"Liability of entities providing tourist services for failure to render or improper rendering of tourist services"

Summary of doctoral dissertation

The subject of my doctoral dissertation focuses on issues connected with the liability of entities providing tourist services for failure to perform or improper performance of agreements concluded with clients. To explain my motives for the selection of this subject for my dissertation, first of all, I would like to underline the considerable research potential of the issues discussed herein. It is connected mainly with the significant development of tourism and increasing value of the market of tourist services in Poland. The augmenting number of agreements, the subject of which is the provision of tourist services is also connected with the increasing number of disputes related to the failure to perform or improper performance of such agreements.

This dissertation consists of four chapters entitled: "Tourist services", "Contractual liability of tour operators", "Contractual liability of travel intermediaries and travel agents" and "Contractual liability of tour guides, tour managers and entities providing tourist accommodation services". Each chapter shall be characterised below and the key arguments, which I want to present in this dissertation, shall be indicated.

II. Tourist services.

The first chapter discusses the basic issues connected with the subject of regulations as well as the objective and subjective scope of the act of 29 August 1997 on tourist services[1] and other legal acts that regulate the issues of agreements on providing tourist services. In particular, I discuss the definitions of terms that are contained in the act and which are basic in terms of the subject hereof, such as: tourist service, package tour, tourist trip and tourist accommodation service. Therefore, the broadest of the aforementioned terms - tourist service - creates a boundary for considerations that are the subject hereof. In the presented arguments, I consistently apply a scheme, which is based on the criterion of the object of a service, i.e. division into organisation and offering of package tours, providing of tour guide services and providing of tourist accommodation services. This scheme is directly reflected in the

[1] Journal of Laws of 2004, no. 223, item 226 as amended, hereinafter referred to as a.t.s.

subchapter focusing on agreements on providing tourist services but also indirectly in the second paragraph, where I characterise entities that provide tourist services and then purchasers of tourist services.

The issue of explaining the subjective scope of the following terms: tour operator, travel intermediary, travel agent and entity providing tourist accommodation services seems to be of special importance from in terms of the subject hereof. Doubts arise especially with regard to the first of the aforementioned terms. Pursuant to the provisions of a.t.s., the condition to begin business activity within the scope of package tour organisation and of a travel intermediary is to obtain an entry into the Register of Tour Operators and Travel Intermediaries, which, in turn, requires prior fulfilment of obligations connected with securing relevant funds in case of insolvency. However, in the dissertation, I pose the following question: what is the significance, from the client's point of view, of having an entry to the register of tour operators and travel intermediaries by an entrepreneur and, specifically, is it necessary to have an entry in the aforementioned register in order to be considered a tour operator within the meaning of a.t.s.? It should be emphasised that the answer to those questions is of basic importance in terms of the subject hereof and, especially, considerations contained in the second chapter hereof referring to the liability of a tour operator and determining the subjective scope of those considerations.

In my opinion, both the linguistic interpretation of a.t.s. as well as schematic and functional reasons justify the adoption of a broad concept of a tour operator, according to which, this status should be assigned to each entity that conducts business activity in an organised and continuous form for financial purposes involving organisation, i.e. preparation, offering or implementation of package tours. However, this argument requires a reservation that it is limited only to the scope of rights and obligations of parties of civil and legal nature. It should be noted, however, that an entry in the register of tour operators and travel intermediaries is of utmost importance but only in terms of administrative and legal solutions as well as rules connected with the guarantees of the State in case of tour operator's insolvency. Whereas, within the scope of rights and obligations of civil nature, the fulfilment of obligation to obtain an entry into a relevant register shall be neutral for the assessment of the legal status of a given entity.

