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Dear Readers,

One of the basic tasks of a lawyer is to cultivate the rule of law on both a macro and a micro level. It is not just regulations that count, but legal culture as well.

Proper determination of subjective rights under the existing legal order lies at the foundations of the functioning of the rule of law. With skilful identification of the rights vested in individuals and economic entities, demands for protection of those rights can be formulated. If demands are not asserted to protect rights when they are threatened, there is no rule of law. The rule of law is a dynamic mechanism. Over time, governments draw up new economic and political programmes, and parliaments enact them. The changing conditions can make it difficult to properly determine these rights.

This will not be possible without cooperation between market participants and legal practitioners. Publications like ours are designed to encourage such cooperation. We seek to share our knowledge in pursuit of the common interest. We write about changes in law and the threats they can pose, and about new facets of the case law handed down by the courts. We hope to shed light on issues and help find solutions.

Tomasz Wardyński

Cybercrime: No longer just a virtual problem

Krzysztof Wojdyło Janusz Tomczak

Just a few years ago, conferences on cybercrime resembled academic discussions of a problem that theoretically existed but was encountered in practice by very few people. This perception of cybercrime has radically changed. Looking back at our experiences in the past few months, we could even venture to say that cybercrime is now the most pressing issue facing the justice system.

How does it work?

Until recently, one of the characteristic features of cybercrime was the difficulty in identifying the injury. Victims were usually not interested in pursuing their rights, because they saw no chance of restoring the situation from before the offence or of obtaining redress for their loss.

The cyber offences we have encountered the most recently, known in the trade as "business email compromise," result in huge financial losses. Online criminals monitor and then intercept email correspondence between current or potential suppliers and customers in which the parties agree on the commercial terms for supply of certain goods, including payment details. At some point the parties exchange information about the bank account where the payment is supposed to be made. At that moment the criminals step in and tamper with the correspondence, disguised as one of the parties, and substitute different bank account numbers. Unfortunately, in many cases the payment is actually transferred to the fraudulent account, in amounts equal to tens of thousands or even millions of dollars.

These offences can be highly refined and clearly have been carefully prepared. We have seen cases where the criminals pretended to be one of the parties to the correspondence not just in one email, but in a series of emails, carrying this off so professionally that the other parties did not suspect there anything amiss. These offences respect no national borders. The injured parties are located in many different places around the world.

Scale of the problem

To grasp the scale of the problem, it's worth visiting a website that tracks cybercrime statistics. For the purposes of this article, we visited kaspersky-cyberstat.com. According to the figures presented there, on that day alone, by 2:00 pm there had been over 17 million cyber attacks around the world.

Legal challenges

Of course, in many instances humans are the weak link: they don't check correspondence thoroughly enough, and it's easy to give in to skilful persuasion, or uncritically accept information that runs contrary to common sense (why would a supplier from Yemen use a Polish bank account?)

But on the other hand, never before have electronic communications enabled such a rapid flow of information or the possibility to send money quickly across state borders, giving criminals a chance to act with lightning speed and destructive force.

Cybercrime presents unprecedented challenges for effective law enforcement. Two specific traits of this type of crime play a key role: the anonymity of the offenders and the international nature of the offences.

Anonymity is manifest primarily in the difficulty of identifying the actual initiators and perpetrators of cyber offences. The crimes are often committed with tools masking IP addresses, or botnets, using infected devices belonging to incidental people. It can be relatively easy to reach the intermediaries in transfers of funds from cyber theft. In the great majority of cases, however, these are people who do not know the initiators of the offences because they have had anonymous online contact with them or contact via a string of intermediaries.

Identifying the perpetrators requires highly complex evidentiary measures. Numerous data carriers must be analysed, information obtained from telecommunications service providers (particularly concerning IP addresses), and data sought from Internet service providers (e.g. email administrators). Highly qualified specialists are required to track down this evidence. The efforts are time-consuming and costly compared to traditional forms of crime. The degree of complexity in these measures usually bears little relation to the scale of the loss caused by the offence. Even in the case of theft of relatively minor amounts, it requires many complicated measures to identify the perpetrators.

The difficulties in battling cyber offences are multiplied by their international character. The data necessary to determine the perpetrators may be stored on media in numerous jurisdictions. The victim's computer may be found in Poland, the computer used as a tool in the offence may be in Nigeria, the email administrator may be an American company, and the account finally reached by the stolen funds may be at a Russian bank. And this is just one of the simpler and more hypothetical state of facts. Usually the situation is much more complicated. Gathering evidence under such complex facts requires cooperation with law enforcement authorities in numerous countries and use of various forms of international legal assistance, which in the case of many jurisdictions is no easy task.

Consequently, the number of cyber offences is growing dramatically and will continue to grow unless fundamental changes are made in the rules for combating these offences. We do not have access to reliable, comprehensive figures on the rate at which such crimes are solved, but it is apparent from our experience that it is minimal. On the part of Internet users, this state of affairs will generate a sense of powerlessness and anarchy, which in turn could even lead to a mass boycott of new technologies.

There is a clear imbalance between the response time by law enforcement authorities (months or even years) and

the time needed by the perpetrators, who may spend several months to prepare an attack but just a few hours or days to carry it out.

What is crucial from the point of view of the injured party is to attempt to make up for the loss caused by the offence. We observe a tendency in our practice that if the funds lost through fraud can be regained (for example because the bank blocked the account), both the victim and the law enforcement authorities lose interest in the case, for pragmatic reasons. They realise that the realistic possibility of identifying the wrongdoers and holding them accountable (which requires gathering evidence in several jurisdictions) is negligible.

This demonstrates powerlessness in the face of a phenomenon that is unusually dangerous, particularly considering the commonly known fact that funds from cyber offences are often channelled into financing of terrorism.

Response

Responding effectively to the threat of cybercrime is difficult and requires a far-reaching redefinition of the traditional approach to combating criminality.

The battle against cybercrime is already taking very non-standard forms, which in itself is beginning to present a greater challenge for the legal system. The private sector is increasingly involved in combating cybercrime, in response to the helplessness of law enforcement authorities. The largest private suppliers of Internet services sometimes have much more effective tools at their disposal to fight cybercrime than the governments of many countries. They have access to information and tools enabling them for example to apply a number of effective preventive measures (such as blocking Internet domains distributing malicious software, or monitoring infected IP addresses in real time). The problem is that there are no clear rules governing the measures taken by the private sector in the battle with cybercrime. This creates a risk that such actions will resemble lynch tactics more than the response of authorities vested with a democratic mandate to fight crime. But if this proves to be the only effective model for overcoming negative phenomena in cyberspace, the legal system may need to adapt to it.

Increasing the effectiveness of the state in combating cybercrime will probably mean modification of many of the rights and freedoms we have grown accustomed to in cyberspace. There are many indications that in the future we should expect to see legislative initiatives increasing the entitlement of state authorities to monitor Internet traffic. Legal solutions are being considered today that would lead to state control over encryption of telecommunications.

Ultimately it will probably be necessary as well to create entirely new instruments for effective international cooperation in combating cybercrime. The current instruments are unproductive, which in practice means that the key information needed for criminal proceedings is obtained outside official channels for the flow of information. This state of affairs in turn conflicts with the fundamental assumptions of the legal system.

We are only now observing the beginnings of the debate over new instruments for fighting cybercrime. We are facing a new and unfamiliar phenomenon. So non-standard responses to the arising threats should be expected. Without creation of effective methods for battling negative phenomena in cyberspace, society may quickly lose trust in new technologies. In these circumstances, to say that the law does not keep up with everyday life would be putting it mildly.

Krzysztof Wojdyło, adwokat, *partner, head of the New Technologies Practice*

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A fresh take on restructuring

After the failed attempt to use preventive proceedings in Poland, in the form of recovery proceedings which in practice rarely worked, a new Restructuring Law and amended Bankruptcy Law entered into force on 1 January 2016. This represents a fresh start, with completely new regulations, as well as evolution of the previous regulations reflecting the experience gained from 12 years of applying the Bankruptcy & Recovery Law of 2003.

Michał Barłowski

The beginning of 2016 is a new stage in the evolution of Polish regulations connected with debtors' insolvency. "Connected" is the key word here, because it has to do with regulations governing the collective behaviour of creditors toward the debtor, and vice versa, when the debtor is not, or will not be, in a position to perform its obligations on time and in full. The great majority of European Union countries have introduced proceedings designed to avoid involuntary liquidation proceedings (in Poland, a liquidating bankruptcy), equated with a state of insolvency.

New Restructuring Law

In conducting an overview of the Restructuring Law, i.e. the group of four types of proceedings—proceedings for approval of an arrangement (*postępowanie o zatwierdzenie układu*), expedited arrangement proceedings (*przyspieszone postępowanie układowe*), arrangement proceedings (*postępowanie układowe*), and reorganisation proceedings (*postępowanie sanacyjne*)—the first and last of these deserve particular attention, as there were no analogous proceedings under the law in force through 31 December 2015.

Undoubtedly the new regulations should make life easier for enterprises, with the possibility of selecting the procedure based on the economic situation of the enterprise, and simpler and faster proceedings. They should also help avoid the last resort, i.e. a liquidating bankruptcy—now known simply as "bankruptcy."

Several important issues related to these procedures should be addressed.

Proceedings for approval of an arrangement—stay of execution and standstill agreements

This is the simplest of the restructuring procedures and is supposed to be the fastest: the court should issue an order on approval of the arrangement within two weeks after the application is filed. The debtor solicits votes on its own in favour of the arrangement, a restructuring adviser (a professional bankruptcy trustee) is hired by the debtor to prepare a draft of the arrangement, and then the arrangement is adopted by the creditors (it must be supported by a majority of those entitled to vote, holding at least 2/3 of the total amount of claims entitled to vote) and confirmed by the court.

The debtor may resort to this procedure if disputed claims do not exceed 15% of all claims participating in the arrangement. If the amount of disputed claims is greater, it is necessary to establish a list of claims, with a right to object, which would prevent quick conclusion of an arrangement and use of this procedure.

The adopted arrangement need not be binding on all creditors. It may apply to only certain creditors identified by type (e.g. banks) and bind only creditors participating in the arrangement (known as a "partial arrangement").

One advantage of proceedings for approval of an arrangement is that they are less formal and the judicial part is limited to filing of the application with the arrangement and, if successful, approval of the arrangement. Votes collected on the arrangement remain valid for three months, and the absence of a formalised procedure for gathering votes allows the debtor to gauge early on, before filing the draft arrangement, whether it has a chance of acceptance.

However, this procedure does not resolve one of the fundamental problems facing the debtor (as well as the creditors who want to rescue the debtor): it does not stay individual execution by an arrangement creditor and does not prevent the situation where execution against the debtor's assets by one of the creditors (under the principle that the early bird gets the worm) can scuttle any chances for reaching an arrangement.

The law does not provide in the case of this type of procedure for a stay of execution (whether by operation of law, at the debtor's motion, or in the court's discretion), as for example in the case of US Chapter 11, combined with the possibility of selecting which claims may be subject to compulsory satisfaction. Conducting negotiations transparently with numerous creditors could require great organisational effort by the debtor, and maintaining good relations with the creditors will require just as much attention as maintaining the state of the debtor's enterprise. A stay of execution even for a brief period would undoubtedly help in the negotiations.

Under Polish realities, a stay of execution could be possible for example upon application of the debtor based on a defined majority of creditors participating in the arrangement, to protect the stakeholders against the spectre of (liquidation) bankruptcy. For the same reasons, the growing practice using standstill agreements freezing the creditors' rights for brief periods will remain a necessary element preceding conclusion of an arrangement in this type of proceeding.

From the practical point of view, it may prove controversial to apply this procedure to debtors that are in a state of insolvency, which the law allows. The new definition of insolvency, in the section referring to cash-flow insolvency, includes a presumption that the debtor is insolvent when, among other things, it has not been performing its current obligations for three months. The point here (as was the case under the Bankruptcy Law of 1934) is that insolvency is not clear until there is a per-

sistent and objective inability of the debtor to satisfy its monetary obligations. Conclusion of a standstill agreement under which a group of creditors (chiefly financial creditors) agree *inter alia* not to enforce their rights by individual execution (without extending the payment deadline) does not change the debtor's position with respect to the obligation to file a bankruptcy petition. The purpose of a standstill agreement is not served if the next day the debtor's representatives file a bankruptcy petition, but they are released from the risk of personal liability in a proceeding for approval of an arrangement only when the arrangement is confirmed.

Thus the debtor's representatives still face the unresolved dilemma of whether to file a timely bankruptcy petition or take the risk and commence proceedings for approval of an arrangement. Therefore the success of the restructuring will depend among other factors on how much appetite for risk the debtor's representatives have.

The inability to force the debtor to open restructuring proceedings when the debtor is already insolvent, in three of the four types of restructuring proceedings, may also be debatable. The economic approach to the issue of the rights of creditors (treated collectively), which is that when the debtor is insolvent the creditors become the owners of the debtor's assets in an economic sense, is not reflected in the Restructuring Law. Insolvency means the inability to satisfy every creditor in full. Creditors suffer a diminishment of their rights not just because they are not satisfied in full, at the agreed time and place (a violation of the principle of enforcement of contracts), but are not even able as a group to force the opening of restructuring proceedings of the type that is the simplest and least problematic for the debtor, which would allow a chance for reaching an arrangement. In this context it should be borne in mind that the main goal of all restructuring proceedings is to avoid the debtor's bankruptcy.

The creditors are entitled to file an application to open only the restructuring proceedings that are the closest to bankruptcy, i.e. reorganisation proceedings.

Reorganisation proceedings and experiences from recovery proceedings

Reorganisation proceedings are the most complicated and longest-lasting of the four restructuring procedures. This is the last chance for the debtor before opening of liquidation proceedings (bankruptcy). This procedure is to be used for debtors that are insolvent but with prospects for returning to solvency. Thus the regulations provide for two stages in the proceedings: reorganisation, i.e. restoring health to the management of the debtor's enterprise, which is supposed to be helped by removing the rights of the debtor in possession to manage the enterprise, by operation of law, and then a procedure leading to conclusion of an arrangement. In this case, unlike in proceedings for approval of an arrangement or expedited arrangement proceedings (but the same as in arrangement proceedings), a condition for opening the proceeding is that more than 15% of the claims participating in the arrangement are disputed.

A debtor who obtains support of creditors holding over 30% of the total amount of claims may apply for the court to appoint or replace the administrator who will manage the enterprise in order to restore it to health. The council of creditors may also file such an application. The administrator will have the right to avoid contracts deemed to be disadvantageous to the debtor. Gaining these new rights, active creditors should have a real influence over what happens to the debtor's assets.

How this concept works in practice remains to be seen—for example, whether administrators will truly cooperate with the council of creditors. Reflecting on poor experiences in application of prior law in the case of bankruptcy with the option of an arrangement, examples could be given where the administrator cooperated more with the debtor than with the council of creditors, cases where lack of cooperation prevented the proceedings from reaching the next stage, or where cooperation between the council of creditors and the judge-commissioner was illusory or generated conflicts. Such situations did not lead to satisfaction of creditors "to the greatest degree," as the reorganisation measures taken by the administrator or the debtor's own management board under the weak and sporadic oversight of the judicial supervisor eroded the value of the enterprise instead of at least maintaining it.

Considering that the point of departure for reorganisation proceedings is the insolvency of the debtor's enterprise, which may not offer great chances for reaching an arrangement, the active role of creditors working through the council of creditors and hiring a professional administrator offers the right tools for bringing an insolvent enterprise back to life.

Michał Barłowski, legal adviser, senior counsel, Bankruptcy & Restructuring Practice

Why does litigation take so long? An attorney's viewpoint

Dr Marcin Lemkowski

Judicial proceedings in Poland take a long time. It's rare for a case to be decided in less than three years. This means that when a business decides on litigation, it must typically postpone whatever plans it has for the matter while waiting for a ruling. It would be interesting to examine the reasons for the lengthiness of litigation in this country.

Number of judges

In discussions about the judicial system, the argument is often made that compared to other European countries there are a relatively large number of judges working in Poland, and thus there is no need to increase their numbers. Is that really so?

While comparative studies of the solutions functioning in other legal systems are helpful, referring to statistics to confirm the view that there are too many judges in Poland compared to other countries is not persuasive. For the comparison to be accurate, Poland would need to be compared to countries that are similar in terms of their stage of socioeconomic development.

In this respect Poland is an exceptional country. In territory and population we are a large European country, not comparable to many smaller countries. Our Central European location, the related transit traffic, access to the sea, and many other factors generate a great number of lawsuits which might not exist in other countries.

But most importantly, since the transition from communism Poland has been developing intensively. It is making up for the infrastructural shortcomings of the prior socioeconomic system. It would be an erroneous conclusion not backed by any studies to say that every large infrastructure project in Poland winds up on the court docket, but without a doubt the courts do hear many such cases. Motorways, rail lines, railway stations, airports, stadiums, shipyards, wind farms: all these projects are litigated over in Poland. And these are often serious and complex disputes, not only because of the huge amounts of money involved but also because they establish certain economic principles. For example, the courts in these cases have condemned imposing high contractual penalties for minor shortcomings by contractors.

In any firm that is short of hands, new employees are hired. So if there are too many cases and judges are overworked, overwhelmed by the number of tasks they are expected to perform, the gateway to this profession should be opened wider. Everyone would benefit. That someday there might be too many judges is a problem for the future. We can think now about how that potential future problem might be solved, but that must not stop us from deciding to increase the number of judges today, particularly in the commercial divisions of the courts in Poland's larger cities.

We'll see you in court

On top of this is the mentality of Polish businesspeople. The time is long gone when the threat "We'll see you in court" made an impression on anyone. Managers have long grown accustomed to the situation where the judicial path—often referred to as "the road through hell"—has become an everyday feature of economic existence. They know that judicial proceedings are costly, lengthy and unpredictable. And yet they still decide to pursue their positions in court. Why?

Mainly because they have no alternative when a settlement is too far off and the positions of the parties differ radically. But if after six years of litigation at the first instance one were to ask the parties whether they would start the proceedings again, knowing what they now know about the costs and the time taken up in trying the case, often the answer would be "No."

But undoubtedly a certain Polish mentality, a refusal to back down, battling to impose one's own opinion, does not help reduce the number of cases in the courts. That's why there are so many cases and they have to last so long.

Petty matters

Judges often have to issue numerous and various orders in cases, requiring written justifications of several pages each, concerning issues that are utterly trivial from the perspective of the main thrust of the litigation. A classic example is awarding a court-appointed expert a fee of a few dozen zlotys in an appealable order. Does an award of such a fee really require a justification—to an expert, who by definition is someone who is aware of his rights—explaining why the fee was set at this amount? Surely it would suffice if a justification were provided only when requested. There are many more such examples.

This work could be done by support staff helping judges handle cases. These duties could be assumed by judicial referees and assistants. That of course also means that such persons should be hired.

There's no courtroom available

One of the things counsel hears the most often when asking for an adjournment of less than three to six months is "We don't have a courtroom available before then."

New courthouses are being built in Poland. An example is the new building of the Poznań Regional Court, opened in 2015. The project cost over PLN 100 million. No doubt the money was well spent if we assume that in Poznań explanations like "there's no courtroom available" will become a thing of the past. But other cities in Poland are still waiting for investments in judicial infrastructure.

Spread-out hearings

Another reason proceedings take so long is that hearing dates are scheduled several months apart, and there are even cases where a year or two passes between hearings. This happens because the courts often state at a hearing

that they are postponing it until a date "to be set by the court"—planning in the meantime to make a decision in closed session or send the case file to a court-appointed expert. But such postponements creates a big risk that the case will be put off indefinitely.

Apart from this, the courts could also schedule several hearings in the same week, or at least in successive weeks. Everyone is the loser when one witness testifies every few months, so the witness testimony alone can stretch out for two or three years.

Bad procedure

The parties and their counsel also contribute to the lengthiness of the proceedings—although it must be admitted that they are forced to do so by the procedural regulations. The parties are required to raise all of their allegations and present all of their evidence in the statement of claim or statement of defence, which forces them to take a conservative approach and present an overly expansive stance in the litigation. Consequently, a statement of claim that could be limited to five pages runs to 50 pages, and instead of two vital pieces of evidence 22 items are submitted, out of a fear that the court would not admit them if they became relevant later in the case. The purpose of these changes, starting with preclusion of evidence in commercial cases, was to expedite the proceedings, but has that really been achieved?

Not necessarily. Serious counsel would not leave their "aces up the sleeve" to the end of the case, or new allegations or evidence that would have to be admitted at a later stage. And even so, that would not happen in every case. But today, in every case, the parties have to submit evidence in advance which everyone knows is not really needed, or at least is not of primary relevance. So the case files run to thousands of pages and the cases drag on for years.

Experts

According to the case law of the European Court of Human Rights, the state is also liable for overlong proceedings caused by the slowness of court-appointed experts, but the courts feel freed from the duty to move the case along as soon as the matter is referred to an expert. And the number of cases in which experts are appointed is great, partly because the parties request an expert opinion out of a concern that if they do not they will lose the case because the court will find that the matter required specialised knowledge.

Recipe for improvement? First a rule should be introduced that if specialised knowledge is required, the court must admit such evidence at its own initiative. Why? Because it is difficult for the parties to guess where the line will be drawn between common knowledge and specialised knowledge. This is an issue the court itself should evaluate. Under the conservative approach that prevails in civil litigation today, much of the evidence is submitted without a strong belief that it is truly necessary, and the same is true for evidence from court-appointed experts.

Indeed, the whole system of court-appointed experts in Poland should be reformed so that it will attract the best specialists. This will involve costs, but those are borne by the parties in any event. Since judgments are issued in the name of the state, shouldn't the courts be assisted by the very best experts? Being a court-appointed expert should be an elite profession, but today it certainly is not.

Finally, the court should conduct a dialogue with the expert—not require the expert to prepare an opinion when the expert declares up front that he or she is not up to the task for whatever reason. It should first be determined with the expert how much time it will take to prepare the opinion and how much it will cost. Then these terms should be enforced. If a party is late in filing a pleading, it can lose the whole case. But if an expert is late in submitting an opinion, there are no repercussions. What is the point of contractual penalties, disciplinary consequences and other tools for holding experts' feet to the fire? Even under the existing regulations there are legal options for arranging the cooperation with experts so that it goes smoothly, with respect for the interests of the parties, particularly in terms of the time required to prepare the opinion.

And lots more

Certainly there are many other reasons for the lengthiness of judicial proceedings. The selection presented above is a subjective one. These are aspects noticeable from the perspective of counsel for the parties, who may not be in a position to observe all of the circumstances contributing to the slowness of the courts.

Perhaps some of these diagnoses aren't the real cause of delay, or at least aren't a decisive factor. But one thing is certain: delay is something that has to be confronted and fought against. Measures must be taken to see that a judgment can be issued at the first instance in one year, not six. This requires first discussion, then empirical studies, a dialogue with all of the stakeholders in the judicial process, development of guidelines for changes, more discussion, and then gradual introduction of a new approach.

Dr Marcin Lemkowski, adwokat*, Dispute Resolution & Arbitration Practice*

Protecting the interests of investment firms' customers

Danuta Pajewska Marcin Pietkiewicz

Measures increasing the protection of customers of investment firms have been visible for several years. Their most recent manifestation is introduction of a new institution in Poland known as the Financial Ombudsman, requirements for financial institutions to resolve complaints in a timely fashion, and implementation of regulations protecting customers of financial institutions against offering them unsuitable products.

Financial and investment services are subject to special protection and regulation by the state. This is exercised not only through licensing, setting conditions for conducting financial activity, and oversight of financial institutions by specially appointed administrative agencies. The state also regulates contractual relations between financial institutions and their clients. It is vital that when customers take investment decisions, they do so with an understanding of the nature of the product and an awareness of the related risks, and after the sale any problems or doubts they have are properly handled. In Poland, special regulations have been adopted recently to address these issues.

Consideration of customer complaints

Clients' use of services offered by financial institutions does not always go smoothly, and the complaint procedures followed by financial institutions are not always effective. Until recently, customers had no resort to external institutions other than the courts and the Polish Financial Supervision Authority (KNF). Only clients of insurance companies could find support from the Insurance Ombudsman.

This changed in 2015. In May, KNF adopted guidelines for consideration of complaints, and the Act on Consideration of Complaints by Financial Market Entities and on the Financial Ombudsman entered into force in October.

The act applies to complaints about the quality of services provided by banks, payment institutions, brokerages, investment fund companies, savings and loan associations, and loan companies. A "complaint" means any reservations the customer has about the services provided. In the case of insurance companies, complaints may also be filed by actual or potential beneficiaries.

The main goal of this regulation was to motivate financial institutions to resolve complaints on a timely basis. Now financial institutions are required to resolve complaints within 30 days from receipt, or 60 days in complicated cases. If this deadline is not met, the complaint is deemed to be resolved in the customer's favour. Moreover, if a complaint is not upheld, the customer must be provided with a factual and legal justification as well as information about possible means of appeal, resort to mediation, filing a claim in court, or seeking review by the Financial Ombudsman.

The Financial Ombudsman is a newly established governmental institution tasked with protecting the interests of clients of financial institutions, including consideration of individual client matters when their complaints are not upheld by the financial institution. The operating costs of the ombudsman's office will be borne by the financial institutions themselves. Previously clients unsatisfied with the services of financial institutions could file complaints with KNF or the Insurance Ombudsman (in the case of complaints against insurance companies). Now the entity appointed to consider complaints by customers of all financial institutions will be the Financial Ombudsman.

The ombudsman has a number of instruments at his disposal to protect the interests of customers. For example, the ombudsman may request the financial institution to reconsider the complaint or ask a regulatory authority to examine the case. The ombudsman may also file a claim seeking a holding that provisions of standard contract forms used by an institution are prohibited—and in this respect the ombudsman may demand that a financial institution disclose specimens of the documents it uses in contracts with customers. The ombudsman can also impose fines of up to PLN 100,000 on financial institutions violating the rules for consideration of complaints.

For a modest fee, clients may also seek mediation by the ombudsman's office, which the financial institution is required to participate in.

Offering services unsuitable for the client

Regulations requiring the type of financial services offered to a customer to be suited to the customer's individual situation have been in operation in Poland for some time, but only applying to some segments of the market. In the case of certain investment products, brokerages and banks have been required since the end of 2009 to examine customers' knowledge and experience with respect to investment products offered to them. Based on an evaluation of the information provided to them by the customer, they must inform the customer whether the given product is suitable. In the case of certain brokerage services (e.g. investment advice), the brokerage must refuse to provide the service if it determines that it is unsuitable for the customer. It is also crucial to present to customers the risks associated with investing in a given financial instrument.

