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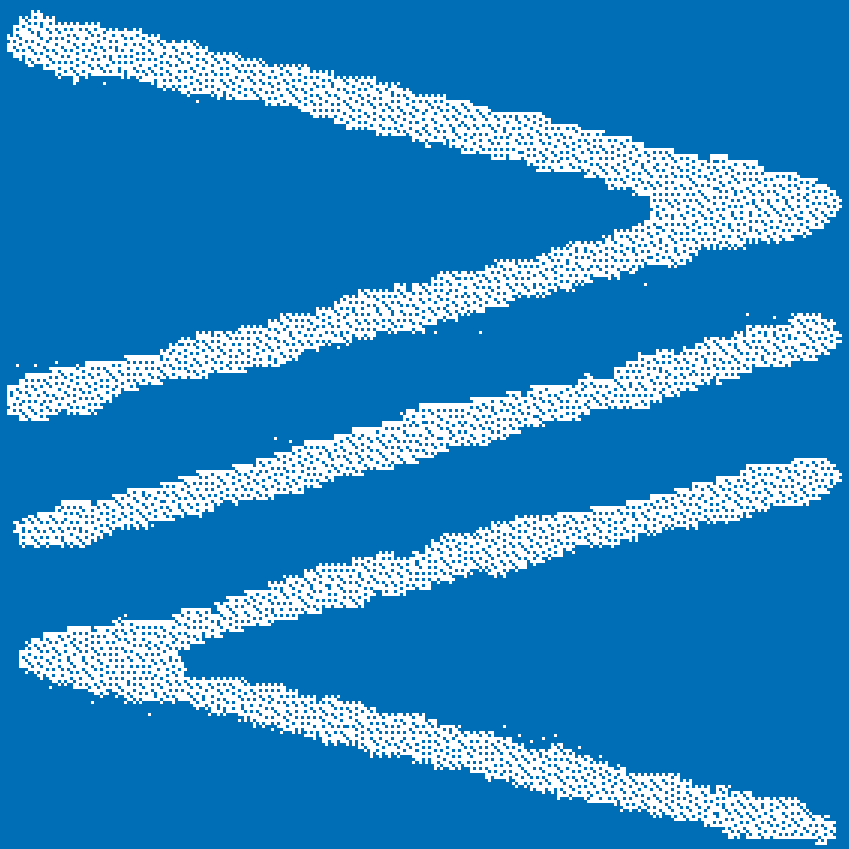

Disputes

This publication was prepared by the team from the Dispute Resolution & Arbitration practice at Wardyński & Partners.

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What do people fight over?

Tomasz Wardyński talks to Justyna Zandberg-Malec

What do people fight over?

Anything that is important to them. In cases that may end up before the courts, they fight over the rights they hold. Unless the dispute arises from obvious fraud, when someone only pretends, or doesn't even pretend, to be exercising some kind of right. Such situations are generally handled by the criminal law.

Where there is a legitimate dispute, both sides maintain that they are acting in defence of some right of theirs. And most often that is indeed the case. The problem is that parties tend to interpret their own rights expansively and minimise or ignore the opponent's rights. The rights of different people, arising under the law or out of contract, clash, and it must be determined how to reconcile their rights and combat abuses. This is the lawyer's task.

When clients come to a lawyer, do they know what they are truly fighting over?

The client usually knows how the dispute arose. But when the client comes to the lawyer, the dispute has usually blown up to towering proportions and the parties no longer remember the essence of the dispute. The lawyer needs to decipher this, find the centre of gravity in the process, and focus the argumentation there.

It is entirely natural that parties whose rights and vital interests are threatened will fear one another. So to increase their psychological sense of safety, they proliferate arguments against the other side, whether meritorious or not. Often these are purely emotional arguments. Even when a big corporation is involved, it is people taking part in the dispute. The task of the legal professional is to bring this under control.

So the point is to trim back the dispute, stripping it of unnecessary branches?

To simplify the pieces. To frame the dispute and make the client aware what is truly essential. Then, in cooperation with your colleague representing the

opponent, to try to limit the dispute to the necessary minimum and resolve it in as amicable an atmosphere as possible.

What if the client is not right or has no chance of success in the dispute? Should the lawyer say so?

It rarely happens that the client is entirely wrong, but typically they overestimate their rights and their chances at trial. This is why the advocate must be the first judge in the case. The advocate must enlighten the client on what they can realistically fight for, so the client can assess whether the game is worth the candle.

Sometimes it may prove that the best solution is to abandon the dispute, or even to refrain from defending one's own rights. In the economic balance this may be the best option. Particularly in commercial disputes. In such cases it is sometimes the best solution to step back and focus on your enterprise instead of pursuing courtroom battles. A commercial dispute is an investment, and must generate an adequate rate of return. The return must be higher than other investments which the means necessary for the litigation could be devoted to instead.

How do clients react when their lawyer tells them it would be better to back off?

I think they handle it very well. Of course the advocate cannot take that decision for the client. Nonetheless, the advocate must provide the client with all necessary information, including information about the chances and the anticipated costs of the litigation. In practice this can indeed take the form of warning the client against joining issue in the dispute. This requires experience and a certain life wisdom. At first the client will often chafe and protest, but quickly realise that a lawyer who can advise them in this manner truly does have their best interest at heart.

What if the client has already sunk so much into the dispute that they want to fight it out to the bitter end?

That also happens. That's why a basic ethical obligation of an advocate, before joining a dispute with the client, is to present to the client a plan for action and resolving the dispute, as well as the costs the client must expect to pay.

If the lawyer is hired when the litigation is already underway and the client has invested a lot in the dispute, the client should be made aware of the chances for success. In the case of businesses, this must always be an economic account. Usually we are dealing with individuals who are responsible for managing

the advocate must be the first judge in the case

other people's money. They have a duty to act in an economically justified manner, and they can be held liable for failing in this duty.

But sometimes the parties lose sight of the economic account. After all, their vital interests are in play, so emotions are entirely natural. But emotions can be blinding and interfere with cool calculation.

This is why, between the two conflicted and emotional parties, the law places two advocates, who first must know how to separate those emotions and second must be professional colleagues. This is their obligation, to attempt to resolve the dispute collegially when their clients cannot do so because they are operating under the influence of emotions. The lawyer's task is to hold down the costs of the conflict and bring about a resolution that is as constructive as possible.

Can such a timetable and financial plan be precisely established?

It can be established just like the timetable for construction of a bridge. It can never be anticipated with 100% certainty how many rainy days there will be during the summer or how low the mercury will drop in the winter. Nonetheless, engineers are expected to estimate how long construction will last. Someone has to do it, and no one is better situated to do so than they are. Similarly, a lawyer cannot guarantee anything but should be capable of carefully estimating the cost and timetable of the litigation. No one else can do this better for the client.

Which stage of conducting a case is the hardest, the most tedious, the most demanding?

Obviously the very beginning: clarifying the matter, reducing the fractions, separating the wheat from the chaff. First determining what happened and what is truly relevant, and second how it can be proved to the court that this was actually the case. The most work is thus done at the start, and it must be done as quickly as possible. The whole art is knowing what you're sitting on before you open your mouth in the dispute—so that when you do speak, you won't need to retract anything.

In such a well-prepared dispute, do surprises ever happen? Is anyone ever thrown completely off-guard by what the adversary has prepared?

As we know, no battle plan survives contact with the enemy. Of course surprises do happen, but the point is to hold them to a minimum, and when

they do happen, to have a plan that can be adjusted to the new situation and continue acting with forethought.

How important is clear communication in the dispute—with the court, with the client?

Clear communication is most important, because an advocate is first and foremost a communicator. First the lawyer must communicate with the client on what the case is about, and then must communicate the client's position persuasively to the court, translated into the language of rights and obligations. Clear communication in the broad sense of this word is the foundation of a trial.

Do you see any clear trends from the perspective of the past 30 years of practice?

On one hand a great deal is changing, but on the other hand nothing is changing. In the economy obviously an absolute revolution is underway due to new technologies. They are also turning aspects of the functioning of societies upside down.

This is rendering regulations obsolete, and lawmakers cannot keep up in the production of new regulations. But the principles and values giving rise to those regulations remain unchanged.

The trend is thus that everything is changing at the level of the regulations. This puts a huge premium on the skill of understanding the principles and interpreting them to develop specific solutions. Because in a changing reality, someone who only knows the wording of the regulations is completely lost. A lawyer today must be able to think in categories of fundamental principles and values.

A good example is what is happening in contract law. The Polish Civil Code is very good, particularly the general section, but the detailed section, governing various types of contracts, is largely out of touch with the current reality. Contract models are changing rapidly, and contracts that were once distinct types now function jointly. Commerce is increasingly based on new business models, and thus new types of contracts, often complex contracts combining elements of contracts that once functioned separately. To understand and justly resolve disputes based on such contracts, we cannot unthinkingly apply to them the detailed provisions tailored to the specific types of contracts that predominated in commerce once upon a time. It is necessary to return to general principles, to ponder the nature of the contract, its economic aim.

empathy is
a condition for
proper functioning
of lawyers

Then you will find that indeed there is nothing new under the sun. The new commercial and economic reality cannot disorient someone who thinks in terms for example of the European Convention on Human Rights. Because everything is there. Everything can be deduced from those few articles—notwithstanding technological innovations, political changes, changes in the structure of state institutions. Today a good lawyer is a lawyer who can think in these terms.

What is the future of disputes? Will they be resolved by algorithms?

I don't believe so. In the case of some disputes that might be possible. There are disputes where the need for a quick and cheap resolution outweighs the need to follow the exact procedures. In such cases even a coin toss could be a better solution than a traditional trial. And perhaps such disputes can be resolved for us by algorithmic intelligence. But also of course employing certain safety valves. Even small and simple cases can gather mass and grow into serious cases demanding reflection and empathy. And that's not something an algorithm can provide.

In the case of disputes where truly important interests are at stake, and real human injury, we cannot permit the dehumanisation of the decision-making process. And this is a real risk, because people seek to evade responsibility. We faced a similar phenomenon in the case of the crimes committed by totalitarian systems, where technology was used primarily to eliminate the human factor from the procedure, and its characteristic sense of responsibility for the decision and feeling of guilt. In such situations, the brakes come off. Resolution of important disputes must always remain the realm of the empathetic human being.

What need does a lawyer have for empathy?

It is a condition for proper functioning of lawyers, as well as social trust in the system of applying the law. It is thanks to empathy that a sense of justice exists, and that law is not reduced to procedures. The blindfold worn by Themis as she holds the scales of justice does not mean that we should be blind to human conditions, observation of which is essential for a proper verdict on who has suffered injury, and what kind of injury.

Obviously such empathy must be combined with a proper understanding of our own mission and role in the process. I understand empathy to mean the skill of entering into a sense of the other person's situation.

The lawyer must first sense the situation of the lawyer's own client, in order to be engaged in defending the client's rights. But we must not become

the client emotionally. The lawyer must be capable of distancing from the emotions steering the client—being intellectually independent.

Second, the lawyer must be empathetic to the client's opponent. The advocate is not there to conduct disputes, but to resolve them. Of course, the lawyer must always act in the just interest of the client, but if possible it is in the client's best interest to achieve an amicable solution. And that can only happen when the lawyers on both sides have empathy not only for their own clients, but also for their adversaries.

Third, empathy for the court is essential. Lawyers must know how to put themselves in the judge's place and consider how they can help the judge resolve the dispute. The lawyer must make it easy for the court to resolve the case, while ensuring that the resolution is as favourable as possible for the lawyer's own client. This is what effectiveness as an advocate is all about. And the court itself must be empathetic so that its resolution does not cause harm.

