fault).

Is a Breach of R&W a Breach of Contract (under Polish Law)?

- **No**: If R&W are not true/accurate (etc.), and a contract **is silent** on what the debtor is obligated to do under such circumstances, then a breach of R&W is **not** a breach of contract.

  For a breach of contract to take place, the debtor must be in default of its performance; however, if the contract does not state what the debtor's performance is to be, there can be no *ex contractu* claim.

  A mere discrepancy between the warranted and actual state of affairs is not enough to say that the debtor was in default under Art. 471 of the Civil Code.

  For non-performance or improper performance of a contract it is necessary that the contract define what the debtor is to perform (to do/not to do).

Is a Breach of R&W a Breach of Contract (under Polish Law)?

- **Yes**: If R&W are not true/accurate (etc.), and the contract **is silent** on what the debtor is obligated to do under such circumstances, then certain interpretational efforts may still help to find the debtor in breach of contract.

  Namely, a contract may then be read to **imply** that offering R&W **means** that the debtor is obligated to take any/all actions in its capacity to **cause** that there be no discrepancy between the warranted and actual state of affairs. Then, the debtor may be liable *ex contractu* for a failure to take actions preventing/eliminating such discrepancy (but not for inaccuracy/incompleteness of R&W alone).

  One difficulty in such reasoning is that it is a long way from saying that the reality is such and such (as described in R&W) to saying that by offering R&W, the debtor is obligated to cause that there be no discrepancy between the represented/warranted state of affairs and the actual one.

Is a Breach of R&W a Breach of Contract (under Polish Law)?

- **Yes**: when R&W are considered in terms of statutory warranty for defects (*rękojmia*). In that case, a sold thing/right is noncompliant with a contract if such thing/right does not have the characteristics described in R&W.

A difficulty in such reasoning is (at least) twofold:

firstly, R&W often do not pertain to what was sold, but to other assets (e.g. in a share deal, the majority of R&W refer to a going concern, and not to the shares sold); also, R&W often pertain not to the characterisctics of the sold thing/other assets, but to „external circumstances", e.g. behaviour of third parties to a contract, business prospects of the company, or even legal environment in which such company operates;

secondly, and more importantly, in a typical M&A deal, statutory warranty for defects is usually excluded.

None of the above is satisfactory.

Is a Breach of R&W a Breach of Contract (under Polish Law)?

(2) BEST SOLUTION:

- **A breach of R&W IS NOT a breach of contract, but is a "precondition" to claim SPECIFIC PERFORMANCE (e.g. payment of damages) under contract.**

How does it work?

A guaranty-type contract, whereby:

- the debtor guarantees that R&W are true/accurate (etc.);
- if the guaranty fails (i.e. R&W turn out not true/accurate), then the contract obligates the debtor to act as stipulated therein (e.g. to redress the damage, to pay a lump sum, to remove - whenever possible - the difference between the actual and the warranted states of affairs);
- the course of action to enforce the debtor's duty to redress the damage is not an *ex contractu* claim (Art. 471 of the Civil Code), but a claim for performance under a contract.

Is a Breach of R&W a Breach of Contract (under Polish Law)?

(3) SUMMARY

- **When the debtor is CONTRACTUALLY OBLIGATED to redress the damage (pay damages), a claim to do so IS NOT an *ex contractu* claim, but IS a claim for SPECIFIC PERFORMANCE under the contract.**

- In Poland, lawyers tend to forget about the above difference and they sue for damages *ex contractu*, whereas they should sue for specific performance under a guarantee-type contract, provided that their contract is properly drafted, i.e. that it states clearly what the debtor is obligated to perform (e.g. pay damages), should a breach of R&W occur. It is not enough to say, e.g., that in case of a breach of R&W, the debtor shall be liable pursuant to generally applicable laws, or to say nothing at all, under the assumption that a breach of R&W alone is a breach of contract.

- When the contract is not properly drafted, either course of action (claim *ex contractu* or in performance of a contract) may fail:
  - in the former case (a claim *ex contractu* for non-performance/improper performance*)*, it may fail because there is no *ex contractu* liability if the contract does not make it possible to determine what the debtor did not perform/improperly performed; a mere discrepancy between the declared and actual state of affairs (breach of R&W) is not tantamount to non-performance/improper performance.
  - In the latter case (a claim in performance of a contract), it may fail for the same reason: specific performance may be enforced only if it is known what the debtor is obligated to perform.

SOŁTYSIŃSKI KAWECKI SZLĘZAK

Warsaw
ul. Jasna 26
00-054 Warszawa
tel.: +48 22 608 70 00
fax: +48 22 608 70 70
office@skslegal.pl

Poznan
ul. Mickiewicza 35
60-837 Poznań
tel.: +48 61 856 04 20
fax: +48 61 856 05 67
office.poznan@skslegal.pl

Katowice
ul. Chorzowska 152
40-101 Katowice
tel.: +48 32 731 59 86
fax: +48 32 731 51 70
office.katowice@skslegal.pl

Wroclaw
Plac Solny 16
50-062 Wrocław
tel.: +48 71 346 77 00
fax: +48 71 346 77 09
office.wroclaw@skslegal.pl

www.skslegal.pl