In this doctoral dissertation, I also wish to focus on issues connected with travel intermediaries. In the literature, relatively low practical importance of business activities of

travel intermediaries is emphasised within the meaning of a.t.s.[2]. However, in my opinion, the changing realities of the market of tourist services are conducive to the development of travel intermediaries. Pursuant to the statutory definition contained in Article 3, item 6 of a.t.s., it can be assumed that a travel intermediary undertakes specific actions intended to create a tourist product that meets purchaser's expectations. The "creation" of this product shall involve, first of all, finding suitable tourist services for the client and, in certain cases, also conclusion of relevant agreements with entities that offer such services. In fact, the final product may take the form of one service or, most frequently, a package of tourist services that are connected with each other. Therefore, the offer of a travel intermediary constitutes an alternative to standard offers of tour operators and travel agents working for those operators. This is because a travel intermediary can adapt to the client's preferences and requirements more easily as well as react quickly to changes on the market of tourist services. In the first chapter of this dissertation, I also explain the essence of a travel agency, the business activity of tour guides and the business activity of entities providing tourist accommodation services. With reference to the issues connected with providing tourist accommodation services, it is necessary to indicate the interdependencies between the terminology of the act on tourist services and the notion of a hotel and similar facility pursuant to the provisions of the Polish Civil Code.

The last subchapter of the first chapter focuses on the characteristics of agreements on providing tourist services. Within this scope, I discuss four agreements: package agreement, tourist trip agreement, agreement on providing tour guide services and accommodation agreement. This selection was not made at random. In my opinion, the aforementioned agreements are of typical nature, specific for the market of tourist services. This formulation means that those agreements basically do not occur outside the tourist industry. It is different in the case of e.g. transportation agreement, which, although it is of significant importance to tourism, cannot be considered as typical exclusively for this sphere of business activity due to its prevalence.

III. Contractual liability of tour operators.

The second chapter of this dissertation is the largest editorial unit hereof. First of all, this results from the relatively detailed provisions of the act on tourist services regarding the

2 See E. Wieczorek, Umowa agencyjna w praktyce biur podróży (in): Prawo w praktyce biur podróży, ed. P. Cybula, Warsaw 2006, p. 81.

issues of tour operators' liability for failure to perform or improper performance of an agreement. As early as at the outset, it should be indicated that the legislator shapes the liability of a tour operator as strict liability. This conclusion results, first of all, from the linguistic interpretation of Article 11a of a.t.s. constituting the basic regulation within the scope of discussed issues. This regulation clearly separates the liability for failure to perform or improper performance by a tour operator from the issue of fault or the issue of diligence while fulfilling an obligation. Also the fact of enumeration by the legislator of circumstances that exclude this liability in the form of force majeure, action or omission to act by the victim and action or omission to act by third parties that are connected with a tour operator, confirms the legislator's intention to base the tour operator's liability on strict liability. Furthermore, the functional interpretation of Article 11a of a.t.s. supports the concept that the tour operator's liability for failure to perform or improper performance of an agreement should be strict liability. The character and specific nature of legal relationship between a tour operator and a client cause that the purchaser of a tourist service or a package of such services is specially dependent upon the service provider and basically has no influence on the selection of subcontractors by the tour operator and, therefore, has no possibility of verification of their reliability and diligence. In such situation, we are dealing with a special provision constituting *lex specialis* in relation to the general rule expressed in Article 471 of the Polish Civil Code in connection with Article 472 of the Polish Civil Code.

Important interpretation problem that occurs on the basis of Article 11a of a.t.s. and which seems to be omitted in the literature, is the determination of objective scope of more restrictive liability of a tour operator. It is important that the hypothesis of Article 11a of a.t.s. refers to the agreement on the provision of tourist services and not agreement on a package tour. Therefore, it means that the scope of analysed liability exceeds the agreement on a package tour and refers to all agreements on the provision of tourist services also when the object of an agreement is not a package service but e.g. only accommodation service - each time when the service provider conducts business activity within the scope of organisation of package tours and the service recipient is a tourist or visitor within the meaning of a.t.s. (Article 3, item 9 and 10 of a.t.s.).