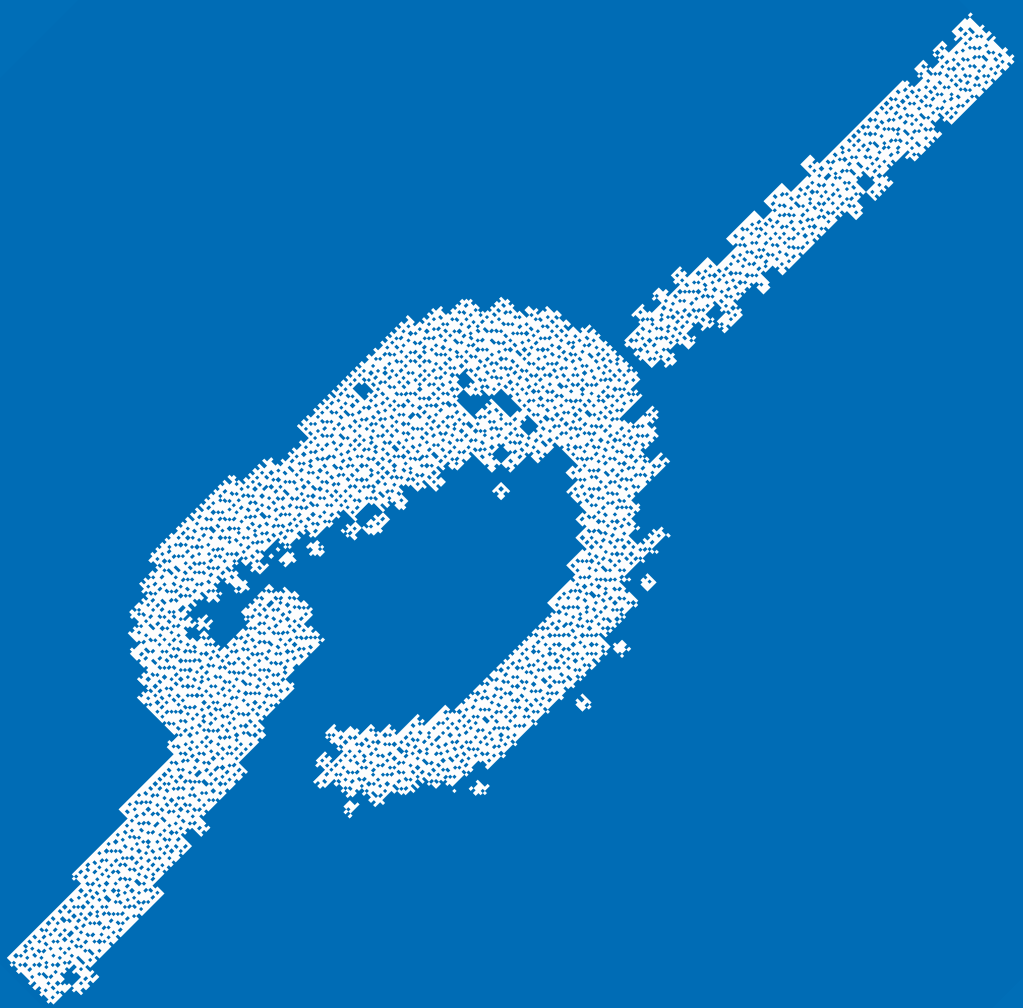
After so many years of practice, do you still come across interesting cases?

In litigation, there is no such thing as an uninteresting case. Every dispute that is a true dispute, and not just a misunderstanding, is in some sense a conflict of values. Even in a dispute over a carrot the question arises of what is just in the given situation. And that is always an interesting question. Sometimes issues repeat, but only superficially, because the stories are always different. If we devote adequate time and attention to the case, it will turn out that either there is nothing to fight over in the case or that the case requires an answer to some fundamental question.

But sometimes the case cannot be pursued in a way that provides satisfaction. This is because economy requires standardisation of the procedure for resolving the dispute, thus expediting the procedure and reducing costs. This is the area where technology will relieve us. But thanks to that, we gain time to handle matters where the conflicting interests of the parties are important enough to justify the investment of our time and means. Technological development and the revolution it has engendered in socio-economic relations mean that there will be only more and more such cases.

Tomasz Wardyński
adwokat, founding partner

Interview conducted by Justyna Zandberg-Malec



Jan Ciećwierz

A case with a history

After 30 years we can point to some of the cases that have brought us the greatest satisfaction. For me it was a case that was ongoing from early in the firm's existence.

The star of this case is the manor house in the village of Obory, near Konstancin-Jeziorna south of Warsaw, which before the war belonged to successive generations of the Potulicki family. The history of the estate reaches back to the 17th century, but its modern history is the most interesting and is unfortunately inseparable from legal tussles and courtroom battles. We pursued these disputes for our client Teresa Potulicka-Łatyńska, who was driven from her family home there in 1944.

The house was seized by the State Treasury in reliance on the Agricultural Reform Decree issued by the Polish Committee of National Liberation on 6 September 1944. In the early 1950s the estate was turned over to the Polish Writers' Union for its use. As Monika Żeromska recalls in her memoirs:

> Again I turned to painting portraits. A large portrait of [composer Andrzej] Panufnik was quite good. He was living then at Obory, which had just been opened as a retreat for the Polish Writers' Union. I was there for the inauguration. The interiors were furnished with splendid antiques. The huge stuffed bear that had once stood in the vestibule running from the main entrance to the terrace was gone. There were frenzied crowds, a sumptuous buffet, and cocktails. As [writer Jarosław] Iwaszkiewicz began his longwinded speech, 'Ladies and gentlemen, allow me to share with you the story of how the writers' retreat came to be...,' [writer Antoni] Słonimski interjected: 'What are you saying? You simply stole it from the Potulickis.'[1]

Proving the terse legal opinion voiced by Słonimski would take our firm's lawyers 22 years of hard work.

1 *Wspomnień ciąg dalszy* (Memoirs continued), Czytelnik, Warsaw 1994, p. 258

Cottage-industry beginnings

It began in 1995 in the flat in a villa on ul. Przy Skarpie which housed our firm's real estate department. The firm's main offices at the time were in the Artichoke Palace at Al. Ujazdowskie 10 (now home to the Lithuanian Embassy). I was in my second year as an *adwokat* trainee and my mentor was *adwokat* Wiesław Szczepiński. It was he who made the original decision to take on the problem of recovering the estate in Obory.

I sat at a small desk. The fax machine clattered away alongside, spitting out reams of paper. At the time it was the only known form of transmitting documents, apart from the Polish Post. I wrote up my first analysis on a computer that functioned solely as a word processing terminal. I remember my constant struggle with WordPerfect 2.0, where it took a combination of two or three keyboard strokes to generate each of the special Polish characters. It was still an improvement over the first Polish word processor, TAG.

In those days lawyers wrote out their timesheets by hand and turned them in to accounting, where the bills were then drawn up—how they did it remains a mystery to me. It took weeks to wait for justifications for judicial rulings to return, transcribed, from the courts' typing pool.

The work of lawyers, free of the agitation of constantly checking emails or taking cell-phone calls, flowed in a bucolic rhythm, allowing absorption in legal analysis. But this wasn't so easy in the day when indexed collections of case law and commentaries were not just a mouse-click away. Peregrinations through libraries were required, or appeals to the knowledge and memory of the partners or senior lawyers. One of the finest venues for legal research was the canteen at the courthouse at al. Solidarności 127 in Warsaw. You could learn just about anything by grabbing a seat with the advocates, and sometimes judges, as they debated abstruse legal issues.

I should point out by the way that in the early 1990s the Warsaw courts—from the district courts for each of the boroughs up through the provincial trial and appellate courts, the court of appeal, and the Supreme Court—all still fit in one building. Now the same courts are spread throughout the city in a dozen different locations.

It was under these conditions that the first study was done finding that it was possible to follow the procedure provided for in the executive regulation to the 1944 Agricultural Reform Decree to demand the return of palace and park property taken by the State Treasury not in compliance with the decree.

Practice developed on the fly

The legal issues forming the foundations for a claim to recover such property essentially boil down to showing that the portions of the land seized under

the decree not functionally connected with the land used for conducting agricultural activity were not subject to the operation of the Agricultural Reform Decree. Such portions of the property included palaces and parks exclusively serving the residential needs of the landowners.

Today this assertion seems obvious to Polish lawyers. So why did it take 22 years to get back the manor in Obory? History is to blame.

The social and economic transformations that occurred in Poland between 1945 and 1989 drove deep wounds into property conditions, stripping most of Polish society of ownership rights. The dictatorship of the socialist ideology during that period also stagnated the evolution of the law protecting the rights of the individual against unjustified acts of expropriation. When they took on the case of recovering the manor in Obory, the lawyers at our firm did not have at their disposal the commentaries and case law available today, and had no established practice to rely on. We had to forge this practice and case law ourselves by pursuing isolated views as they appeared in the rulings issued by the Polish courts. The rulings were far from consistent.

Discrepancies in authority

Over the course of 22 years, the Supreme Court of Poland and the common courts addressed several times the topic of the state courts' authority to evaluate the consequences of the operation of the Agricultural Reform Decree. This led to recognition that the common courts could rule on claims for delivery of possession of real estate taken by the State Treasury in a manner inconsistent with the 1944 decree, without waiting for completion of parallel administrative proceedings pending simultaneously.

By contrast, the administrative courts took the view that ruling on whether a given property or portion of it had passed to the State Treasury pursuant to the Agricultural Reform Decree lay within the exclusive power of the administrative authorities.

The Constitutional Tribunal did not resolve this discrepancy in authority. While it did express the position giving the common courts exclusive jurisdiction to assess the effects of operation of the Agricultural Reform Decree, it did so only in orders, rather than judgments with the force of shaping provisions of law. A crack opened when administrative authorities began to fall in line with this legal view stated in rulings by the Constitutional Tribunal ranking lower than judgments, and consequently started discontinuing administrative proceedings pending before them.

This action by the administrative authorities and acceptance of the Constitutional Tribunal's view provoked, in turn, a response from the Supreme Administrative Court, which twice gathered *en banc* and issued resolutions

holding that ruling on the effects of operation of the Agricultural Reform Decree lay exclusively within the administrative route.

The view of the Supreme Administrative Court was ultimately recognised as controlling in the rulings of the common courts and the Supreme Court. This meant that any proceedings for delivery of possession of real estate, or to reform the land and mortgage register to reflect the true legal status of the property, had to be stayed until legally final completion of administrative proceedings determining whether the property or a part of the property could pass to the State Treasury by operation of law on the basis of the decree.

This summary of how the case law of the common courts, the Supreme Court and the administrative courts developed fits into just five paragraphs, but covers over a decade of real time. And over those many years of simultaneously conducting a civil case for delivery of possession of the estate at Obory and an administrative proceeding, every now and then (that is, every two to five years) one of these proceedings was stayed in order to take up the other one. Meanwhile, it was also necessary to introduce the same evidence before the court and before the administrative authority.

Finally in 2013 the administrative proceeding ended in the issuance of a legally final administrative decision finding that the palace and park property in Obory near Konstancin-Jeziorna was not subject to the operation of Art. 2(1)(E) of the Agricultural Reform Decree of the Polish Committee of National Liberation of 6 September 1944. Thus title to the property was confirmed.

Then the State Treasury sought to prove that it had acquired ownership of the palace and park property in Obory through prescription. Here history came to the rescue—the life history of our indomitable client.

Evidence from files of the Institute of National Remembrance

Teresa Potulicka-Łatyńska comes from an aristocratic family which had cultivated patriotic and independence-minded traditions for hundreds of years. During the Nazi occupation she belonged to the Home Army (pseudonym Michalska). In 1944 she was involved in the Warsaw Uprising as an orderly of the Wigry scout battalion, taking part in battles in the Old Town and Śródmieście. After the uprising was crushed, in retaliation for the children's involvement in the uprising the entire Potulicki family were evicted from the Obory estate by the Nazi army. Nor could they return to their property after it was occupied by the Red Army. In 1945 Teresa was living with her mother in Konstancin-Jeziorna when they were visited by a representative of the Office of Public Security (UB), who declared that they were prohibited from approaching the Obory estate.

As an aristocrat and an insurgent in the Warsaw Uprising, Teresa Potulicka-Łatyńska was deemed to be an enemy of People's Poland and together with her family was placed under strict monitoring by UB. In 1950 she was arrested by UB without any grounds.

After the war she married Marek Łatyński. In 1967 the couple took a journey to Italy with their daughter but were denied re-entry to the Polish People's Republic (their passport file is noted, "Betrayal of the Homeland—return to country refused").

In 1968 they began working for the Polish section of Radio Free Europe. Marek Łatyński, broadcasting under the pseudonym Michał Suszycki, was one of the main commentators on domestic politics and later also director of the Polish section.

After their escape from communist Poland, the couple were the subject of a joint operational inquiry by the Security Service (SB) of the Ministry of Internal Affairs (Division VIII, Department I). The aim of "operation Fidelis" was for SB to enter into an operational dialogue with them and recruit them. As the couple would not budge, operation Fidelis was wound up in 1977 with a finding that "the case offers no prospects for recruitment."

This difficult life story proved to be grounds for finding that during the era of the Polish People's Republic, through 31 December 1989, our client could not in any manner effectively enforce her rights as owner of the palace and park property at Obory. After all, no courts or administrative authorities in communist Poland would take any action to restore seized palaces to aristocrats who had fled to the West to become involved in activities aimed at the overthrow of the communist regime.

Epilogue

Finally, on 24 November 2017, Teresa Potulicka-Łatyńska once again crossed the threshold of her family home, 73 years after being driven out by the Germans. I am proud to be one of the large group of lawyers at our firm who saw to it that justice was served in this case.

Jan Ciećwierz
adwokat, partner, Dispute Resolution & Arbitration practice

Paweł Mazur
Maciej Zych

Internationalisation of Polish civil procedure, yesterday and today

The transformations in the political and economic system in Poland following 1989, accession to the European Union, and integration of the Polish economy with the global market have impacted numerous areas of law, including civil procedure regulations.

Comparing the Civil Procedure Code from 1989 with its current shape, we can boldly say that Polish civil procedure has undergone a deep transformation in its fundamental tenets and in specific mechanisms, adopting a range of solutions from Western legal systems.

Below we outline some of most interesting and important aspects of this process over the last 30 years as well as the prospects for further changes in the not-too-distant future.

