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## Set-off claim in Polish civil proceedings conducted under general rules

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### **Introduction**

Invoking the right of set-off is one of the most common defences used in civil proceedings for payment in Poland. In 2019,<sup>(1)</sup> the legislator introduced procedural restrictions on raising this claim in proceedings by adding article 203 to the Code of Civil Procedure (CCP).<sup>(2)</sup> It was noted that the purpose of the new regulation was to prevent the abuse of this claim. Court practice indicated that a set-off often constituted a mere procedural ploy without a factual basis and that raising this claim was aimed only at prolonging proceedings in a case. After less than four years of article 203 of the Code of Civil Procedure being in force, the legislator is making the first amendment to some of the solutions contained in this provision.<sup>(3)</sup> The amendment Act (amending Act 2023) entered into force on 1 July 2023

### **Set-off**

The procedural set-off claim is closely related to the substantive legal institution of a set-off regulated in articles 498-499 of the Civil Code<sup>(4)</sup> (CC). Article 498 section 1 of the CC provides for several prerequisites for a set-off:

- two persons must be both debtors and creditors to each other;

- the object of both receivables is money or things of the same quality specified as to their kind;
- maturity of the receivables, with the generally accepted view in the literature that only the receivable of the deducting party has to be mature;<sup>(5)</sup>
- the receivables may be pursued before a court of law or before another state body.

A substantive set-off is effected by a declaration made to the other party.<sup>(6)</sup> As a result of the set-off, both claims are cancelled up to the amount of the lesser claim.<sup>(7)</sup>

The set-off claim, on the other hand, is a procedural action requesting the dismissal of a claim in whole or in part on the grounds that the claim asserted in the action has been extinguished by the set-off. A declaration of set-off, therefore, constitutes a substantive legal basis for a set-off claim raised in the proceedings.<sup>(8)</sup> The success of a properly raised allegation of a set-off depends on the fulfilment of the substantive legal prerequisites for a set-off contained in article 498 of the CC.

Until 2019, Polish civil procedure did not provide for restrictions on invoking a set-off claim in proceedings under the general rules. This situation changed with the introduction of article 203 of the CCP. This provision indicates the prerequisites for the admissibility of a set-off in civil proceedings in terms of its grounds, as well as the time limit and the form of its submission.

### **Basis of set-off claim**

Pursuant to article 203 CCP, a defendant's receivable arising from the same legal relationship as the receivable asserted by the claimant may be the basis for the set-off claim.

The original wording of this provision provides for two exceptions to the above rule. A set-off claim can also be raised when the defendant's receivable is not contested and when it is "substantiated by a document that does not originate solely from the defendant". On one hand, non-contentiousness is clearly intended to relate only to the defendant's receivable. On the other hand, it is argued in the doctrine that the prerequisite of substantiation refers only to the admissibility of a set-off claim, while its acceptance requires proof.<sup>(9)</sup>

In the Amended Act 2023, the legislator decided to alter the second exception and add others. As of July 2023, it is no longer possible to set off a receivable substantiated by a document that does not originate solely from the defendant. A receivable must be substantiated "by a document confirming its recognition by the claimant". However, the substantiation of a claim can still only be established by a document and not by other means of evidence, such as witness testimony.

Due to the elimination of the reference to a "document that does not originate solely from the defendant", the legislator also indicated that an allegation of set-off may be based on a receivable established by:

- a final court decision;
- an arbitration court decision;
- a settlement concluded before a court or an arbitration court; or
- a settlement concluded before a mediator which has been approved by a court.

In addition, in Amending Act 2023 the possibility of setting off a claim for reimbursement of a fulfilled service owed by one joint and several debtors against other co-debtors was introduced. As indicated by the legislator in the explanatory memorandum, this situation is mainly encountered in the legal relations related to the performance of construction contracts. According to the legislator, in such cases it is desirable for the investor in a dispute with the general contractor to be able to raise a set-off claim if it has performed a benefit against the subcontractor.

As of 1 July 2023 the catalogue of receivables that can be the basis for a set-off claim in civil proceedings conducted under general rules is as follows:

- receivables from the same legal relationship as the claimant's receivables;
- non-contentious receivables;
- receivables confirmed by:
  - a final court decision;
  - an arbitration court decision;

- a settlement concluded before a court or an arbitration court; and
- a settlement concluded before a mediator and approved by the court;
- receivables substantiated by a document confirming its acknowledgement by the claimant; and
- a claim for reimbursement of a performance owed by one co-debtor to another co-debtor.

### **Time limit to exercise right of set-off and its form**

As of 2019, a defendant may raise a set-off claim no later than at the moment of entering a defence on the merits or within two weeks of the date on which its receivable became due.<sup>(10)</sup> The introduction of this time limitation was due to the fact that raising a set-off claim late in the proceedings, especially when the evidence was gathered, most often delays the issuing of the decision in the given case.

Furthermore, a procedural allegation of a set-off may only be raised in a pleading. The provisions relating to a statement of claim will apply mutatis mutandis to this pleading, except for the provisions relating to fees.<sup>(11)</sup> This means that the allegation cannot be raised orally.

### **Comment**

Both the 2019 and 2023 amendments were directed at speeding up proceedings in specific cases, at the expense of a comprehensive resolution of all contentious issues between the parties. The purpose of these amendments is also evident in the regulation of article 203 of the CCP. The limitation of the catalogue of receivables that can be the basis for a set-off claim inevitably leads to a situation in which, in order to protect their rights, the defendant is forced either to file a counterclaim (if this is permissible in a given case) or to initiate separate proceedings – as is the case in commercial proceedings, in which filing a counterclaim is not allowed.

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### **Endnotes**

- (1) Act of 4 July 2019 on Amending the Act – Code of Civil Procedure and Certain Other Acts, Journal of Laws [in Polish: *Dziennik Ustaw*] 2019, item 1469.
- (2) Act of 17 November 1964 – Code of Civil Procedure; consolidated text: Journal of Laws [in Polish: *Dziennik Ustaw*] 2021, item 1805, as amended.
- (3) Act of 9 March 2023 on Amending the Act – Code of Civil Procedure and Certain Other Acts, Journal of Laws [in Polish: *Dziennik Ustaw*] 2023, item 614.
- (4) Act of 23 April 1964 – Civil Code; consolidated text: Journal of Laws [in Polish: *Dziennik Ustaw*] 2022, item 1360, as amended.
- (5) G Sikorski in: M. Balwicka-Szczyrba, A. Sylwestrzak (ed), *Kodeks cywilny. Komentarz aktualizowany*, LEX/el 2023, commentary to article 498 of the CC.
- (6) Article 499 of the CC.
- (7) Article 498 section 2 of the CC.
- (8) See the Supreme Court judgement of 14 January 2009, IV CSK 356/08.
- (9) A. Ciepla, 8.1 Potrącenie in: B Karolczyk (ed), *Postępowanie cywilne po nowelizacji. Komentarz dla pełnomocników procesowych i sędziów*, Warszawa 2020.
- (10) Article 203 section 2 of the CCP.
- (11) Article 203 section 3 of the CCP.