Within the scope of considerations of the second chapter of this dissertation, the premise of liability of a tour operator as well as exoneration circumstances that exclude that liability shall be discussed in detail. Moreover, I want to address the provisions of a.t.s. referring to the operator's obligations in the case of failure to perform or improper

performance of an agreement and the client's rights correlated with those obligations, including provisions that regulate the client's right to withdraw from an agreement.

The issue of the tour operator's liability for non-material damage suffered by a client in connection with the failure to perform or improper performance of an agreement on the provision of tourist services, seems to be of special importance. The considerations within this scope are preceded by a presentation of views of the doctrine on the admissibility of seeking redress for non-material damage in the regime of contractual liability and by remarks of comparative nature. The resolution of the Supreme Court of 19 November 2010 is undoubtedly of no less importance to the indicated problem. This resolution constitutes a significant precedence in relation to the existing legislation that rejects the possibility of seeking redress for a wasted leave of absence[3]. The essence of the solution adopted by the Supreme Court in the judgement of 19 November 2010 is based on the assumption that Article 11a of a.t.s., as an autonomous provision in relation the provisions of Article 471 of the Polish Civil Code in connection with Article 361, item 2 of the Polish Civil Code, refers to the damage *sensu largo* including not only material loss but also non-material loss[4]. The adoption of broad interpretation of the notion of damage on the basis of a.t.s is supported by a strong argument in the form of interpretation of Article 5 of directive 90/314 made by the Court of Justice of the European Union (previously: the European Court of Justice). In the judgement of 12 March 2002, in the case no. C-168/00 Simone Leitner v. TUI Deutschland GmbH & Co. KG, the Court of Justice indicates that Article 5 of directive 90/314 should be interpreted as granting the consumer, as a rule, the right to "damages for non-material loss" suffered as a result of failure to perform or improper performance of an agreement on a package tour. In other words, the Court of Justice ruled that Article 5 of directive 90/314 obliges Member States to undertake necessary measures to ensure the liability of a tour operator for any damage caused to a consumer, i.e. both material one and non-material one.

In my opinion, the interpretation of Article 11a of a.t.s. made by the Supreme Court has no basis in the linguistic interpretation of the indicated provision or in the schematic or functional interpretation. The only but decisive argument in favour of the conclusion adopted by the Supreme Court is the binding nature of the judgement of the Court of Justice of the European Union in which the Court of Justice made an interpretation of Article 5 of directive 90/314, which, via a.t.s., is implemented to the Polish provisions of law. Therefore, it can be

[3] E.g. resolution of the Supreme Court of 25 February 1986, III CZP 2/86, OSNCAP 1987 no. 1, item 10.
[4] J. Gospodarek clearly claims that the indicated judgement is a sign of final establishment of a broad understanding of the notion of damage under the civil law, see J. Gospodarek, Commentary to the resolution of the Supreme Court - Civil Chamber of 19 November 2010, OSP 2012, No. 1, p. 9.

said that the Supreme Court "helped" the legislator in this manner by making Community-oriented interpretation of provisions of law that improperly implemented the EU directive.

