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Jakub Oleszczak

Contract for difference in Polish law – civil law issues

SUMMARY

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A contract for difference (CFD) is one of the over-the-counter (OTC) derivative instruments. Derivatives are a special category of contracts, used in economic transactions for centuries. Their essence lies in a kind of speculation on fluctuations in the value of specific goods, known as underlying instruments. The use of derivative instruments allows for achieving profits or limiting losses related to price changes of various goods on the market. The structure of these instruments has led them to be associated with gambling for centuries and has raised numerous doubts about their legality and fairness. These controversies demonstrate that derivatives are extremely interesting contracts that are worthy of legal analysis.

In contrast to economic sciences, the body of legal literature on derivative instruments is not substantial. While several legal studies have been dedicated to the most popular types of derivatives, particularly exchange-traded ones, such as futures contracts or options, the relatively new type of OTC derivative known as the contract for difference (CFD), which is the subject of this doctoral thesis, has not yet been thoroughly discussed in legal doctrine. Undoubtedly, there is a research gap that this thesis aims to fill.

The goal of this dissertation is to characterize the contract for difference from a civil law perspective. Characterizing any institution of civil law requires consideration of a number of specific issues. Identifying the key issues related to contracts for difference has influenced the structure of this work. The doctoral thesis is divided into seven chapters. The first chapter presents the history of derivative instruments. The analysis leads to the conclusion that the archetypes of derivatives were already used in ancient times, while the modern version of derivatives, settled exclusively in cash, developed in the 17th century on Dutch exchanges. Over-the-counter derivatives, to which the contract for difference belongs, began to gain popularity in the market only in the second half of the 20th century.

The second chapter is dedicated to the concept of a derivative instrument. National and EU legal regulations do not define this concept but indicate which structures fall under its scope. However, based on these regulations, several general characteristics of derivatives can be identified. Therefore, a partial definition of derivative instruments is formulated in this work, according to which they are proprietary rights whose economic value depends on the value of the underlying instrument, and their execution occurs at a predetermined value.

Subsequent parts of the thesis are dedicated to a specific type of derivative instrument, the contract for difference. Chapter three discusses the application of contracts for difference in practice. The main part of this chapter presents the results of empirical research on the content of the regulations of investment firms. These studies allow for the presentation of a typical content of contracts for difference concluded on the Polish Forex market.

The results of the empirical research are then related to the traditional conceptual framework of the law of obligations. Thus, in the following chapters, contracts for difference are subject to legal analysis. Chapter four addresses the issue of entering into a contract for difference. The analysis conducted in this chapter leads to several conclusions. The structure of the parties to a contract for difference depends on the model in which the investment firm operates on the Forex market. The parties may include: an investment firm and its client (in the market maker model) or an investment firm acting as an intermediary for the client and a liquidity provider (in the intermediary model). The process of concluding a CFD is complex. Its first stage is the conclusion of an agreement for the execution of orders to buy and sell financial instruments, which takes the form of a framework agreement. In its execution, the client enters into an order contract to purchase a financial instrument with the investment firm, which is equivalent to entering into a contract for difference. The order can be executed in two ways: either the investment firm enters into the CFD directly with the client, or the firm enters into the CFD transaction with a third party, called the liquidity provider, in its own name but on behalf of the client.

Chapter five deals with the content and legal nature of the contract for difference. The considerations made in this chapter lead to the conclusion that a CFD is a contract between an investment firm and its client or between an investment firm acting on behalf of the client and another entity (a liquidity provider), in which one party agrees to pay the difference between the value of a specified underlying instrument at the time of the contract's execution and its value at the time of the contract's conclusion, if this value increases, while the other party agrees to do the same if the value of the underlying instrument decreases. It is generally the client who has the right to determine the moment of execution of the contract.

Chapter six is dedicated to comparing the contract for difference with other contracts – the sale contract, insurance contract, game and wager contract, and other derivative instruments – futures contracts, options, and swaps. These discussions lead to the conclusion that the contract for difference is a subtype of a futures contract, and like other derivatives settled in cash, it is a form of wager.

The final, seventh chapter addresses selected issues regarding the invalidity of contractual provisions in contracts for difference. The need to address this issue arises from doubts raised in the doctrine regarding the fairness of the contractual clauses of derivative instruments, including contracts for difference. The discussions lead to the conclusion that the structure of the contract for difference is within the bounds of freedom of contract. However, some typical contractual clauses in CFDs may be considered as unfair contract terms under Article 385^{1} of the Civil Code.