Trial in the parties' hands

One of the first but also deepest and now somewhat forgotten changes in Polish civil procedure in the last quarter-century was the switch from the inquisitorial principle, which was in force for the entire post-war era up until 1996, to the adversarial principle.

Under the inquisitorial principle, the court had the burden of clarifying the circumstances of the case. The parties did have the right to offer evidence, but the parties' failure to exercise that initiative generally could not result in imposition of negative consequences on them. Conversely, the court's failure to seek out evidence could be grounds for appeal. In many respects this was comparable to the model still followed in criminal trials and in administrative proceedings.

The inquisitorial principle was introduced into civil procedure after the war following the tenets of the socialist system (the primacy of the public interest).

In this sense the Polish regulations at that time represented a departure from universal international standards in democratic states.

This state of affairs ended under the amendment of 1 July 1996, which first and foremost repealed Civil Procedure Code Art. 3 §2, which imposed on the court the duty to apply its own efforts to "thoroughly examine all relevant circumstances of the case and to clarify the actual content of the factual relationships." A number of other regulations were also amended concerning the admission of evidence, stripping the court of the authority to order an investigation into the circumstances of the case (Art. 232).

Since then the burden of proving their assertions has truly rested on the parties. Consequently, the parties themselves are responsible for the course and result of the trial, and the court is now only a referee weighing the parties' arguments. This means that civil trials are truly adversarial, as has been the case for many years in Western countries.

Integration with the EU judicial system, and more

Undoubtedly the greatest "external" source of changes in Polish law was EU accession, which entailed adoption of the extensive legal order of the EU and participation in further integration of the legal systems of the EU member states. In the area of civil procedure this mainly involved the rules for national jurisdiction and recognition and enforcement of foreign rulings.

Originally, the rules for national jurisdiction of the Polish courts and for recognition and enforcement in Poland of foreign judgments were mainly set forth in Part Five of the Civil Procedure Code. These rules, which had remained unchanged for half a century following adoption of the code, gradually became outdated and inadequate to the needs of contemporary international commerce.

For example, a Polish court would have jurisdiction if at the time of service of the statement of claim the defendant was present in Poland, and thus potentially if the party's presence in Poland was short-term or even incidental. On the other hand, in recognition and enforcement of foreign rulings, a highly conservative rule of reciprocity was applied, understood to mean that a foreign ruling could be recognised (or enforced) in Poland only if the state in which it was issued recognises and enforces Polish rulings. In practice this generated many problems (such as the necessity to determine foreign law) and exposed the interested parties to the risk that the ruling they had obtained would prove useless in Poland for reasons entirely outside their control. Meanwhile, the benefits from the rule of reciprocity were negligible, as no other state would change its own law for this reason.

The procedures for recognition and enforcement of foreign rulings were also quite rigorous. They both relied on the requirement to prove the nonexistence of a number of grounds (so-called "negative proof"), such as that the party was not deprived of the opportunity to defend its rights and—in an extremely protectionist solution requiring a deep analysis of the merits of the case—that Polish law was applied when the case was subject to Polish law.

This state of affairs began to change before Poland joined the EU when the country joined the Lugano Convention,[1] which extended rules on jurisdiction (different from the Polish rules), as well as mutual recognition and enforcement of rulings in force between EU member states, to member states of the EFTA and, as an exception, also to other countries. Poland took advantage of this exception, and the convention entered into force in Poland in 2000, four years before EU accession.

The Lugano Convention eliminated irrational grounds for jurisdiction, adopting instead as the foundation the classic link of the defendant's place of domicile (or seat in the case of legal persons), and first and foremost rationalised and liberalised the rules for recognition and enforcement of rulings from EU and EFTA member states in Poland (and vice versa).

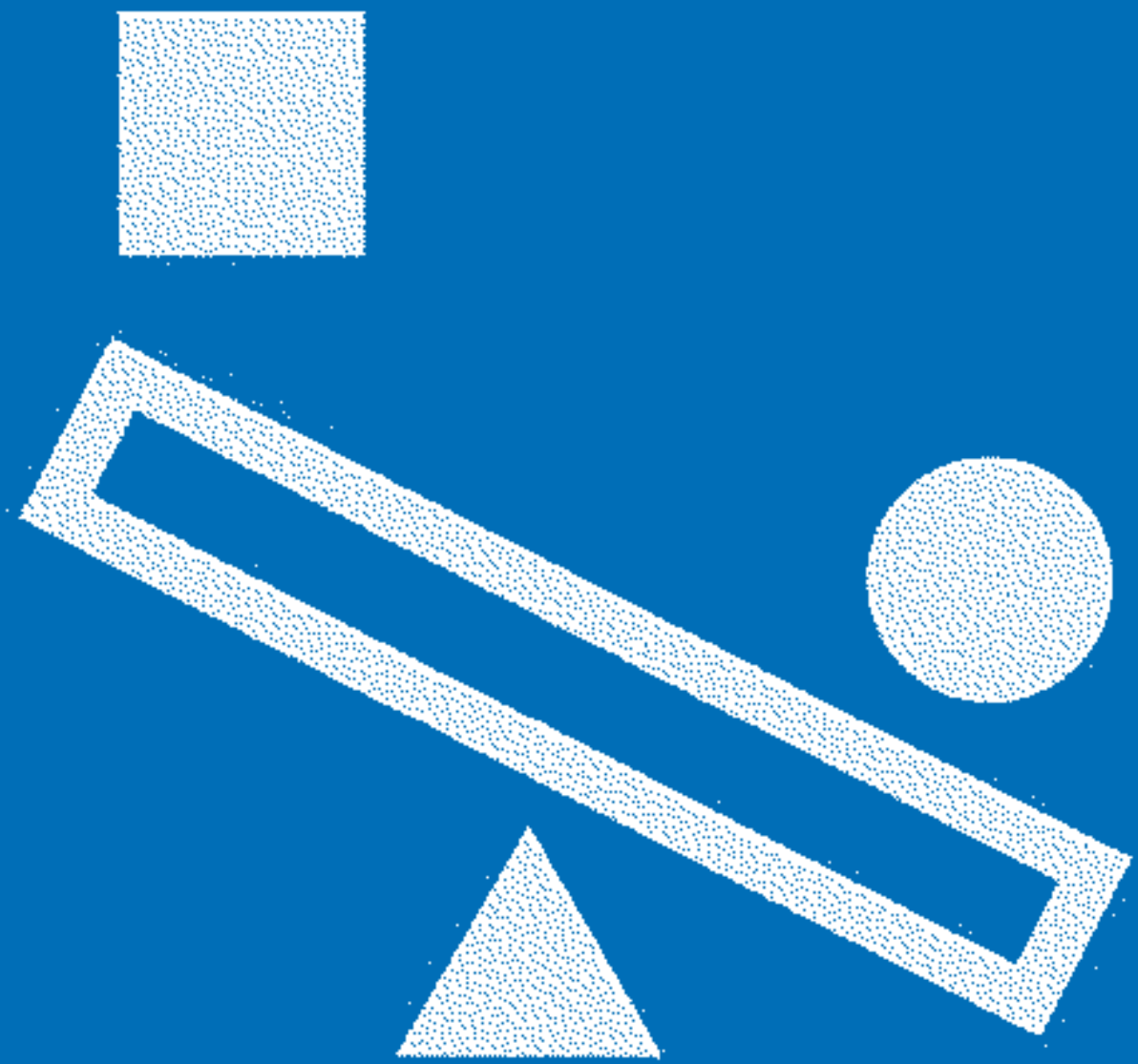
In practical terms, adoption of the Lugano Convention expedited the changes that otherwise would not have been introduced until Poland joined the EU. This is because the wording of the Lugano Convention was generally copied from the Brussels Convention,[2] in force between EU member states, which in turn was used as the basis for later EU regulations governing this subject matter, known for this reason as "Brussels I" (44/2001) and "Brussels II" (2201/2003).

Although the Lugano Convention and the later Brussels regulations are generally binding only in cases involving parties connected with the EU, they inspired changes to Part Five of the Civil Procedure Code applying to all other instances. In 2008 solutions were introduced into the Polish code largely tracking the wording of the Lugano Convention and the "old" Brussels I Regulation. Among other things, the requirement of reciprocity for recognition and enforcement of rulings from outside the EU was abolished.

To conclude this topic, it should be added that the recent "recast" Brussels I Regulation (1215/2012) even more deeply liberalised the rules, eliminating entirely the separate procedure for enforcement of rulings in other member

1 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988

2 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968



states. Now they are submitted directly to the bailiff for enforcement, as with Polish rulings. This is an example of a very deep "internationalisation" not only of the procedure in force in Poland, but of the entire justice system.

Opening up to non-judicial methods of resolving disputes

Major changes in Polish civil procedure inspired by foreign solutions have also involved an opening up to alternative dispute resolution methods popular abroad for many decades, particularly in commercial cases, namely arbitration and mediation.

In fact, Poland had been a party to key international arbitration instruments since the 1960s, namely the New York Convention[3] and the European Convention,[4] and the original version of the Civil Procedure Code from 1964 included provisions on arbitration. But, as in the case of the provisions on civil trials, they were drafted for the needs of the communist state of that time, and after the Polish economy rejoined the global commercial system they did not fully fit the relevant standards.

Certain adjustments were introduced in the 1990s, but the true "arbitration revolution" did not occur until 2005, when the existing arbitration regulations were repealed and replaced by a new set of rules based on the UNCITRAL Model Law on International Commercial Arbitration of 1985.

Apart from a general tidying up of the regulations and clarification of numerous issues, the amendment to the Civil Procedure Code introduced a number of serious changes and new solutions. A major step toward modern arbitration was recasting the grounds for setting aside arbitration awards in a manner limiting the possibility of review of awards on the merits by the state court. The possibility for the arbitral tribunal to grant interim relief was provided for, along with the possibility of reducing a settlement agreement to the form of an arbitration award, which is particularly useful for the purpose of enforcement of awards in other countries on the basis of the New York Convention.

There may be doubts as to the wisdom of certain departures from the Model Law adopted by Polish lawmakers, such as the absence of rules for establishing of the governing law by the arbitral tribunal (Civil Procedure Code Art. 1194 §1), the wording of certain grounds for setting aside awards (Art. 1206), or the ban on asymmetrical arbitration clauses, which are commonly used in international commerce (Art. 1161 §2). Nonetheless, adoption of the Model

3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958

4 European Convention on International Commercial Arbitration of 21 April 1961

Law should be regarded as a correct step, bringing Polish law closer to foreign standards. Unfortunately, it can be said from the perspective of time that it has not brought about increased popularity of arbitration in Poland, particularly in domestic commercial dealings. (We write more about arbitration at page 53.)

The other ADR method introduced into Polish civil procedure, also in 2005, was mediation. Common in many Western countries, mediation allows disputes to be resolved before suit is filed or at an early stage of litigation, greatly unburdening the court system, which is particularly important in complex and time-consuming commercial cases. Unfortunately, as in the case of arbitration, it is apparent that the progress in popularising mediation has so far been quite modest. (We write about mediation in public administration at page 61.)

Class actions and private enforcement

Foreign inspirations and the influences of European law have also led to introduction of new procedures in Polish trials. Leaving aside procedures directly implemented through EU regulations in order to integrate the justice system in the member states (such as the European payment order, the European small-claims procedure, and the European order for attachment of bank accounts), the most interesting instances of such procedures are class actions and private enforcement of antitrust law through civil damages.

Class actions derive from the United States, where for years they have functioned very effectively, greatly strengthening the position of private individuals (particularly consumers and employees) in disputes with corporations, forcing them to make certain concessions and protect consumers' interests more diligently (hence, for example, the extensive or even overdone warnings on products or in terms and conditions). The core of class actions is the concept of a group or "class" of plaintiffs covered by the suit. Under American law, the class is defined by specifying criteria for membership in the class, which essentially enables all persons meeting those criteria to take advantage of the judgment or settlement, regardless of whether they were actually involved in the litigation. However, the American model was not entirely reflected in the Polish act adopted in 2009.

Without entering into a detailed critique of the solutions adopted in Poland, it should be pointed out that the Polish act unfortunately suffered from a number of defects imposing additional barriers (apart from the novelty of the procedure) to the effective conduct and spreading popularity of class actions. These problems primarily involved the key procedure of formation of the class, which was greatly prolonged and sometimes derailed the whole process from the very start. Despite these formal problems, there is still a great

deal of interest in this procedure, for example in high-profile cases seeking damages for flood victims, or claims by holders of savings insurance policies or home mortgage loans denominated in Swiss francs. This shows that this instrument still has growth potential and can play a greater role in the Polish system. Perhaps such growth will be spurred by the recent amendment of the regulations (in 2017) implementing current recommendations of the European Union and addressing some of the most nagging practical problems.

The Act on Claims for Redress of Loss Caused by Infringement of Competition was adopted in Poland in 2017 as a result of EU regulations, permitting private enforcement of public-law competition rules normally enforced by the Office of Competition and Consumer Protection (UOKiK) or the European Commission.