Following in the tracks of these regulations, the Competition and Consumer Protection Act was amended in August 2015 to introduce regulations designed to protect customers of financial services in all segments of the financial market against offering them unsuitable products. It will also be a practice infringing the collective interests of consumers to propose to consumers the purchase of financial services which do not correspond to their needs as determined on the basis of the information available to the financial institution, or to propose the purchase of such services in an unsuitable manner.

Lawmakers worked from the assumption that investment products offered on the market are often complicated and varied, entailing different levels of risk, and thus financial institutions should not offer them without first determining whether they are suitable for the client in light of the person's age, familiarity with the product, and investment goals.

To insure compliance with this obligation, Poland's consumer regulator, the president of the Office of Competition and Consumer Protection (UOKiK), will be authorised to order a financial institution to cease and desist specific practices until a final decision is issued on the use of practices harmful to the collective interests of consumers, and if the order is not complied with can impose a fine of up to 10% of the institution's turnover for the financial year.

The act also introduced new possibilities for verifying that the protective regulations are being complied with. With court approval, UOKiK will be able to conduct controlled purchases of financial products. UOKiK can also enjoin a financial institution from offering a product and publish warnings on public radio and television against purchasing a given financial product, designed to reach as many consumers as possible (a topic we discuss also in the article "A new weapon in the hands of UOKiK" at p. 34).

These new instruments for consumer protection will undoubtedly strengthen the position of customers in relation to financial institutions. In the past it has happened that a customer in a dispute with a financial institution had to wait patiently for a long time while a complaint was considered, or faced barriers in obtaining evidence such as a record of placement of the customer's order. The new rules are designed to remedy this.

This is expected to occur through increased customer awareness of the risks connected with financial products before purchasing them, and by motivating financial institutions to improve their dealings with customers after a financial product has already been sold and a need arises to resolve doubts or disputed issues.

Danuta Pajewska, legal adviser, partner, head of the Capital Markets and Financial Institutions practices

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Honest traders punished? The dangers of VAT fraud

Dariusz Wasylkowski Wojciech Marszałkowski

The problem of illegal avoidance of VAT continues to grow. The Polish Treasury estimates its losses at tens of billions of zlotys every year. But the state is not the only victim of tax fraud. Trading in goods through illegal structures can hurt honest businesses too.

VAT fraud is based on creation of a chain of successive sellers and buyers trading in goods, often with the same goods changing hands repeatedly. Criminal schemes generally exploit the principle of intra-Community supply of goods within the European Union through a "VAT carousel" or trade with Asian countries. Either way, the result is a shortfall in the output VAT which should finally be paid into the account of the State Treasury, or an unauthorised refund of input VAT.

In the criminal chain, successive sham sellers and buyers play defined roles. One of them is the role of the "missing trader," which enables the funds to be withdrawn from the chain and the traces erased. Often this entity is a limited-liability company operated by a straw man, such as a homeless person, and managed behind their back, or after the crime is committed the company is sold to a straw man, with the company's assets and documentation removed from the reach of the tax administration. Also figuring in the structure is a buffer entity maintaining a front of honesty, an exporter entitled to a VAT refund, and the leader of the carousel, who is most often located abroad.

VAT fraud doesn't just hurt the State Treasury. It also impacts competitors offering goods on the same market as the entities illegally evading VAT, as well as entities involved in acquiring goods which were "contaminated" by passage through the criminal chain. While the state's shortfall is obvious, the injury to the latter two groups requires some explanation.

Carousel with competitor

VAT criminals most often operate in areas of trade enabling turnover of large amounts of money and repetitive transactions. The experience of recent years shows that criminal schemes can effectively interfere with trade on certain markets, in particular markets for commodities and other markets with low margins, where the products are fungible or all of similar quality. An illegally operating enterprise typically offers a lower price than its competitors, as the significant gain from non-payment of VAT makes up for taking a mark-up below the market standard. Honest traders offering similar goods at a higher price may thus gradually lose orders until they are driven out of business entirely.

For this reason, businesses should remain alert. If they notice behaviour by other players that is not in line with the market, or price dumping, they can request the competent authorities to check the actions of a suspicious competitor.

Cheap poisoned apples

The injured party could be the buyer of goods that are traded in the criminal scheme. The tax authorities often learn about the operation of a criminal scheme after the entities involved in the scheme have disposed of their assets and the shares are sold to a new owner. When seeking funds owed to the State Treasury, the authorities attempt to trace successive links in the chain of sales until they reach a lawfully operating enterprise. Then they demand that the enterprise pay the same tax which they did not succeed in recovering at an earlier stage of trading.

An honest trader can become entangled when the seller of the goods does not remit VAT, while the unwitting buyer of the goods resells them in an intra-Community supply of goods and then seeks refund of the input VAT, or sells the goods and deducts the VAT not paid by the seller. Often the subsequent buyer of the goods is an entity connected to the first seller.

In that situation, the tax authorities conduct an inspection of the honest trader to verify whether it acted in compliance with the legal requirements. Often the business is forced to enter into a dispute with the Treasury, which denies it the right to deduct the input VAT on acquisition of the goods from a participant in the criminal scheme.

Defending the right to deduct VAT

A taxpayer who unwittingly takes part in a situation that violates the law and does not know that the transaction was exploited for fraudulent purposes must not be deprived of the right to deduct VAT. But this right of the taxpayer is not unconditional: the taxpayer must have acted in good faith and with due care in acquiring the goods. Acting in good faith means that the buyer was not aware of the criminal origin of the goods and did not turn a blind eye to certain suspicions. Acting with due care means that the buyer should at least verify the supplier's VAT registration and basic information concerning the supplier's activity.

This conclusion was confirmed in a recent ruling by the Court of Justice of the European Union, which held in *PPUH Stehcemp sp.j. v Dyrektor Izby Skarbowej w Łodzi* (Case C-277/14, judgment of 22 October 2015) that the regulations should be interpreted to mean that the taxpayer has the right to deduct VAT due or paid on goods supplied to it even if the invoice was issued by an entity which under the regulations should be regarded as non-existent and there is no way to determine the true identity of the supplier of the goods, unless it is shown that under objective grounds, and without requiring the taxpayer to carry out checks that are not the taxpayer's responsibility, the taxpayer knew or should have known that the transaction was connected with VAT fraud.

Exposure to the risk of fiscal criminal liability

Sometimes an audit seeking to determine the amount of the tax obligations of a company which has bitten the poisoned apple leads to fiscal criminal proceedings against individuals.

As a rule, exposure to fiscal criminal liability is a derivative of a ruling in a proceeding to determine tax liabilities. If the proceeding ends successfully for the company, it is rare for the matter to be continued on a criminal basis. But if the company ultimately loses the tax case, it is then the individuals performing managerial functions in the company who will have to defend themselves against personal liability.

Under the law, only individuals, and not a company, can be held criminally responsible. Under Art. 9(3) of the Fiscal Penal Code, a person who handles the economic affairs of the company, and in particular the financial affairs, is responsible as the perpetrator of a fiscal crime or fiscal petty offence. In practice it is presumed that this responsibility rests on the members of the management board. The burden of proof that it was not a member of the management board but another person who was responsible for the company's tax matters and had the real ability to comply with the company's tax obligations will rest on the suspected management board member.

The threatened penalty under the Fiscal Penal Code is up to 5 years in prison. When there are aggravating circumstances, the maximum penalty can be raised to 10 years in prison. In practice, the sanctions handed down are not high, which can also contribute to a perception of tax fraud as an attractive alternative to, say, narcotics trafficking. But there is an observable trend on the part of law enforcement authorities to extend the catalogue of allegations deriving from tax fraud to include offences defined in the Penal Code. These include money laundering, racketeering, and sometimes also forgery. In a case combining allegations of fiscal offences with other crimes, the length of imprisonment to which the defendant is exposed can increase by as much as half. And given the impact that VAT fraud is having on the state budget, sanctions may be stiffened in the near future.

A company can bear quasi-criminal responsibility, that is, it can be ordered to cover a fine imposed on a convicted individual if the company obtained material gain from the offence and the individual is not able to pay the fine himself.

The company can also be held liable under the Act on Responsibility of Collective Entities for Punishable Offences if it is found that a crime was committed and the company did not exercise due care in selecting or supervising its personnel. This primarily involves financial liability.

Fragile presumption of innocence

One of the first principles of criminal law is the presumption of innocence. While the practice may not violate this principle, it can be observed that law enforcement authorities don't always seek to exhaustively determine facts casting a favourable light on the defendant. Then the defendant must take matters into his own hands.

Because only a person guilty of committing the offence alleged against him can be convicted, the defence should focus on the subjective aspect of the offence. It helps to show that the behaviour that led to refusal of the right to deduct VAT occurred independently of the management board member, or despite exercising due care the management board member did not know about that behaviour or was unaware of the circumstances linking the company's activity with the illegal transactions.

In order to limit the risks, the management board may introduce procedures at the company ensuring appropriate verification of suppliers to exclude or at least greatly reduce the possibility of acquiring goods which have been traded illegally. Tasks can also be assigned to specific people (most often in the form of management board bylaws) so that one person is responsible for economic matters, including financial matters. This can mitigate the other management board members' exposure to this risk.

Slowly seeking a better future

Successive governments have taken measures to plug the gaps in the VAT system. But the legislative response so far has been too little too late. For example, only in the middle of 2015 was a reverse-charge mechanism introduced with respect to types of goods that had for a long time been the subject of trading in VAT carousel schemes (e.g. mobile phones and portable computers). Now a wide range of goods are traded in fraudulent transactions, which means that the group of honest businesses now at risk is very broad. The risk grows in proportion to the number of suppliers and goods purchased, and thus even large commercial firms and retail chains can become the victim of dishonest traders.

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Wojciech Marszałkowski, Tax Practice

Criminal law: Trial reforms under trial

Janusz Tomczak

2015 was a major year for the criminal justice system in Poland. Two acts entered into force amending the Penal Code and the Criminal Procedure Code, reforming the model for criminal procedure and trials which had functioned for decades in Poland. The acts were the fruit of several years of labour by the Criminal Law Codification Commission. After the first few months of confusion, the time has come to consider whether the reform has achieved its goal.

Efficient procedure, greater involvement by the parties

The main purpose of last year's amendment was to expedite and streamline the hearing of criminal cases, as well as relieve judges from bureaucratic work so they can focus on deciding cases, while shifting the burden of presenting evidence to the parties: the accuser and the accused, and consequently trial counsel.

The amendment expanded the catalogue of instruments enabling criminal proceedings to be completed by a settlement between the parties, under judicial supervision, based on the pragmatic assumption that many categories of minor offences do not require a trial with extensive consideration of evidence, but could be resolved with only a single session before the court. The system of penalties and enforcement was made more flexible.

In cases that do reach trial, a new obligation has been imposed to schedule preparatory hearings to agree on issues concerning the organisation, planning and course of the trial, which is intended to significantly streamline the trial.

The model of appellate procedure has also been changed to limit the possibility of setting aside judgments from the first instance and remanding the cases for retrial. This should also speed up the proceedings.

Adoption of these assumptions was supposed to modernise and streamline trials by bringing them closer to the Anglo-Saxon model, where it is the parties rather than the court that are responsible for the evidence (with the possibility of demanding court-appointed counsel at practically any stage of the proceedings). An expression of the new approach to the roles of the parties at trial is adoption of the rule that a defence is a right, not an obligation. Thus the rigors concerning participation by the parties at court hearings have been loosened.

All of this was meant to realise the adversary principle, under which the dispute between the parties is resolved by the judge as an arbiter supervising the course of the proceedings from the formal point of view, but not intervening in the substance of the parties' positions and applications. Poland was to become one of the first post-communist Continental countries to adopt this model for criminal proceedings.

This all seemed promising in the assumptions and theory. But how has it gone in practice?

Experiment on a living organism

Legal practitioners realise that the law as applied in practice often differs markedly from the assumptions adopted by lawmakers.

Even before the amended regulations entered into force, prosecutors protested. They loudly demanded that the grace period be extended, arguing that the units run by the prosecution service were not organisationally prepared to introduce such major changes. One issue was how to ensure that the prosecutor who oversaw the preparatory proceeding and then drafted and filed the indictment also participated in the hearings at which the indictment was considered. (Previously it was standard practice that the prosecutor appearing in court was not the same prosecutor who drafted the indictment, and often the prosecutor attending the hearings was not very familiar with the case and was not in a position to assert arguments that were important for pursuing the indictment.)

Judges were also responsible for delay in entry into force of the new rules. They argued that it was a revolution the courts and the parties' representatives were not prepared for substantively or organisationally.

Despite these objections, the reform entered into force, and after its first few months in operation certain tendencies can be noticed which seem to depart from the assumptions adopted by lawmakers and discussed above.

The word from many courts in Poland is that the number of indictments being filed has dropped considerably. The trial logic is that after filing an indictment, the prosecutor must prove the allegations by applying for admission of specific evidence. The judge will not do this for the prosecutor under the principle of "substantive truth," as used to be the case. This requires much greater precision in framing the allegations, but also requires greater caution in filing cases with the court.

But some feel that the smaller number of indictments demonstrates that the prosecutor's offices are not working effectively, because there is no reason to believe that the reduction in indictments reflects a decline in crime rates.

Pressure is also felt from the side of prosecutors to resolve cases consensually, by settlement. This allows the case to be completed quickly and without the risk of losing at trial. But it is hard to resist the impression that the purpose is not to obtain a truly just result, reconciling the parties, with compensation for the injured party, but only to improve the statistics and raise the number of completed cases while avoiding the need to file cases in court with an indictment. It is still apparent that prosecutors treat participation in judicial hearings as an unavoidable necessity dragging them away from their everyday desk job, which seems more important to them and is the key to their professional advancement.

There is also an increasing number of preparatory proceedings (investigations) being discontinued. The word is that the prosecutor's offices are using this route to

avoid pursuing difficult cases, where it is hard to draw a clear picture and it is necessary to gather a lot of evidence, often a costly process. The decisions in these cases are usually challenged in court, causing an increase in the number of cases involving appeals against decisions by prosecutors or police to discontinue the case. Premature decisions to discontinue the proceedings, or refusal to commence them, therefore causes significant delays in the legal response to criminal activity.

There are also reports that the police are not handling the reforms well in financial terms, as their additional duties (service of more notices to witnesses and suspects) generate additional costs.

The conservative new Minister of Justice (in office since October 2015) has plainly stated his negative view of the reform, regarding the assumptions behind it as wrong-headed. When this publication was going to print, a final decision had not been taken yet on whether changes were needed, a further amendment of the criminal procedure rules, or even withdrawal of last year's reforms.

Under these circumstances, it may be wondered whether the reforms serve any purpose at all.

Pragmatism vs justice

Certainly it was reasonable to expect that the first such significant and comprehensive overhaul of the criminal law system in the 21st century would adjust the law to more closely suit the socioeconomic system that has been functioning in Poland for the past 25 years.

A manifestation of this was to be the shifting of responsibility for the handling of evidence to the parties, represented by professionals, who would carefully plan the actions they take in the preliminary proceedings and before the court of first instance, in the awareness that their omissions in this respect would have repercussions in the appellate proceedings.

For the same reason, greater ranks of specialists from various fields were included in the process, through the admission of proof using opinions of private experts. This led to a noticeable stimulus of the market for detective services, forensic IT and the like. On the other hand, there are no regulations governing such experts as a separate group who should follow specific rules (although there is a Judicial Experts Act still at the drafting stage).

The amendment achieved its established goal at least in the sense that it has created much greater room for initiative by the parties, and particularly their counsel (defence counsel or counsel for the injured parties). Meanwhile, counsel's professional responsibility for the results and the fate of the overall case has also increased. It goes without saying that an active defence, as well as gathering exacting and exhaustive evidence to support the indictment, generates additional costs, sometimes heavy. The Parliament provided for additional costs arising out of the expanded right to court-appointed counsel, but the state budget does not provide for additional funds to cover the costs actually incurred by the parties.

One change that has been universally regarded as favourable, and reflecting the spirit of the times, is the introduction of "absorptive" discontinuance, in which the injured party and the perpetrator can be reconciled, particularly when the perpetrator redresses the victim's loss, resulting in the criminal proceedings being dropped entirely without any consequences for the perpetrator. The practice shows that this is a popular option, giving the injured party a chance to negotiate for compensation in exchange for requesting discontinuance of the case. This practical solution leaves the issue of the responsibility of the accused in the hands of the parties.

But the overall picture that has emerged after the new regulations have been in force for six months is that of seeking quick and pragmatic solutions to release law enforcement authorities from the risks carried by an adversarial form of trial.

There is still a palpable sense that all of the actors in the criminal justice system are involved in an experiment. There is evidence of resistance from old hands, accustomed to the way the system functioned for decades, who are not eager to follow the solutions introduced mainly by legal theoreticians. There are also those who say that in the hubbub surrounding introduction of the reform, a value of overriding importance has been lost sight of: justice. And they have a point.

Trying to evaluate the effects of introducing such a deep reform in the law just a few months after the reform entered into force may be risky, but it is a necessary task as calls have already been issued to withdraw from the reform or modify it seriously. Nonetheless, an accurate evaluation of the consequences of the changes will be possible only with several years, not months, of hindsight.

Unfortunately, the current situation does not give citizens a sense of trust in the legal system and confidence that the state can ensure that justice is properly pursued.

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Pitfalls of perpetual usufruct

Stefan Jacyno

From an economic point of view, it is assumed that the right of perpetual usufruct of land is just as good as ownership. An enterprise holding usufruct of land can erect a building on the land and become the owner of the building. Therefore, market prices for ownership and perpetual usufruct do not differ much. But in reality perpetual usufruct only appears on the surface to be equivalent to ownership. And in fact there are several sets of rights that share the common label of "perpetual usufruct" but are substantially different.

The right of perpetual usufruct has existed in the Polish legal system since 1961. It always applies to land, is limited in time, and requires payment of annual fees calculated as a percentage of the current value of the land (i.e. like a cadastral tax), at the rate of 3%, 2%, 1% or 0.3%. But the rights of the usufructuary also depend on the method by which the right of perpetual usufruct was established.

Only consistent with the intended use

The perpetual usufructuary may use the land only in compliance with the intended use specified in the agreement. Originally, during the communist era, perpetual usufruct was the only way to place state-owned land in private hands, essentially only for individual or cooperative residential construction, or for small craft or cooperative establishments. If someone today buys vacant production buildings on such land with the idea of demolishing them and erecting residential or retail buildings, they may encounter unforeseen difficulties. Such agreements included an express designated use for "production plant" and imposed an obligation to "maintain the buildings in suitable condition"—and thus the buildings cannot be pulled down without amending the agreement. The owners of the land (the local government or the State Treasury) may condition amendment of the agreement on payment of a "voluntary" fee—in Warsaw it is 12.5% of the value of the land.

The perpetual usufructuary must also deal with the owner wanting to be a participant in the administrative proceeding for issuance of a building permit and seeking to monitor the actions taken by the perpetual usufructuary. We are aware of instances of actions challenging, for example, the possibility of issuing a building permit for a mixed-use office and retail building if it does not correspond literally with the wording of the intended use specified in the agreement delivering the land in perpetual usufruct. Curiously, in such a case the Mayor of Warsaw (as the owner) appeals against a building permit decision issued by the Mayor of Warsaw (as an authority)!

Sometimes investors believe that receiving a decision on construction conditions for a venture different from that provided for in the perpetual usufruct agreement means there is an automatic change in the intended use of the land—because after all the competent authority has issued the decision. But they forget that in a democratic system authority is divided and vested in various public entities in different spheres. The land held in perpetual usufruct may be owned by the state, while the zoning plan or decision on construction conditions lies within the competence of local government. Moreover, development of land is not an act of authority, but an act of ownership, and thus with respect to land owned by the local commune one unit is competent to establish the zoning plan and another unit is competent with respect to the specific method of developing the land. In that situation, consent to change the designated use depends solely on the owner of the land. The perpetual usufructuary may also request a change, but the owner may not want to change the intended use that has already been established.

Cases are also commonly encountered of land held in perpetual usufruct established by operation of law through the process of "enfranchisement" of state enterprises at the beginning of the transformation of the socioeconomic system in 1990. These rights of perpetual usufruct do not have a specified intended use and are free of the problems and limitations discussed above. The rights to such land are closer to ownership. But it must be borne in mind that undeveloped land held in perpetual usufruct is always subject to a right of preemption by the local commune, even if the land became undeveloped because of demolition of buildings in preparation for a new construction project.

Allure of auction

At a time when the market economy prevails, public entities organise tenders through which rights of perpetual usufruct may be acquired, and the agreement concluded as a result of the tender will specify the purpose for which the land is delivered and the period for construction. But an auction presents enticements that can cause huge losses to investors if they are not cautious.

In the tender, the value of the land is auctioned, but only the first annual payment, equal to 15–25% of the auction price, is paid to the owner, with annual fees being paid in subsequent years equal to 1%, 2% or 3% of the value of the land (depending on the intended use). Because the upfront payment is only 25%, developers may bid very high, in the expectation that they will quickly complete construction and find another buyer. If the investment cycle is 5 years, the total payment may be 25% + 4 x 3% = 37% of the price of the land, but the developer sells the property for the full market value, together with the buildings erected on the land. So even if the sale price of the land is lower than the auction price, there is still a safe profit margin. Sometimes buyers at auction take out large loans secured by a mortgage on the right of perpetual usufruct.

But if for any reason the realisation of the planned development is delayed, it is necessary to pay additional penalty fees for extension of the construction deadline (10% of the price), but even then whether the owner consents to extend the construction deadline, and for how many times, depends on the owner's patience. The

owner may not agree to an extension, and instead apply to the court for termination of perpetual usufruct, and then the investor will lose everything. The law does not provide for refund of the initial fee, the annual fees, or the penalty fees for extension of the construction deadline. If the right of perpetual usufruct was encumbered by a mortgage, the mortgage will also be extinguished, and then the financing bank also loses everything. This is not just theory—there are actual examples.

Loss of perpetual usufruct

The right of perpetual usufruct can be lost not only at the beginning, but also at the end of the period for which it was established. This was felt most painfully by inhabitants of residential buildings in Warsaw for whom perpetual usufruct was established for a period of 40 years which expired in the early 21st century. This also resulted in loss of ownership of their units, because when perpetual usufruct expires, so does the separate ownership of the buildings—it automatically passes into the ownership held by the owner of the land. The Civil Code provides for a right to apply during the last 5 years of perpetual usufruct for an extension of perpetual usufruct for a further period. The extension can be refused only for legitimate social interests. The problem was that the residents forgot to file an application, and the deadline passed.

Even filing a timely application will not necessarily bring the desired result. In a widely publicised recent case, the Mayor of Warsaw refused to extend the period of perpetual usufruct of land for a sports club. The perpetual usufructuary wanted to erect an office building on the site and had neglected the sports facilities. First the mayor, and subsequently the courts, including the Supreme Court of Poland, found that in this case the refusal of an extension was justified by legitimate social interests.

Joining and dividing plots

To improve the shape of a plot intended for development, adjacent land which cannot be developed independently can be acquired from public entities, without a tender. But if even one of the plots is in perpetual usufruct, this solution must give pause. If someone plans to construct a building on several plots and then sell subdivided units, all the plots first have to be joined in one land and mortgage register. This is not possible if the plots have different legal status. Even holding the land on a basis enabling construction and receiving a building permit without reservations, the units cannot be sold before consolidating the legal status of the land—and on the basis of ownership, not perpetual usufruct. Then the state and local governmental units need to reach agreement on the issue of transferring the right of ownership. Needless to say, this is a difficult task.

Recent case law appears aimed at limiting the rights of perpetual usufructuaries against the owner. The resolution of the Supreme Court of 13 March 2015 (Case III CZP 116/14) expressly held that the perpetual usufructuary of land may not partition the land delivered in perpetual usufruct. It is hard to agree with this line of reasoning, which is inconsistent with the practice followed for several decades. While some rationale might be found where the land was delivered for a specific purpose and the partition could threaten achievement of that purpose, where the right of perpetual usufruct derives from enfranchisement there is no basis for such arguments. After all, enfranchisement was not supposed to result in socialist plants becoming set in stone within the existing boundaries of their land, but on the contrary, was intended to enable sale of unnecessary property, so it could become part of the economy, allowing others to develop the property in compliance with zoning plans or construction conditions issued for the site.

Check before buying

Consequently, before acquiring the right of perpetual usufruct of land, it must be checked not only who is the perpetual usufructuary and the period for which this right was established. It is also necessary to examine the other rights and obligations making up this right and the suitability of the site for the potential buyer, such as the manner of use, the period for construction, and the amount of the annual fees. These may be hidden in the terms of the agreement delivering the land in perpetual usufruct, together with any annexes—and even in the correspondence between the parties, as the amount of the fees is updated through written notices.

The amount of the annual fee can also be set by the court if the perpetual usufructuary does not accept the proposed assessment and demands that a proceeding be conducted before the local government appeal board and subsequently before the state court. But note: if the agreement delivering the land in perpetual usufruct was concluded on the basis of a tender, the value of the land cannot be lower than that established in the tender. Anyone who buys a commercial unit from a developer and later wants to reduce the annual fees will be refused—even if the market value has fallen by half—if the developer purchased the right of perpetual usufruct in a tender, bidding aggressively and setting a high price (but the developer itself actually paid only 25% plus annual fees until the unit was sold). In the case of residential units, fortunately, this restriction applies only for the first 5 years.

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The building is delivered but construction continues

Hanna Drynkorn Mirella Lechna

A building is ready for delivery when it can be used by the owner for its intended purpose, even if defects are found during the handing over which require the contractor to do more work on the site.

When the contractor presents a building for acceptance, it is a key point in the relations between the parties to the construction contract because of the consequences. Acceptance of the building is a moment that both parties look forward to. For the contractor delivery first and foremost is grounds for demanding payment of its fee. The owner, for its part, is able to begin using the building. And upon acceptance, responsibility for injury on the building site passes to the owner and the period of the warranty for defects begins to run. If the owner unjustifiably refuses to accept the work, it is a violation of the owner's statutory duty, which puts the owner in default. Therefore, the contractor's claim for payment becomes due and payable at the time delivery should be accepted, when the contractor has performed its obligation (Katowice Court of Appeal judgment of 17 February 2000, Case I ACa 1027/99).

But the only statutory regulation referring (indirectly) to acceptance of delivery is Civil Code Art. 647. Under that provision, in a construction contract the contractor undertakes to deliver the building provided for in the contract, built in compliance with the design and principles of technical knowledge. This obligation is mirrored by an obligation on the owner's part to take the actions required by relevant regulations related to preparation for the work, specifically turning over the building site and providing the design, as well as the obligation to take delivery of the completed building and pay the agreed fee.

