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Civil Procedure in Poland
Separate Proceedings In Commercial Matters Reinstated

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On July 24, the President of the Republic of Poland signed into law the act significantly amending the Code of Civil Procedure and several related acts. The authors of the reform believe that reinstating separate proceedings in commercial matters – done away with in 2012 – will improve and expedite the work of court divisions handling them. Time will tell whether or not it does. Our previous alert has already featured the key amendments, now we present certain amendments, emphasizing the institutions previously unknown to commercial matters and even not hitherto existing in the civil procedure.

Hearing Organization

The new rules for organizing hearings, stipulated in the general civil procedure provisions, also apply to the commercial procedure, unless they contradict its separate rules.

This means that, in the commercial procedure, the court will also be able to summon the parties to a preparatory session and, together with them, plan a further course of action by arranging for the so-called hearing plan, resolving issues of, among other things, motions for evidence and hearing schedules. The objective of these regulations, as anticipated by the legislator, is to expedite handling cases in an optimal and amicable manner.

Preclusion

The most seminal amendment appears to be the reinstatement of evidentiary preclusion, in the form we know from the previous commercial procedure. The parties will be obliged to refer to all claims and evidence in the initial pleadings (the plaintiff in the statement of claim, the defendant in the rejoinder).

The new solution is to grant the party not represented by a professional attorney a deadline extension of at least one week in order to refer to all claims and evidence. The extension is counted from the date on which such party received appropriate notes for guidance from the court.

Claims and evidence referred to in violation of these rules will be dismissed, unless a party demonstrates that referring to them was impossible or that the need to do so arose later. Then commences the additional two-week period for referring to the above, well remembered by practitioners.

Withdrawing from Commercial Proceedings

What is new is the possibility of a motion for having a case heard as per the general procedural provisions. Such motion may be effectively filed by an individual who is an entrepreneur, but whose matter is subject to such special provisions according to the amended definition of a commercial matter, e.g. a party to a leasing or construction works agreement. An entrepreneur who is a natural person may also file such a motion.

The court is bound by the motion. It must be filed within a prescribed, respectively short, period of time. The law does not require stating any particular grounds for the motion.

This new addition is to be viewed rather positively, as one providing for more flexibility of the commercial procedure. Yet, what ought not to be ruled out is room for practical abuse at the expense of the primary objective of the amendment, it being expediting the procedure.

Claim Modification Restriction

Inspired by the old commercial procedure, the new regulations introduce restrictions with regard to the subject and object of the claim.

As for the object modifications, only intervention and garnishment remain permissible. Modifying the statement of claim as to its subject has been restricted to the possibility of expanding the scope of the claim with further recurring performances and changing the existing performance subject into a different one or its equivalent.

Defence Restrictions

From among the defence restrictions of the previous commercial procedure, the legislator has decided to reinstate the option to bring cross-action.

As regards the restrictions on raising setoff claims, formerly functioning in commercial matters, it should be emphasized that a decision was made to close the legislative loophole, which lasted several years, by the comprehensive regulating of this demurrer in the procedural provisions. Thus, these restrictions will also apply to the commercial procedure.

Evidence Agreement

The amendment also introduces the notion of an evidence agreement, thus far unknown in the Polish legislative framework. By virtue of this agreement, the parties will be able to exclude certain evidence in matters arising from a particular legal relationship under an agreement. This, for instance, excludes the application of this institution in tort.

Such agreement must be executed in writing or orally before the court, otherwise it is null and void. But an agreement on condition or with a deadline proviso will be deemed void in its entirety. The invalidity or ineffectuality of the evidence agreement may be claimed, at the latest, during the court session in which such agreement was referred to. If the reference was made in a pleading, the claim must be in the next pleading or in the next session.

The court will not be able to admit *ex officio* any evidence excluded by the evidence agreement. The court will, however, have the authority to determine the facts to be demonstrated using such excluded evidence on the basis of the parties' statements, having considered the entirety of the case circumstances.

So long as any practical applications are found for this addition, its implications can hardly be fathomed, for instance, in a situation in which the parties decide to apply broad-spectrum evidence exclusion. Taking any evidence would then become inadmissible and the court would have to rule solely on the basis of the parties' counter-statements. Allowing for a sole possibility of the court estimating the extent of the performance under Article 322 of the Code of Civil Procedure does not seem to be a sufficient solution.

Witnesses as a Last Resort

A complete *novum* is the legislator's attempt at giving the commercial procedure a strictly document-based character. As per the amendment, evidence from witness testimonies will only be admitted by the court if material facts, from the point of view of the ruling, remain to be determined after having exhausted all other evidentiary measures or in the absence thereof. Such rules for admitting evidence are indicative of its subsidiary nature (as auxiliary evidence).

The Polish civil procedure has so far known only one subsidiary evidentiary measure – evidence from hearing the parties. Currently, this will also be the attribute of witness testimonies in commercial proceedings.

The practice of the functioning of parties hearing evidence shows that such evidence was admitted by common courts despite its subsidiary and secondary nature. It can hardly be ascertained whether the new institution will share the same fate and whether witnesses will frequent court rooms in commercial matters as often as previously. Perhaps the possibility of taking testimonies in writing, stipulated in the general provisions, will prove to be the middle-of-the-road solution (also an absolute novelty in the Polish procedure).

Particular Judgement Gravity

Also worth mentioning is the reinstatement of another aspect from the previous commercial procedure, i.e. rendering the judgements issued by first-instance courts awarding a pecuniary or alternative consideration as enforceable security title without rendering the judgement itself enforceable.

The reinstatement of this solution ought to be seen as positive, even taking into consideration its possible drawbacks, which come with the territory. What ought to be borne in mind is the long waiting time for a final judgement, as well as familiar practical issues related to securing a claim prior to and in the course of the proceedings.

Game Changer – Since When

To the extent discussed, the amending act will come into effect three months following its announcement. The provisions pertaining to such proceedings will not apply to matters – which, under the existing regulations, would be subject to the commercial procedure – brought or underway prior to the effective date. The transition provisions, however, are not definitive as to how to resolve the matters underway, to which the new provisions grant the commercial dispute status. It is difficult to determine whether this was deliberate or simply the legislator's omission. The transition provisions of the amending act are, in fact, its weakest point and it can already be seen that they are bound to cause interpretational difficulties.

Summary

Future court practice will show to what extent the objectives of the civil procedure reform have been attained. It does seem that the structure of the procedure alone is not the primary concern of the justice system, as the authors of the amendment strive to convince, and the reasons for excessive case load of commercial divisions lie elsewhere.

In such situation, will reinstating severe restrictions on taking evidence, coupled with new institutional experiments (e.g. the evidence agreement) expedite the court proceedings? When will we see the results? One may only speculate.

Regardless of the assessment of the amendments, practitioners will have to adjust to them. Yet, they are not devoid of points of reference. The body of rulings issued under the previous regulations pertaining to the commercial procedure will certainly prove of assistance.

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