A new feature introduced by the private enforcement act is the possibility for the court to issue an order at the plaintiff's request (the defendant does not have this right) requiring disclosure by the defendant of evidence concerning facts relevant to the case. This measure is sometimes compared to discovery or document production typical for common-law jurisdictions, requiring the parties to exchange all relevant evidence, but the solution adopted in Poland more closely resembles that previously provided for in Civil Procedure Art. 248 §1, under which the court could order a party to produce a specific document in its possession. Under the new Polish act, the plaintiff must identify the evidence in question "as precisely as possible." Thus the plaintiff cannot demand general categories of documents which might prove useful in pursuing its claim.

Nonetheless, the act introduced a number of mechanisms facilitating the implementation of this entitlement. First and foremost, an order to disclose evidence takes the form of a court order constituting an enforceable title, which therefore can be executed with the assistance of the bailiff. An additional incentive for the defendant to turn over the evidence is the threat of charging the defendant the entire costs of the trial in the event of unjustified refusal to disclose evidence—regardless of the result of the trial. Such compulsory measures for evidentiary purposes are a new feature in Polish civil procedure.

Practice doesn't keep pace with regulations

This overview of the transformation of Polish civil procedure under the influence of international standards and foreign models shows that formally the Polish regulations have grown ever closer to those applied elsewhere, drawing extensively on the experiences of other countries, while not differing significantly if at all from the procedural regulations in force in other developed countries. It can be said without exaggeration that huge

progress has been made in this area over the past few decades, although the evolution of these changes is not always perceptible or appreciated.

At the same time, the description of these few selected examples of the "internationalisation" of Polish procedures shows that amendment of the regulations in itself does not always generate the desired practical effects. Plainly, the practice is shaped not only by the legal community, but also (and perhaps primarily) by other factors, such as the habits and customs of the authorities and the parties, the general legal culture of the society, or, even more broadly, the level of social capital, which remains low compared to Western societies and especially impacts the willingness to resolve disputes amicably. It is impossible simply to decree changes in entrenched practices, no matter how harmful, or enthusiasm for new solutions, no matter how beneficial. But obviously this does not bar the justified hope that in the longer term, laws based on good models may bring this about. In this respect, "internationalisation" makes sense.

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it is impossible to decree enthusiasm for new solutions, no matter how beneficial

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The future of commercial dispute resolution

After three decades of resolving commercial disputes, we may debate how the nature of commercial cases has changed over that time. But it may be more interesting to ponder the upcoming decades. Will cases have a similar nature? Will we handle them the same way? How will they be resolved? Predicting the future is obviously risky, but based on the digital revolution unfolding before our eyes we can at least say that the changes in the next decade will be more sweeping than in the last three.

Changes in legal paradigms

In 1996, when we connected to the internet by dialling the mysterious number 0202122, blocking the phone line, lawyers fascinated by new technologies were already debating the need to create a special field of internet law. At a conference in Chicago the American judge and lecturer Frank H. Easterbrook gave a talk entitled "Cyberspace and the Law of the Horse"[1] (published at *University of Chicago Legal Foru*m 1996: 207). He argued that cyberspace did not require a field of law all to itself: "[T]he best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on 'The Law of the Horse' is doomed to be shallow and to miss unifying principles." It is sufficient to apply general principles of law—some of them dating as far back as Roman times.

Now, a quarter-century after Easterbrook's lecture, we recognise that he was right. New technologies do not need special types of rules different from those governing "real life." But they do need wise and bold advisers who can apply traditional legal concepts in the world of new technologies. They also need wise and bold advocates and judges who can develop new solutions that are then followed by others. This is no easy task. A sound knowledge of the rules

1 https://www.law.upenn.edu/fac/pwagner/law619/f2001/week15/easterbrook.pdf

new technologies do not need special types of rules different from those governing "real life"

governing the specific legal system will not suffice. It also necessary to navigate skilfully through the world of high tech and bring to the table a fair dose of creativity, to translate the technical rules for the functioning of technology into legal standards. Only then can we identify the real legal problems and find balanced and effective legal solutions to them. The solutions must take into account a whole spectrum of issues, for only such solutions will be acceptable.

The experience of the past few years shows that problems "happening" in cyberspace can be solved without specific regulations. An example is cases involving online piracy and counterfeiting. Lawyers and judges have come up with ways to shut down websites supplying pirated content or marketing counterfeit goods, without infringing the freedom of speech. Lawyers involved in cases of "theft" of cryptocurrencies have also succeeded in creating innovative solutions. Polish judges have already issued rulings awarding interim relief secured against cryptocurrency units. Precedent-setting cases involving banks' liability for facilitation of bank-transfer frauds, which have been a plague over recent years, are now awaiting decision. Business email compromise scams have targeted companies all over the world. The perpetrators manipulated counterparties' email correspondence so that transferred funds would be forwarded to accounts at Polish banks opened by straw men but controlled by the criminals. Law enforcement authorities have yet to find a good method for identifying the perpetrators and recovering the funds. Nonetheless, the defrauded customers filed claims against the banks, alleging lack of due care in monitoring their customers and the activity in their accounts, and thus a failure to actively combat frauds committed via the banking infrastructure.

No month passes without presenting new challenges to lawyers. And it is they, not lawmakers, who bear the burden of finding effective solutions. This in turn requires them to rely on the fundamental principles guaranteed in the Polish Constitution and the European Convention on Human Rights, and to skilfully weigh competing rationales and values.

How will we resolve disputes in the future?

We have no doubt that in the future a large portion of cases currently decided in courtrooms will be resolved online using private dispute-resolution platforms. A society accustomed to transacting business with a click of the mouse will no longer accept a situation where disputes drag on for months in distant jurisdictions and evidence must be submitted in paper form. Ineluctably, disputes will have to be resolved online, simply, cheaply and quickly. Operators of e-commerce sites have already rolled out their own out-of-court mechanisms for resolving disputes between users. For example, the popular auction site eBay handles 60 million disputes

a year.[2] Users dissatisfied with a transaction—receiving a defective product or not receiving payment—can submit the case to a dispute-resolution system integrated with the eBay platform.

Such mechanisms of online dispute resolution also function on other platforms (e-marketplaces) and will certainly continue to expand. We anticipate that similar systems will be developed by international arbitration institutions and by states. Many disputes will be resolved without any physical contact between the parties, counsel, or the facilitators of the dispute-resolution process (mediators, arbitrators, judges). ODR platforms will primarily offer effective management of disputes: structuring the whole process, enabling efficient exchange of positions, submission of evidence, and sifting between disputed and undisputed issues.

Resolution of disputes will also be increasingly automated. In routine cases, smart algorithms will draw on data from thousands of comparable cases to suggest optimal amicable solutions or even a specific result. In the initial phase of operation of these tools, the role of algorithms will be limited to assisting mediators, judges and arbitrators. In time, however, we will come to rely on and trust these machines, and they will assume the burden of resolving such disputes. Only a few cases, probably in the form of appeals from machine-driven rulings, will end up being decided by humans.

Yet we have no doubt that resolution of the most complex cases will remain entirely within the human domain. They will be decided much as they are today, in courthouses or arbitration centres, but—relieved of petty cases—with a much more individualised approach.

Global centres for resolution of judicial and arbitral disputes will naturally rise in importance. The panels there will be made up of the most distinguished judges and arbitrators, no doubt recruited from all corners of the globe. This will contribute to even greater internationalisation of law firms, which will have to represent their clients before international courts and tribunals across various jurisdictions.

There is already a noticeable trend toward building global dispute-resolution centres. Brexit has spurred several European capitals to propose a centre for resolution of commercial disputes, as an alternative to London. Such aspirations have been voiced by Amsterdam, Brussels, Frankfurt and Paris. All these courts would offer modern infrastructure, qualified and experienced judges from various jurisdictions, and the option to conduct

2 https://ict4peace.wordpress.com/2006/09/21/conversation-with-colin-rule-director-of-online-dispute-resolution-for-ebay-and-paypal/

resolution of the most complex cases will remain entirely within the human domain

proceedings in English.[3] Jurisdictions outside Europe have also stated such aims. Recently China announced the establishment of an international commercial court.[4]

Globalisation and convergence of legal systems—the growing role of private sources of law

The globalisation of dispute-resolution mechanisms goes hand in hand with unification of legal systems, dictated by the global reach of commerce. Harmonisation of law is already proceeding at the regional level (such as the EU) and the global level (e.g. the WTO and WIPO). The role of various sets of standards and best practice is also growing, issued not by states but by private organisations, typically of a scholarly nature, such as UNIDROIT. These organisations are capable of assembling multidisciplinary teams of specialists from various regions. Thanks to their diverse knowledge, it is becoming possible to draft common rules governing specific fields of activity. These rules are eagerly applied in practice and achieving wider and wider acceptance in commerce, supplanting traditional national legal systems.

How will lawyers work?

Also in cases that remain the province of lawyers, machines will play a major role. Many tasks that today absorb hundreds of thousands of hours of lawyers' time all over the world will be performed by machines. We will no doubt use voice commands to communicate with virtual law clerks, just as we already "converse" with our telephones and refrigerators (e.g. through Siri or Cortana). Machines will review and analyse large sets of data and documents and generate reports identifying various correlations.

New technologies will find applications in cases of all sorts, but will provide particular advantages in construction and post-transaction disputes in which decisions have generally been reached on the basis of lengthy but standardised documentation. Data-crunching and identification of correlations will also play a big role in a range of financial matters and areas like pharmaceuticals. Machines will also relieve lawyers from drafting legal memoranda. They will prepare analyses on any issue of law, drawing on the case law and literature from practically the whole world. Under similar principles, in many fields machines will begin assisting lawyers in their work as experts, autonomously

3 http://conflictoflaws.net/2018/towards-a-european-commercial-court/
4 http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/

performing construction calculations, estimating losses, and reconstructing accidents.

Thus in the future litigators will spend a small fraction of their time poring over case files and treatises. Their role will boil down to skilful deployment of the tools at their disposal, and the wisdom to examine each case from the perspective of fundamental rights and discover the true essence of the matter and how to resolve it.

What kinds of cases in the future?

In the future we probably won't handle routine construction or post-transaction disputes. Most cases will probably involve human rights and conflicts between various legally protected values, which cannot be resolved merely by knowledge of the evidence and the regulations. Finding the best solution for such cases will require empathy, sensitivity to various forms of abuse of legally protected institutions—what some call "legal intuition"—and relevant life experience.

An example would be disputes concerning groundbreaking technologies, such as disputes over liability for accidents caused by autonomous vehicles (should the owner be liable, or the programmer, or should the software be vested with legal personality and itself held liable?) Or disputes over the responsibility of providers of vital services, such as banks and telecoms, for exploitation of their infrastructure to commit cyber offences (should the central importance of their services be tied to broader liability, including responsibility for persons who are not their customers?)

Summary: the future of lawyers

Disputes are an inherent feature (or bug) of human nature and will continue as long as our species. But regardless of how the nature of disputes evolves, there will always be a demand for specialists capable of diagnosing their true cause and offering a solution. So, in our view, the legal profession will not disappear, but will certainly be transfigured. Success will come to those of us who can navigate the technologically new reality and display sensitivity to the clashes that are certain to arise between competing sets of values.

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Protecting investments in a BIT-free world

Bilateral investment treaties (BITs) have contributed hugely to the growth of the international economy and the economic progress of many countries, including Poland. These treaties guarantee foreign investors certain minimum standards of treatment for their investments and enable them to seek effective legal protection against abuses by the host country before a neutral forum of international arbitration. BITs have facilitated the international expansion of capital and transfers of the related benefits, such as flows of money, technology, know-how and modern methods for management of teams and assets—all essential to economic and social development.

Many companies that decided to invest in a foreign country but were injured by abuses by the local authorities have succeeded in obtaining effective legal recourse only thanks to investment treaties. In line with the adage "When goods cannot cross borders, armies will," these treaties have in countless circumstances helped maintain peace or at least defuse harmful economic-based political tensions between states.

BITs have also been an essential tool in the process of European integration. Countries seeking to join the European Union were recommended to conclude investment treaties with the existing member states in preparation for accession. It was correctly assumed that emancipation of the societies of states seeking membership in a united Europe and their economic opening to the world would naturally lead to the same effects in the political sphere.

With this in mind, it is easy to understand the outcry in the legal community stirred by the European Commission's efforts to invalidate BITs in force between EU member states, as well as the recent judgment by the Court of Justice in *Slovakia v Achmea BV* (C-284/16) upholding the Commission's position. BITs have served their purpose well, and the attachment to them and the protection they afford is entirely understandable.

But the landscape of international economic law is changing greatly, gradually squeezing out traditional bilateral investment treaties.

4th Industrial Revolution

BITs were a consequence of the 19th-century industrial revolution, just as the growth of international commercial law resulted from the commercial revolution of the 15th and 16th centuries. Geographical discoveries and inventions in transportation, organisation of commercial activity, and navigation planted the seeds of international law, guaranteeing merchants the ability to travel and trade with foreign countries. The invention of manufacturing machinery and other capital-intensive production methods led to the creation of a web of treaties guaranteeing businesses the ability to safely build establishments in other countries.