Because of the far-reaching consequences of delivery, it is vital to determine when according to the law the building is deemed ready for delivery. The statutory rules in this respect often prove inadequate for the purposes of evaluating the proper completion of the building by the contractor.

Interpretive guidelines for this regulation can be found in the case law from the Supreme Court of Poland and the lower courts. It is accepted that refusal to accept delivery can be justified only by circumstances that would qualify as "non-performance" of the contractor's obligation, whereas merely "improper performance" gives rise to an obligation on the part of the owner to accept delivery. So what counts as non-performance vs. improper performance when it comes to construction of a building?

Not every defect is material

There is said to be non-performance of an obligation when the performance was not rendered at all or the performance rendered lacks essential characteristic features. Under a construction contract, it should be found that there is non-performance of the obligation when defects are of a sort that prevent proper use of the structure, exclude normal use in compliance with the purpose of the contract, or deprive the structure of characteristics that are proper or expressly provided for in the contract, significantly reducing its value. Such defects are deemed to be material. Because one of the criteria for materiality is the fitness of the building for its intended purpose, the owner should consider whether under the specific circumstances the mere continued presence of the contractor's team of workers will make the building unfit for use for its intended purpose. While this form of unfitness for use does not arise out of a technical evaluation of the defects and shortcomings, in reality it might keep the owner from conducting its intended activity in the building even though delivery of the building could be accepted.

Other defects—deemed immaterial—demonstrate only that the contractor's obligation was "improperly" performed. Their existence does not prevent use of the building, and thus the contractor has a right to demand acceptance of delivery and payment of its fee. The owner should then be sure to draw up a protocol of final delivery with reservations, indicating the defects and shortcomings together with a deadline for the contractor to cure them. The existence of defects of this type may also constitute grounds to reduce the contractor's fee. But they are not sufficient grounds to refuse to accept delivery (Supreme Court judgment of 26 February 1998, Case I CKN 520/97).

It has also been held in the case law that it is impermissible even to agree in the contract that payment of the fee depends on acceptance of delivery free of defects, as this would conflict with statute or principles of social coexistence, enabling the owner to arbitrarily determine the proper time for acceptance of delivery. Under this view, acceptance of the work is an obligation of the owner and cannot be made conditional on lack of defects or shortcomings in the work (Gdańsk Court of Appeal judgment of 24 February 2012, Case V ACa 198/12).

Therefore, the well-established position is that even if at the time of delivery the building is defective, the owner is forced to accept this state and then wait for the contractor to cure the defects, meanwhile tolerating the contractor's presence on the site. But in that case the contractor is released from responsibility for the construction site, and thus from that point is not required to maintain insurance for the construction site ("contractors all-risk" insurance). Nonetheless, the contractor remains on the site and conducts work there necessary to cure all of the defects, as required by the reservations in the delivery protocol, which becomes a new obligation of the contractor.

Two liability regimes

Polish law clearly distinguishes the regime of liability for defects already known at the time of delivery—

resulting from improper performance of the contractor's obligation—from the regime of warranty liability for defects discovered after delivery. These are subject to separate regulations.

The first set of defects—those referred to in the delivery protocol—are disclosed defects. The fact that they are known does not deprive them of the nature of defects that are to be cured pursuant to the contractor's liability for improper performance of the contract.

The rule of exclusion of liability for disclosed defects applies only in the case of contracts involving a ready item, such as a sales contract. But in regard to a contract to perform a specific work or a contract for construction work, which by their nature contain a creative element, and where the subject of the contract is individualised, the law provides a delivery procedure so that the allocation of risk for possible curable errors in performance of the work does not unduly burden the contractor. The contractor's responsibility to cure defects would be excluded only if the owner were aware of the defects but accepted the building without reservations. Inclusion of a list of defects in the delivery protocol means that the delivery is effective, but does not bring to an end the contractor's performance of the contract.

Otherwise, a building could never be accepted until it was completely free of defects. That in turn would mean that a building that was in fact ready for use could not be used due to even the slightest shortcoming that required additional work, because if the owner accepted delivery in that situation it would be acting to its own disadvantage, depriving itself of the possibility of requiring the contractor to cure the defects found during the delivery.

So, in the case of a contract for construction work, by requiring the owner to accept delivery of a building which (as indicated in the case law) only substantially complies with the contractor's obligation, lawmakers excluded the general rule that the contractor is not liable for curing defects disclosed at the time of delivery.

The second set of defects—those to be cured under the rules for warranty—are defects that appear only after delivery, within the period defined by statute or contractually. Currently, following the amendment of the Civil Code that went into effect on 24 December 2014, the statutory period of the warranty for defects in structures is 5 years. This period may be freely modified by the parties to the contract under Civil Code Art. 558, which provides that the parties may expand, limit or exclude warranty liability.

In light of the rules discussed above, the owner should accept delivery of the building when it is fit for use despite the existence of defects. Accepting delivery subject to reservations protects the interests of both parties to the contract. This means that the owner has performed its statutory obligation (i.e. is not in default in refusing to accept the building) and the contractor is entitled to receive payment of its fee. At the same time, however, delivery of the building does not release the contractor from its contractual obligations, because it still has the task of conducting the additional work necessary following delivery to ensure that the building fully complies with the contract.

Hanna Drynkorn, Transport, Infrastructure, and Public Procurement & Public-Private Partnership practices

Mirella Lechna, legal adviser, partner, head of the Transport, Infrastructure, Public Procurement & Public-Private Partnership practices

Improvements in Polish arbitration law

At the beginning of the year, two acts significantly amending Polish arbitration law came into effect. The first amendment, dated 15 May 2015, modified the impact that a bankruptcy declaration has on arbitration proceedings. The second, dated 10 September 2015, limits post-arbitration proceedings before state courts to a single instance. Both changes were sought by the arbitration community in Poland and may help to increase the popularity of arbitration as a form of dispute resolution.

Monika Hartung

Bankruptcy versus arbitration

Under the Bankruptcy & Recovery Law in force until the end of 2015, an arbitration agreement concluded with a debtor expired upon declaration of the debtor's bankruptcy, and pending arbitration proceedings were discontinued irrespective of whether they concerned liquidating bankruptcy or arrangement bankruptcy. These regulations, criticised from their adoption, did not raise interpretational difficulties with respect to arbitration proceedings pending in Poland. It was more complicated in relation to arbitration proceedings taking place outside Poland in jurisdictions which did not provide for an arbitration agreement to expire if a party to an arbitration was declared bankrupt.

In the well-known Elektrim case, an English court held that the declaration of bankruptcy of a Polish party to arbitration proceedings did not affect the ability to continue the arbitration in England. In an analogous situation, a Swiss court took a different view. The Polish court considering the application to enforce the English award ultimately agreed with the English court. In yet another case, a Polish court held that declaration of the bankruptcy of a Polish debtor which had participated in arbitration proceedings in France, where it had first been examined, was no barrier to continuing the proceedings and issuing an award. Consequently, it held that the award could be enforced in Poland.

These rules essentially weakened the certainty of arbitration and its appeal, particularly considering that if the arbitration proceedings were discontinued the claimant could not count on being reimbursed even part of the arbitration fee. The arguments asserted in favour of including these rules in bankruptcy law were also not persuasive. The idea was that claims against the debtor had to be reviewed in bankruptcy, and therefore the case should be heard by the bankruptcy court, which applies the law in the general interest of creditors of the bankruptcy estate. This undermined the reliability and impartiality of arbitration awards. After all, arbitration awards are subject to review in post-arbitration proceedings, which is sufficient to protect the fundamental principles of the legal system, including the rights of creditors in bankruptcy proceedings.

The act amending the Bankruptcy Law provides that declaration of bankruptcy will not cause the expiry of an arbitration agreement and will not prevent disputes being resolved before arbitration courts. The parties will exceptionally be able to renounce their agreement to arbitrate, but only in relation to disputes in which proceedings have not yet been commenced as at the date bankruptcy is declared. The receiver can also exercise this right, with the approval of the judge-commissioner, if pursuing a claim in arbitration would hinder the liquidation of the bankruptcy estate, particularly if the bankruptcy estate lacks funds to cover the costs of commencing and conducting the arbitration proceedings. The wording of this provision seems to indicate that it can apply to a situation in which the debtor is the potential claimant. The notion of "hindering the liquidation of the bankruptcy estate" is broad, so the way it is understood by the bankruptcy courts will be decisive. One could imagine that an arbitration agreement specifying the place of arbitration as being outside Poland could be regarded as a hindrance, or for example the duration of the arbitration or post-arbitration proceedings.

This situation generates uncertainty for the debtor's contracting party, which will be able to request the receiver to state in writing whether he is renouncing the arbitration agreement. The failure by the receiver to respond within 30 days will be treated as renunciation of the arbitration agreement. The contracting party can also renounce the arbitration agreement if the receiver refuses to share the arbitration costs (as is required for example in proceedings under the ICC Rules of Arbitration). Then the contracting party may either renounce the arbitration agreement or cover the advance against arbitration costs in full. From the claimant's perspective, this is not a completely satisfactory solution, because it probably will not be able to count on its claims awarded in the arbitration being satisfied in full.

Rules analogous to those for proceedings before state courts will apply to arbitration proceedings pending as of the date of bankruptcy declaration. Arbitration proceedings concerning the bankruptcy estate, arrangement estate or reorganisation estate are automatically stayed upon declaration of bankruptcy. This rule also applies if a receiver is appointed in the proceedings for declaration of bankruptcy, or a temporary administrator in proceedings for opening reorganisation proceedings, insofar as the arbitration proceedings concern assets covered by the aforementioned proceedings.

The aforementioned arbitration proceedings are automatically resumed on the appointment of:

- A compulsory administrator in proceedings for declaration of bankruptcy
- A receiver if bankruptcy is declared or secondary insolvency proceedings are commenced
- A temporary administrator in proceedings for opening reorganisation proceedings
- An administrator in restructuring proceedings.

It should be borne in mind, however, that arbitration proceedings in cases commenced prior to bankruptcy

declaration can only be resumed if the bankruptcy court refuses to recognise the claim in the list of claims.

Streamlining post-arbitration proceedings

The aim of the amendment dated 10 September 2015 is to expedite post-arbitration proceedings, whether pursuant to a petition to set aside the award or an application for recognition or enforcement of the award, and additionally to strengthen the guarantee of independence of arbitrators.

The amendment limits the number of instances in all of these proceedings, remitting them to the jurisdiction of courts of appeal, and shortens the period for filing a petition to set aside an arbitration award to two months. A cassation appeal to the Supreme Court of Poland can be filed against the judgment issued in proceedings to set aside an award. A cassation appeal will also lie against the legally final order of the court of appeal on recognition or enforcement of a foreign arbitration award. As under the previous regulations, no cassation appeal can be filed against an order on recognition or enforcement of an arbitration award issued in Poland. This is not necessary because with respect to domestic awards, the principal instrument for judicial review is a petition to set aside the award. A complaint heard by a different panel of the same court may be filed against an order of the court of appeal on recognition or enforcement of a domestic award.

The legislature left unchanged the rules concerning territorial jurisdiction of the courts hearing post-arbitration proceedings. In such cases, the relevant court is "the court of appeal in whose territory the court that would have been relevant to hear the case if the parties had not made an arbitration agreement is located." Legal commentators point out that in post-arbitration cases—particularly to set aside an award—the relevant court should be the court for the place where the arbitration proceedings were conducted. This would ensure greater uniformity in case law. However, since most arbitration cases in Poland are heard in Warsaw, where the state courts are the most overburdened, that could prolong the time it takes to obtain a ruling.

Some doubts are raised by the regulations governing post-arbitration proceedings. Under the amendment, if the regulations concerning proceedings to set aside an arbitration award do not provide otherwise, the regulations on appeals shall apply accordingly. This construction of procedural regulations might seem to incline state courts to exercise a heightened level of substantive review of arbitration awards. But in light of the existing case law, these doubts do not seem warranted. So far the state courts have generally not exceeded the bounds of review established by the grounds for setting aside an arbitration award.

Under the previous law, the regulations governing the form and content of a statement of claim applied to a petition to set aside an arbitration award. Consequently, the requirements for drafting these petitions were less formalised, but subject to certain restrictions under the regulations expressly governing petitions to set aside awards. Therefore, it should not be assumed that applying the regulations governing appellate proceedings, as relevant, will significantly change the construction of the petition to set aside an award or proceedings to examine the petition.

This amendment also resolves doubts surrounding the obligation to serve on the respondent a copy of the application commencing proceedings for recognition or enforcement of a domestic arbitration award. The practice in this respect differed, and sometimes these cases were heard by the court of first instance without the involvement of the respondent, who only learned of the existence of the proceedings when it was served with the order granting recognition or enforcement of the award. Now the respondent is allowed 14 days after service of the application to take a position on the matter. This excludes the possibility of these applications being granted *ex parte*.

Conclusions

The changes described above are a step in the right direction, but their importance will have to be evaluated in practice. At this stage it is hard to predict how often and for what reasons receivers will renounce arbitration agreements, or what grounds for renouncing arbitration agreements will be held by the bankruptcy courts to be justified. It also remains to be seen whether streamlining the model for post-arbitration proceedings will actually speed up these cases. Notwithstanding the doubts that always accompany changes in the law, it may be hoped that these changes will make arbitration a more attractive forum and will make Poland a more arbitration-friendly jurisdiction.

Monika Hartung, legal adviser, partner, co-head of the Dispute Resolution & Arbitration Practice

A new weapon in the hands of UOKiK

Quicker resolution of cases concerning abusive contract clauses, the institution of the "secret shopper," and the possibility of issuing public warnings are new tools designed to achieve better protection of the interests of consumers.

Sabina Famirska

An amendment to the Competition and Consumer Protection Act entering into force in April 2016 vests the Office of Competition and Consumer Protection (UOKiK) with new competencies. Businesses may be concerned about new legal solutions intended to help combat abuses involving "mis-selling" and a total change in the system of review of form contracts for the use of abusive clauses.

Mis-selling under the eye of UOKiK

The concept of "mis-selling" requires some explanation. It involves improper practices connected with offering of products or services. In recent months there have been widespread reports of problems of consumers in Poland who concluded life insurance or annuity agreements with a capital insurance fund, or unit-linked life insurance products. The consumers were not aware of the risks connected with these financial products and claimed that they were presented to them as secure deposit accounts not subject to investment risk. But after some time it turned out that the value of the investment fell significantly, and withdrawal of the funds was subject to high fees, sometimes a substantial percentage of the value of the investment. Consumers also complained about credit denominated in foreign currencies (where currency-exchange risk was not adequately explained) and consumer loans alleged to contain an unclear and excessive fee structure.

A fundamental change from current law is to provide expressly in the act that such actions constitute a practice infringing the collective interests of consumers. This will enable the regulator to issue administrative decisions in this respect and impose fines. It should be noted, however, that the statutory definition may raise some doubts in interpretation. Under the law, it is an act infringing the collective interests of consumers to "propose to consumers the acquisition of financial services which do not correspond to the needs of those consumers determined with reference to information available to the undertaking concerning the characteristics of the consumer, or to propose acquisition of such services in a manner inappropriate to their character." Thus the honesty of the seller will not be examined in terms of the legality of the product, but in terms of directing the product to an appropriate person and presenting it appropriately. The product may be entirely lawful (although financial products are often complicated) but not meet the real needs of the consumer.

The question arises whether the needs of the consumer referred to here must be determined on the basis of subjective or objective criteria. Suppose that a consumer seeks to purchase a risky financial product which is aimed at a different target group. Must the seller discourage the consumer from purchasing the product because objectively the product is not for him? Sometimes it will be difficult to assess what is an "appropriate" manner of offering less complicated financial instruments, for example whether it is appropriate to offer them by telephone.

Certain guidelines for institutions conducting brokerage activity are provided by the regulations already in force requiring them to examine the customer's profile and to warn customers of investment risks. (At the beginning of 2016 similar regulations entered into force for insurance activity.)

In any event, a financial institution must always protect itself against the charge of mis-selling by refusing to offer risky products to certain consumers and through a thorough and understandable system of information about products (a topic we write about also in the article "Protecting the interests of investment firms' customers" at p. 16).

UOKiK like agent 007

An interesting instrument which will be available to UOKiK, and not only in the fight against mis-selling, is the "secret shopper" institution. A designated employee of UOKiK will be able to conduct controlled purchases, playing the role of a consumer interested in buying the product. This is designed to combat various pathologies on the consumer market. UOKiK has said that it intends to use this tool to assess threats arising not only on the financial market, but also on the market for energy and telecommunications services, as well as sales at product shows, where mainly older people are talked into buying various household products at inflated prices.

Because this instrument seriously interferes with the seller's business (for example, UOKiK can record the transactions with a hidden camera), it will require prior consent of the Court of Competition and Consumer Protection (SOKiK). The UOKiK staffer is supposed to reveal himself to the seller immediately after making the controlled purchase.

Public warnings

One of the most controversial and criticised changes is public warnings. UOKiK will be permitted to publish an announcement on radio or television concerning various "behaviours threatening the interests of consumers." This instrument certainly interferes deeply with the activity of businesses affected by the warning, as they will be publicly stigmatised without the possibility of appealing to a court. Thus it is fairly criticised for its invasiveness and the lack of review mechanisms.

UOKiK will also be able to respond quickly to improper actions by sellers of consumer products by issuing an interim decision prohibiting such actions. Using this measure UOKiK could, for example, ban advertising of a financial instrument if it believes that the instrument does not meet statutory requirements. The decision would remain in effect until formal completion of the proceeding (and thus in extreme cases for up to a year or more).

UOKiK like a court

Another significant amendment is the change in the system for review of form contracts for the use of abusive clauses. Under current law, examination of form contracts (such as terms and conditions) applied in consumer trade lies within the jurisdiction of the Court of Competition and Consumer Protection (SOKiK). The president of UOKiK may file a claim with SOKiK challenging provisions of a form contract, and the regulator's status does not differ markedly from that of the plaintiff in an ordinary civil proceeding. After considering the claim, SOKiK rules on the whether the given contract clause violates Civil Code Art. 385^1, and if it does, that provides grounds for entering the clause in the register of impermissible clauses. Only when the court ruling becomes legally final is UOKiK entitled to commence a proceeding for applying a practice infringing the collective interests of consumers, if another business uses the same clause or a similar clause. Eliminating impermissible contractual clauses is a process that takes years, and until the judgment of SOKiK becomes legally final, the business is not required to cease using the abusive clause.

Following the change in regulations, UOKiK will decide in an administrative proceeding whether a clause is abusive or not. The initiative to commence proceedings will lie with the regulator, but consumers and consumer organisations will be able to submit notices of suspected use of abusive clauses. In the administrative decision completing the proceeding, UOKiK may indicate to the undertaking the actions it must take to redress the infringement. It could for example order annexes to be concluded to existing contracts with consumers to remove or modify the disputed clause. Another major change from the current model is that in the decision holding a clause to be abusive, UOKiK can impose a fine for use of the clause. Issuance of an administrative decision by the regulator will not be the end of the case, because the undertaking will have a right to appeal against the decision to SOKiK.

This type of change may raise valid concerns among businesses routinely using form contracts. The system of judicial review of contracts has provided for control by an independent court of the regulator's arguments asserted in the statement of claim. Now all the power will rest in the hands of UOKiK: it will be the first and most important reviewer of form contracts. While it will be possible to appeal against a decision issued by UOKiK to the Court of Competition and Consumer Protection, until a judgment is issued (or more broadly, until avenues of appeal have been exhausted), the undertaking will be in limbo as to the legality of the clause it uses. The fact that UOKiK can impose a fine in the decision concluding the proceeding makes the new model even more repressive. A situation can be imagined in which an undertaking withdraws a contractual clause only out of concern over imposition of a fine and the burdensomeness of pursuing appellate measures, even though it is convinced of the legality of the clause.

"Soft" oversight by UOKiK

Finally, a significant new feature compared to the current law should be noted which in certain instances will enable avoidance of the invasive actions by UOKiK discussed above. Currently communications between the regulator and businesses are conducted through formalised proceedings, and lack of response from the business leads to monetary sanctions. Now UOKiK will be able to send a letter to a business raising its doubts about behaviour it has observed prior to commencement of a proceeding. The undertaking can present its position in the matter, but a failure to respond will not be threatened with a fine. This instrument is intended to enable avoidance of formal proceedings through voluntary resolution of the matter.

In summary, UOKiK now has at its disposal an entire arsenal of measures which it can use to combat pathologies on the consumer market, from impersonating a secret shopper through public warning and rapid interim decisions (e.g. banning broadcast of advertising), to issuance of administrative decisions with high fines. Now we will have to wait and see the consequences of these regulations—whether these instruments truly protect consumers' interests or excessively restrict the activity of sellers of consumer goods.

Sabina Famirska, legal adviser, Competition Law Practice

Company property, but maybe private?

Katarzyna Żukowska Agnieszka Lisiecka

While exercising supervision over staff, may an employer access content stored on company computers or smartphones or transmitted using such devices? Or does the employer's accessing such content violate the confidentiality of the employee's correspondence, as well as data protection regulations?

In furtherance of its duty to organise the work of employees, the employer provides employees with working tools. Now, for many employees, basic working tools include computers and other multifunctional devices used for transmitting and storing data, such as smartphones.

In most cases these devices are the property of the employer. The employer entrusts them to its employees as working tools they need to properly perform their official duties pursuant to their employment contract. Some employers also award employees additional employment benefits in the form of permission to use such devices for personal purposes.

When using such devices for business purposes or private purposes, a wide range of content is transmitted via the device, containing for example information covered by the employer's business secrecy, but also personal data of correspondents and personal data concerning other individuals. If the employer permits employees to use such devices for private purposes, the content transmitted via the device or stored in its memory may also contain sensitive data (e.g. concerning the health condition of the employee or family members).

Because content stored in such devices or transmitted via the devices generally contains information concerning the employer's business, including trade secrets, it should be assumed that as a reasonable business entity, the employer will apply all necessary measures to protect its property (including information) against threat, damage or loss. Consequently, such data may be stored in the employer's IT system, including the employer's servers or backup copies. Moreover, in connection with processing of personal data in the employer's IT system, the employer as a data controller has a legal obligation to secure the data by applying technical and organisational measures ensuring protection adequate to the threats and to the categories of protected data. More specifically, the employer must secure the data against access or receipt by unauthorised persons, processing in violation of law, as well as alteration, loss, damage or destruction.

This raises the question whether in exercising supervision over employees, which is one of the fundamental characteristics of an employment relationship, the employer may access content stored or transmitted via devices provided to employees, or monitor the employee's use of such devices; or, conversely, does the employer's viewing of such content violate the privacy of the employee's correspondence or data protection regulations? This is a particularly vital issue as devices provided to employees are essential tools for performance of their work for the employer, and the devices themselves typically belong to the employer. Furthermore the information stored or transmitted via the device relates to the employee's work obligations pursuant to his or her employment by the employer. Thus limiting the employer's right to access such content means restricting the exercise of supervision over the employee's work.

ECtHR on monitoring

The European Court of Human Rights issued a landmark ruling on this issue in *Copland v UK* (judgment of 3 April 2007) concerning monitoring of Lynette Copland's telephone, email and Internet connections at the workplace by her supervisor. The Internet monitoring involved an analysis of the sites she visited, the date, time and duration. The ECtHR found that telephone calls from work, emails and Internet usage are covered by the notions of private life and the confidentiality of correspondence. The court also found that the employee had never been informed that her conversations, emails and Internet usage could be monitored, and thus she had a reasonable expectation of privacy. The court consequently held that there was interference with rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, including the right to respect for private life and correspondence. The court also pointed out that staff must be aware that their activities could be monitored, and this requires creation of an appropriate procedure and familiarisation with the procedure by staff.

Supreme Administrative Court on monitoring

The essence of the ruling in the *Copland* case also holds under Polish law. In the judgment of 13 February 2014 (Case I OSK 2436/12), the Supreme Administrative Court held that failure to inform an employee of the existence of a functionality of the IT system that gathers information between the intranet at the workplace and the Internet means that the employee is not aware that he or she is subject to monitoring, and thus the monitoring is not transparent and violates the employee's right to privacy. It was irrelevant that the employer did not use this functionality to monitor the correctness of performance of the employee's work duties, but only to secure its own IT system and the data processed in the system. The court cited Art. 23(1)(5) of the Personal Data Protection Act, under which processing of personal data is permissible only if processing is necessary for the legitimate interests pursued by the data controller or the party to whom the data are disclosed, and the processing does not violate rights and freedoms of the data subject.

The Supreme Administrative Court found that installation of this functionality did meet the requirement of a legitimate purpose on the part of the employer (as the data controller), but nonetheless

processing of the employee's data obtained in this manner violated the employee's rights and freedoms. Under the circumstances of the case, the software gathering information about connections between the employer's intranet and the public network also constituted workplace monitoring of the employee, because it enabled the employer to check a list of websites visited, the time of the connections, addresses of websites and files to which the connection was made. Assuming that monitoring of the IT system is necessary to achieve the legitimate purposes of the employer as the data controller, this provision could not be grounds for legal processing of the employee's personal data—the processing violated the employee's right to privacy because the employee was not aware that his computer usage could be monitored. The court stressed that the monitoring must meet the requirements of lawfulness, legitimate purpose, proportionality, transparency, and compliance with data protection regulations. The transparency requirement means that employees must know that they are subject to monitoring and be aware of the rules for how the monitoring will be conducted.

Council of Europe on monitoring

A similar position was presented by the Council of Europe in Recommendation CM/Rec(2015)5 on the processing of personal data in the context of employment, issued on 1 April 2015. The recommendations are not binding, but may be followed as a statement of best practice, particularly as they correspond to rules for processing of personal data under Polish law and are consistent with the rulings of the ECtHR and Poland's Supreme Administrative Court.

The recommendations stress respect for human dignity and privacy. Processing of personal data must comply with principles of lawfulness, legitimate purpose, transparency and proportionality.

The recommendations permit monitoring of employee activity (when the foregoing principles are complied with), but require prior notice to employees concerning the monitoring, including the technologies and IT systems installed for this purpose. Employees should be informed of the categories of personal data processed, the recipients of the data, the right to access the data (including the possibility of correcting or removing the data), and the purpose of the given operation, as well as the period of storage or retention of a backup copy.

The employee's private electronic communications must not be monitored even if conducted at work.

The Council of Europe also recommends introducing procedures for accessing correspondence of an absent employee when there is a professional necessity, in the least intrusive way possible, and only after having informed the employees concerned. And after an employee departs, his or her work email account should be deactivated. If employers need to recover the contents of an employee's email account for the efficient running of the organisation, they should do so before the employee's departure and, when feasible, in his or her presence.