III. Contractual liability of travel intermediaries and travel agents.

In the literature, the issues connected with the liability of a travel intermediary for failure to perform or improper performance of an agreement, are clearly marginalised. It seems that the reason for this situation is the apparent transparency of statutory regulations referring to the liability of this group of entrepreneurs. It should be indicated that in a.t.s., the legislator clearly omits travel intermediaries and provides that the specific regime of liability created in the act refers only to tour operators. Therefore, it should be assumed that a travel intermediary is liable for failure to perform or improper performance of an agreement according to the general principles of law resulting from the Polish Civil Code. Therefore, the basic principle of this liability shall be the principle of individual guilt and only in cases specified in the provisions of law it may incur strict liability (e.g. in a situation specified in Article 430 of the Polish Civil Code). In the third chapter of my dissertation, I attempt to answer the question whether the liability of a travel intermediary based on the general principles of law in light of the provisions of Article 11a of a.t.s. and the legal regime of tour operators' contractual liability resulting therefrom should be considered as correct in light of the functional interpretation and in the context of compliance of such situation with the provisions of directive 90/314.While referring to this last issue, *prima facie* it seems that certain doubts may arise with regard to the correctness of solutions adopted by the Polish legislator. If in the act on tourist services it is assumed that a travel intermediary incurs the same strict liability as a tour operator, reflected by restrictions with regard to the business activity of both groups of entrepreneurs and introduction of analogous precautions against insolvency, the correct and full implementation of Article 5 of directive 90/314 shall require ensuring the same protection for travel intermediaries' clients as for tour operators' clients. Therefore, if a tour operator incurs strict liability for failure to perform or improper performance of an agreement, the liability of a travel intermediary should also be strict liability. Regardless of the foregoing, I would like to indicate the significant similarity of business activities of travel intermediaries and tour operators discussed earlier. First of all, the final "product" of their business activity is similar in the form of one or several interconnected tourist services provided for a client. In both cases, this "product" often takes the form of a

package tour[5]. Moreover, as a rule, neither a tour operator nor a travel intermediary provides services that are the object of an agreement, they rely on "subcontractors" - hotels, restaurants or carriers. Therefore, having in mind the significance of similarities with regard to the scope of business activity of tour operators and travel intermediaries, such large differentiation of principles of liability for failure to perform or improper performance of an agreement may raise doubts.

In the third chapter of this dissertation, the principles of liability of travel agents shall be discussed. Especially important issue that requires addressing within this scope is the situation, in which a travel agent incurs the same liability as a tour operator. This refers to situations specified in Article 10b, item 3 of a.t.s. and 19a of a.t.s.

IV . Contractual liability of tour guides, tour managers and entities providing tourist accommodation services.

The fact of discussing in one chapter the rules of liability of tour guides, tour managers and entities providing tourist accommodation services is connected with the role that may be assigned to those entities within the structure of tourist services market. The characteristic fact is that those entities may occur as subcontractors of tour operators or travel intermediaries or as entities providing one tourist service, the service of a tour guide or tourist accommodation service, respectively.

The fact of discussing the issues connected with the liability of a tour guide and a tour manager requires, first of all, the indication of circumstances, in which we can speak about the failure to perform or improper performance of a tour guide agreement. The placement of obligation of client care in the wording of contractual relationship between the parties and indication of consequences of infringement of that obligation seem to be very important here. It also seems necessary to indicate the premise of tour guide's liability based on the legal qualification of a tour guide agreement and in the context of distinguishing between an agreement of diligence and an agreement of result.

Whereas, a number of doubts arise with reference to the contractual liability of entities providing tourist accommodation services. In the subchapter of the dissertation devoted to this issue, the following shall be discussed: general principles of liability for failure to perform or improper performance of an accommodation agreement, liability for objects brought by a

[5] Article 12, item 1 of a.t.s. directly refers to tour operators or travel intermediaries that offer package tours or tourist services to clients.

hotel guest and liability for non-material damage resulting from the failure to perform or improper performance of an accommodation agreement. Among issues raised within this subject, I would like to emphasise especially the following.

The first one is discussing the legal nature of a hotel reservation. This problem, not further analysed in the literature, determines, in my opinion, the scope and nature of claims that the client is entitled to in the event of refusal to accommodate for reasons attributable to the hotel (error in reservation) or as a result of intentional actions of the hotel (overbooking). *Prima facie*, it seems that a reservation of accommodation is not, as a rule, of definitive nature constituting only a certain declaration of intention to conclude an agreement. This circumstance favours a conclusion that, in fact, this is a preliminary agreement, the object of which is the obligation to conclude a proper agreement on a specific date. Indication of situations, which can be considered as improper performance of an accommodation agreement, is also of significance with regard to the subject of this dissertation. Within this scope, I suggest distinguishing two basic types of infringements, which can occur while providing tourist services. The fist one shall involve the failure to provide one or several services constituting the object of the agreement and which the hotel is obliged to provide. The second one shall involve defects with regard to the quality of services rendered by an entrepreneur. At the same time, I assume that the provision of accommodation itself, constituting the basic element of an agreement between a hotel and a client, conditions the fact of agreement performance. Therefore, the lack of this element causes that we are dealing with the failure to perform an agreement. Whereas, infringements involving the failure to provide any additional services listed in an agreement (e.g. catering or recreation services) should be considered as improper performance of an agreement.