The digital revolution now underway is the next stage on the path to growth of the global economy, leading to further transformations in international economic law. It is known as the 4th Industrial Revolution, although it is truly an economic revolution in the full sense of the word—both commercial and industrial.

Digitalisation on one hand is opening up new and previously unknown "trade routes" enabling many businesses to market goods and services worldwide via digital distribution channels. On the other hand, this is revolutionising models for the functioning of manufacturing enterprises. Equity relationships are replaced by contractual relationships. In large measure this is rendering traditional foreign capital investments unnecessary. It is also upending the structure of global assets of enterprises, shifting the centre of gravity towards intangible assets. This makes conducting commercial activity on a global scale easier and more widespread than at any time in history. Enterprises located in one country can impact the economies of other countries while hardly transferring any physical assets abroad.

All of this means that traditional states and the traditional instruments of international law applied by them are becoming less and less relevant to ensuring the freedom of international commercial activity for businesses seeking to conduct it, and guaranteeing such businesses and other market actors protection against threats tied to such activity.

Today, to ensure the proper functioning of the international economy it is not enough for treaties to ensure the free flow of goods, services, and capital investments between states. The global Economy 4.0 requires close cooperation between regulators in different countries, e.g. in the area of protecting competition. It is essential to harmonise laws and ensure their

uniform application. In other words, the contemporary economy requires convergence of economic law.

A trust-based community

The future will not belong to traditional forms of interstate legal cooperation, including BITs, but to federal communities of a supranational nature. Communities of this type are grounded on principles of a certain type of morality and in particular on the trust identified by Daniel Halberstam as "fidelity" in his article "Of Power and Responsibility: The Political Morality of Federal Systems" (*Virginia Law Review* 90:731, 821 (2004)).

Under that principle, members of a supranational community must not treat one another as rivals who have achieved a compromise, but as partners carrying out a joint venture. When exercising their rights and competencies, they must always act to ensure the proper functioning of the community, fostering its success as a whole, and loyally to all its other actors and stakeholders (Halberstam at 734), with due attention to their legitimate interests.

The principle of fidelity requires of the members of the federal community both active compliance with and implementation of legal norms. This means that the members of the community cannot restrict themselves to applying the formal interpretation of regulations and the conflict standards under which higher-ranking law supersedes lower-ranking law. They must actively promote clarity and consistency in the values of their shared legal order, and take all necessary measures to ensure full effectiveness and realisation of its aims. Only in a community of this type is it possible to achieve the convergence of legal systems essential in the contemporary economy.

The ideal of convergence of international commercial law has been realised in its broadest extent to date within the European Union. The future belongs to supranational legal systems of this type. The global economy of the Industry 4.0 era requires precisely such supranational solutions.

Traditional investment treaties between member states, although useful at the initial stage of growth of the international economy, are gradually becoming not only unnecessary at the current stage, but downright contrary to the values on which international economic law 4.0 will be based. The judgment in *Achmea* well reflects this trend.

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members of a supranational community must not treat one another as rivals, but as partners carrying out a joint venture

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Alternative methods for financing litigation and arbitration

In business, disputes are a fact of life. From the perspective of the management board, however, they primarily generate costs, while also stirring uncertainty about the future of the enterprise and impeding business planning. Ongoing administration of disputes also soaks up the time of managers, distracting them from the company's core business.

Thus the negative consequences of disputes greatly exceed the immediate commitment of certain cash flows to the expenditures required to pursue litigation. But even from a strictly financial point of view a dispute can present a major problem. Funds invested in the case may be recouped many years later without interest, at best in a ratio of 1:1. Often only a small portion of the outlays are recovered. Consequently, pursuing capital-intensive proceedings can significantly hinder or even prevent achievement of the financial results expected by shareholders.

Where there is a large amount in dispute, however, there are a number of tools for solving this problem. So far these tools are rarely employed in Poland.

Third-party funding (TPF)

How does third-party funding work?

The first method is third-party funding of litigation (TPF). It is a form of cooperation between the client (most often the plaintiff) and an investment fund specialising in financing of litigation. In TPF, the fund assumes the entire cost of the proceeding in exchange for a percentage of the amount obtained from the defendant after winning the case and completing enforcement. The client thus earmarks for the fund some of the proceeds it may win in the future, in exchange for covering all the current expenditures

related to the case, and potentially, in the event of a loss, also the trial costs awarded to the opponent.

The financing provided by the fund is not unlimited, but must fit within an agreed budget. Typically the budget reflects the court or arbitration filing fee, the fees for the law firm, and the costs of presenting certain evidence (e.g. submission of opinions by privately appointed experts in arbitration), and sometimes also the costs of enforcing the judgment or award.

The cooperation between the client and the fund may be focused on a single case or may cover a whole portfolio of claims. In the latter instance, a collective budget is established for financing all the cases, and the fund reserves a certain percentage of the benefits flowing from all the proceedings, regardless of which cases end in success.

Benefits of TPF

Thanks to cooperation in financing the dispute, the plaintiff may achieve a number of benefits. Obviously, first and foremost it need not commit its own capital to the case, which it can devote to other purposes. Smaller companies can use TPF as a way to raise funds to conduct disputes with much larger adversaries. TPF can also hedge against the risk of a negative result in the dispute, as well as minimise the impact of the dispute on the ongoing results included in financial reports.

The fund's involvement in the case can also free up the managers. Some funds actively participate in management of the dispute. Their representatives may take part in internal meetings, hearings (if permitted for procedural reasons), exchange of correspondence, or reaching key decisions. Conversely, the fund's involvement may be relatively limited. Each time the cooperation model expected by the parties should be discussed in detail.

Using TPF may prove particularly beneficial in arbitration cases. There is a trend to include the costs of third-party funding in the costs awarded by the arbitral tribunal to the winning party. This means that the amount awarded to the plaintiff is increased by the fund's full fee. In such cases, the use of TPF is financially neutral for the claimant. It should be expected, however, that in each instance decisions on recovery of third-party funding will be made by the arbitral tribunal hearing the dispute. Arbitrators have discretion in this respect and are not bound by the arbitration agreement.

Disputes eligible for TPF

Third-party funding of litigation first developed in Australia and then spread to other common-law jurisdictions. Currently funds providing financing under this approach also operate in Continental Europe, including Poland.

pursuing capital-intensive proceedings can prevent achievement of the expected financial results

In civil-law jurisdictions they concentrate primarily on arbitration disputes. Their involvement in judicial proceedings is not excluded, but depends on the circumstances of the specific case, particularly the type and size of the claims, as well as the possibility of reliably estimating the chance of success.

TPF funds try to limit their exposure to a tenth of the value of the claim being pursued, and expect a return of about 300%—that is, calculating on the basis of the amount invested, recovering four times the amount of funding provided to the client. The fund's fee may also be defined as a fixed amount or a percentage of what can be collected from the other party. It is also recognised that the financing costs should not exceed 50% of the amount that can realistically be collected from the other party. Otherwise, the client's commitment to the case might weaken.

At first glance a 300% return might seem high, but it is justified by the business model. The fund receives payment of a fee only in cases that end in effective execution. Often this is achieved only after many years of proceedings. Depending on the specific arrangements, the fund may also bear the risk of covering the costs that may be awarded to the opponent in the event of a loss. Additionally, the funder's fees must cover its current operating costs as well as enable the funder to pay a return to investors on their invested capital, adequate to the risk they bear. If any of these elements is modified, e.g. if the case ends with an early settlement, lower costs for the TPF can be negotiated.

The fund's involvement in the case is preceded by a careful selection process. The decision-making process usually has two stages. First there is a preliminary screening of cases based on information obtained from the potential client. In the second stage, this information is verified by the fund. In their analysis, funders primarily consider:

- The amount in dispute
- The amount that must be invested
- Certainty of the jurisdiction of the court or tribunal which is to hear the case
- Defences that may be raised by the defendant
- The forum and the anticipated duration of the proceedings
- Chances for an amicable resolution
- The financial condition of the potential client and the other party
- The chances for effective enforcement of the judgment or award
- The law firm representing the client and how its fee is calculated
- Possible involvement of other entities in the case.

Potential threats

Like any solution, TPF also entails certain risks which should be skilfully managed.

Firstly, in some instances the interests of the client and of the fund may conflict. This may happen for example when there is an opportunity to settle the dispute but the amount obtained will not enable payment of the funder's full fee and also satisfy the plaintiff's expectations. The agreement between the fund and its client should provide mechanisms for resolving conflicts of this type. Otherwise, it may generate another dispute.

Assignment

A solution similar to TPF can be assignment of the claim. Whether sale of the claim is possible in the given conditions or justified by business considerations will depend on a number of factors. It should also be borne in mind that funds offering financing on a TPF basis may also be interested in assignment as an alternative.

Insurance in the event of a dispute

Insurance is another tool for managing the costs of a dispute. Two main types of insurance may be distinguished.

BTE insurance

The first is insurance taken out before the dispute arises ("before the event" or BTE). Usually it relates to a certain category of proceedings and covers the costs incurred during the case (fees of lawyers, arbitrators, experts). It may also include insurance against the trial costs awarded to the other side.

ATE insurance

The second type of insurance is a policy taken out after a dispute has arisen ("after the event" or ATE). Its scope reflects the risk of losing the case and the related costs.

Some commentators take the view that policies of this type cannot be issued under Polish law because the insurance covers a contingency that has already occurred. This is an erroneous view based on a misunderstanding of this instrument. Insurance of this type secures against the risk of losing the case, and not the risk that the dispute will arise. Thus the fact that the policy is issued after the event is irrelevant. Nonetheless, there is nothing preventing Polish businesses from taking out insurance policies governed by foreign law where such doubts do not arise.

Within ATE insurance the solution is sometimes encountered where the insurance premium is payable to the insurer only if the insured prevails in the dispute. The functionality of such an instrument closely approaches the TPF model, but can be much cheaper.

Other forms of funding litigation

There is also a trend toward applying the business model of a private equity fund in disputes. If the case is pursued by a special-purpose vehicle, the funder may be interested in taking up shares in the entity and thus raising its share capital. A similar model for cooperation may be applied in the case of medium-sized companies conducting a dispute of strategic importance for their existence but greatly exceeding their financial capabilities.

Summary

Financial markets offer more and more tools for managing litigation costs. This creates far-reaching possibilities for optimising the litigants' financial and organisational processes. On the other hand, each solution may have certain drawbacks, which should be weighed when deciding whether to apply a particular solution in a given situation.

For their part, law firms must be prepared to participate in this process along with their clients and support them with their experience.

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BIBLIOGRAPHY:

"Report of the ICCA–Queen Mary Task Force on Third-Party Funding in International Arbitration", *ICCA Reports* no. 4 (April 2018)
"Decisions on Costs in International Arbitration", ICC Commission Report, *ICC Dispute Resolution Bulletin* 2015 no. 2

Monika Hartung

Between court and arbitration

Along with the spread of arbitration, standards have been developed for these proceedings, confirming the existence of substantial differences between arbitration and litigation in state courts. Generally, arbitration is better-organised and shorter, thanks to the active role of the arbitrators in shaping the timetable for the proceedings and the much lesser formalism of the procedure in arbitration.

Some of the rules governing proceedings before the state courts, particularly concerning the admission of evidence, are outdated and no longer function as procedural guarantees, while greatly prolonging the proceedings. An example in Poland is the necessity to hire a court-appointed expert to resolve a dispute involving specialised knowledge, even though it would suffice to base the ruling on the often much more professional opinions prepared by "private experts" and submitted by the parties. In light of the growth of technology, the rule of direct admission of evidence and the need for experts and witnesses to appear in person before the court (whether the court deciding the case or another court brought into the case to take evidence elsewhere) is no longer justified. There are many such examples.

Arbitration award before the state court

The procedural requirements under the Polish Civil Procedure Code do apply, however, in post-arbitration proceedings conducted before the state courts. Fortunately, given the nature of post-arbitration proceedings, they tend to be notably less formal than most state-court proceedings. Nonetheless, institutions and concepts that carry their own meaning in the world of arbitration are sometimes viewed in post-arbitration proceedings from the perspective of comparable institutions applicable to proceedings in the state courts.

This conclusion can be drawn from examining one of the recent rulings by the Supreme Court of Poland, in which the court expressed the view that the absence of a justification for an award issued by an arbitral tribunal may justify the allegation that the tribunal failed to consider the essence of the case,

followed by setting aside of the arbitration award (judgment of 7 February 2018, Case V CSK 301/17).

Although in that case the Supreme Court cited the autonomous procedural regulations governing the content of justifications for arbitration awards, the court interpreted those regulations in the spirit of the provisions binding on the state courts, through the prism of Civil Procedure Code Art. 328 §2.

What must an arbitration award contain?

Most sets of arbitration rules (but also national procedural regulations) provide that an arbitration award must set forth the grounds for the resolution of the case, but do not provide even the most general guidelines on what constitutes the grounds for the award.

The mandatory requirements that must be met by any arbitration award under Polish law are set forth in Civil Procedure Code Art. 1197 (the award must be made in writing, signed by the arbitrators and served on the parties; it must set forth the grounds for the resolution, identify the parties, the arbitrators, and the date and place of issuance of the award, and must indicate the arbitration agreement on the basis of which the award was issued). Apart from this, the award must contain an explanation of the decision adopted by the arbitrators.