In the event of processing of personal data relating to Internet or intranet pages accessed by the employee, preference should be given to the adoption of preventive measures, so that in the first place less intrusive solutions are applied (e.g. filters preventing particular operations). Any monitoring of personal data should also be done in steps, with preference for non-individual random checks on data that are anonymous or in some way aggregated.

It clearly follows that the employer's right to control devices belonging to the employer but provided to employees as working tools may be significantly restricted in light of the content recorded on the devices—all because of legal protections of the employee's personal rights and personal data.

Katarzyna Żukowska, Employment Law Practice and Personal Data Protection Practice

Agnieszka Lisiecka, adwokat, *partner, head of the Employment Law Practice*

Groundbreaking new rulings on slotting fees

Cases decided recently by the Constitutional Tribunal, the Supreme Court and some lower courts take a fresh view of Art. 15(1)(4) of the Unfair Competition Act, which forbids hindering access to the market by charging fees for accepting goods for sale other than a commercial margin.

Jan Markiewicz

For nearly a decade, the courts in Poland followed an interpretation of Art. 15(1)(4) of the Unfair Competition Act that was particularly harsh on retail chains. This section of the act provides that it is an act of unfair competition to hinder other enterprises' access to the market, in particular by charging fees for accepting goods for sale other than a commercial margin.

It was accepted that this provision, firstly, prohibits retailers from performing any paid services for their suppliers other than logistics services—including advertising services—and secondly, prohibits the use of cash rebates and bonuses in dealings with suppliers, i.e. contractual modification of the price of goods purchased by chains.

Interpretation detached from market realities

The position of the courts was based on a number of controversial quasi-economic and quasi-normative assumptions. First and foremost it was accepted (although this is not clear at all from the regulation) that the payment received by a retail chain for a service that was contractually agreed and actually performed, and an amount by which the price for purchasing goods is modified as a result of rebates, bonuses or discounts, can constitute "a fee for accepting goods for sale other than a commercial margin." It was also held that if the contract with a chain imposes additional monetary obligations on the supplier, it should be presumed that a fee paid in this manner is prohibited. It was further assumed that for a retail chain to charge a supplier a fee is always tantamount to hindering the supplier's access to the market and violation of fair commercial practice, and these circumstances need not, or even cannot, be the subject of income for the chain. Meanwhile, the "market" was understood to mean the "market created between the parties to the supply transaction," and "hindering access to the market" meant "any restriction by the chain on the profitability of the economic activity conducted by the supplier." Finally, it was accepted in the case law that a "fee" paid to a retail chain by a supplier is never equivalent consideration if the amount of the fee is a percentage of parallel purchase and sale transactions, and even actually performed advertising services do not constitute equivalent consideration for the fee paid for their performance if at the time of performance of the service the retail chain has already taken title to a specific lot of the advertised goods.

In effect, to prevail at trial against a chain, the supplier only had to dispute the value of the services performed for it or the justification (and amount) of the rebates granted to the chain. This was and still is unanimously condemned by legal scholars because this interpretation does not correspond to the wording of Art. 15(1)(4) of the Unfair Competition Act and the assumptions made by the courts conflict with scientific findings from the field of economics and marketing.

Interpretive guidelines from the Constitutional Tribunal

To a large degree the interpretation presented above still prevails. But a number of new, groundbreaking rulings have been issued that require a new look at how the courts apply this provision of the Unfair Competition Act.

First there is the judgment of the Constitutional Tribunal of 16 October 2014 (Case SK 20/12), in which the tribunal held that Art. 15(1)(4) is not unconstitutional, but made a number of remarks on its proper interpretation. The tribunal indicated that in evaluating the equivalence of the consideration exchanged by the two sides to the contract, the court should consider findings and theories from the field of economics as the proper field for a full identification of the relations between the enterprise supplying goods and the enterprise accepting them for sale (the supplier and the retailer). It appears to be the tribunal's view that this evaluation should be made on the basis of expert opinions.

The tribunal further indicated that contrary to the position of the lower courts (and the Supreme Court), Art. 15(1)(4) of the act not only does not settle the issue of hindering a supplier's access to the market, it also does not contain a presumption in this respect, which means that this issue must actually be examined through admission and consideration of evidence. (This position was confirmed in the order of the Constitutional Tribunal of 28 July 2015, Case SK 22/14, and thus may be regarded as well-established.)

Although it initially appeared that this judgment of the tribunal was being ignored by the Supreme Court and the lower courts, that no longer seems to be the case (although it still cannot be said that the views of the tribunal have been fully accepted). Particularly notable is the judgment of the Supreme Court of 17 April 2015 (Case I CSK 136/14), in which the court agreed with the tribunal that there was no presumption of hindering access to the market. This view has not yet been reflected in the rulings of the courts of appeal or the regional courts, but given the clear position of the Supreme Court this is expected to follow.

Admissibility of evidence from marketing experts

An even more significant effect of the rulings by the Constitutional Tribunal is admission in some cases under Art. 15(1)(4) of the Unfair Competition Act of evidence from marketing experts to determine the role and value of services performed for suppliers who are

claimants under the act (when the performance and value of the services are disputed in the statement of claim). This is a completely new approach, as it was traditionally recognised that advertising services performed by retail chains (advertising in circulars issued by the chain) are not and cannot be beneficial for the suppliers, and thus cannot be deemed to be performed as a service for the suppliers (for a fee). Interestingly, the experts often reach the opposite conclusion.

Court-appointed experts are in a position to establish what services were actually performed by the defendant retail chain, whether they generated an economic benefit for the purchaser of the services, and what their actual value was. Although their opinions may also reveal abuses by retailers (charging fees for services that are not performed), they nonetheless confirm what seems obvious: featuring the goods and logo of the supplier in advertising leaflets distributed to hundreds of thousands of consumers can result in an increase in the supplier's turnover and market recognition—in other words, it may generally constitute mutual consideration corresponding to the fee charged by the retailer.

Permissibility of post-transaction rebates and monetary bonuses

Another issue where there have been major changes recently is the permissibility of post-transaction rebates and monetary bonuses in dealings between retail chains and their suppliers. Although the permissibility of rebates as such (mechanisms for determining prices) has never been directly disputed, through various auxiliary arguments the amounts by which prices are cut have been equated with prohibited fees for accepting goods for sale. This position has raised legitimate objections, because in essence it means that Art. 15(1)(4) of the act can be used to review the correctness of price levels, which is not warranted by the letter or spirit of this provision.

The breakthrough in this area was the Supreme Court judgment of 20 February 2014 (Case I CSK 236/13), in which the court not only confirmed that rebates, as a mechanism for determining prices (and thus also margins), are not covered by Art. 15(1)(4), but also found that the same holds true for any mechanism whose economic aspect is similar. In this case the court addressed monetary bonuses which were formally presented as services (documented by new invoices) but *de facto* served as a mechanism for collective adjustment of sales invoices (which was prohibited by Polish tax law until 2012).

Since that judgment was issued, the Supreme Court has addressed these issues several more times, but has taken divergent positions not only on the issue of monetary bonuses, but also rebates as such. The Supreme Court did not resolve the resulting uncertainty even when responding to a straightforward legal question referred by the Katowice Court of Appeal: "Does a post-sale rebate paid to the buyer by the seller in the event of achievement of a level of sales defined by the parties constitute a fee other than a sales margin as provided in Art. 15(1)(4) of the Unfair Competition Act?" In the resolution of 18 November 2015 (Case III CZP 73/15) issued in response, the court stated only that monetary bonuses may be regarded as rebates, and those in turn may not be covered by this provision.

Notwithstanding the continuing discrepancies, unlike over many previous years most of the lower courts now deny claims by suppliers for amounts representing a reduction in prices via post-sales rebates.

Differing approach in arbitration

For several years most of the retail chains operating in Poland have included arbitration clauses in their contracts with suppliers, which means that currently the lion's share of new cases under Art. 15(1)(4) of the Unfair Competition Act are heard in arbitration. Experience shows that arbitrators tend to interpret this provision entirely differently than the Supreme Court and other state courts traditionally did. It may even be said that two separate streams of interpretation of this one regulation have begun to function in legal practice. For example, arbitrators tend to place great stress on the issue of hindering suppliers' access to the market, correctly holding that the claimant must prove this fact. Arbitrators are also inclined to question the good faith of suppliers who for many years cooperated with the same retail chain without objection, contracting for its services, but then in the arbitration claim that these services were imposed on them and the fees should be returned. As a result, retailers typically emerge victorious, at least in part, from arbitration cases commenced by suppliers.

The rulings discussed above, although groundbreaking on certain points, leave many questions open. It is likely that a lot will change in the traditional understanding of Art. 15(1)(4) of the Unfair Competition Act this year as well. In particular, it remains to be seen how the case law will be affected by judgments issued on the basis of opinions by court-appointed experts, and whether decisions by the courts of first instance finding a need to appoint such experts will be upheld by the appellate courts and the Supreme Court of Poland.

Jan Markiewicz, adwokat, *Dispute Resolution & Arbitration Practice*

Will solar panels cover Polish roofs in 2016?


Radosław Wasiak


Weronika Pelc

Until recently, users of photovoltaic panels who wanted to sell unused surplus electricity had to register as an individual business. This greatly reduced or eliminated the feasibility of such sales. New regulations make life easier for "prosumers" and make prosumer power an interesting alternative.

Advantages of your own source of electricity

It is hard to imagine today that an individual photovoltaic installation could completely eliminate the need to buy electricity from the grid. The time for generation of electricity from the rays of the sun is obviously limited by the duration of daylight. There are no cheap and effective methods for storing greater quantities of electricity from renewable sources installed by individual producers generating power mainly for their own needs—"prosumers."

Nonetheless, private sources can significantly supplement electricity from the grid, ensuring access to power during interruptions in supply, which in Poland are some of the longest in Europe. According to figures from Poland's Energy Regulatory Office, the average length of unplanned outages is 273 minutes per year, well over the average European range of 50–150 minutes. The distribution of these outages varies across different regions of the country. They are more common in rural and less densely urbanised areas.

Moreover, having one's own source of energy can reduce the costs of purchasing power from the grid. The advantages can grow if a favourable system is adopted under which surplus electricity generated by prosumers can be sold on to power companies.

Legal help for installing solar units

The legal regulations in Poland governing investments in installation of photovoltaic panels have been revised numerous times in recent years. The Renewable Energy Sources Act of 20 February 2015 simplified and relaxed the legal procedures which must ordinarily be fulfilled before launching the smallest renewable energy installations.

Previously, the lack of regulations governing micro-installations of renewable energy sources resulted in ambiguities and discrepancies in interpretation concerning the permits necessary to build, install and operate such facilities. Additionally, persons interested in generating electricity for their own needs who also wanted to sell the unused surplus had to register as an individual business. Now most of the many hindrances that used to exist have been eliminated and the regulations have clearly been liberalised in this respect.

Firstly, it was permitted for individuals to sell electricity generated at micro-installations and introduce it into the power grid without having to register as a business entity. The previous regulations regarded the activity of production and sale of electricity as a form of economic activity regardless of the scale or the source from which the power was generated. Sale of surplus unused electricity therefore required registration as a business entity and payment of taxes and additional social insurance contributions. In the overall balance, this at least extended the period required to recoup the investment in solar panels, and in many instances made the venture completely unprofitable.

Now individuals wanting to use their own photovoltaic panels need not register such activity anywhere (the registration requirement applies to installations with a capacity of 40–200 kW). They are also released from the obligation to hold a concession, which applies only to renewable installations with a capacity exceeding 200 kW. The duties of prosumers have been limited to notifying the power company to whose network their micro-installations are connected of the date of commencement, interruption or cessation of generation of electricity, any modification to the installation, and the quantity of electricity produced and sold to the grid.

Another advantage for prosumers under the new rules is the ability to hook up a solar installation to the grid using an existing connection. Prosumers tend to be also buyers of electricity, receiving electricity over existing connections. Connecting a solar panel to the grid does not require establishment of a separate connection or, as that would entail, obtaining separate technical conditions and concluding a separate connection agreement. It is sufficient to notify the power company of the intention to connect the micro-installation to the grid. The relevant security systems and metering systems are then installed at the power company's cost. This simplified procedure for connecting solar installations to the grid can be applied only to sources whose capacity does not exceed the capacity of the existing connection. Otherwise, it will be necessary to establish conditions for the connection again and conclude a separate agreement on connection to the grid. But even then prosumers will not be charged the costs of making this connection, which generally represent the total investment borne by the power company.

Before proceeding with installation of photovoltaic panels, prosumers generally are not required to obtain any administrative approvals. Under the relevant provisions of the Construction Law, installation of photovoltaic equipment with an installed capacity of up to 40 kW is exempt from the requirement to obtain a building permit. Nor is prior notification of the relevant construction administration authorities required. And once installed, operation of micro-sources can be launched without obtaining any separate approvals.

Support system for micro-installations

A new system of support for producers of electricity at newly built renewables micro-installations with a capac-

ity of up to 10 kW will enter into force on 1 July 2016. It consists of the possibility to obtain a fixed, guaranteed price for the electricity generated and introduced into the grid.

This price, specified in the Renewable Energy Sources Act, is much higher than the market price and is equal to PLN 0.75 per kWh of electricity produced at a newly built renewables micro-installation with a capacity of up to 3 kW; this price applies to hydro, solar and land-based wind power. The price per kWh of electricity produced at micro-installations with a capacity of 3–10 kW, depending on the type of installation, ranges from PLN 0.45 (installations using biogas from waste dumps) and PLN 0.65 (photovoltaics) to PLN 0.70 (agricultural biogas). This means with a projected output of a photovoltaic installation of 950 kWh per kW of installed capacity per year, an installation with a capacity of 10 kW could generate maximum annual revenue of PLN 6,175.

The Renewable Energy Sources Act does not expressly provide whether these prices include VAT. As other prices provided in the act do not contain VAT, it should be assumed that these prices also are exclusive of VAT.

Both individuals not conducting economic activity (prosumers) and business entities may benefit from the guaranteed prices. The settlement with the "ex-officio seller" for electricity generated and introduced into the power grid is made on the basis of an electricity sale agreement between the producer of the power at the micro-installation and the ex-officio seller.

The ex-officio seller is the power company handling the sale of electricity with the greatest sales volume from 1 January through 31 August of the given year to end users connected to the distribution grid in the area of operations of the operator of the given grid. To put it more simply, the ex-officio seller is the most popular power company in the given region. The ex-officio seller is required to conclude a contract for sale of electricity with the owner of a micro-installation under the terms specified in the Renewable Energy Sources Act. It should be pointed out, however, that the act requires the ex-officio seller to settle the difference between the quantity of electricity taken from the grid and the quantity of electricity introduced into the grid in the given half-year on the basis of the meter readings. Thus it cannot be expected that every kWh generated at a micro-installation will be purchased, because the ex-officio seller will not pay for electricity that is not introduced into the grid but is used for the producer's own needs, reducing the value of the power taken from the grid.

It should also be borne in mind that electricity taken from the grid is charged with the costs of distributing the power via electricity networks, and consequently power taken from the grid will always be more expensive. Thus, assuming average consumption of electricity for household purposes and installation of the smallest micro-installation, the settlement with the ex-officio seller will allow prosumers to reduce their electricity bills, but this will probably not translate into gaining direct revenue on this basis. When calculating the feasibility, the cost of purchase and installation of the equipment must be included. According to available studies, the period for recouping the investment in a photovoltaic micro-installation is long, and the potential profits are less attractive for the owner of a single-family home that investing the same money on the financial markets.

Technological progress in the efficiency of renewables installations and the techniques for storing electricity, on one hand, and the costs of modernising and expansion of power networks and large power plants on the other, mean that prosumer power remains an interesting alternative. So even in Poland, which isn't all that sunny, sooner or later a large proportion of roofs will be covered with solar panels. The regulations discussed above are the first step in that direction.

Radosław Wasiak, adwokat, *Energy Law Practice*
Weronika Pelc, legal adviser, partner, head of the Energy Law Practice

Closed-end investment funds: Still an effective tool for tax optimisation

The financial crisis has motivated the search for savings in every area, including tax. Seeking to limit their tax obligations, undertakings and investors register their activity in jurisdictions offering favourable tax regimes, take advantage of tax relief and deductions, or decide to operate in a special economic zone. Structures using a closed-end investment fund may also generate measurable tax advantages.

Joanna Prokurat

Closed-end investment funds

A closed-end fund (CEF) is an investment vehicle established and operating under the standards set forth in the Investment Funds Act of 27 May 2004. The sole purpose of a CEF is to invest money gathered through a public or private offer to acquire investment certificates in domestic or foreign securities within the meaning of the Trading in Financial Instruments Act of 29 July 2005. A CEF may also invest in real estate under certain conditions. A CEF is established by an investment fund company, which manages the CEF and represents it externally.

From a tax point of view, the key feature of a CEF accounting for its tax efficiency is the subjective exemption of CEFs from corporate income tax under Art. 6(1)(10) of the Corporate Income Tax Act of 15 February 1992. This means that a CEF is not a payer of Polish CIT in any situation.

Structures become extinct...

The CEF, alongside the joint-stock limited partnership (SKA), was a key element of one of the most interesting and effective models for tax optimisation. Until the end of 2013, a SKA was a tax-transparent entity, and its income was taxed at the level of the partners (additionally, income of the stockholder was not taxed until a resolution to pay a dividend was adopted). A CEF could invest in stock issued by a SKA. Under that structure, not only did the SKA not pay corporate income tax, but the CEF was also exempt from CIT. Additionally, the tax burdens at the level of current operating activity were held down to the level of the CIT payable by the general partner (which was usually minimal because the general partner typically held only a small share in the profits of the partnership). But an amendment to the Corporate Income Tax Act went into effect on 1 January 2014 imposing CIT on joint-stock limited partnerships, eliminating this structure from practice.

...or evolve...

Temporarily, the foregoing scheme was continued using previously established SKAs with an extended tax year (even through the end of October 2015) included in the structures of CEFs. Conversion of an existing joint-stock limited partnership into a registered partnership (sp.j.) or limited partnership (sp.k.), if done prior to the final acquisition by the SKA of the status of a CIT payer, allowed continued use of the tax neutrality enjoyed by the SKA.

...and new ones emerge

The role of a tax-transparent Polish SKA can be taken over by tax-transparent entities registered in other jurisdictions issuing securities within the meaning of the Trading in Financial Instruments Act which can be the subject of investments by a CEF.

An example of such a company is a Luxembourg *société en commandite spéciale* (SCSp). An SCSp is a partnership without legal personality established for a limited or unlimited time by at least two partners: an *associé commandité* in the nature of a general partner, with unlimited liability for the obligations of the partnership, and an *associé commanditaire,* corresponding to a stockholder or limited partner. Polish entities can be partners in an SCSp. To eliminate the risk of creation of a Polish establishment of the SCSp, the general partner should be a tax resident of Luxembourg.

Contributions by the partners to the SCSp may be made in cash, in kind, or in the form of services provided to the partnership by a partner. The nature of the rights connected with participation in an SCSp may be formulated as a security, thanks to which a CEF can also be a partner in an SCSp. Equally important, an SCSp is tax-transparent if only its general partner holds no more than 5% of the shares in the partnership and its activity is not limited to management of private assets.

An SCSp may be successfully used for ventures involving real estate or trading in financial assets.

The owner of real estate intended for sale could avoid taxation of the income from the sale using a structure involving a CEF and SCSp. The structure in this example should include the owner of the real estate in the form of a tax-transparent partnership (which may require prior conversion of a company into a partnership, if the owner of the real estate is a company) where a partner is an SCSp, and the partners of the SCSp are a Polish CEF and a Luxembourg *société à responsabilité limitée* (SARL). In this method, the income from sale of the real estate will not be subject to corporate income tax at the level of the tax-transparent Polish partnership and SCSp, nor at the level of the CEF, which is exempt from CIT. Apart from minimal tax in Luxembourg at the level of the SARL, only the potential distribution of profit in the CEF will be subject to taxation, if the structure is not expanded to include entities from other jurisdictions, which may also enable tax-optimal transfer of profits from the sale of the real estate.

Other methods of using CEFs

Because the CEF is exempt from corporate income tax, it also enables tax optimisation of the sale of assets contributed directly to the fund, such as real estate, shares, or other securities.

In a skilfully designed structure, a CEF may also be used as a corporate vehicle for managing assets from various classes (such as shares, real estate and intellectual prop-

erty rights). The owner of such a structure can exercise consolidated supervision over various businesses on the basis of the transparent and conservative rules arising out of the legal nature of the CEF.

The involvement of independent institutions which conduct mutual settlements of their activity (investment fund company, auditor, depositary bank), combined with oversight by the Polish Financial Supervision Authority, also means that the CEF can be an effective tool for passing assets to heirs, particularly if they do not have management experience.

The CEF is also an interesting construction enabling savings on other taxes. For example, the involvement of a CEF in the sale of receivables or portfolios of receivables in the form of securitisation or subparticipation, not subject to VAT, enables avoidance of the tax on civil-law transactions. Otherwise, the acquirer of receivables constituting property rights is required to pay that tax in an amount equal to 1% of the market value of the receivables.

Non-tax advantages of using CEFs should also be mentioned. The restrictive rules for oversight of the activity and finances of CEFs make them a reliable and desired partner for investors, including financial institutions, making it easier to obtain credit or other forms of financing. The investment certificates can also be pledged.

Costs

Tax optimisation based on CEFs also has certain drawbacks.

First and foremost, investments by a CEF are subject to mandatory diversification, i.e. a CEF may not invest more than 20% of its assets in the same financial instrument issued by one entity. The diversification requirement must be fulfilled within a maximum of three years of operation of the CEF. With proper structuring, the diversification requirements can be fulfilled in the case of most activities.

When considering establishment of a structure involving a CEF, the costs of establishment and operation of the CEF itself as well as the other entities involved in the selected structure must be factored in.

Ongoing monitoring of tax law (including tax treaties) and interpretation is also recommended.

Joanna Prokurat, tax adviser, Tax Practice

Foreign minimum wage for a Polish employee

Magdalena Świtajska Agnieszka Lisiecka

With the growing popularity of assignment of Polish employees to work in other EU countries and hiring of employees to work in those countries by Polish employers, such employers more and more often face the problem of applying foreign regulations on minimum wages.

Many doubts and many regulations

The institution of assignment of employees has not been adequately addressed in Polish law. Moreover, it most often implies the need to apply another country's regulations. Consequently, its use generates numerous doubts. A fundamental question is which country's law should be applied. The answer should be sought in the regulations set forth in the following European acts:

- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (known as "Rome I")
- Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (the Posted Workers Directive)
- Directive 2014/67/EU of the European Parliament and of the Council on the enforcement of Directive 96/71/EC (the Enforcement Directive)
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as the "Recast Brussels Regulation").

Frequent or long-term assignments and protective regulations

Generally, employer and employee may choose the law governing the employment relationship between them. But under Art. 8(1) of Rome I, such a choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable if no choice of law had been made. This refers to the protective regulations of the country in which or from which the employee habitually carries out his work in performance of the contract (which is not deemed to change because he is temporarily employed in another country). If the applicable law cannot be determined under that test, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. Nonetheless, if it appears from the circumstances as a whole that the contract is more closely connected with another country, the law of that other country shall apply.

The scope of provisions affording protection to employees is not identical to the concept of mandatory regulations for purposes of Directive 96/71/EC (which include regulations on minimum rates of pay). It is broader, and covers all regulations that seek to protect the rights of the employee as against the employer and are mandatory in the national legal system (under Polish law, for example, most of the provisions of the Labour Code are of this nature—derogations from them are permitted only to the advantage of the employee).

In practice, this means that if an employee is hired by an employer with its registered office in Poland and his employment contract indicates another EU member state as the place of work (or, even without such indication, the employee habitually carries out work in the territory of another EU member state, e.g. in connection with frequent assignments), then Art. 8(1) of Rome I provides grounds for applying foreign protective regulations to the employee, including minimum wage regulations—regardless of whether or not the contract provides for application of Polish law. Consequently, such an employee may claim payment from his employer for time worked in another EU member state in accordance with the minimum rates of pay in force in that country, if the employee was paid less. Such a claim may be pursued before a Polish court or a foreign court, including in the country where the employee habitually carries out work or most recently habitually carried out work.

Brief and incidental assignments and mandatory regulations

But what about the case where an employee hired by an employer with its registered office in Poland does not "habitually" carry out work in another EU member state, but carries out work most often in Poland or another state, and his stays in the foreign country are brief and incidental?

In that situation, provisions of Polish law will undoubtedly apply to the employee, even if the parties did not select Polish law in the employment contract. Then Art. 8 of Rome I will not provide grounds for applying foreign protective regulations, including minimum wage regulations, to the conditions of his employment.

However, Art. 9 of Rome I provides for further modification of the rules governing the law applicable to an employment relationship. Under that article, overriding mandatory provisions are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the regulation. Therefore, if the state of facts exists for which the law of the given country requires application of its regulations as overriding mandatory provisions, those regulations must be applied.

According to the preamble to Rome I (point 34), overriding mandatory provisions include regulations of the country to which a worker is posted in accordance with Directive 96/71/EC. Under that directive, the laws of the member states were harmonised by ascrib-

ing the character of mandatory rules of law to provisions of labour law concerning terms and conditions of employment which are listed in Art. 3(1) of the directive (including among other things regulations governing minimum rates of pay) in the case of workers posted to member states within the meaning of the directive. Consequently, mandatory rules of law (also including foreign minimum wage regulations, if adopted) apply to employees posted to other EU member states within the meaning of Directive 96/71/EC.

Therefore, the understanding of "posting" under directives 96/71/EC and 2014/67/EU is vital. Under those directives, it will basically include the following situations:

- A worker is posted to the territory of another member state under a contract concluded between the domestic employer and the party for whom the services are intended operating in the other member state.
- A worker is posted to the territory of another member state to an establishment or undertaking within the group.
- A worker is hired out to another member state by a temporary employment undertaking or placement agency (but this situation is not of practical relevance within the scope of this article).

Based on these regulations, it may be assumed that if the work carried out in another EU member state by a worker hired by an employer with its registered office in Poland consists only of travelling through the other member state, without performing any activities there for a service recipient or at a group establishment or undertaking, that work is not a "posting" for purposes of directives 96/71/EC and 2014/67/EU. Consequently, because it is not a posting, the mandatory rules of law in force in the country where the work is performed will not apply to that work. Such an employee therefore may not claim payment from his employer for working time in the other member state in the amount of the minimum wage there if the employee was paid less. Nor will there be grounds for the employee to pursue such a claim before a foreign court, because the grounds for exercise of jurisdiction by the foreign court will not arise.