The provisions of Article 846 et seq. of the Polish Civil Code regulating the rules of contractual liability for loss or damage to objects brought by a hotel guest are of special importance to the issue of hotels' contractual liability. In the civil law doctrine, following Z. Radwański, it is generally assumed that the source of liability, referred to in Article 846, item 1 of the Polish Civil Code, is not any agreement but the fact of bringing objects by a given person to a hotel or similar facility[6]. Therefore, according to this assumption, a hotel guest is every person staying at a hotel - both in the situation when such person concluded an accommodation agreement and when such agreement was not concluded but such person

[6] See Z. Radwański, Odpowiedzialność, prawo zastawu i przedawnienie roszczeń utrzymujących hotele i podobne zakłady (in:) System prawa cywilnego. Vol. III, Part 2. Prawo zobowiązań – część szczegółowa, (collective work edited by S. Grzybowski), Wrocław 1976, p. 634; Z. Radwański, J. Panowicz Lipska, Zobowiązania – część szczegółowa, Warsaw 2008, p. 181.

brought objects to a hotel which gives the impression that such person intends to conclude such an agreement[7].

Whereas, K. Zagrobelny presents an approach that is different from the ones presented above. This author, when analysing the issues of legal nature of liability set forth in Article 846 of the Polish Civil Code, indicates that this liability occurs at the moment of concluding an agreement - accommodation or other agreement, on the basis of which, the guest gives the luggage to the hotel or similar facility[8]. In the presented dissertation, I consequently support and accent the second indicated concept. In my opinion, it is not possible to agree that an event, which should be considered as actual behaviour of a given person, could result in such significant legal consequences for the parties especially in a situation, in which the other party (a hotel) may not participate in this event at all. As a consequence, while referring to the notion of a hotel guest itself, I suggest assuming that this term may refer only to a person, who has a contractual relationship with a hotel or similar facility. It seems that, following K. Zagrobelny, it should be assumed that it shall not always be an accommodation agreement[9]. This is because the legal relationship between the parties may result from e.g. a storage agreement that precedes an accommodation agreement[10]. However, what is important, in order that such contractual relationship could be created, it is necessary that the hotel (or a person acting for or on behalf of the hotel), even implicitly, makes a declaration of will to enter with a given person into a legal interaction. Otherwise, such person shall not be considered as a "guest" within the meaning of Article 846 of the Polish Civil Code.

The last issue discussed in the fourth chapter is the issue of liability for non-material damage incurred by a hotel guest. However, it seems that considerations within this scope are *de lege lata* of purely theoretical nature because there are no general grounds for seeking redress for non-material damage under contractual liability.

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[7] See M. Nesterowicz (in:) M. Nesterowicz, A. Rembieliński, Odpowiedzialność cywilna zakładu hotelarskiego, Toruń 1995, p. 54.

[8] See K. Zagrobelny, Charakter prawny odpowiedzialności z art. 846 k.c.(in:) O źródłach i elementach stosunków cywilnoprawnych. Księga pamiątkowa ku czci prof. Alfreda Kleina edited by E. Gniewka, Zakamycze 2000, pp. 425-426.

[9] Cf. K. Zagrobelny, Charakter...,, pp. 425-426.

[10] Such situation shall occur when a room that is to be made available for a guest is still occupied and this guest, at the moment of arriving, leaves his luggage in the hotel and goes e.g. sightseeing.