It is accepted that the presentation of the grounds for an award need not meet the requirements for judicial proceedings before the state court. In particular, the arbitral tribunal is not required to indicate the legal basis for the resolution. The justification should disclose, however, the factual findings relied on by the tribunal and which circumstances the tribunal found to be essential for resolving the dispute.

It is pointed out in the legal literature that there are no statutory guidelines as to the contents of the grounds for an arbitration award or their degree of specificity. (By contrast, such guidelines for the justification of judgments by the state court are set forth in Civil Procedure Code Art. 328 §2.) It is accepted that the justification should state the reasons for issuance of an award with such and such content and the arguments for the position adopted by the arbitral tribunal in the award.

It should also be stressed that Civil Procedure Code Art. 1184 does not impose an obligation on the arbitral tribunal to explain exhaustively the circumstances relevant to resolution of the case. Consequently, the arbitral tribunal is not vested with inquisitorial competences and has no obligation to pursue substantive truth on its own initiative. However, the arbitral tribunal may decide on the admission and relevance of evidence proffered by the parties, and may agree with the parties on the scope and rules for presentation of

evidence. The authority vested in the arbitral tribunal also includes the right to freely evaluate the admissibility, relevance, and weight of the evidence presented by the parties.

For these reasons, in practice there are no uniform rules for the manner and scope in which arbitral tribunals should justify the awards they issue. The provisions of the Civil Procedure Code governing proceedings before the state courts should not be applied here, even by analogy. Because an arbitration award is required only to state the grounds for the resolution, it should suffice to indicate in the justification which evidence admitted in the case led to the factual findings forming the basis for the award issued by the tribunal. In my view, there is no obligation to address every piece of evidence admitted in the case and its probative value. Otherwise, in practical terms, awards issued for example in construction cases of even moderate complexity would have to run to hundreds of pages.

Do the arbitrators have to explain why they ignored certain evidence?

In the past, a reasonable understanding of the grounds for arbitration awards has prevailed in the case law from the Polish state courts. But in the recent ruling cited above, the Supreme Court held that the grounds for an arbitration award should address the totality of the evidence in order to demonstrate that it was exhaustively considered; otherwise, the state court reviewing the award may conclude that the arbitral tribunal failed to consider the essence of the case. In the Supreme Court's view, the arbitrators must include in the justification for the award their assessment of the weight and credibility of the evidence presented by the parties, referring to the evidence they found to be essential for their decision. And they should furthermore state the reasons why they did not find other evidence relied on by one or more of the parties to be credible. The absence of such justification, according to the court, means that the arbitrators failed to consider the essence of the case.

In light of the Supreme Court judgment discussed above, the differences between the justification for a state court judgment and for an arbitration award would shrink to nothing. To satisfy the foregoing view of the Supreme Court, arbitration awards would have to become incredibly extensive. The exhaustiveness of the justification would make it difficult for the arbitral tribunal to maintain the cogency of its reasoning, thus raising the risk of inaccuracies and prolonging the time required for the arbitrators to draft the award.

the primary aim of the justification is to ensure the award's longevity

Who is the arbitration award for?

So is it warranted to strive for a structure and presentation of the grounds for the ruling in an arbitration award similar or even identical to the justification for a judgment of a state court?

In answering that question, we should consider the aims of the award and the persons it is intended to serve.

It is obvious that the award is written primarily for the parties to the proceeding and their counsel, particularly the losing party. The party that has lost the dispute needs to know why it lost. It must be certain that the dispute was resolved impartially. But I don't believe that the parties expect the arbitrators to parse in the award every piece of evidence presented in the case.

Sometimes an award is written also with an eye to third parties not directly involved in the dispute but whose rights and obligations will be impacted by the award, such as insurers or reinsurers. In this case as well, a detailed description and evaluation of all the evidence is also irrelevant. The same is true for the arbitration institution, e.g. in the case of the ICC, where the award is examined primarily for compliance with formal requirements.

Finally, the award is written with an eye to the state courts that will rule on recognition or enforcement of the award, decide on the application to set aside the award, or determine the extent to which the award is controlling in some other civil matter. Apart from understanding the factual findings and the legal reasoning, the examination of the award by the state court will involve whether the procedure was fair and whether the procedural rights of the parties were violated. It should be borne in mind, however, that an application to set aside an arbitration award is considered not only on the basis of the wording of the award itself, as the state court also has at its disposal the file from the arbitration proceeding. Thus if the court has doubts as to the course of the proceeding, it can clarify them by consulting the arbitration file. Moreover, as I see it, the state court considering an application to set aside an arbitration award does not reconsider the case itself, and an "evidentiary error" by the arbitral tribunal is not grounds to set aside the award.

Durability counts

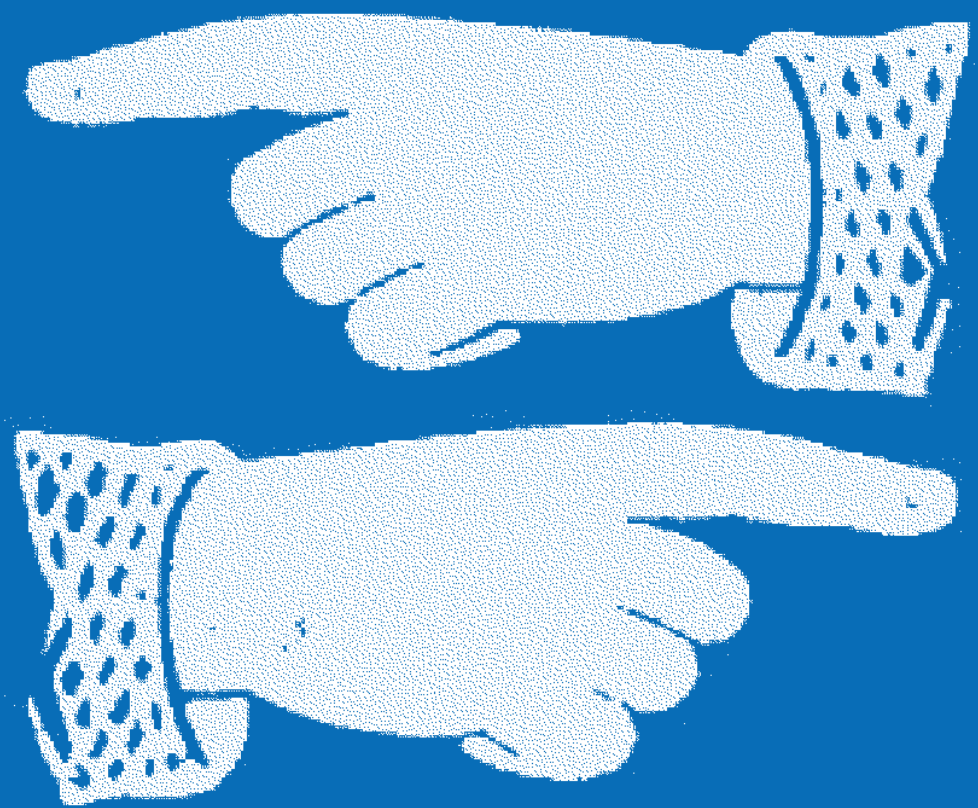
The primary aim of drafting a justification for an award is to ensure the longevity of the award, protect it from being set aside in post-arbitration proceedings, and ensure that it can be recognised or enforced.

This means that the award must meet many procedural and substantive legal requirements rooted in the laws of the state where the award is issued or will be enforced—requirements that must be fulfilled from the perspective of the state court ruling on post-arbitration proceedings.

So in light of the authority vested in state courts to exercise oversight of arbitration awards, the award is drafted also with the state courts in mind, and should be written in a way that most strongly ensures the survival of the award, in light of how the state courts interpret the grounds for setting aside awards. But this can lead to paradoxical conclusions. The state courts will most readily regard an arbitration award as "correctly" justified when the justification is written the same way as a state court would justify its own judgments. Thus, opportunistically, it might be expected that in drafting the grounds for the award, the arbitrators will hew as closely as possible to the requirements for state-court judgments set forth in Civil Procedure Code Art. 328 §2.

But arbitration proceedings should not be likened to proceedings before the state courts. An arbitration award should present a synthesis focused on explaining the reasons for issuance of the ruling in the case, instead of describing the entire course of the proceeding and extensively relating the positions presented by the parties in their various pleadings. In an arbitration award, which is after all intended for a professional audience (businesses, counsel, and the state courts), it should suffice to establish the facts decisive for resolution of the matter and the legal assessment of the relevant facts.

Monika Hartung
attorney-at-law, partner, Dispute Resolution & Arbitration practice
vice president of the Arbitration Court at the Polish-German Chamber of Industry and Commerce



Maciej Kiełbowski

ADR in public administration

The concept of ADR—alternative dispute resolution—is typically associated with civil disputes or cases between businesses which are filed (or could be filed) with the civil courts. But it is important to be aware that some ADR methods can also be applied in administrative cases conducted before various public administrative authorities and then reviewed by the administrative courts.

In many fields, business is tightly controlled and regulated. This makes it hard to imagine businesses functioning without contacts with the public administrative authorities (nor can individuals function in complete isolation from the public administration). And no decline in regulations appears anywhere in sight. Regulatory inflation is a trend not just in Poland, but throughout Europe and indeed worldwide. This entails certain issues and barriers for those who have dealings with the administration. It is no secret that matters before administrative authorities often last longer than the parties would wish, and in some areas, such as real estate development, the duration of the administrative proceedings can have a huge or even life-and-death impact on the project.

Routine administrative proceedings need not be long-lasting, but in many cases they nonetheless drag out. ADR, and in particular mediation, may offer a way to avoid this problem.

Mediation in administration

Resort to mediation within pending administrative proceedings is a new feature of the Polish legal system, introduced by an amendment to the Administrative Procedure Code which entered into force on 1 June 2017. It is still too early to say how much mediation has taken hold in administrative offices (there are no collective statistics yet enabling an assessment). One of the greatest concerns when introducing these provisions was a reluctance toward mediation, and a lack of such tradition, among civil servants accustomed to resolving matters through an authoritative decision-making process. On the other hand, mediation and the regulations governing it now provide many opportunities for expediting proceedings and resolving matters in a way that meets the expectations of the business or other parties.

The specific solutions involving mediation can have a favourable impact on the duration and consequences of administrative proceedings.

First, the very accessibility of mediation is beneficial. Depending on the set of parties, the code provides for the possibility of conducting mediation even between the authority and the private party, as well as among the private parties to a dispute (Art. 96a §4). Both options are potentially highly relevant, depending on the needs and structure of the specific case. For example, we can imagine the benefits generated by effective mediation concerning the construction conditions for a development project which initially sparked objections from neighbouring landowners. In mediation, the investor could undertake to introduce specific solutions benefitting the neighbours, e.g. constructing additional infrastructure for local residents. It is hard to imagine achieving such results through issuance of an administrative decision.

Second, mediation simplifies the presentation of evidence. Mediation may be used in a dispute to clarify the factual circumstances (Administrative Procedure Code Art. 96a §3), which could otherwise pose a huge problem for the private parties and the administrative authorities (as the authorities are required by Art. 7, 77 §1 and 80 of the code to gather and consider the entirety of the evidence in order to determine the "substantive truth," i.e. the actual state of affairs in the given instance).

Third, in some respect mediation removes the decision from the hands of the public administrative authority, which sometimes is advantageous for the party in and of itself, for example in light of previous negative experiences (in terms of the duration of the proceeding or the quality of the decision). The mediator does not resolve the dispute on the merits, but mediation should nonetheless aim at resolving the matter within the bounds of the applicable law, and the parties and the mediator can take a more flexible and nonstandard approach than the administration in proposing a specific solution.

Finally, even if mediation does not achieve the hoped-for result, it should not be a waste of time. The parties can still agree to include the findings they agree on in the record of the mediation. The authority will include these findings in the evidence and should consider them when deciding the case.

In short, mediation offers a range of advantages worth considering in practically any administrative proceeding—particularly in real estate development cases involving the Construction Law or zoning issues, as well as other cases involving multiple parties.

Administrative settlement

Administrative mediation may—but need not—lead to an administrative settlement. The notion of settlement entered the Administrative Procedure

Code much earlier than mediation as such, but it was used very rarely in practice.

The construction of settlement in the code is quite specific. As a rule (Art. 114) it is concluded between the private parties to the proceeding, and thus is permissible only in cases where there is more than one party—a clear drawback to the regulation, as mediation can be conducted with one (private) party, between the administrative authority and the party. The proceeding must also be contentious, i.e. the interests of the parties must differ.

The settlement is not concluded with the administrative authority (which is also the case when mediation is conducted with the authority, where the mediation results in issuance of a decision by the authority with the content agreed during the mediation), but the settlement is subject to confirmation by the authority.

The regulations do not specify the grounds for positive confirmation, but indicate when the authority must refuse to confirm the settlement. Art. 118 §3 provides that confirmation will be denied if the settlement violates the law or fails to reflect the position of an authority which was required to be sought, or infringes the interests of society or the legitimate interests of the parties.