The situation is different for an employee hired by an employer with its registered office in Poland carrying out work in the territory of another EU member state at an establishment or undertaking within the group, or under a contract between the employer and a service recipient in the other member state—even if these activities are brief and incidental. Directives 96/71/EC and 2014/67/EU generally regard as "posting" any carrying out of work in the territory of another member state if it falls within any of the three categories listed above, regardless of the length of the posting. Therefore, in situations where such work is performed in another EU member state, there will be grounds for applying foreign mandatory rules of law, governing among other things minimum rates of pay.

Such an employee can pursue a claim (primarily before the Polish court) against his employer for payment for time worked in the other country at the minimum rates of pay provided for in that country's mandatory rules of law, if the employee was paid less. Then, under Art. 9(3) of Rome I, the Polish court may (but does not have to) give effect to the foreign minimum wage regulations as overriding mandatory provisions, taking into consideration the nature and purpose of the provisions and the consequences of their application or non-application. This is because under that paragraph, the court may give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, the court must have regard to their nature and purpose and to the consequences of their application or non-application.

The employee can seek such payment before a foreign court, but only if there are grounds for finding that the employee habitually carries out work or most recently habitually carried out work in that country. If the foreign court has jurisdiction, it will then be required to apply its minimum wage regulations.

Magdalena Świtajska, adwokat, *Employment Law Practice*
Agnieszka Lisiecka, adwokat, *partner, head of the Employment Law Practice*

When is repackaging of medicines legal?

In parallel imports, drugs often require repackaging so that the labelling meets the requirements in the country of import. But repackaging generates legal risks, particularly the possibility of trademark infringement.

Katarzyna Pikora

Drugs from parallel imports are drugs brought in from another country on the basis of a permit for parallel import obtained by an applicant other than the manufacturer. The imported drugs are essentially identical to those admitted to the market in the country of import and offered there by the manufacturer.

But often it is necessary to repackage the drugs because of differences between the legal regulations in force in the country from which the drugs are imported and the country into which they are imported. Such differences mainly involve the quantities in the packaging of the medicine or the language of the informational flyer. The parallel importer must adapt the product, including the packaging, to comply with the regulations in the country of import. Often this boils down to placing the medicine in a new package which includes the information required in the target country, or placing new labels on the existing packaging.

Repackaging of medicines generates legal risks, mainly because of the possibility of trademark infringement. Interfering with the appearance of packaging often makes it necessary to reapply the trademark to the packaging, but the trademark belongs to the manufacturer, not the importer. The proprietor of the trademark has an exclusive right to place the trademark on goods and packaging and to market the trademarked goods. Thus the proprietor can prohibit third parties from performing such actions.

BMS conditions

Repackaging medicines and importing them into another EU member state may give rise to claims by the manufacturer of the drug for infringement of its trademark rights. But repackaging will be legal if the importer complies with certain conditions. The Court of Justice laid down five conditions that a parallel importer must meet when repackaging medicines in the *Bristol-Myers Squibb* case in 1996—hence they are known as the "BMS conditions."

Parallel import of a medicine is legal if all the following conditions are met:

- **Reliance on trademark rights by the owner in order to oppose the marketing of repackaged products under that trademark would contribute to the artificial partitioning of the markets between member states.**

  The trademark owner's objection to repackaging and parallel import of a drug will not be upheld if it would lead to artificial division of the market. This could occur when the trademark owner has marketed the same product in various member states in different packaging, including packages of different quantities, while the product marketed in one country in the given packaging cannot be marketed in the country of import in the same packaging. The ban on using the given configuration of the packaging in the country of import cannot result for example from the regulations in force there, national practices, or health insurance rules conditioning reimbursement of medical costs on the quantity of the packaging of the medicinal product. In such a situation, the trademark owner's objection to repackaging would result in artificial division of the market.

  Nor can the trademark owner object to import of a repackaged medicine if the repackaging was necessary to market the product in the given country. Repackaging is not necessary if it is sufficient to put a new label on the packaging or to include a new informational flyer in the language of the country of import. But relabelling existing packaging will not suffice if there is strong resistance to the medicine in the modified label by a segment of consumers, hindering effective access to the market or part of the market. Then repackaging of the drug is objectively necessary.

- **The repackaging cannot affect the original condition of the product inside the packaging.**

  There is no infringement if the product is placed by the manufacturer in double packaging, and the importer changes only the external packaging, or where the repackaging is conducted under the supervision of the competent authorities in order to guarantee that the condition of the product is not affected. Moreover, fixing of new labels on flasks, phials, ampoules or inhalers does not affect the original condition of the product inside the packaging.

  The original condition of the product might be indirectly affected if the external or inner packaging of the repackaged product or new user instructions or information omits important information or gives inaccurate information about the nature, ingredients, effects, dosage or storage of the product. The importer is generally permitted to include additional information on the repackaged product, but it must not be inconsistent with the information placed on the packaging by the manufacturer in the country from which the drug is imported. The condition of the product is also considered to be affected if the importer inserts an extra article in the packaging for ingestion or dosage of the product which does not comply with the method of use and the doses envisaged by the manufacturer.

- **The new packaging clearly states who repackaged the product and the name of the manufacturer.**

  This information is intended to avoid misleading end users as to the person conducting the repackaging. However, this need not be the enterprise hired and authorised to conduct the actual repackaging, but the enterprise which commissioned the repackaging and takes responsibility for it.

- **The presentation of the repackaged product does not damage the reputation of the trademark.**

  There could be damage to the manufacturer's reputation if the repackaging is of poor quality, defective or sloppy. When determining whether there is damage to reputation, the nature of the product, the intended market and the recipients should be considered. The requirements that the new packaging must meet will largely depend on whether the product is sold to hospitals or pharmacists so that the product will not reach consumers directly in the new packaging. For hospitals and pharmacists, the external appearance of the product is typically unimportant. But for consumers, the packaging carries information about the quality of the product, even if the medicine is prescribed and supplied to them via a pharmacist or doctor. Actual or threatened injury to the trademark owner's reputation may exist even with respect to trademarks not previously used by the manufacturer in the country of import.

- **The importer gives notice to the trademark owner before the repackaged product is put on sale, and, on demand, supplies the owner with a specimen of the repackaged product.**

  The final condition for legal repackaging of a drug is for the importer to notify the trademark owner of its intention to sell the repackaged drug. The trademark owner can then request a sample of the repackaged product to determine whether the repackaging affects the original condition of the product inside the packaging or if the packaging itself damages the reputation of the trademark on the packaging.

When all of these conditions are met, the owner of the trademark on the imported product cannot effectively ban the marketing of the repackaged product, because the parallel import is legal.

Advantages and drawbacks of parallel imports

Commentators, including the European Commission, point to numerous advantages of parallel imports of medicines. They stress that parallel imports lower the treatment costs borne by consumers and taxpayers. Because of differences in pricing on different markets, it pays to buy a product in a country where the price is low and resell it in a country where the price is high, but at a price lower than the prices in force there. The flow of cheaper products exerts pressure on prices in the more expensive regions, resulting in lower prices for customers—the health service and taxpayers in the country of import.

But parallel imports can be disadvantageous to pharmaceutical companies, because they interfere with the distribution of their products in specific countries. Therefore drug manufacturers oppose parallel imports, most often by assertion of trademark rights. The trademark owners then attempt to show that the repackaging is unlawful because it damages the reputation of the trademark or affects the original condition of the product.

If the importer changes the trademark by affixing a trademark which the drug is known by in the country of import but different from the existing trademark on the imported product, the trademark owner will try to show that the repackaging with the change in trademarks is unjustified. Thus there are methods for combating parallel imports, but it is a difficult task and not always effective.

Katarzyna Pikora, legal adviser, Intellectual Property Practice

Green light for retroactive appointment of management board members?

According to the Supreme Court of Poland, it may be acceptable for the management board members' mandate to be renewed by implicit decision of the shareholders. But arbitrary use of this practice could threaten the security of commerce. If shareholders can manipulate the membership of the management board, it cannot be determined with certainty who was authorised to enter a transaction for the company or what its legal consequences are.

Maciej Szewczyk

Izabela Zielińska-Barłożek

Anna Dąbrowska

Sometimes, when members of the management board of a limited-liability company (sp. z o.o.) are appointed for long terms, or when some of the members are appointed in the middle of the term of the other members, the shareholders neglect to renew the appointments of board members.

This can lead to a situation where the company is deprived of an authority entitled to represent the company (or a "rump" board is created, with fewer members than required by the articles of association).

This has far-reaching consequences, because under Civil Code Art. 38, a legal person acts through its authorities, and in the case of a company it is primarily the management board that conducts its affairs and represents the company (Commercial Companies Code Art. 201 §1).

The lack of an authority, including improper composition, deprives the company of the ability to conduct its affairs, which in the longer term may even result in appointment of a curator for the company by the registry court (Civil Code Art. 42 §1).

This is one of the most frequently encountered irregularities during due diligence, and thus one of the most common risks in M&A transactions.

Appointment after the fact: harmful

Particularly harmful is the practice sometimes encountered of making subsequent amendments to resolutions of the annual (ordinary) meeting of shareholders to add provisions on reappointment of members of the management board to a further term (for example, adopting a resolution in 2014 amending a resolution adopted in 2013). The conception that the management board can be appointed for a retroactive period is not acceptable under the code principle of term appointments of the management board or regulations calling for the member's appointment to lapse at the end of the term.

Permitting practices of this type would violate the principle of the certainty of trade, because the shareholders could almost at will manipulate the composition of the management board. In consequence, the group of persons who undoubtedly held an appointment allowing them to take a given legal act at the time the act was taken, as an officeholder in the company, cannot be determined with complete certainty.

But the judgment of the Supreme Court of Poland of 4 March 2015 (Case IV CSK 340/14) opened the crack to legitimising similar practices.

Supreme Court permits "implied" appointment

The facts as found by the Supreme Court were as follows. The articles of association of a limited-liability company did not contain provisions on the length of the term of the management board, and thus under Commercial Companies Code Art. 202 §1 the term of office of this authority should last one year (or more precisely, should expire on the date of holding the meeting of shareholders approving the company's financial report for the last full financial year of service by the given member of the management board). The annual regular meeting of shareholders of the company adopted only resolutions approving the management board's business reports and financial reports, division of the profit or coverage of losses, and issuance of a release to the members of the management board.

Because the company functioned on the market during this period, the members of the management board continued to be disclosed in the commercial register, and the shareholders' meeting granted them a release each year, the Supreme Court held that there was no barrier to finding that they were appointed by resolutions adopted implicitly, due to "the implied intention of the shareholders to maintain the original composition of the management board and renew its appointment." At the same time, the court pointed out that the legal effectiveness of adoption of a resolution is not determined by the fact that it is duly recorded and signed, but by "the votes actually cast," and thus failure to comply with the requirement to record the wording of the resolution did not render it invalid.

The logic followed by the Supreme Court warrants criticism for the reasons discussed below.

Declaration of will must be adequately revealed

The Commercial Companies Code does not contain provisions addressing the manner of adoption of resolutions by the shareholders' meeting of a limited-liability company (or shareholder resolutions adopted apart from meetings). There are a few exceptions concerning the required form for recording specific resolutions (e.g. resolutions amending the articles of association) or the requirement to follow a specific form of voting, such as secret balloting in the case of resolutions on "personal" matters. The requirement to enter adopted resolutions in the book of minutes and the requirement to sign them, referred to in Commercial Companies Code Art. 248, are only in the nature of points of order, and, as the Supreme Court correctly pointed out in the judgment in question, failure to comply with those requirements does not render the resolutions invalid.

In this situation, adoption of resolutions is governed by the general rules concerning submission of declarations of will, and more specifically Civil Code Art. 60, under which a declaration of will may generally be expressed

by any behaviour of the person making the declaration that adequately reveals the person's intent.

It is accepted in the legal literature that a declaration of will may also be made implicitly, so long as the code requirement to adequately reveal the declaration is met. Correspondingly, it can also be accepted that in certain circumstances it is permissible for the representative body of a company to adopt resolutions by implication. Thus, for example, appointment by resolution of the shareholders' meeting of a proxy to conclude a contract for the company with a member of the management board (Commercial Companies Code Art. 210) may generally be realised by an obligation to consent to conclusion of the contract (e.g. in a situation where the articles of association require a proxy to be issued).

But appointment of a member of the authorities of a company—whether for the first term or for successive terms—does not appear to fit within the list of instances where a resolution of the shareholders' meeting can be adopted by implication.

Potential source of abuses

Firstly, under Commercial Companies Code Art. 247 §2, secret balloting is required for elections of members of the company's authorities. This method of voting is essentially intended to prevent identification of how specific shareholders voted. Implied adoption of a resolution appointing members of the management board does not meet the requirement for ensuring secrecy (as by definition the implicit nature of a decision on this matter requires acceptance of the decision by all of the shareholders).

Second, implied appointment seems incompatible with the requirement of Civil Code Art. 60 that the declaration of will be adequately revealed. Because the consequence of appointing a management board member is to authorise the person to perform the function, it is only as a result of adoption of the resolution that the person can be sure he or she has really been appointed and can perform the resulting obligations. Otherwise, without adequate disclosure of the shareholders' intention, the person performing the duties of a management board member at any given time could remain in doubt whether his or her implicit appointment really occurred (i.e. whether issuance of a release for the prior year implied a decision to renew the person's appointment or not). In that situation, the board member, the company, or third parties conducting transactions with the company could at best only subsequently learn in what nature the "management board member" was acting (as a member of that body, as a proxy, or as a "false proxy"—*falsus procurator*).

Finally, this uncertainty as to whether the appointment actually occurred—an uncertainty continuing for the entire period of the implicit term of the management board member—could be used as a tool for abuses and manipulation. Depending on what is in the interests of the shareholders and what happens during the course of the year (or the period of the implied term of the management board), it would then be possible to retroactively confirm the appointment of specific members of the management board—or not.

A solution that makes sense in one case should not be treated as a new rule

For these reasons, recognising the permissibility of implicit appointment of members of the management board of a limited-liability company is a highly doubtful issue. Given the paucity of code regulations, the arguments raised above could no doubt also be debated. But the intractable problem remains that for as long as the declaration of will of the shareholders to appoint a management board member implicitly is not externalised in any way, it remains in a vacuum—until it is subsequently externalised or confirmed. This is because there is no certainty that the next annual regular meeting of shareholders will adopt a resolution after the end of the financial year granting the management board member a release for performance of his or her duties. Another unknown is whether in the event of doubt the overall factual circumstances can be interpreted as implicit consent of the shareholders for the person to serve as a management board member.

From the point of view of security of trade—a purpose expressly articulated by the Supreme Court as one it was seeking to further—it seems dubious to accept more broadly solutions that might be justified only under the unique facts of the case.

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Sources for financing companies by the shareholders

Kinga Ziemnicka

Before deciding on how to finance a company, the shareholders should consider the legal options, the benefits they will receive in return, and the conditions for repayment of the invested funds.

Equity financing and debt financing

When launching a business in the form of a company, the owners (and subsequently shareholders) may select the method for financing the company. The choice depends not only on the financial needs of the business, but also on the aspect of building an optimal capital structure reflecting the interests of the shareholders. Essentially a company's operations may be financed from two main sources: the company's own capital (i.e. equity) or external sources of financing (i.e. debt). The structure for financing the company is reflected in the balance sheet on the side of liabilities, as equity and obligations.

Equity corresponds to the net asset value of the company, equal to the difference between the balance-sheet value of gross assets, i.e. the sum of all the company's assets, and its obligations. Equity also reflects the equivalent of the assets financed through contributions to the company by the shareholders (toward the capital) and funds generated by the company itself through its operations (profit). Any gifts to the company by shareholders are revenue for the company, affecting its financial result in the financial year in which the gifts are made, and in consequence indirectly increasing the company's profit or reducing its loss at the level of the company's equity.

Debt depicts the company's obligations to third parties, particularly under credit, loans, deliveries with deferred payment deadlines, and public obligations, obligations to employees, etc. Debt also reflects obligations to the shareholders if they arise from a legal relationship other than the corporate relationship, for example under loans made to the company.

Financing the company through share capital

Share capital is the foundation on which the corporate entitlements of the shareholders are based, depending on the number of shares they hold. In Poland, the law provides for a statutory minimum share capital (PLN 5,000 in a limited-liability company or PLN 100,000 in a joint-stock company), leaving relatively wide discretionary powers to the shareholders in determining the amount. During the course of the company's operations the share capital may also be increased, typically with the purpose of providing the company with additional financing by the existing shareholders or new investors. Increase of the share capital may also be connected with restructuring of the company's debt through conversion of claims held by the shareholders or other creditors into shares in the company's share capital.

Contribution of funds to the share capital may also be combined with an increase in the supplementary capital, as any excess obtained as a result of taking up of shares for a premium above the nominal value—known as *agio*—is transferred to the supplementary capital (Commercial Companies Code Art. 154 §3 and 396 §2). The purpose for creating supplementary capital might include, for example, gathering funds to cover potential losses of the company or planned investments. In practice, however, supplementary capital is often the result of tax optimisation in the company's capital structure. A problem that may arise for shareholders in connection with financing of the company by making contributions toward covering shares in the share capital and *agio* is tied to the rules for withdrawing them from the company through redemption of shares. If the company does not have profit enabling the company to pay amounts owed to a shareholder, it is necessary to conduct a "convocation" procedure, enabling the creditors to file an objection (in a limited-liability company, Commercial Companies Code Art. 264 §1) or assert claims against the company (in a joint-stock company, Art. 456 §1) within three months after announcement of the resolution on reducing the share capital. Creditors who file objections or claims within that time should generally be satisfied or secured by the company. However, redemption of shares out of net profit in a limited-liability company does not require a reduction of the share capital. In a joint-stock company, by contrast, redemption of shares always involves a reduction of the share capital, but if the redemption is made out of an amount that could be distributed to the shareholders (under Commercial Companies Code Art. 348 §1), then there is no obligation to conduct a convocation procedure.

It follows that if the company does not have a profit, withdrawal of funds in the share capital or paid into the company as *agio* may be hindered by the company's creditors.

Nonetheless, an advantage of this form of financing the company by its shareholders is the possibility of obtaining corporate rights designating their position in the company, for example a right to dividends or the right to vote at the meeting of shareholders.

Additional payments to boost equity

The articles of association or statute of the company may provide for creation of supplementary capital or reserve capital to cover specific losses or expenditures. Reserve capital may be created out of net profit, but the source of reserve capital could also be, among other things, additional payments paid into a limited-liability company by the shareholders.

Unlike loans from shareholders to the company, which are recorded on the liability side of the balance sheet

as obligations, additional payments constitute equity of the company. It should also be pointed out that shareholders who have paid in additional payments to the company have no claim for repayment of them until a resolution of the shareholders on such repayment is adopted. But repayment of additional payments is much easier than reducing the share capital, because the regulations concerning the convocation procedure do not apply.

There are restrictions on repayment of additional payments in a limited-liability company under Commercial Companies Code Art. 189 §2, which provides that the shareholders may not receive payments on any grounds out of the assets of the company necessary to fully cover the share capital. Therefore repayment of additional payments depends on the current financial condition of the company. In a joint-stock company additional payments have a different character than in a limited-liability company, because they can be contributed only in exchange for awarding the shareholders specific entitlements, whether incorporated in the shares (Art. 396 §3) or personally vested in the specific shareholder (Art. 354 §§ 2 and 3 in connection with Art. 396 §3). These additional payments flow into the supplementary capital (and thus not the reserve capital) if they are not going to be used to make up extraordinary write-downs or losses.

Corporate profits

One of the sources for financing the operations of the company is the profit earned by the company. Pursuant to a resolution of the shareholders, the profit may be transferred to supplementary capital or reserve capital instead of being distributed as a dividend. In a joint-stock company this is partially obligatory, as under Commercial Companies Code Art. 396 §1 supplementary capital must be created to cover losses, and at least 8% of the profit from each financial year must be transferred to that supplementary capital until it reaches a level equal to at least one-third of the share capital.

Shareholders in a limited-liability company are free to decide the extent to which they wish to leave the profit in the company and transfer it to the supplementary capital or reserve capital. Often they decide to do so in order to avoid the relatively high costs of obtaining bank financing.

It is also worth noting that pursuant to a resolution adopted at the annual regular meeting, the shareholders of a limited-liability company or joint-stock company may get back the profit that was shifted to the supplementary capital or reserve capital in previous financial years, through a distribution of dividends in later years (excluding the amount of profit referred to above which must be retained in the supplementary capital of a joint-stock company)—assuming that the company's financial condition allows.

Shareholder loans

Similar to bank credit, loans to a company by its shareholders are obligations of the company, not equity. Thus shareholder loans are regarded as external sources of financing the company's assets. In this case, the parties specify in the loan agreement the rules for repayment of the loan to the shareholder, and if not otherwise provided these rules will be determined by applicable regulations of law. However, in a situation where the assets of a limited-liability company are insufficient to fully cover the share capital, the shareholders cannot receive a payment from the company on any grounds (Commercial Companies Code Art. 189 §2). It must also be pointed out that while a loan from a shareholder does improve the company's liquidity, it does not increase the company's equity.

Significantly, under the amended Bankruptcy Law which went into force on 1 January 2016, repayment of loans made to a company by shareholders within five years prior to declaration of the company's bankruptcy may be pursued together with interest in the bankruptcy proceeding, but only in a separate, fourth category in terms of priority of satisfaction (Bankruptcy Law Art. 342(1)).

Aside from the restrictions mentioned above, an advantage of shareholder loans is the relatively simple mechanism for withdrawing funds invested in the company. A shareholder may also receive interest on loans to the company, which is not possible in the case of investments in the company's equity.

Summary

As the foregoing analysis shows, a company may be financed in various forms which entail certain legal consequences, and in particular limitations on recovering the invested funds. Thus before deciding on financing of the company, the shareholders should consider the various possibilities in terms of the anticipated benefits, the repayment conditions, and tax optimisation.

Kinga Ziemnicka, legal adviser, M&A and Corporate Practice

Financing documentation under the new Restructuring Law and Bankruptcy Law

Łukasz Szegda Artur Bednarski

Major changes to Poland's Bankruptcy Law entered into force at the beginning of 2016, along with a brand-new Restructuring Law. The new regulations are important not only for entities that are insolvent or threatened with bankruptcy and their creditors, but also those granting and seeking financing. The new regulations will affect their rights and the financing documentation.

Change in definition of insolvency

The definition of insolvency, which is key for the entire area of bankruptcy and restructuring law, has changed in both the cash-flow sense and the balance-sheet sense.

Cash-flow insolvency is not so much a state where the debtor is not performing its obligations as they become due (as defined in the previous regulations), but where it has lost the ability to perform them—which entails a financial evaluation of the debtor's situation. A presumption has been adopted that the debtor has lost this ability if it is more than three months behind in performing monetary obligations.

Balance-sheet insolvency, in turn, arises when the debtor's monetary obligations exceed the value of its assets, and this state last for over 24 months. The regulations also provide that for determining insolvency, monetary obligations do not include:

- Future obligations, including those subject to a suspensory condition
- Obligations to shareholders under loans or transactions of similar effect.

A presumption has been introduced that the debtor's monetary obligations exceed the value of its assets if, according to the balance sheet, its obligations, excluding provisions for obligations and obligations to affiliated entities, exceed the value of its assets, and this state lasts for over 24 months.

These changes in the understanding of insolvency should be reflected in loan agreements, particularly under the Loan Market Association standard, and more specifically in the provision concerning events of default describing a state of insolvency.

Particularly in cross-border financing transactions, the clause limiting the level of guarantees under foreign law granted by Polish entities to secure such financing (guarantee limitation language) will also need to be adjusted. In light of the clear exclusion from the balance-sheet insolvency test of future and conditional obligations, it may be recognised that there is no longer any reason for using guarantee limitation language with reference to the balance-sheet insolvency test, as was the previous practice. It remains to be seen whether interpretations confirm this understanding, but it seems that due to interpretational ambiguity (in particular uncertainty whether guarantee obligations will really be excluded from this test), guarantee limitation language will continue to be used after 1 January 2016, although in modified form.

Bankruptcy petition or application to open restructuring proceedings as grounds for termination of financing agreement

In the past, loan documentation typically entitled the lender to terminate the financing agreement due to the borrower's insolvency or bankruptcy. The regulations limited the effectiveness of clauses reserving the right to modify or terminate legal relationships in the event of declaration of bankruptcy, but the loan documentation often included a provision permitting termination of the agreement because of filing of a bankruptcy petition. The new regulations reject that practice.

The operation of the provision preventing modification or termination of legal relationships to which the bankrupt is a party in the event of declaration of bankruptcy has been expanded. It now expressly covers not only the declaration of bankruptcy, but also filing of a bankruptcy petition, filing of an application to open restructuring proceedings, and commencement of restructuring proceedings.

This affects banks' ability to terminate financing agreements. This is clearly stressed by the change introduced in the Banking Law, maintaining the bank's existing right to reduce the amount of credit awarded or terminate the credit agreement if the borrower does not comply with the conditions for granting of the credit or loses its borrowing capacity—but with the reservation "if not otherwise provided by the Restructuring Law."

Creditors wishing to maintain the ability to terminate financing agreements in connection with restructuring should therefore focus on events that may occur in the run-up to filing of an application to commence restructuring proceedings—for example when grounds arise for commencement of restructuring proceedings.

Strengthening the status of financial pledge

There is a clear and notable strengthening of the status of financial pledges and other types of financial security. Under the amended Bankruptcy Law, it will not be permissible to avoid such security as preferences, i.e. transactions by the debtor during a specific period prior to filing of a bankruptcy petition.

Conversely, it will be possible to avoid other forms of security if they were established within six months (rather than two months, as before) prior to filing of a bankruptcy petition to secure a debt that was not due and payable at the time the security was established.

New advantages of registered pledge

The amended Bankruptcy Law permits enclosure with the bankruptcy petition of an application for approval of the terms of sale of the debtor's enterprise or a signifi-

cant part of the enterprise. For increased protection of creditors holding a registered pledge enabling them to satisfy their claims from the pledged assets out of court, by seizure or notarial sale of the pledged assets, the possibility of filing such an application or selling the debtor's enterprise in this expedited procedure is excluded with respect to assets covered by a registered pledge. This is a major argument in favour of lenders' more extensively requiring borrowers to establish a registered pledge, particularly a pledge over the entire enterprise.

Effectiveness of assignment of future claims

In a new approach to assignments of future claims, including assignments for security, it is now expressly stated that such assignments will be ineffective if the claim arises after declaration of bankruptcy. As an exception, this rule will not apply if the agreement assigning the claim was concluded in writing, with a certified date, no later than six months prior to filing of the bankruptcy petition. On one hand this confirms the ability to assign future claims arising after the declaration of bankruptcy, but on the other hand provides an additional argument for use of a certified date in the case of assignments generally, and not only assignments for security.