Confirmation of an administrative settlement is not a mere formality, as the order issued in this respect can be set aside through the relevant administrative route, not only through a complaint (Art. 119 §1) but also for example through a finding of invalidity. Thus it is in the interest of the parties and the administrative authority to ensure that the settlement is consistent with the law. The position taken by the administrative courts in this respect should also be considered. As the Province Administrative Court in Warsaw held in its judgment of 21 November 2006 (Case VII SA/Wa 1289/06):

> An order confirming a settlement is of a procedural nature, as it unleashes the substantive legal consequences of the settlement confirmed by the order. It is also of a supervisory nature, as it enters into legal effect as an act concluding the matter on the merits. Art. 118 §3 sets forth the criteria for refusal to confirm a settlement, and one of them is conclusion of a settlement in violation of law. Violation of legal regulations covers violation of substantive legal provisions as well as provisions of procedural law. Violation of provisions of substantive law is manifest in wording of the settlement that conflicts with such regulations, e.g. when provisions of substantive law do not permit such legal outcomes under the given state of facts. Violation of provisions of procedural law is manifest in violation of the procedure and form for conclusion of the settlement as well as the elements of its structure.

Mediation before the administrative court

Interestingly, for over a decade mediation has theoretically existed in proceedings before the administrative courts in Poland, but unfortunately the statistics demonstrate that this institution is essentially a dead letter.

According to a report entitled "Information on the activity of the administrative courts in 2017" (available at the website of the Supreme Administrative Court, www.nsa.gov.pl), last year, in all the proceedings conducted before the administrative courts nationwide, mediation was used in exactly one case (whereas there were eight such cases in each of the previous two years). The reason for the small number, according to the authors of the report, could be the speed and efficiency with which cases are heard under the regular procedure. Currently a ruling is issued in most cases before the administrative courts in 6–12 months. This means that resorting to mediation would probably not speed up such cases, which is assumed to be one of the key advantages of mediation.

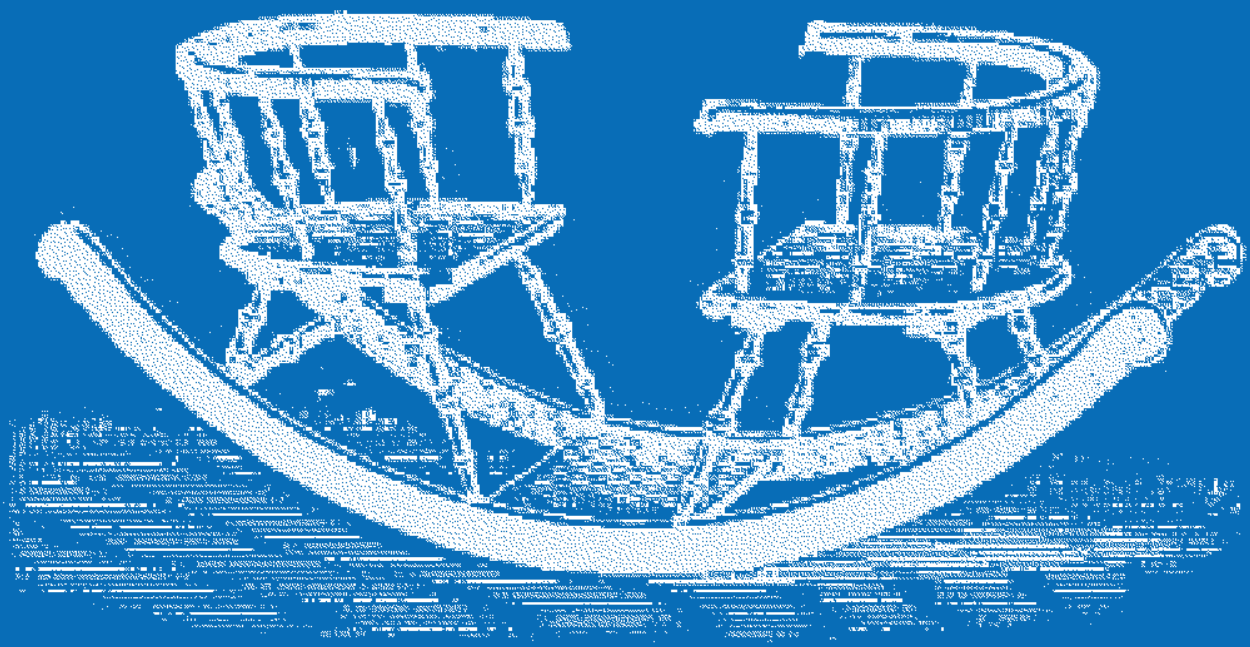
Legislative changes were required for mediation to become more useful for the parties before the administrative courts. Along with the amendment to the Administrative Procedure Code, the Administrative Court Procedure Law was also changed. Previously, mediation was conducted by the court or a judicial referee, and thus was not "true" mediation, which in theory should be conducted by a mediator entirely unconnected to the litigation. The amendment introduced a mediator in this role instead.

On the other hand, the nature of many administrative court cases requires great knowledge and skill in this field of law. (From a legal point of view, it is easy to mediate a settlement in a civil dispute where the parties agree on payment of two-thirds of the amount originally claimed. An entirely different level of engagement is required, and consideration of a range of additional elements, to mediate a settlement on the construction conditions for a real estate development project.)

It should be added that it would be worthwhile to enable mediation in proceedings governed by the Tax Ordinance (which were historically governed on the procedural side by the Administrative Procedure Code). The general principle that the amount of tax obligations is governed by statute does not stand in the way, and neither does the nature of tax disputes, which essentially are just one type of administrative case and amenable to medi`ation. Such a solution would allow the parties to take advantage of the benefits flowing from alternative dispute resolution methods also in tax cases.

Dr Maciej Kiełbowski

adwokat, administrative disputes practice, Dispute Resolution & Arbitration practice



Marcin Lemkowski

Slow justice in a fast world

The world is speeding up and the courts are standing still. Briefly, and oversimplified, that about sums up the current reality of the Polish justice system in civil cases. Estimating how long the case will take is the second-hardest question clients direct to lawyers conducting litigation. (The first is, What are our chances?) Why do court cases last so long, and is there really no way to speed them up?

We plan everything

Everyone tries to a greater or lesser extent to plan their activity over time. So it is natural for a plaintiff or defendant in a civil case to ask how long the litigation will last. This question is obviously addressed to their counsel, not the court, because litigants do not communicate directly with the court. Unfortunately, in today's reality it is impossible to provide a responsible answer to the question how long a specific case will take—other than "probably a long time."

It should be pointed out at the start that these deliberations do not concern routine matters like issuance of an order for payment, but cases heard at the first instance using the ordinary procedure, with testimony by non-party witnesses, the parties, and sometimes also experts. For this reason as well, statistics showing for example that the average resolution time for a civil case in the regional courts is 8 months do not explain much, and can even create a false picture because they cover all cases filed with the courts. It would be more useful to indicate the duration of specific types of proceedings. The average time now required in Poland for a trial in a commercial case is twice that long, at 16 months.

When we know the court and the panel it's a little easier

Anticipating the length of the proceedings is obviously more prone to error before the case is filed, when it is not yet known which court or judge will handle the matter. But even identifying the panel hearing the case and

consulting experiences from earlier cases does not provide adequate grounds for predicting the duration of the trial.

Thus any time estimates provided by counsel, even the most experienced practitioners, must be treated with great caution, because the length of the proceedings is outside their control. It depends on the court.

The court is not in a hurry

But the court is not interested in deciding the case quickly. This is a conclusion drawn from observation and experience. There are many reasons for this.

Lengthy proceedings tend to exhaust the parties, making them more willing to reach a settlement. The more frustrated a party is with the long failure to reach a resolution, the greater is its eagerness to close the case, even at a greater loss than originally assumed. It has been noticeable recently that parties are more willing to conclude a settlement than they used to be, even after years of litigation.

It also appears that judges are not adequately motivated to work quickly by what we might call internal organisational solutions. Whether a judge decides cases efficiently or with delay, his or her professional position (at least as perceived by counsel) remains the same. It does not seem, for example, that judges who do their work faster are promoted faster within the judicial ranks.

When the party fears the judgment

It can also often be observed that one or even both of the parties don't want a judgment to be handed down too quickly. There can be many reasons for this. Often the judgment must be carried out, by paying money or delivering possession of property. This makes the defendant allergic to quick issuance of a judgment—because it doesn't have the money or doesn't want to turn over the property. But then when the defendant ultimately has to pay interest on top of the amount awarded, it may be upset that the dispute lasted so long.

And for some parties, including serious businesspeople, courts and litigation can be almost a way of life, allowing them to get to know new people, attend meetings, travel, and along the way continue to hope for satisfaction of their often very high claims. Such aficionados also have no interest in seeing their cases resolved quickly, because they live for litigation.

The procedure also does not speed things up

It would be helpful in expediting the consideration of cases to set specific times within which the court is required to take certain actions. Where such solutions are already in place, they are observed with greater or lesser

scrupulousness, but at least they can provide a basis for some rough time estimates. Thus, for example, as the court is supposed to rule on interim relief within one week and is supposed to provide a written justification for a ruling within two weeks, when counsel are asked when the court's decision can be expected, they have a certain point of reference—even though it does happen that the court takes six months to draft a justification instead of two weeks.

But there are no time limits in place for the court to schedule successive hearings, to consider the admission of evidence or other applications by the parties, or to issue a judgment on the merits. Delay in considering the case is sanctioned only by the possibility of filing a complaint for overlengthy proceedings. Parties do resort to this measure more and more often, but as this is a form of sanction it should not be the case that only this mechanism can succeed in having the proceedings handled more efficiently. Proceedings should be handled efficiently as a rule, and a complaint for overlengthy proceedings should be a last resort used only in the most severe instances of delay.

Too much evidence

Another reason for lengthy trials is that the parties and the court can be incapable of distinguishing truly essential issues from secondary or utterly irrelevant questions. Without an awareness of what is important and what is not, the parties inundate the court with evidence in the form of both witnesses and documents. A case like that can start out with several volumes of files, or even a dozen or more. This leads the court to exercise an understandable prudence and restraint, as it must examine all the evidence before it can issue a proper judgment.

But this effect is also reinforced by the procedural rules. Because the parties cannot be sure whether evidence offered at some later stage will be admitted, just in case they submit everything at once, with their initial pleading, to avoid the objection that evidence is being raised too late, losing the case accordingly. Thus the effort to focus the litigants on bringing their evidence together at the start of the case does not really expedite the proceedings.

Thirty years down, many more ahead

This year Wardyński & Partners is celebrating its 30th anniversary. In our practice there has not been any case that has remained pending for that entire period. But there are some cases that are nearly that old, counting all stages of various related proceedings. And we have had numerous occasions to mark the 10th anniversary of case filings. There are even such cases where

that milestone has been reached while the case is still pending at the first instance. This does not foster optimism for the future. We can safely assume that cases will still last a long time. The parties should always bear this in mind when they decide to do battle through the courts.

Dr Marcin Lemkowski
adwokat, partner, Dispute Resolution & Arbitration practice

Time for a set of best practices

Stanisław Drozd talks to Justyna Zandberg-Malec

In June 2018 the document "Good Practices for Relations between Judges and Professional Attorneys in Civil Proceedings" was published on the firm's website for further discussion. Where did this idea come from? Why these rules?

The concept partly derives from the experience with our English qualifications, as nearly a dozen lawyers at the firm are qualified as solicitors in England and Wales (although not practising). We had a chance to observe how trials are conducted in England, which generated certain frustration on our part. We decided to investigate why trials function much better there, provide much greater satisfaction, are much more accurate and professional, and are better at meting out justice.

Is it also faster?

It is faster, but also much more costly—although that means that litigants go to trial only when truly necessary. I think that is the secret. In England a court case, specifically the hearing, is sacred. It rarely happens. Generally disputes end not with hearings, but with a settlement—before the case reaches the court or at least before it goes to trial. The system is set up to resolve cases whenever possible without troubling the judges. Judges are treated like a valuable resource to be used sparingly, so as not to block access in truly important cases.

It is different in Poland. The formal right of access to the court is treated as sacred, and thus any pettifogger can pester the court for three years. Meanwhile, people who truly need the judge's assistance and are humble enough to present their case diligently have limited access to the court. Of course they may file a claim, but must wait a long time before the court can

devote proper attention to their case. Consequently, the right of access to the court is realised only superficially, in its formal aspect.

In England the profession of counsel appearing before the courts is governed by certain principles, also covering dealings with the judge and duties to the court. It is thanks to these principles that trials function so well there. In Poland as well there are rules, and practically everything is provided for in the legal professionals' code of ethics—we didn't invent anything new. But the code of ethics is quite general. Thus we thought it would be worthwhile to propose a more specific adumbration of these rules for the small field of trials, showing how in practice the relation between counsel and judge should look according to these principles.