Privileging of new financing

Another major change in the context of financing is privileging of new financing granted during the course of the bankruptcy proceeding. Borrowings during restructuring proceedings will be privileged with respect to satisfaction in the event that the restructuring is unsuccessful and bankruptcy is declared. Establishment of security for such borrowings cannot be held ineffective against the bankruptcy estate.

Limitations on termination of agreements after opening of restructuring proceedings

The Restructuring Law seeks to solidify the legal relationships necessary for functioning of the debtor's enterprise for the duration of the restructuring proceedings. The new rules limit the other party's right to terminate agreements for lease or tenancy of the premises where the debtor operates its enterprise, as well as agreements for finance leasing, insurance, bank accounts, and credit.

The lender will no longer be permitted to terminate a credit agreement insofar as the principal has already been paid out to the borrower or the borrower has a right to draw the credit. There is an exception to this rule for the borrower's non-performance of obligations not covered by the arrangement or other circumstances provided for in the agreement if they arise after the opening of the proceedings.

This rule will affect the position of lenders in two ways. First, they will not be permitted to terminate a credit agreement with respect to funds that have already been paid out to the borrower, even if the claims are secured and in this respect are not covered by the arrangement. Upon opening of the proceedings, exercise of the right to terminate for defaults committed by the borrower before that date is "suspended."

Second, lenders must continue to provide funds to the borrower despite commencement of the proceedings. This could be particularly disadvantageous to lenders who are forced to lend to an entity which essentially may already have lost its borrowing capacity.

To protect against such situations, lenders should consider appropriate provisions concerning conditions precedent for disbursement of the principal and further conditions for disbursement, introducing a drawstop in the run-up to bankruptcy or restructuring and enabling the lender to cancel the loan commitment.

Effectiveness of security against reorganisation estate

The new Restructuring Law permits the debtor to institute reorganisation proceedings (*postępowanie sanacyjne*). This results in the ineffectiveness of certain forms of security against the debtor's assets (referred to after commencement of the proceeding as the "reorganisation estate").

Security will be ineffective against the reorganisation estate if it was established within one year before the filing of the application to open reorganisation proceedings and is not directly connected with consideration provided to the debtor. Under the regulations, payout of credit by a bank is regarded as providing consideration. However, the regulations raise some doubts with respect to security established in connection with restructuring of the debtor's obligations. Establishment of security in favour of creditors threatening to terminate a credit agreement could be undermined on the basis of the Restructuring Law unless the parties ensure that the debtor receives the relevant consideration.

Summary

As can be seen from this overview, Poland's new restructuring and bankruptcy regulations affect new financing as well as risk evaluation. This needs to be borne in mind when drafting the financing documents for new transactions.

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What makes energy sector transactions different?

Marek Dolatowski Weronika Pelc

The energy sector in Poland is heavily regulated at both the national and EU levels. The substance and stability of these regulations fundamentally affects the opportunities and threats for profitable ventures by energy companies.

Energy regulations are designed to further various social and political goals, such as climate policy, environmental protection, social inclusion, energy security, economic competitiveness and protection of jobs, directly impacting the costs and income of energy companies. Acquiring the shares or enterprise of an energy company can mean huge risks and huge benefits for the parties. When planning and conducting M&A in the energy sector, it is essential to bear in mind the specifics of this industry.

Regulation of economic activity

Operating in the energy sector typically requires a concession, while operating small renewables installations is registered as a regulated activity. M&A in the energy sector requires a check on whether all of the necessary permits have been obtained and the operations comply with the permits. Operating without a concession or entry in the register of regulated activity is a petty offence, and violation of the terms of a concession is punishable by stiff fines.

In asset transactions (such as sale of the enterprise), it is controversial whether it is possible to transfer a concession to another entity. The regulator takes the position that in such cases, the concession is not automatically assumed by the entity that purchased the assets used to operate the concession activity.

Price policy and tariffs

In determining a price, it is primarily the income and profit generated by the enterprise in question that is taken into consideration. But energy enterprises have limited freedom to set their own price policy. A portion of the market is based on tariffs approved by the President of the Energy Regulatory Office. This applies to distribution and transmission services. The regulator also approves tariffs for heat and gas as well as tariffs for electricity sold to the smallest customers—in practice meaning households.

The way tariffs are set is regulated in detail by the law, but the practice followed by the President of the Energy Regulatory Office is of primary importance. While construction of tariffs is based on the assumption that they should cover the justified costs of the enterprise, in practice it is the regulator who decides which costs are justified and which are not, taking into account the statutory rule of protection of customers against unjustifiably high prices and fees.

When planning a transaction on the energy market, it should be examined in detail what are the tariff prospects for the given enterprise and whether there is a chance for it to be released at least in part from the obligation to submit tariffs for approval. Additionally, some enterprises are subject to an exchange obligation; that is, they must sell energy through a tender or commodities exchange. The exchange obligation applies mostly, but in varying degrees, to producers of electricity and gas trading companies.

State oversight

The Act on Control of Certain Investments went into force on 1 October 2015. It provides protection to, among others, entities producing electricity or handling distribution of natural gas or electricity or transmission of gaseous fuels. The protection consists of a requirement to notify the supervisory authority of a planned transaction in instances specified in the act. Lack of notice or conducting the transaction over the regulator's objection could result in the invalidity of the transaction or the inability to vote the acquired shares. So far the executive regulation has not been issued under the act specifying the list of entities subject to protection.

Another major law is the Act on Special Entitlements of the Minister for Treasury and Exercise Thereof in Certain Companies or Capital Groups Operating in the Electricity, Petroleum or Gaseous Fuels Industries of 18 March 2010. This act vests entitlements in the Minister of Treasury in companies or groups in the listed sectors whose assets are included in a list of critical infrastructure (the list is not publicly available, and only the companies in question are aware of their inclusion in the list). The minister can object to disposals of assets constituting critical infrastructure or to resolutions of corporate authorities on dissolution, change in use or cessation of operation of an asset, transfer of the registered office abroad, or sale of the enterprise.

Finally, the Act on Rules for Exercise of Entitlements of the State Treasury of 8 August 1996 requires consent of the Minister of Treasury for disposals by state-owned legal persons of assets with a market value exceeding EUR 50,000.

Climate policy

The need to cut greenhouse gas emissions will force changes in Poland's energy mix in future years. The energy sector is now responsible for about 42% of emissions in Poland, and changes appear unavoidable. This may represent a growth opportunity for renewables. The first nuclear power plant may also be built in Poland at the expense of conventional power, which will in turn be forced to make significant investments to cut greenhouse gas emissions. Assuming that the forecast growth in prices of carbon emission rights holds true (from EUR 8/tonne currently to EUR 19 in 2020), the cost of emission rights will soon become a major item in the operating costs of energy companies.

One hope for reducing the costs connected with climate policy is to maintain free allocation of emission rights for the power industry in Poland. The current proposals would allow each EU member state to allocate for free up to 40% of the emission rights it receives in 2021–2030 for sale at auction. The allocation would also involve a tender procedure for development projects worth more than EUR 10 million. (Smaller projects would have to be selected under objective and transparent criteria.) This means that it may be much harder than it is now to obtain free emission rights.

Support for renewables and cogeneration

Support systems for renewable energy represent a major source of additional revenue. This is why an integral element of any deal involving renewable assets is to verify how long the given renewable installation can count on support in the form of certificates of origin, or support awarded under state aid rules (e.g. confirming the incentive effect), and that the documentation and permits issued for the project do not demonstrate a risk of significant delay in project implementation, which in turn could bar entering an auction or prevent completion of the project within the time required by the regulations after winning the auction.

Cogeneration is also to enjoy support via certificates through 2018. Whether this form of support will be extended or how must be decided by lawmakers.

Support in the form of certificates for renewables and cogeneration is the subject of examination by the European Commission for compliance with rules for state aid in the internal market. A potential transaction must thus also take into account the risk that aid already awarded into the form of certificates of origin will be disputed, requiring the recipient to refund the aid.

Other tools for furthering policy goals in energy

The situation of energy enterprises on the market is affected by current state policy. On the gas market, this policy largely depends on regulations governing mandatory gas reserves and requirements for diversification of gas supplies, meaning requirements concerning the proportion of gas that can come from any one source. The diversification regulations were intended to prevent monopolisation of the market by Russian gas, but interpretation of the rules has generated many problems. Even the biggest players on the gas market have been fined by the President of the Energy Regulatory Office for violating these rules. The obligation to maintain gas reserves at levels specified in the regulations is the source of significant costs. Rules intended to increase energy security have in practice limited growth of the market for many years due to insufficient capacity of gas stores and made it harder for new players to enter the Polish market. The situation of market players can also be affected by special, ad hoc regulations, such as the sanctions imposed on some Russian enterprises in response to events in Ukraine.

Conclusions

The multiplicity of political and social goals pursued via the energy market means that the regulations in force frequently change, and the interpretations of the regulations can also change. Acquisition of an energy enterprise must therefore be preceded by a detailed examination of all regulatory aspects. Planned joint ventures, long-term investments, or long-term supply contracts also require an understanding of the regulatory conditions. This doesn't mean just checking the enterprise's compliance with the law, but also an assessment of the possibility of continuing to operate under the existing rules and the scale of costs connected with the need to comply with increasingly numerous and severe standards, particularly in climate policy and environmental protection.

It's no surprise that the industry calls for energy policy to be set once and for all and then consistently pursued. Frequent changes in priorities and promotion of various sometimes mutually contradictory purposes through chaotic introduction of regulations destabilises the market. Until that changes, deals in the energy sector will continue to entail a higher than average regulatory risk.

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Reprivatisation for foreigners

Stefan Jacyno

Foreigners with claims for reprivatisation of property in Poland may pursue their claims on the same basis as Polish citizens. However, in practice the path to enforcement of these claims may prove very complicated for foreigners. There are also conditions arising out of international agreements.

The term "reprivatisation" has a specific meaning in Poland. It is not the same as reversal of the nationalisation that was conducted on a wide scale shortly after the communist authorities took power, in 1944–1946. Unlike other former communist countries, no law has been enacted in Poland to regulate these issues. Consequently, a reprivatisation claim—a demand for restitution of property, or if that is not possible, to pay compensation—may be enforced only if the state took property in violation of the law in force at the time. So reprivatisation is only a verification of the legality of actions taken by the communist authorities.

Where property can be regained

Because of the extensive changes in Poland's borders after the Second World War, the situation in territories lost by Poland and in territories annexed to Poland is different. In the lost territories, the Polish authorities did not take anything from anyone; this was done by the authorities of the Soviet Union. The Polish legal system does not provide any possibilities for regaining such property. There was a right to compensation (although very limited) for real estate left in the lost territories of the Second Polish Republic, but applications for such compensation had to be filed by the end of 2008. Now these lands are part of Lithuania, Belarus or Ukraine, and any issues concerning property located there is governed by the laws of those sovereign states.

In the territories joined to Poland, which had previously been part of the German Third Reich or the Free City of Danzig, any German property—whether owned by the state or by companies or private individuals—passed to the ownership of the Polish State. Poland does not recognise any claims in this respect. The issue of borders is governed by the Potsdam Agreement and by bilateral agreements between Poland and Germany. The German government has promised that it will not support any such claims, and in *Preußische Treuhand v Poland* (ruling of 7 October 2008, no. 47550/06), the European Court of Human Rights rejected the application by the Prussian Trust concerning property of German citizens.

Therefore, territorially reprivatisation is limited to areas which were and still are Polish territory.

What can be regained

With respect to agricultural and forest land, there may be grounds for restoration only in the case of nationalisation of properties with an area of less than 50 hectares (or 100 hectares in northern and western territories), or those that before the war were already divided into plots for development. All structures and parks were also taken together with agricultural lands. Residential structures and parks may be returned only if it is proved that they were not connected with agricultural operations but served only as residences for persons not involved in operation of the agricultural property.

With respect to industrial properties, a chance for regaining the property may arise in a situation where it can be shown that, for example, a nationalised industry was essentially not subject to nationalisation because it could not employ at least 50 persons in a single shift, or it was taken under compulsory state administration in violation of law.

Another situation involves urban real estate, where homes were taken from their owners. There is a special situation in the case of real estate within the 1945 boundaries of Warsaw. The Bierut Decree (the Decree on Ownership and Usufruct of Land in Warsaw) entered into force on 21 November 1945. Pursuant to that decree, all land passed to the ownership of the City of Warsaw, and persons thus deprived of ownership could apply, within a strictly defined period, for award of "perpetual tenancy." If the application was granted, then the former owner remained the owner of the structures on the land, and the land was given to the former owner in perpetual tenancy (a right now known as "perpetual usufruct"). If the application was denied, then the owner lost not only the land, but all structures on the land.

The practice of applying this decree deviated from the rule of law, and in a great many instances there are grounds for setting aside the decisions refusing to award the right of perpetual tenancy. Warsaw was almost completely destroyed during the war, and over the many years since then there have generally been extensive changes. Pre-war buildings or their ruins were removed, and in their place other buildings were erected with different footprints not reflecting the boundaries between former plots. The State Treasury, or later the City of Warsaw, sold the real estate or delivered it to others in perpetual usufruct; a policy was pursued of selling units to the residents occupying them, together with shares in the land. Because of the principle of protection of good-faith purchasers of property from the person disclosed as the owner in the land and mortgage register, those purchasers cannot be deprived of their ownership. Thus the return of all or part of such properties to the rightful owners can be impossible because of irreversible legal consequences. In such situations, compensation for the lost property or parts thereof may be sought from the State Treasury.

The brief period for filing an application for perpetual tenancy, at a time when a huge number of owners of real estate in Warsaw had died in the war or were deported or imprisoned, or fled abroad, etc., meant that with respect to a large number of properties no application

was filed at all. In such instances, the former owner may obtain compensation if the property was a farm within the boundaries of Warsaw or was suitable for residential construction. An additional condition for obtaining compensation is that the property was taken from the owner (for example land was taken for construction or a rental tenement building was taken into municipal administration) after 5 April 1958.

How to regain property

The rules for proceeding are the same for Polish citizens and foreigners, but from a practical point of view a foreigner will encounter significant barriers. For natural reasons, after the passage of 70 years the applicants in these cases are rarely the persons whose property was taken. Typically they are heirs of the second or third generation.

Anyone who seeks return of property must begin with setting aside the administrative decision pursuant to which the property was taken. All of the persons who are heirs of the persons deprived of the property must take part in this proceeding. This makes it necessary to indicate the addresses of all the entitled persons and to identify their inheritance rights. This is where a major practical difference arises in the situation of foreigners and Polish citizens. In the case of citizens, it is relatively easy to confirm their inheritance rights, because there is a regime in Poland of judicial confirmation of inheritances (and for some time also notarial confirmation). In the case of foreigners, this is determined by their domestic law. If for example the entitled person held Swedish citizenship at the time of death, Swedish documents confirming the inheritance must be presented. An additional complication is the need for recognition of these documents by the Polish court. These regulations have changed, however, and rulings issued by foreign courts in recent years do not require this procedure. But a judicial procedure for confirmation of inheritance rights is not provided for in all countries. This makes it necessary to evaluate each case individually, depending on the specific citizenship and the time when the events occurred. This can cause huge complications and difficulties in the proceedings. Once more it should be stressed that the administrative body can only begin to process the case when all of the legal successors of the former owner have been presented.

If the foreigner is not a statutory heir but acquired rights to the inheritance under a contract or will, then the foreigner will have to seek a permit from the Minister of Internal Affairs to acquire the real estate. (This requirement does not apply to citizens of countries from the European Economic Area.)

If a decision is issued finding that the nationalisation occurred in violation of law and that irreversible legal consequences have occurred, then compensation may be sought. This requires commencing a court case and conducting a full trial in which the damages are assessed.

What cannot be regained

Poland concluded bilateral settlement agreements with 13 countries. Under these agreements, Poland would pay a lump-sum settlement to the governments of those countries, and those governments undertook to pay out compensation to their citizens who had lost property in Poland as a result of nationalisation. In this manner, citizens of these states could direct claims only to their own government. Poland concluded such agreements in 1949 with France, Denmark, Switzerland and Sweden, in 1954 with the United Kingdom, in 1955 with Norway, in 1960 with the United States, in 1963 with Belgium, Luxembourg, Greece and the Netherlands, in 1970 with Austria, and finally with Canada in 1971. These agreements differ in their details, but a common feature was assumption by the other government of responsibility for claims against Poland. In order to obtain compensation, a person had to have held citizenship of the other country both at the time of loss of ownership and on the date of conclusion of the settlement with the given country; whether or not the person was also a Polish national was irrelevant. Many Polish owners of real estate lived abroad and acquired foreign citizenship at various times, and they also lost their ownership at various times.

Persons seeking restitution of property who are citizens of the countries mentioned above must first check whether their predecessors obtained compensation, because receipt of compensation excludes any possibility of restitution. Even if it is proved that the property was taken unlawfully, but compensation was paid by a state that was party to a settlement, there is no possibility to return the compensation and demand restitution of the real estate. But the situation is different if the Polish authorities took a person's property but no compensation was paid to the person in the country where the person was a citizen—whether because compensation was denied (e.g. for lack of adequate proof of ownership, or because the person acquired citizenship at the "wrong" time) or because an application was not filed within the proper time. In that situation, there is no barrier to showing the unlawfulness of the taking by the Polish State and demanding restitution of the property or compensation.

Stefan Jacyno, adwokat, *partner, head of the Reprivatisation Practice and the Real Estate & Construction Practice*

So a sportsman can be a business

Kazimierz Romaniec

A breakthrough has occurred in the long-running dispute with the Polish tax authorities on taxation of revenue from performing sports. This opens up possibilities for sports clubs to optimise their operating costs and allows professional players to cut their tax burdens.

An expanded panel of judges of Poland's Supreme Administrative Court adopted a resolution on 22 June 2015 (Case II FPS 1/15) in litigation by a professional speedway racer against the tax authorities, who had disputed his right to classify the income he earned from performing the sport as having its source in "economic activity," taxable at a flat rate. The court held that if the taxpayer obtains income from performing a sport while also meeting the statutory conditions for performing non-agricultural economic activity, it should be treated as income from non-agricultural economic activity.

Athletes, referees or coaches conducting business activity may therefore pay tax on income from their sports activity as income from non-agricultural economic activity—not at a marginal rate of 32%, but at a flat rate of 19% with the right to deduct costs incurred in connection with that activity as revenue-earning costs. Sports clubs in turn will be able to reduce the costs of maintaining their roster of players and coaches, because those individuals can pay their own mandatory social insurance contributions, releasing the club from this obligation. The club will also gain a VAT deduction, as the input VAT on the invoice issued by the sportsman, connected with the VAT-paying activity of the club, will reduce the club's output VAT.

Previous discrepancy in the case law

Until recently there were doubts how to classify income earned by a taxpayer if the income fell into a list of types of income from activities performed personally but also was part of a business operated by the taxpayer, and thus met the conditions specified in the definition of economic activity. This problem affected not just professional athletes and sports referees, but also for example artists or court-appointed criminal defence attorneys.

The prevailing view in the rulings by the administrative courts was that revenue from practising sport should be classified solely as revenue from activity performed personally, as revenue could be taxed as business income only if the revenue could not be attributable to other sources of income listed in the Personal Income Tax Act. So if the act listed income from practising sport as income from activity performed personally, it could not be treated as income from non-agricultural economic activity. In the case of the speedway racer in which the Supreme Administrative Court issued its resolution, this was the position that was taken by the tax authorities at both instances and then by the Province Administrative Court in Bydgoszcz.

Under the competing view, if income-generating activity by the taxpayer could fall within various sources of income, the characteristics of economic activity are of primary and decisive relevance. According to that view, all income from activities bearing those characteristics should be deemed to have its source in "non-agricultural economic activity."

Athlete like court-appointed counsel

The seven-judge panel of the Supreme Administrative Court departed from the existing line of precedent. The panel recognised the arguments in favour of the possibility of taxing the income of professional sportsmen conducting economic activity as income from non-agricultural activity. The court found good reasons for applying a "dynamic functional interpretation" reflecting the evolving social and economic reality. In this specific instance, the change involved the trend toward professionalisation of sport and new economic conditions surrounding gainful practice of sport which did not exist in the past.

Important support for this argument was contributed by the previous resolution of the entire financial chamber of the Supreme Administrative Court of 21 October 2013 (Case II FPS 1/13). There the court held that the tax classification of income of court-appointed counsel for indigents depends on the legal form in which the lawyer practises the legal profession. Thus the fee of court-appointed counsel is regarded as income from non-agricultural economic activity if the counsel practises in the form of economic activity. Conversely, if the lawyer practises in another form, the fee for court-appointed counsel should be deemed to have its source in activity performed personally.

The resolution in Case II FPS 1/13 had two consequences. The first was the judgment of the Supreme Administrative Court of 29 April 2014 (Case II FSK 1219/12) concerning allocation of the income of professional sports referees to a specific source. There the court upheld the position of the court of first instance that when a given income-generating activity may be classified under various sources of income, the existence of characteristics of economic activity should be given primary and decisive weight. The second consequence was the general interpretation issued by the Minister of Finance on 22 May 2014 which was subsequently reflected in individual tax interpretations issued for example by the director of the Bydgoszcz Tax Chamber and the director of the Katowice Tax Chamber.

"Income from practising sport" is not the same as "income of a sportsman"

According to the justification of the court's resolution of 22 June 2015, the law defines revenue obtained as a result of practising sport as income from practising sport, and not as the income of a sportsman. This is because the law ties the income to the activity it results from rath-

er than the characteristics of the person (the taxpayer) receiving the income. The court found that because the Personal Income Tax Act does not define "income from practising sport," this should be understood to mean income obtained from involvement in and dedication to exercise and games intended to improve physical fitness. With the desire to compete and achieve good results, such activity may be organised and ongoing, but the aim of earning a profit and making this a permanent source of earnings is not an inherent feature of this activity. The absence of this characteristic distinguishes it from the economic activity which is activity of independent sportsmen (not "practising sport") taking part mainly in professional sports competitions in front of a live audience. The crucial finding in this instance is that income is obtained by a sportsman acting in this role.

As the court observed, in enacting tax legislation the Parliament has great leeway in allocating tax burdens and may shape the rules of the tax system as it wishes, within the limits of constitutional principles. Attribution of income to a specific source is one of the objective characteristics of the income, and is not a matter of the taxpayer's subjective belief. In line with constitutional principles, tax regulations must enable an unambiguous differentiation between sources of income, and therefore should require income to be attributed to the source that corresponds to the taxpayer's chosen form of activity.

Absent a clear provision to the contrary, the court reasoned, the differentiation allowed by the law in the legal forms of activity of competitors (sportsmen) affects the allocation of their income to varying sources. As a sportsman can earn income as an employee of a sports club, or from economic activity, or under a civil-law agreement concluded apart from economic activity conducted by the sportsman, or also obtain income arising solely from the fact of practising sport, these revenues may be attributed to varying sources set forth in the law. This could be employment income if it is payment under an employment contract and is not income from practising sport. It may be income from activity performed personally if the revenue is obtained from practising sport, understood to mean involvement in and dedication to exercise and games intended to improve physical fitness, without the intention of making this activity a permanent source of earnings (e.g. prizes, bonuses, food and lodging during competitions, training, sports stipends and the like). Finally, if the sportsman performs sports services for the club as part of economic activity conducted by the sportsman, such revenue does not constitute income from practising sport and should be included in the taxpayer's income from non-agricultural economic activity.

Consequences of June 2015 resolution

The Supreme Administrative Court's resolution of 22 June 2015 is vital for the permissibility of taxing income earned by sportsmen under the rules applicable to economic activity, including taxation at a flat rate. While the resolution shares the conclusions stated in the Minister of Finance's general interpretation of 22 May 2014, general interpretations are not binding on the courts but apply only to the public financial administration, including tax authorities issuing individual interpretations. This is particularly important in the situation described here, because this general interpretation was inconsistent with the prior judgment of the Supreme Administrative Court of 8 April 2014 (Case II FSK 1125/12).

The resolution of the seven-judge panel thus brings to an end the doubts surrounding the determination of this issue by the administrative courts. But it should be stressed that for taxpayers to take advantage of this option, they will have to consistently fulfil the requirements set forth in the definition of economic activity. Therefore it will be vital to draw up carefully the agreement in place between the sportsman and the club, and also to carefully define how the sportsman will conduct his activity.

Kazimierz Romaniec, legal adviser, Sports Law Practice and Tax Practice

What does TTIP mean to you?

Agnieszka Kraińska

The Transatlantic Trade and Investment Partnership—the free-trade agreement being negotiated between the European Union and the United States, commonly known as "TTIP"—arouses controversy. Here we provide an overview of what TTIP is all about and the framework in which the European Commission has been authorised to negotiate it.

In 2013 the European Union and the United States began negotiations for TTIP, a free-trade agreement which is designed to respond to the challenges and approaching changes in international policy and the international economy. One of the reasons for the decision to take up bilateral negotiations was the impasse in work by the World Trade Organisation under the Doha round, underway since 2001. Given the lack of progress in the WTO, the EU negotiated bilateral trade agreements in recent years with South Korea, Canada and Singapore.

Because the EU and the US are the world's most developed economies, a trade agreement between them could become a pattern for international trade agreements to follow. TTIP would also have an impact on developing countries, including adjustment of standards for goods produced outside the EU or US to comply with requirements for selling on the huge combined market. The agreement now being negotiated has generated great interest and controversy in the EU and in America.

Negotiating mandate

In June 2013 representatives of EU member states gathered in the Council of the European Union granted the European Commission authority to negotiate a free-trade agreement with the United States within the framework defined by the Council. The text of the negotiating mandate, together with information concerning the negotiations, is available at the website of the Commission's DG Trade.

The negotiating mandate stresses that the agreement negotiated between the EU and the US must be consistent with the rules and obligations of WTO membership. Both the United States and the European Union are members of the WTO, as are the EU's member states, although they are represented in the WTO by the EU (transfer to the EU of the member states' competences in the field of trade policy). WTO law prohibits discrimination against trade partners from other member states to the advantage of national entities (the national treatment clause) and requires equal treatment of trade partners in all member states (the most-favoured nation principle). An exception permitting privileged treatment of a group of states within the WTO is creation of a free-trade zone or customs union which will not result in increasing customs or creating new barriers for members remaining outside the zone. The EU and the US are relying on this exception when negotiating TTIP.

The negotiating mandate states that the agreement must be consistent with the EU legal *acquis* as well as international agreements and standards for protection of the environment, consumers and workers, and must not result in lowering of national rules of environmental protection, labour law, safety standards, and regulations promoting cultural diversity. The agreement must be framed with consideration for the interests of small and medium-sized enterprises.

Structure of the agreement

TTIP is divided into three parts: market access, regulatory issues and non-tariff barriers, and general rules.

- **Market access**

The first part of the agreement is to address customs duties on goods and unify the approach to rules of origin. The negotiations should also cover issues concerning sensitive goods (such as agricultural products) and dual-use items.

The market for services would be liberalised, together with development of a framework for mutual recognition of professional qualifications. Public services and audiovisual services are excluded from the agreement.

The agreement would create markets for public procurement at the national, regional and local levels.

Each of the parties would be required to ensure national treatment of enterprises of the other party.

The agreement is supposed to ensure the possibility of asserting reservations for protection of the public interest and fundamental interests of safety, and to apply anti-dumping and countervailing measures and safeguards.

- **Regulatory issues and non-tariff trade barriers**

Non-tariff barriers include for example sanitary and phytosanitary measures, technical regulations and standards, the need to obtain certificates and licences, and complex inspections and procedures. TTIP is intended to remove such barriers through mutual recognition of solutions aimed at compliance with the same standards, uniform requirements and regulatory cooperation in the future.

TTIP may contain detailed provisions applicable to certain sectors. (Currently solutions concerning automobiles, chemicals, cosmetics, pharmaceuticals, ICT, engineering products, pesticides, medical devices and textiles are under discussion.)

- **General rules**

TTIP should include rules for protection of intellectual property and European geographical indications, provisions on competition policy, energy and raw materials, SMEs, and capital movement and payments. There is a need for simplification and modernisation of procedures and documents, cooperation between customs authorities, and compliance with the principle of transparency.

The negotiating mandate also calls for rules for protection of investments and the possibility of introducing an

instrument for resolving investor/state disputes. Solutions for resolving disputes between the parties to the agreement should be included, as well as the possibility of binding interpretation of the agreement by the EU and the US.

Once again the importance of the parties' obligations to ensure sustainable growth, high standards in employment law, and environmental protection was stressed.

A few controversies

- **Investor/state disputes**

The current system for resolving disputes between investor and state through arbitration, known as the investor-to-state dispute settlement (ISDS) mechanism, has generated much controversy. In 2014 the European Commission conducted public consultations on this mechanism. It found that ISDS was perceived by many of the respondents as a non-transparent mechanism favouring investors and presenting a threat to state finances.

In response, the Commission presented proposals in May 2015 to replace the ISDS mechanism with an Investment Court System, and in September proposed relevant provisions to be included in TTIP.

The draft of these provisions stresses the right of the state to establish regulations protecting the public interest. Five fundamental principles are introduced which states must comply with in dealing with investors: a prohibition against expropriation without compensation, the right to transfer funds from investments, fair and equal treatment, observance of written contractual obligations toward the investor, and compensation for certain losses resulting from wars or other armed conflicts. The concept of indirect expropriation has also been defined.

Disputes would be resolved by special courts—a Tribunal of First Instance and an Appeal Tribunal—and not, as has been the case, by ad hoc arbitral tribunals. The Tribunal of First Instance would be composed of 15 judges, five of whom would be US citizens, five EU citizens, and five from third countries. The Appeal Tribunal would comprise six judges—two from the US, two from the EU, and two from third countries. The panel of judges hearing each case (one from the EU, one from the US, and one from a third country as the chair) would be determined by lot. Judges would be required to comply with strict ethical requirements, including a prohibition against acting as an adviser in investment disputes. Documents concerning the disputes would be open and available online. The loser would be required to cover the costs, in order to discourage filing of frivolous claims.

The new Investment Court System would be used not only for TTIP, but for all trade agreements concluded by the EU.

- **Standards for food safety, environmental protection, and employment law**

In the discussion over TTIP, concerns have been raised about lowering of food safety standards, including uncontrolled access to the European market by foods containing GMOs. Pointing to its negotiating mandate, the European Commission has explained that regulatory cooperation and mutual recognition of products will be possible only if in consequence the level of consumer protection remains unchanged or is increased. The EU procedures for introducing GMO products into trade will not change. With respect to concerns over environmental protection and labour standards, the Commission has similarly indicated that the negotiating mandate contains a reservation for maintaining the existing level of protection in these fields, and the member states retain the right to introduce regulations protecting the public interest.

What's next?

In addition to its trade aspects, the agreement being negotiated between the EU and the US also has a strategic dimension. The ambition of the parties is to create a state-of-the-art agreement that will establish a global standard. TTIP is attracting a lot of public attention and must meet requirements posed by democratic societies on both sides of the Atlantic, such as compliance with principles of environmental protection, food safety, product safety, employee protection and corporate social responsibility.

Despite the criticism, it must be admitted that access to documents and information concerning TTIP and the negotiations has been ensured in a manner that is incomparable to previous practice. TTIP sets a new standard for engagement of the civil society and the weight given to its voice in negotiations of the trade agreement.

The 11th round of negotiations ended in October 2015 and the 12th round is scheduled for February 2016. The European Commission is consulting with EU member states on TTIP as part of the Trade Policy Committee of the Council of the European Union. Conclusion of TTIP by the Council will require approval by the European Parliament. In the United States the agreement will have to be ratified by Congress. If the final agreement contains provisions exceeding the exclusive competences of the EU, it will also have to be ratified by the member states.

Agnieszka Kraińska, legal adviser, EU Law Practice

Business, law and sustainability

Dominik Wałkowski Izabela Zielińska-Barłożek

Sustainable development is one of the most common buzzwords in global socioeconomic relations. It shows up in just about every document shaping state policy or fundamental principles of environmental protection and economic growth. Increasingly it serves as one of the pillars of enterprise management.

Understanding sustainable development

In 1987 the World Commission on Environment and Development, popularly known as the Brundtland Commission, presented a report entitled *Our Common Future.* The report posited: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Thus the notion of sustainable development became an essential link between global environmental policy and the policy of economic growth. It also became an intrinsic element of policy declarations and legal acts.

This is not just a theoretical concept, but has been legally formulated as an obligation. For example, in 1992 the Rio Declaration stated, "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

The essence of sustainable development is not imposing simple arithmetical limitations on current generations in order to ensure that an adequate quantity of natural resources is left for future generations. The point is rather to manage and modernise particular spheres of human activity to ensure harmony between negative impacts on the environment and the capacity of the environment to absorb those negative impacts. Consequently, sustainable development seeks to reflect here and now the needs of both current and future generations, and thus pursue the ideal of intergenerational justice. This notion requires an understanding that current generations bear certain obligations, and do not have a right of unlimited exploitation of our planet's resources.

Sustainable development is therefore not a single, strictly defined static condition. It is more a direction toward which economic growth, exploitation of commodities, technological development, scientific research, and so on, should aim—in the properly understood common interest.

Business and sustainable development

The concept of sustainable development should not be associated only with environmental law. Only some of the legal and policy documents in which it appears directly and exclusively concern environmental protection. Often it is a key element of contracts, laws and economic declarations. Policy declarations alone do not suffice to achieve the stated goals. This requires the active involvement of all participants in society, lawmakers, consumers, and businesses.

Enterprise management based on the concept of sustainable development is therefore not just a fuzzy ideal. In a certain respect it is a legal obligation requiring implementation of appropriate standards of risk management. So sustainability in business has a practical dimension. This involves diagnosis of changes in the world around, environmental conditions and the availability of resources. This all helps the enterprise prepare properly for evolving business conditions, perceive new trends, and dynamically adapt to them. This concept also helps ensure the survival of the enterprise, as early identification of new needs enables an early and targeted response.

The concept of sustainable development requires innovation and flexibility from enterprises. It encourages savings and draws special attention to the employee's situation. It influences corporate governance, business ethics, and organisational culture. It presents an extra dimension of responsible business based on values and trust.

Business, sustainable development, and lawyers

The concept of sustainable development obviously also applies to lawyers. Legal advice provided in the spirit of sustainable development is more than a mechanism for explaining regulations, but comprehensive support in properly pursuing the mission, values and goals of the client's business. The essence of a lawyer's work is legal assistance, not only advice in specific, discrete situations. It is more about problem-solving than just presenting methods for avoiding liability.

In a practical, everyday dimension, this requires cooperation with administrative agencies, labour inspectors and environmental authorities, and not just disputing the findings made by these institutions. Here the key is openness to various methods of problem-solving, without bureaucratic or legal formalism. To achieve the defined goal, it is sometimes worthwhile to reach for rarely used and undervalued legal instruments such as an administrative settlement, which can simplify and expedite the proceedings.

Advising in the spirit of sustainability is particularly vital in environmental impact proceedings. Prudent application of the regulations on social participation can increase social acceptance of the venture. Sometimes all it takes is one procedural error to undermine social trust and provide a key counterargument to opponents of the project. Principles of sustainable development are particularly important in the case of projects in Natura 2000 areas. These are not zones that are excluded from any development or industry. With proper application of the regulations, such ventures can be realised, so long as they avoid any significant impact on protected species and habitats.

Finally, sustainability issues play a role in due diligence for M&A and in ongoing, standard compliance procedures. Legal risk arising out of violation of regulations entails not only potential administrative fines, but also social and business consequences. These can be more devastating for businesses than the need to pay a fine. Lawyers and managers must also perceive this dimension. A legal audit is more than a scrupulous verification of compliance with regulations, but also—or even primarily—a comprehensive assessment of risk by a trusted and experienced adviser. This applies not only to environmental protection, but also to aspects connected with the risk of corruption, money laundering, improper working conditions, claims by local communities for impacts caused by the enterprise, and so on. It sometimes goes unnoticed that all of these spheres are governed by law, even when the regulations are not obligatory.

There are also numerous guidelines and recommendations for enterprises which cannot be ignored in business today. These include documents drafted by the United Nations and the OECD, such as the *OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*. In day-to-day business operations, environmental management systems such as ISO 14001 or the European Eco-Management and Audit Scheme encourage compliance with sustainability principles.

The practical dimension of sustainability is obvious. Sustainability helps achieve goals here and now, rather than imposing additional and vague demands on businesses with no clear value. By complying with sustainability principles, enterprises can achieve measurable business goals.

Dominik Wałkowski, adwokat, *leader of the Environmental Law Practice*

Izabela Zielińska-Barłożek, legal adviser, partner, head of the M&A and Corporate Practice and the Environmental Law Practice

FIDIC in Poland: Not a holistic solution

Mirella Lechna

FIDIC contract forms derive from a common-law environment, but Poland is a civil-law country. These two systems take quite different approaches to contracts, and solutions designed for one system don't always work in the other.

The main advantage of using contract forms from FIDIC (the International Federation of Consulting Engineers) is the equitable distribution of risks between the employer and the contractor. The FIDIC forms were designed to work as a comprehensive whole whose provisions are balanced, interrelated and aimed at achieving successful completion of projects. But in Poland that balance is generally not maintained. The FIDIC forms are often extensively amended to favour one of the parties—the one that drafts the contract, typically the public entity, the organiser of the tender and the "dominant" party.

In practice, FIDIC standards are not applied consistently in Poland, but are just a starting point.

Polish law may prevail over FIDIC terms

Polish law is code-based, and "off-the-rack" solutions play a key role in shaping contractual relations. The application of some of these rules is mandatory, and others discretionary. Parties cannot contract out of mandatory provisions. If the contract contains a provision inconsistent with mandatory regulations, that provision is invalid and the rule provided in the law will apply instead.

There are also non-mandatory provisions of law that allow the parties freedom to address certain issues differently. Then the law will play a gap-filling role, governing only issues not addressed in the contract.

Different statutes apply to various types of construction and infrastructure projects. Most important for FIDIC projects are the Construction Law, the Civil Code, and, in the case of public contracts, the Public Procurement Law.

Construction Law undercuts the FIDIC contract engineer

The Construction Law requires specific persons to be involved in the construction process. Their duties are governed by administrative law, not civil law.

Unlike FIDIC, the Construction Law does not provide for the function of contract engineer. Instead, in addition to the "investor" (analogous to the "employer" in FIDIC terminology), it provides for the functions of investor supervision inspector, designer, and construction site manager or works manager.

The absence of a contract engineer in Polish law tends to reduce the engineer's role in practice to a "mailman" between the parties, rather than the coordinator of construction and an independent arbiter.

In Polish practice, the contract engineer is prevented from applying FIDIC instruments to resolve disputes early on. The engineer is also stripped of his impartiality. For example, in contracts promulgated by the General Directorate for National Roads and Motorways—the largest entity in the country using FIDIC contracts—the contract engineer is not entitled to make objective findings.

This is done through reservations in clauses appointing the engineer, for example prohibiting the engineer from:

- Making vital decisions without the agreement of the employer
- Making independent decisions without consulting the employer
- Acting to the detriment of the employer, or
- Giving evidence against the employer in any dispute.

Civil Code requires employer to pay subcontractors

The Polish Civil Code prohibits the parties from contracting out of some provisions of the code, for example concerning the investor's and general contractor's joint and several liability to subcontractors.

This issue is regulated differently between the FIDIC Red Book and the Yellow Book. Regardless, in Poland the hiring of subcontractors is governed by Civil Code Art. 647^1, which provides that "in concluding a contract with a subcontractor, the investor and the contractor are jointly and severally liable for payment of the fee for construction work by the subcontractor." This regulation applies to any construction contract when the employer consented to hiring of the subcontractor (in writing). If the employer pays the contractor but the contractor fails to pay the subcontractor, this does not release the employer from liability to pay the subcontractor.

This liability means that in Poland a contractor usually needs to issue an additional performance bond to cover the contingency of such claims by subcontractors.

FIDIC deadlines may be void under the Civil Code

In Poland, statutory limitation periods vary for different types of contracts. A 3-year limitations period applies to construction contracts, and the parties cannot contractually establish a shorter limitations period.

FIDIC clause 20.1 requires the contractor to notify the engineer within 28 days after it becomes aware that it will require an extension of the time for completion and/or additional payment. This clause is sometimes amended in Polish contracts from "28 days" to "an appropriate time." But in either case the problem of attempting to contract out of the limitations period set by law arises.

A Polish court would probably strike out an attempt to enforce clause 20.1 in contracts as being contrary to law.

But the courts do not rule uniformly on this issue, making it an area of legal uncertainty.

DAB unknown in Polish regulations

Frequent doubts appear in practice about the functioning of Dispute Adjudication Boards (DABs) and their decisions, largely because the nature of the DAB is inconsistent with mandatory Polish law.

Although the Polish regulations do not establish the procedure for how the DAB should reach decisions (or prohibit DABs), the DAB rules are not always amended when FIDIC forms are used under Polish law. Because the institution of DAB is unknown in the national regulations, there are problems establishing the legality of DAB decisions and the obligation to submit disputes to DABs for resolution.

In the common-law system, contractual arrangements take priority, and determinations by DABs have the effect agreed by the parties. Because the Polish legal system is statute-based, in the Polish system DAB decisions must conform to mandatory statutory rules. They do not contain a structure quite like DAB. At best DAB can be compared to a binding designation by a third party to determine how the parties should act—a structure known to Polish civil law.

It is commonly understood that the DAB provisions of FIDIC require the parties to refrain from instituting arbitration proceedings until the occurrence of a specific event (*pactum de non petendo*). Commentators accept that if the parties agree to these FIDIC terms, a dispute is not arbitrable until the pre-arbitration procedures are exhausted.

The courts have sometimes taken a different view. Discussing the possibility of challenging a DAB decision, one court pointed out that a DAB decision makes sense only if the parties intend to respect it, because there is no mechanism for enforcing DAB decisions. Therefore, if prior to appointment of a DAB one party refuses to accept determination of an issue by the DAB, then the procedure is moot.

Another court held that rejection of a DAB decision does not trigger arbitration, and arbitrators are not bound by DAB decisions, which are merely evidence in the case. The court held that non-appointment of a DAB because one party refused to appoint it permits immediate resort to arbitration (FIDIC clause 20.8).

Public Procurement Law limits freedom of contract

Parties cannot contract out of the main provisions of the Public Procurement Law. The most important constraints imposed on public investors and contractors are:

- Compulsory compliance in selecting the successful bidder, which limits the freedom to choose the contractor
- Prohibition against making material changes to the contract, unless stated otherwise in the contract or the tender notice
- An obligation to include in the contract a standard clause on subcontracting
- Specific regulations on employing subcontractors
- The right to rescind a contract due to the public interest, without compensation.

Summary

The freedom to modify FIDIC contracts essentially means there is no one standard form of FIDIC contract normally used in Poland. Studies have shown that whenever FIDIC contracts are used, the terms are individually shaped, in varying ways.

In Poland, FIDIC contract forms are used as a shell rather than a turnkey solution. Polish contracting authorities do not treat them as a comprehensive framework. The habit of modifying FIDIC forms is often justified by the need to adjust the FIDIC language to suit not only the specific project, but also the mandatory provisions of Polish civil law, which are founded on substantially different principles than those under which the FIDIC standards were drafted.

As a result, FIDIC terms have evolved in Poland to an extent unforeseen by FIDIC's creators. Excessive interference in the general conditions, or addition of clauses, often distorts the essence of the FIDIC terms. This can create traps which the parties may have difficulty resolving. Very often the project suffers as a result.

Caution is required whenever contracting in Poland on the basis of FIDIC terms. It cannot be assumed that contract provisions that work smoothly in common-law jurisdictions will work the same way in the Polish civil-law system.

Mirella Lechna, legal adviser, partner, head of the Infrastructure, Transport and Public Procurement & Public-Private Partnership practices

Involuntary dissolution of a company

Formation and dissolution of a corporate relationship, as a relationship of civil law and private law, is governed by the principle of the autonomous will of the parties. But in consideration for certainty and security in commerce, the law provides a number of regulations which can be the basis for involuntary dissolution of a company. Regardless of the intention of the parties, a company may be dissolved in such circumstances as a corporate dispute, failure to perform statutory obligations, or other violations of law.

Piotr Wcisło

The most common instance of involuntary dissolution of a company in Poland occurs as a result of declaration of the company's bankruptcy (which does not occur however if the bankruptcy proceeding ends with an arrangement or is for other reasons set aside or discontinued). Dissolution of a company because of declaration of bankruptcy occurs upon deletion of the company from the register at the application of the bankruptcy trustee.

But the law provides for a number of other instances of involuntary dissolution of a company. The existence of these regulations is often not widely known or obvious for participants in commerce, which can have serious consequences. For example, when pursuing a corporate dispute the shareholders are not always aware that the dispute may lead to dissolution of the company. Below we discuss the main instances of involuntary dissolution of companies provided for under Polish law.

Dissolution of company by registry court because of lack of corporate authorities

The registry court will appoint a curator (known as a "substantive-law curator") for a company that cannot conduct its own affairs because it lacks corporate authorities. The curator's task is to bring about the appointment of the company's authorities, or if that does not succeed, then to bring about the liquidation of the company. The curator's authority does not include performing legal acts or conducting the affairs of the company. This means that the curator cannot take the place of the missing corporate authority.

The authority appointed to conduct the affairs of a company is the management board, and thus the curator's primary task is to see that a management board is appointed. But first it may be necessary to appoint other authorities, particularly a supervisory board, if under the organisational rules of the company the management board is not appointed directly by the shareholders but by another authority.

Failure to appoint a management board of the company is grounds for liquidation of the company if objectively the failure is definitive and permanent. In that case the registry court will rule on dissolution of the company, but deletion of the company from the register, causing its legal existence to cease, first requires that a liquidation proceeding for the company be conducted.

Dissolution of company by registry court as a result of essential defects in the corporate relationship

This regulation applies when the company was entered in the register because of oversight of serious defects in the corporate relationship. It is therefore of an exceptional nature and serves to protect certainty of commerce in a few special instances.

The registry court may rule on the dissolution of a company if:

- The articles of association were not concluded
- The subject of the company's activity specified in its articles of association or statute is unlawful
- The articles of association or statute of the company lacks provisions concerning the company name, the subject of the company's activity, share capital or contributions
- None of the persons concluding the articles of association or signing the statute had legal capacity at the time.

Entry of a company in the commercial register is constitutive in nature, and therefore even in the event of serious defects in the corporate relations a company entered in the register legally exists. For this reason, its dissolution requires an appropriate ruling by the registry court, and dissolution of the company does not affect the validity of legal acts previously made by the company. In order to protect the certainty of trade, the existence of essential defects in the corporate relationship cannot be grounds for dissolving a company more than 5 years after it is entered in the register.

The ruling by the registry court on dissolution of the company does not cause the legal existence of the company to cease, but only causes opening of the company's liquidation. After the liquidation proceeding is conducted, the company is deleted from the register, which finally ends its legal existence.

Dissolution of limited-liability company pursuant to a judgment by the court

A limited-liability company may be dissolved by a judgment of the court issued after conducting a proceeding commenced by a shareholder or authority of the company if it has become impossible to achieve the company's purposes or for other sufficient reasons due to the corporate relationship. A state body authorised by statute may also seek dissolution of a company if the company's unlawful activity threatens the public interest.

Grounds for the inability to realise the purposes of a limited-liability company which justify its liquidation may include:

- Withdrawal of a concession or licence required for the company to conduct its business
- Insufficient capital to conduct business, with an objective inability to obtain the necessary capital
- Loss of intellectual property rights necessary to conduct the company's business
- Introduction of prohibitive tariffs practically preventing conduct of the company's business, or other long-term limitations on imports or exports

- Changes in law limiting the company's ability to conduct its business.

This is an open list and these are only examples.

It is accepted that the inability to realise the company's purposes must be permanent and definitive over the foreseeable future. Dissolution of the company by the court cannot be justified by temporary economic difficulties, the failure of the company's business, or even long-term losses, if objectively the company's purposes can still be realised.

Another valid reason for dissolving the company can be, for example, a long-lasting restriction of the rights of minority shareholders by the majority shareholders, particularly through:

- Restrictions on payment of dividends over many years, particularly when the majority shareholders are receiving value from the company on other grounds
- Repeated dilution of the share capital of minority shareholders by preventing them from taking up new shares
- Imposing a longstanding obligation on minority shareholders to pay significant surcharges to the company without objective need
- Blocking of the minority shareholders' access to information about the company's affairs.

Another valid reason for dissolving the company may be a total lack of involvement in the affairs of the company by a majority of the shareholders, persistent refusal to participate in shareholder meetings, and the like.

Issuance by the court of a judgment dissolving the company results in opening of the liquidation proceeding. Only after that is conducted can the company be deleted from the register, ending the company's legal existence.

A limited-liability company may also undergo involuntary dissolution by the court upon application of a competent state authority if the company's unlawful activity threatens the public interest. The company's activity may be unlawful because it is contrary to standards of either public law or private law.

Dissolution of company under the National Court Register Act

The registry court may dissolve a company without conducting a liquidation proceeding if, among other reasons:

- The bankruptcy court has found grounds for dissolving the company without conducting a liquidation proceeding, or the inability to conduct the company's bankruptcy because its assets are insufficient to cover the costs of the proceeding
- The registry court has decided not to conduct a proceeding to force the company to perform its obligations because conducting such a proceeding would be pointless
- The company has failed to perform certain obligations provided for in the National Court Register Act despite being summoned by the court twice.

This regulation was introduced with the purpose of eliminating from commerce companies which exist only formally but are not actually functioning or have permanently lost the capacity to function. But this applies only to situations where the financial condition of the company is such that it is unnecessary to conduct a liquidation proceeding before deleting the company from the register. In that case, the registry court will rule on dissolution of the company without conducting liquidation, and will order its deletion from the register, ending its legal existence.

The registry court may also dissolve a company when it is necessary under regulations of corporate law to conduct a liquidation proceeding prior to deletion from the register. In that case the basis for the ruling by the registry court on dissolution of the company is the company's failure to perform a specified statutory obligation, if in addition there are valid reasons favouring dissolution of the company. But then the deletion of the company from the commercial register, ending its legal existence, occurs only after completion of liquidation.

If a company fails to perform a specified statutory obligation despite the registry court's use of a procedure to enforce compliance with the obligation, and the failure is also connected with the lack of corporate authorities, the registry court may appoint a curator for the company (known as a "registry curator").

The curator is required to promptly conduct actions necessary for appointment of authorities for the legal person. The curator also has statutory authorisation to take actions aimed at liquidation of the company if the authorities cannot be appointed or the company's appointed authorities fail to perform their statutory obligations. Then the company's legal existence will not end until its liquidation is conducted and it is deleted from the register.

Conclusions

There are many situations under Polish law when a company can undergo involuntary dissolution. In some cases where this occurs as a result of violations of law, it may happen automatically or the regulations do not provide for the possibility of curing the problem. Therefore it is important to be aware of these rules and take the necessary efforts in the company's day-to-day business to ensure that the company can continue to operate unimpeded and in compliance with the law.

Piotr Wcisło, adwokat, *M&A and Corporate Practice*

Consumer knowledge or producer expense: Where to place the accent in food law?

Following a series of crises in the food industry in the late 20th century, EU legislators decided to reform the food law system to increase the level of protection of human life and health. This goal is pursued through issuance of regulations imposing requirements for food safety and consumer information. Will the new system be equally satisfactory for producers and consumers?

Dr Ewa Butkiewicz

The goals of the regulations governing production and distribution of food in the European Union are clear: food should be healthy and safe, and consumers must be informed in detail about the ingredients and origin of the food they eat. But these goals must be pursued with due consideration for the needs of the uniform internal European market, which should ensure smooth and efficient operation, free of excessive administrative burdens. In a perfect world neither of these goals would overshadow the other.

So the question arises whether EU lawmakers have succeeded in reconciling protection of the consumers of food with creation of conditions fostering the operation of businesses on the food market. Are the regulations too protective of consumers and disproportionately burdensome for businesses serving as links in the food chain "from farm to table"? We will try to answer these questions with reference to the EU's Food Information for Consumers Regulation (1169/2011), which with a few exceptions entered into force on 13 December 2014.

Reform of EU food law

Until the end of the 20th century EU food rules were issued almost exclusively in the form of directives to be implemented into the legal systems of the individual member states. But this method did not prove very effective at furthering the public interest, such as protection of consumers and protection of the life and health of people and animals. The line of rulings from the European Court of Justice from the late 1980s through the 1990s was consistent in this respect.

Change was spurred by the crises in the food industry which occurred in the latter years of the 20th century. These crises, of which mad cow disease (BSE) was a famous example, were of a mass, widespread character, extending well beyond the territory of a single country or region. This significantly undermined consumer confidence in food producers and distributors. The measures imposed to redress the effects of these crises and avoid them in the future were financially disastrous for the food industry.

In response, the European Union has been reforming its policy on food issues since the beginning of the 21st century, reviewing and updating the existing rules, combining them in packages and tightening their internal consistency. But the most striking difference in approach is to issue regulations instead of directives. With this approach, the core of the EU's food law is directly applicable and uniform across all member states, which should encourage proper functioning of the internal market and further the principle of the free movement of goods.

The reform of EU food law has already generated measurable results. The European Commission has collected the general principles and requirements of food law and appointed the European Food Safety Authority. The Commission has adopted three regulations making up the "Hygiene Package," issued several regulations on food contamination, additives and flavourings and a regulation on food labelling, and is continuing work on several more regulations. So the number of instruments for protecting consumers is steadily growing.

Reducing regulatory burdens

At the same time, there is a growing awareness of the costs associated with the regulations introduced at the EU level. The Mandelkern Report from 2001, issued by the Mandelkern Group on Better Regulation, found that there are 40% too many EU rules, and the red tape they impose on businesses costs billions of euro a year. Consequently, in 2007 the European Commission launched a wide-ranging programme to reduce the administrative burdens on businesses connected with compliance with informational obligations.

Deregulation measures were undertaken in 13 areas, including food safety. Currently these measures are being pursued as part of the EU Regulatory Fitness programme, or "REFIT" as it is known. EU acts, including in the area of food law, are reviewed and revised with the goal of simplification and reduction of regulatory burdens. One of the areas that was reviewed was food information provided to consumers. The Food Information for Consumers Regulation (1169/2011) represented an effort to clarify the rules in this area. This regulation can be used as an example to examine whether and to what extent the Commission has succeeded in minimising the obligations imposed on food producers and distributors.

Regulation has not cut costs

In terms of the costs generated for businesses, Regulation 1169/2011 cannot be regarded as a success of the Commission. Food safety is one of two areas (alongside financial services) where, according to the Commission's report, deregulation will not only not lead to a reduction in costs, but will require businesses to incur additional expenditures. The costs of implementation of Regulation 1169/2011 are estimated at over EUR 100 million. The situation is a little better on the issue of consolidation of the existing law. The regulation largely constitutes a compilation of rules previously found in two regulations and five directives, and thus represents a good step toward simplifying the rules and ensuring clarity and consistency among them.

Certain doubts are raised however by the cross-reference to six other regulations and directives in the definitions

of fundamental concepts for Regulation 1169/2011. This does not make it easy to apply the regulation. Moreover, in 2013 the Commission issued guidelines for the regulation, essentially admitting that it is not as clear and understandable as it should be. Following the Commission's lead, Poland's Agricultural and Food Quality Inspectorate has also issued a guide to the regulation. The guide provides valuable assistance in applying the rules—assuming that the interpretation adopted by the national inspectorate is consistent with the intention of the drafters of the EU regulation, is up-to-date, and does not merely carry over the existing routine approach previously followed by the Polish inspectorate. The Polish guide does not fully live up to these assumptions.

Consequences for consumers

Regulation 1169/2011 was supposed to guarantee consumers the right to accurate information and give them a basis for making conscious choices about the foods they buy and eat. But achieving this goal will take time. The level of perception of information among consumers varies (notably, the regulation never refers to the "average consumer"), but the requirements for providing information about foods are uniform. This means that some consumers will need more time to become accustomed to such information and use it consciously when selecting foods. The European Commission itself perceives a need for educational and informational campaigns to help consumers better understand the information presented to them.

No doubt the regulation provides extensive protection to consumers against misleading information about foods and in advertising and presentation of food products. Inspection authorities, with extensive practical knowledge at their disposal, can effectively track down inaccurate or misleading advertising messages or presentations of food products that do not comply with the regulations.

Therefore, bringing order and consolidation to the food law rules clearly helps increase consumers' knowledge of foods.

Consequences for food producers and distributors

The regulation provides for the possibility of updating the requirements for providing information about foods, but this should not be done too frequently and the new requirements must enter into force on the same day of each calendar year (1 April), following an appropriate grace period. This mechanism provides the food industry a sense of security.

Major concerns are raised by the rule that all entities operating on the food market bear legal responsibility—from the manufacturer or importer of a product all the way down to the corner grocer. Fines have already been imposed on shops for providing inaccurate information about the foods they sell. This liability principle is forcing participants in the food distribution chain to monitor one another, which is now perceived as a burden imposing too much risk of negative consequences of irregularities by another entity in the distribution chain. Regulators could do more to alter this perception if they first inspected the source of the inaccurate information, i.e. the manufacturer, and only after that gradually extend their inspection down to the other links in the food distribution chain.

The goals adopted by the European Commission with respect to the internal market, namely simplifying the rules, ensuring legal certainty, and cutting administrative burdens, do not appear to have been fully achieved yet. Truly smooth functioning of the internal market in this area is still in the future.

Conclusions

The European Commission deserves recognition for its efforts to enable consumers to make conscious choices of safe foods based on reliable information. But consumer awareness needs to grow continuously as new food products appear on the market.

The burden of educating consumers falls in large part on food producers and distributors, who must comply with detailed requirements when it comes to providing information about their foods. First and foremost, however, they must produce and deliver food that meets safety requirements, and this is a costly process. Despite the measures taken by the Commission to consolidate the regulations, the fruits are not satisfactory for the industry. But it must be borne in mind that lowering of regulatory requirements would create a high risk of danger to human life and health, on a wide scale, and eliminating the consequences would probably cost more than it would to comply with the current regulations.

Dr Ewa Butkiewicz, legal adviser, senior counsel, Life Science & Regulatory Practice

The doctrine of equivalents is alive and well

Włodzimierz Szoszuk Norbert Walasek

In a patent infringement case, the court's basic task is to determine the scope of exclusivity awarded by the patent. Often this is difficult and generates a heated dispute between the parties. One of the most serious controversies is how to apply the doctrine of equivalents.

Patent claims—scope of protection

It is in the interest of a patent holder for the scope of protection under the patent to be defined as broadly as possible, to ensure the most extensive patent monopoly. On the other hand, it should be possible to determine unequivocally what falls within the bounds of the holder's monopoly, so that other parties know what action will be held to infringe the patent.

The patent claims stated in the patent document are key for determining the scope of protection of the invention. Under Poland's Industrial Property Law, the patent claims define the scope of the patent, while the description of the invention and figures may help interpret the patent claims. The law also states that the patent claims should define the invention and the scope of the patent protection sought, concisely and clearly, by stating the technical features of the solution.

These rules seem to justify a strictly literal interpretation of the patent claims. But that approach could make the patent protection illusory in many instances, because any variation from the invention as described, however minimal and immaterial for the solution, would fall outside the bounds of the monopoly. As stated in the legal literature, "A narrow, literal interpretation would exclude from the sphere covered by the scope of the patent solutions containing functional elements identical to those claimed and substituting for them. Adoption of such an interpretation would deprive the patent of practical and economic value and frustrate its purposes and functions as a special form of protection for inventions" (Barbara Czachórska-Jones, *System prawa własności intelektualnej (The System of Intellectual Property Law),* vol. 3, *Prawo wynalazcze (Patent Law),* Ossolineum, 1990).

Therefore, the legal theory and court practice permits expansion of the protection beyond the literal wording of the patent claims to cover "equivalents."

Essence of the doctrine of equivalents

An equivalent solution may be encountered when an element expressly indicated in the patent claims for the invention is not used literally, but a solution equivalent to that element is applied. A technical means is said to be equivalent when the means serves to achieve the same technical purpose, performs the same functions, and leads to the same technical result.

An example of an equivalent solution given in the literature is replacing a pair of diodes provided for in the patent with a pair of triodes or pentodes. Triodes and pentodes are not the same as diodes, but in the case of the disputed solution it was determined that they perform essentially the same function as diodes, so when they are used it constitutes an equivalent solution.

To depict this in simple terms, in the case of an invention which is a construction of wooden elements connected with screws, if nails were used instead of screws it would not infringe the patent under a literal reading of the patent claims. But the doctrine of equivalents enables a finding of infringement despite the replacement of screws with nails. A consequence of this is that a solution cannot be patented which differs from the patented solution only in that the screws are replaced with nails. In turn, the holder of the patent providing for the use of screws could rely on its patent to prohibit marketing of an invention containing nails.

Doctrine of equivalents in the legal literature and the case law

The doctrine of equivalents as such is not controversial in most legal systems. What may be controversial, however, is the amount of latitude the doctrine allows in defining the scope of patent protection. In this respect, the discrepancies are great. Some legal systems and theories permit departing from the literal wording of patent claims only when the patent claims leave room for interpretation. Others allow protection of the essential concept of the invention apart from the patent document, taking into consideration the contribution the invention makes to the state of the technology, regardless of the wording of the patent document.

One of the most interesting examples of the controversies sparked by application of the doctrine of equivalents is the well-known case of the product Epilady. It involved infringement of a patent for a depilation device. The invention provided for use of a helical spring (Figure 1 below), which when spun would grab the hair and pull it out. This patented solution was opposed to a competing one; in the Smooth & Silky epilator the helical spring was replaced with a rubber rod with numerous slits (Figure 2 below), which would trap and pull the hair much as the spring would do on the other device.

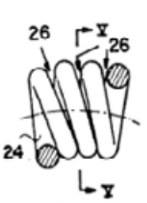

Fig. 1

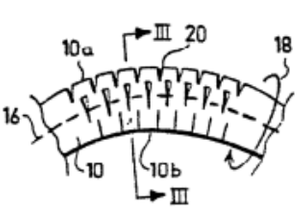

Fig. 2

Different European courts reached opposite conclusions in this dispute. Under the doctrine of equivalents, a German court found there was a patent infringement. An English court held there was no infringement, finding that despite the obvious similarity in the function and purpose of the two solutions, it did not appear from the patent claims that the inventor had perceived the possibility of using an entirely different material, and the intention was not to protect anything other than a spring.

Doctrine of equivalents in Poland

The doctrine of equivalents has been known in Poland for a long time. Although it is not governed by any specific regulation, it has developed through the literature and the case law. The case law on this topic from the Supreme Court and other courts is sparse. In the judgment of 3 February 1970 (Case II CR 615/69), the Supreme Court wrote that "an interpretation based on the doctrine of equivalents remains within the bounds defined by the patent claims, but interpreted not only in the light of the other elements of the patent document (description and diagrams), but also reflecting the knowledge and experience of a skilled person as of the date of filing of the invention." In a ruling issued on 9 November 2012 (Case I ACa 612/12), the Łódź Court of Appeal held that "an equivalent to a solution covered by patent claims is a solution in which the technical means specified in the patent claims is replaced by another creating the same (intended) effect as the patented solution, where for the average skilled person the use of this other (equivalent) means does not require a creative contribution, but is in essence a realisation of the concept contained in the patent claims."

So the Polish courts in the majority permit application of the doctrine of equivalents, but as can be seen from the passages cited above, how it can be applied may vary.

Arguments in favour of broader application of the doctrine of equivalents in Poland are also provided by the European Patent Convention (known as the Munich Convention), which Poland joined as of 1 March 2004. The provision of the convention on the scope of protection under a European patent is essentially the same as the corresponding provision of Polish law governing domestic patents. However, the protocol on interpretation of this provision gives valuable guidelines on how to understand it, expressly stating that in examining the scope of protection granted by a patent, any equivalents to elements specified in the patent claims must also be considered.

Summary

The doctrine of equivalents has been recognised in the legal literature and the case law for many years, and the need to follow it should not be doubtful. But the lack of a clear legal regulation generates controversy on the rules for applying the doctrine. The theories developed by scholars and judges fill this gap by indicating various possible criteria and methods for evaluation.

But this issue must always be analysed individually, in the context of the overall invention, reflecting the essence of the invention and the importance for the invention of the feature for which an equivalent is offered. This approach should ensure some flexibility in interpreting patent claims formulated in hermetic language. This guarantees real protection of patent rights while maintaining moderation, protecting other market participants against unjustified allegations of infringement and an overbroad patent monopoly.

Włodzimierz Szoszuk, adwokat, *partner, head of the Intellectual Property Practice*

Norbert Walasek, adwokat, *Intellectual Property Practice*

Outsourcing as a cross-border transfer of a workplace or part of a workplace

Dr Szymon Kubiak Wojciech Kuzmienko

Outsourcing continues to grow in popularity. Today there are not just cities but entire countries that attract outsourcing centres by offering competitive conditions, with low production and labour costs, becoming the "back office for the world." Offshore outsourcing—spinning off and moving abroad functions previously performed by an enterprise in-house, in its home country—generates many legal issues, particularly under employment law.

Transfer of a workplace is governed by the Transfers of Undertakings Directive (2001/23/EC), implemented in Polish law primarily through Art. 23^1 of the Labour Code. This provision is hugely important for the acquirer of a workplace, because the acquirer becomes a party to the existing employment relationships by operation of law. Directive 2001/23/EC applies to transfers in which the acquired establishment is located in the European Union or the European Economic Area. It specifies only the departure country, not the target country. Thus it is accepted (but not unanimously) that it also covers cross-border situations in which the transfer is made between an EU/EEA country and a third country.

When outsourcing is the transfer of an enterprise

Transfer of a workplace may occur under various legal grounds. The Polish and European case law leaves no doubt that outsourcing can also *de facto* constitute such a transfer. The Court of Justice of the European Union has laid down a series of criteria, now adopted as well by the Supreme Court of Poland, for assessing whether under the facts of the case there is a transfer of an undertaking. These criteria also cover outsourcing, and, as the practice shows, they have been applied in this context on numerous occasions.

A key judgment from the Court of Justice in this respect, also cited in the Polish case law, is the *Spijkers* case from 18 March 1986 (24/85). There the court held that to determine whether an undertaking, business or part of a business has been transferred, a catalogue of relevant circumstances must be examined, such as the type of undertaking or business, the sale of tangible and intangible assets, whether a majority of the employees are taken over, whether the customers are transferred, the degree of similarity between the activities before and after the transfer, and any suspension of activities. Examination of these criteria is commonly referred to as the *Spijkers* test.

Now there appears to be complete consistency in the line of case law from the Court of Justice and the Supreme Court of Poland, although for a long time there were discrepancies in this area that were significant and risky in practice. First and foremost, the Polish court did not give adequate weight to the criterion of maintaining the identity of the workplace or part of the workplace, focusing on the material aspect of transfer of the workplace. Indeed, it was held that the new employer need not conduct activity the same as or even somewhat similar to the prior activity. The decisive factor was rather the transfer of assets (see Supreme Court judgment of 3 June 1998, Case I PKN 159/98). Unfortunately, this approach survived after Poland joined the European Union, and in its judgment of 5 April 2007 (Case I PK 323/06), the Supreme Court held that the subject of the activity conducted by the new employer using the acquired assets is irrelevant to the scope of application of Labour Code Art. 23^1 §1.

The Supreme Court fully addressed the criteria from the *Spijkers* test for the first time in the judgment of 13 April 2010 (Case I PK 210/09). A complaint was filed by a legal adviser dismissed by a hospital when its in-house legal function was contracted out to an external law firm. That judgment should be regarded as favourable to the outsourcer (the hospital) and the supplier of the outsourced services (the outside law firm), because the claim by the dismissed legal adviser was denied.

The court referred to all of the elements of the *Spijkers* test, one by one, pointing out for the first time the issue of the identity in the types of enterprises and the activity they conduct. The court stressed that a hospital and a law firm operate in entirely different fields. The court also pointed out that the legal function was only an auxiliary subject of the hospital's activity, while the law firm provided legal services to other clients as well, apart from the hospital. Nor was the hospital's clientele taken over, since a law firm does not treat patients.

This judgment leads to the general conclusion that outsourcing, in the basic form of shifting auxiliary functions to an external service provider, will relatively rarely constitute transfer of a workplace or part of a workplace. However, the mere fact that auxiliary activity is spun off does not exclude it from being a transfer.

The *Spijkers* test is not everything

Fulfilment of the criteria from the *Spijkers* test is not sufficient to definitively determine that outsourcing should be regarded as transfer of a workplace. Practical aspects of the venture should also be taken into consideration, particularly in a cross-border context. Employees faced with changes in their cultural environment or the need to learn a new language may not be eager to move abroad (for family or personal reasons). Moreover, the change in the legal, economic and social realities on such a large scale may exclude a finding that the identity of the activity and the type of enterprise is maintained. It also may not be feasible to transport tangible assets over long distances, when it would be cheaper for the provider of outsourcing services to secure the appropriate infrastructure locally.

But from these aspects one should not leap to the conclusion that offshore outsourcing can never constitute transfer of a workplace. In the *Englischer Dienst* case, the appellate labour court in Hamburg held that the relocation of a press agency from Germany to Ireland constituted transfer of a workplace. The court admitted that

the great distance generally speaks against maintaining of the identity of the transferred enterprise, but in the case of the press agency the system used for processing and distributing information was more important than its location and not dependent on environmental realities.

Even more so, relocations within one country can be found to be the transfer of an enterprise. For example, in the judgment of the Court of Justice of 7 March 1996 in the *Merckx* and *Neuhuys* cases (C-171/94 and C-172/94), it was held that a change in the territorial range of operations of an enterprise within the greater Brussels area did not rule out a finding of transfer of an undertaking.

The criteria listed in the *Spijkers* judgment obviously do not represent the only correct method for evaluating the transfer of an undertaking, as pointed out by the Court of Justice in its judgment of 10 December 1998 in the *Ziemann* and *Hidalgo* cases (C-173/96 and C-247/96). There the court held that in labour-intensive sectors, a group of employees may in themselves constitute a freestanding economic unit undergoing a transfer, if it is a team of people regularly involved in the same activity and assigned to perform the same task. This position was fully approved by the Supreme Court of Poland in the judgment of 17 May 2012 (Case I PK 180/11), finding that when most of the employees in a labour-intensive sector (e.g. cleaning services) are not taken over, there is no transfer of the workplace.

But in sectors not based solely on the workforce, what is primarily relevant is use of the same infrastructure, even though the acquirer argues that there was no transfer because the employees were not taken over from the previous employer. This is what the Court of Justice ruled in its judgment of 20 November 2003 in the *Abler* case (C-340/01). These observations are also relevant in the context of outsourcing, which depending on the type of activity taken over may sometimes constitute the transfer of an enterprise or part of an enterprise, and other times not.

Another interesting issue is the possibility of transfer of an establishment between two providers of outsourcing services. This was addressed by the Court of Justice in the judgment of 11 March 1997 in the *Süzen* case (C-13/95). The facts there were based on two contracts for cleaning services concluded by a school, first with one company and then with another company. An employee dismissed from the first company argued that the business was transferred from the school's previous cleaning company to its new cleaning company. The court held that the absence of any contractual relationship between the two companies did not rule out the transfer of an undertaking, because it could be a two-step transfer involving an intermediary or third party.

The true reason for termination

The issue of cross-border outsourcing in the context of transfer of a workplace is vital, because under Labour Code Art. 23^1 §6 transfer of a workplace cannot be grounds justifying termination of an employment contract. Therefore it must always be examined thoroughly whether such a transfer has occurred. After all, outsourcing usually entails changes in employment, primarily a reduction in headcount and dismissals, which always require a statement of specific, real, true grounds justifying termination of the employment contract.

As the Court of Justice held in its judgment of 15 June 1988 in *Bork International* (Case 101/87), in order to determine that employees were dismissed solely because of transfer of the undertaking, the objective circumstances in which the transfer occurred must be considered, and more specifically the date of the dismissal (whether it was close to the date of the transfer) and whether employees were subsequently rehired by the acquirer. Sometimes the desire to reduce costs and focus on the core business of the enterprise may result in the transfer of a workplace in the guise of outsourcing, also potentially leading to terminations being conducted improperly.

Consequently, cross-border outsourcing may generate serious problems in the area of employment law. The great variety of decisions in the case law means that certain issues can only be flagged, because the specific determination will always depend on the given set of facts. Maintaining the identity of the acquired unit and the type of activity it conducts will be the main decisive factor.

A separate but very important matter is the choice of law and issues of the possible need to use amending notices or agreements with respect to the change in the location where work is performed in connection with the transfer—but that is a topic for another article.

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New era for personal data protection

On 17 December 2015, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs voted in favour of the proposed Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The draft adopted is the result of several years of legislative work, discussions among stakeholders, and weighing of competing priorities. The proposal is a point of departure for further legislative work and may undergo further modifications. Nonetheless, it gives a clear picture of the General Data Protection Regulation which is soon expected to become law. A major reform of the data protection system throughout the European Union is about to take place.

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When enacted, the General Data Protection Regulation, as it is known, will apply directly in the member states of the European Union, superseding the Data Protection Directive (95/46/EC) and its implementations in national law (in Poland, the Personal Data Protection Act of 29 August 1997).

In this article we highlight selected changes to be introduced when the General Data Protection Regulation is adopted and enters into force.

Scope of application of the regulation

The regulation is to apply to processing of personal data when the processing occurs in the context of the activity of a data controller or data processor based in the EU, regardless of whether the processing occurs in the EU. This means that it will be necessary in each case to analyse the factual circumstances under which the controller processes data.

The regulation will also apply to processing of data of entities from the EU by a data controller or processor based outside the EU, if the processing is connected with offering of goods or services (including free of charge) or observation (monitoring) of the behaviour of data subjects, if the monitoring occurs in the EU.

Data controllers and processors

The draft regulation addresses the requirements for entities processing data more specifically than the current law. For example, the controller is required to select an entity providing adequate guarantees of implementation of appropriate means and technical and organisational procedures so that processing of the data meets the requirements of the regulation. It also specifies the elements that must be established in the agreement between the data controller and the data processor.

According to the draft, a data controller, as well as an entity contracted to process data, may (optionally) appoint a data protection officer. The regulation also provides for situations where it is mandatory to appoint a data protection officer (e.g. in the case of entities processing data concerning criminal convictions). Controllers and processors are also required to ensure that the data protection officer is properly and in a timely manner involved in all issues which relate to the protection of personal data. As under current law, the data protection officer is to perform his or her duties independently. The data protection officer should not be given instructions on performance of this function, but should report directly to the management of the data controller or processor.

Notification of data protection breaches

The draft regulation imposes on data controllers an obligation that does not exist under current law to notify the supervisory authority (in Poland, the Inspector General for Personal Data Protection—GIODO) of a breach of personal data protection. The notification must be made without undue delay, but no later than 72 hours after the event. If this deadline is not met, the reasons for the delay must be explained. The notification must include, at least, a description of the nature of the breach, including the categories and number of data subjects potentially affected, the identity and contact details of the data protection officer or other contact point where more information can be obtained, the anticipated consequences of the breach, and the measures proposed or taken to minimise or eliminate the negative consequences of the breach. If complete information cannot be provided immediately, it should be supplemented when possible, along with documentation of remedial measures so that the supervisory authority can verify that they are proper and adequate. Data processors will be subject to a similar notification obligation in the case of a breach, but they should notify the data controller.

The data controller also has to notify the data subject of a breach of data protection, providing an understandable description of the breach, the potential consequences, and the remedial measures. This notice will be required only when the breach carries a high risk of infringement of the rights and freedoms of the data subject. The data controller will be released from the requirement to notify data subjects if it has implemented technological and organisational measures to protect the data affected by the breach, particularly by rendering the data unintelligible to third parties (e.g. through encryption), where the measures taken by the controller have eliminated the risks to the rights and freedoms of the data subjects, and where the notification of data subjects would be disproportionately burdensome to the contractor (in which case the direct notification of data subjects can be replaced by public announcements or other means with similar effect).

The obligation to report data breaches is a major change from current law. Now data controllers and processors do not have to disclose such events. Outside of the public eye, they make their own choice of remedial measures according to their capabilities. Any inadequacies or incompleteness in the solutions they adopt may only be identified in the event of an inspection by GIODO. The proposed model will ensure that in the event of a breach, the data controller will implement remedial measures in close dialogue with GIODO and under GIODO's supervision. This will reduce the risk that measures will be used that are not adequate to the nature of the breach.

Transfer of personal data outside the EU or EEA

The need to ensure an adequate level of protection in the country to which data are transferred is to be maintained.

The transfer of personal data to third countries without obtaining an additional permit from GIODO will still be possible in a situation where the parties have signed standard data protection clauses adopted by the European Commission. However, there is a stress on onward transfers, particularly in light of the clarifications by the Article 29 Working Party excluding the use of clauses for onward transfers when a data controller from the EEA concludes an agreement with a data processor in the EEA and the processor would then subcontract processing to an entity in a third country.

The draft also provides that data may be transferred on the basis of binding corporate rules, approved codes of conduct, and certifications (Art. 38 and 39) without additional permits, but there is also a delegation to establish procedures for the exchange of information among controllers, processors and supervisory authorities.

Under the draft, data may be transferred with the consent of the data subject, after the data subject is informed of the risks of such transfers. This could mean that existing transfers based on consent but without first warning the data subject of the risks cannot be continued.

It is unclear how the Commission will issue decisions on the adequacy of the protection in a third country, processing sector, or international organisation. While the wording of Art. 41 is clear, in light of the holding that the Safe Harbour decision was invalid, the mistrust in data transfer rules based on Commission decisions declared by certain NGOs (and even national data protection authorities) appears justified.

Sanctions for violating data protection regulations

The current law in Poland provides sanctions for violation of data protection regulations (for petty offences and criminal offences), but their application is typically limited to liability for a petty offence (not very severe), while it is exceedingly rare for criminal responsibility to be imposed (because the societal harm of the act is deemed to be low). Thus there is an absence of a proportionally severe sanction to be applied even in the case of small-scale violations.

This gap will be filled by administrative fines imposed by GIODO. The amount of the fines would reflect such factors as the nature, gravity, duration and consequences of the violation, the degree of fault, the infringer's responsibility for implementing proper technical and organisational measures, the remedial actions taken to limit or eliminate the negative consequences of the violation and cooperation with GIODO in this respect, previous violations, and the manner in which GIODO learned of the violation.

The maximum fine, depending on the nature of the violation, would be EUR 10 million or 20 million, or in the case of an enterprise, 2% or 4% of its total annual revenue in the preceding year. The member states are to adopt executive regulations concerning inspection proceedings and procedures for imposing and enforcing penalties, which should be proportionate but severe enough to act as a deterrent.

Data controllers and processors would also be liable (based on fault) for injury caused by unlawful processing of data. Any person who suffers material or non-material damage as a result of unlawful processing of personal data may demand compensation. The data controller's liability is limited to cases where it has violated the regulation, while the data processor's liability is limited to violation of the provisions of the regulation addressed specifically to data processors or for acting contrary to the data controller's instructions. The controller and the processor would bear joint and several liability for the same occurrence, but could assert claims for recourse between one another.

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