The genesis was thus that together with representatives of the judiciary and colleagues, both advocates and legal advisers, we decided to propose something so that Polish civil trials could begin to function better. It all began with our friendship with judge Aneta Łazarska, who has published for years on the topic of fair trials. Our discussions turned to the problem of mistrust between bench and bar, which is not felt in the West. We decided to hold a conference on this topic. Many people expressed an interest in bringing judges and lawyers together in one room, which rarely happens. Then we determined it would be worth extending this. We formed a working group and began to draw up a set of principles, which we then presented at the second conference and later published on our site for discussion.

Was the perspective of the lawyers and the judges different?

The postulates proved to be surprisingly similar. An advantage of working in this group was the dialogue that formed between the judges and the attorneys (in the broad sense in which we use this term in our guidelines). From this we could see that essentially we all sought the same thing.

In Poland there is a chasm between the judicial community and the community of attorneys—unlike in England, where it is essentially all one profession. The judges are drawn from the bar and are basically the senior colleagues of the counsel appearing before them. This means that they know their needs perfectly well, trust each other and assist each other in the process.

In Poland it is also the attorney's role to assist the court—of course while looking out for the interests of the attorney's own client—but nonetheless to assist the court in dispensing justice. In Poland, however, judges are a separate profession, attorneys have their own bar associations, and between them is a gulf of mistrust, suspicion and lack of dialogue. That is what we wanted to change by working together on a set of best practices. And it turned out that change really doesn't require much.

the greatest challenge is to reconcile the attorney's duty to the client with the duties to the court

Thus arose guidelines that are valuable for both sides: for the attorney because they present the judicial perspective, and for the judge because they present the attorney's perspective.

Doesn't this lack of contact here result partly from a belief that attorney and judge should not contact one another because of the corrupting potential of such contact?

It probably does, and that is a big problem. In England for some reason they don't have that problem. There lawyers and judges work together and befriend one another, judges school young attorneys, help in their professional development, are authorities for them and patterns to follow. A judgeship there is the crowning of the profession, and thus judges enjoy due respect, which causes a certain distance, but it would never occur to anyone to avoid contact because it could stir some suspicions. I don't know what that derives from. Maybe because the professional ethics are so deeply rooted that it would never even cross anyone's mind to take improper advantage of such contact.

In Poland mistrust is certainly a problem. It arises partly from the division between the professions. In Poland, law students complete their degrees and then their paths diverge, to the bench or the bar. They later come into contact almost exclusively in the courtroom.

It follows from what you are saying that the problem is not only the relations between judges and professional attorneys, but also between attorneys and their clients.

Of course. The attorney functions professionally in relation to the court, the client, and opposing counsel. All these relations impact one another and must function properly. The greatest challenge is to reconcile the attorney's duty to the client with the duties to the court.

In England they say that an advocate is first and foremost "an officer of the court," in other words in some sense serves or assists the court and only second helps and safeguards the client (and was once called the client's "patron"). Thus certain things that would be in the client's interest the attorney cannot do, because it would be disloyal to the court. The attorney must not mislead the court. Of course attorneys must maintain confidentiality and pursue their clients' interests, but must not become indentured to their clients. The attorney must maintain professional and intellectual independence. Together with the court and opposing counsel, the attorney is an element of the machinery of justice and must not forget it.

I was struck by the fact that there are just 41 principles stated in the document. My favourite is the last one, which states that pleadings should be "above all clear, understandable, and helpful in resolving the case."

My favourite rule is the one that says that the attorney's duties to the court should take precedence over his duties to the client, and that the attorney must be independent in relation to the client in order to properly fulfil his duties to the court and the justice system. The principle you cite is a corollary of that.

Pleadings are often written in an unclear and foggy manner not because the author doesn't know how to write better—although this is no easy matter, as written advocacy is a great art and writing simple pleadings in complicated cases is a skill that takes years to learn—but because the author does not entirely want to reveal to the court what the case is about. Because if the case is broken down into its prime factors, it turns out that the client's chance of winning is lower than would be desired. Clients don't like pleadings that show too clearly what the dispute is about, if that makes their position seem weaker. Hence the temptation to muddy the waters. And this is simply unethical, because it impedes the court.

Our role is to persuade the court to uphold the legitimate interests of our client when dispensing justice. But first and foremost we should assist the court in the administration of justice. In other words, to facilitate the court's handling of the case—in pleadings and in statements before the court. But the client—particularly a defendant—may insist on confusing things, to hinder understanding, so that the judgment is random. And unfortunately in Polish litigation often it is random, for precisely this reason. After all, if a litigant has a 20% chance of prevailing, then striving for issuance of a random judgment raises the client's chances to 50/50. The math is simple. But the attorney must not agree to that, due to the overriding principle that he is firstly an officer of the court.

What are your further plans for this set of best practice?

Certainly we would like to disseminate it. I dream of these rules becoming something like a universal declaration within the profession, at least with respect to attorneys who try cases. We could all undertake to comply with these principles when we appear against one another before the court.

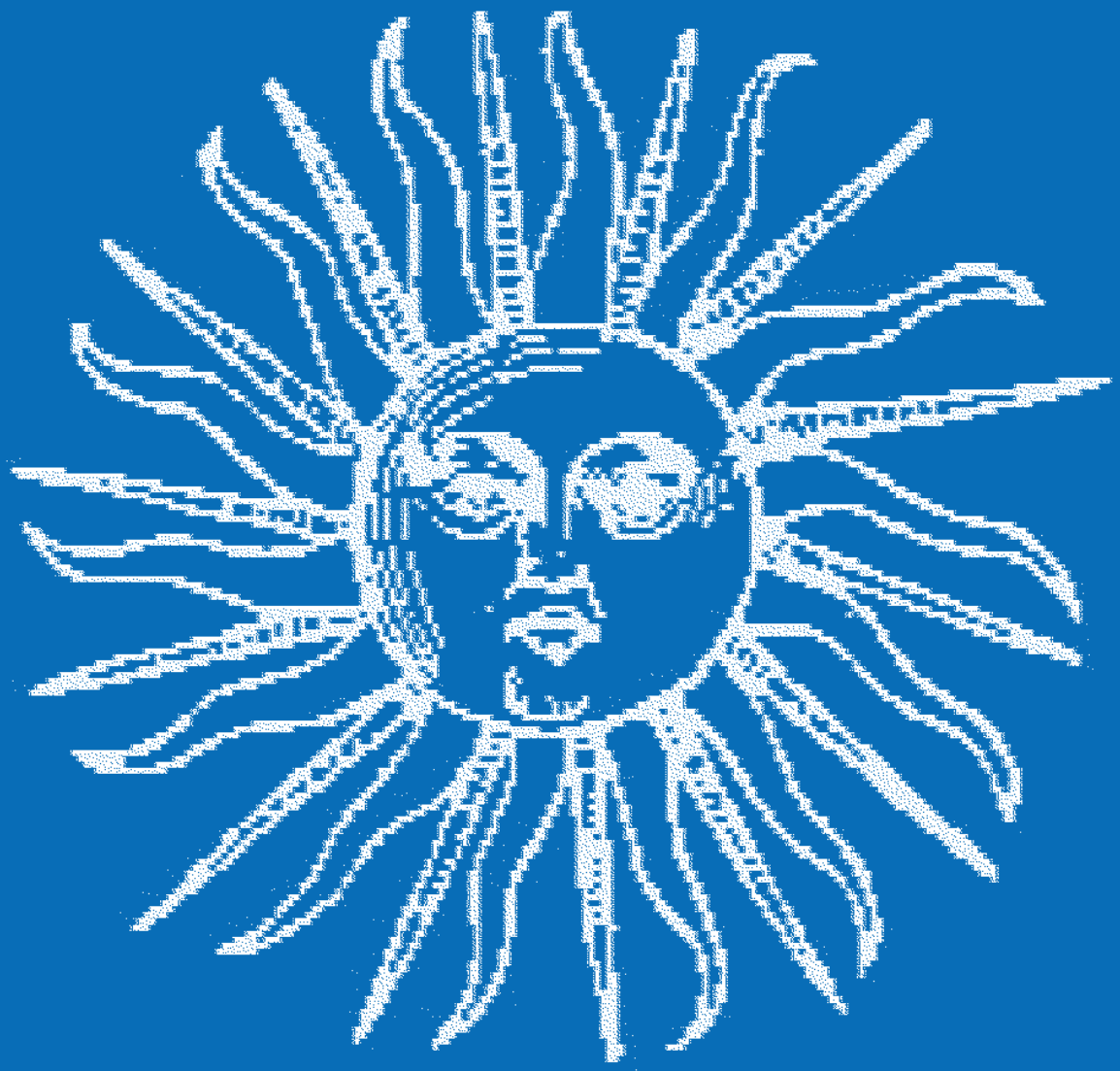
We will continue to organise debates and meetings using these principles as a pretext for dialogue with judges, which today is needed more than ever.

We want to discuss these principles, modify them if need be, but first and foremost promise each other that we will comply with them.

Stanisław Drozd
adwokat, partner, Dispute Resolution & Arbitration practice
solicitor in England and Wales (not currently practising in that jurisdiction)

Interview conducted by Justyna Zandberg-Malec

I dream of these rules becoming something like a universal declaration within the profession



Good practices for relations between judges and professional attorneys in civil proceedings

The quality of the relations and proper cooperation between judges and professional attorneys is of key importance for achieving the main goals of court proceedings, which are issuing a just ruling in a fair trial and upholding the rule of law.

Proper relations between judges and professional attorneys are grounded on the rules of professional ethics. The relevant sets of ethical rules contain general and fundamental principles. In order to be able to apply them to the specific problems that judges and professional attorneys have to deal with daily in their mutual relations, it may be helpful to expand on the general ethical rules to provide specific recommendations and guidelines.

This collection is an attempt to formulate and propose a set of practical recommendations to judges and professional attorneys that they should follow in their mutual relations. In the opinion of the authors, these recommendations follow from the ethical rules of judges, *adwokats* and legal advisers. Their adoption may, then, contribute to a fuller implementation of the principle of a fair trial and observance of the rule of law.

Section I
Cardinal principles

1.

The common duty of judges and professional attorneys is to ensure that the administration of justice operates efficiently and effectively, and that cases are settled fairly. The resources available to the justice system are limited and have to be deployed in observance of the principle of proportionality. Therefore, judges and professional attorneys should carry out their duties in such a way that a party that acts with due care and in good faith may, if necessary, have a possibility of defending its case in court, and a party that

disrespects the common good, as exemplified by the justice system, and acts with intent to abuse the right to a fair trial, may not.

2.
Professional attorneys should remember that, above all, they fulfill an important role within the administration of justice. The duty of a professional attorney and his role within the justice system is to defend the legitimate rights of the client. However, in the event of a conflict between the professional attorney's duties to the client and his obligations to the administration of justice, the duties to the court should take precedence. Therefore, a professional attorney may not deliberately mislead a court, nor assist the client in abusing the right to a fair trial, e.g. by raising claims, making applications or allegations that are obviously unfounded or that do not actually serve to defend the client's legitimate rights, but obstruct the proceedings or serve some other inappropriate objectives. The relations between judges and professional attorneys must be based on mutual respect and trust.

3.
Judges' treatment of professional attorneys should show understanding for their important role, and therefore as trustworthy partners who are jointly responsible for the proper functioning of the justice system. Judges should cooperate with the authorities of appropriate professional bodies in enforcing the professional ethics of the attorneys. At the same time, however, they should treat the attorneys of these professions in ways that give justice to the dignity and significance of their professions. Both judges and professional attorneys should ensure that the justice system is not only impartial and independent, but also perceived by users as such.

Section II
Pre-trial actions

4.
One of the basic duties of a professional attorney is supporting the client in making a sensible and honest decision as to whether to pursue his grievance in court at all. The professional attorney's obligation is ensuring that his client does not engage the administration of justice without having a justified requirement, or if in bad faith.

5.
Therefore, when taking on a case, the professional attorney should be the first judge in the client's matter. With the client's cooperation, he should accurately identify and explain the facts that may be relevant to the resolution of the case, and collect and discuss with the client the evidence that favours the client as well as that which is unfavourable. With the consent of the client, the attorney should contact potential witnesses specified by him in order to determine their knowledge about the facts or the evidence that may be relevant to the resolution of the case. The attorney should discuss with the client the claims that the client and his opponent may be entitled to in view of the established facts and evidence and appropriate provisions of law.

6.
Professional attorneys should strive to ensure that, before entering into a court dispute, the parties which they represent should exchange their positions and their evidence and assess rationally and honestly the validity of their claims and allegations in their light. A professional attorney is obliged to inform the client of expected costs and the duration of the trial and of the likelihood of its favourable conclusion, as well as about the options for attempting an amicable resolution of the dispute, and its attendant benefits.

7.
A professional attorney should not undertake to conduct a case in court, if it is clear from the facts and evidence that the client is not entitled to the claim that the client would like to pursue in court, or to the allegation that the client would like to defend in court.

8.
Judges should respond to parties' abuses of procedural rights and use available legal remedies (e.g. in relation to adjudicating costs), if a party engages the justice system with no due consideration and thereby exposes the opponent to unnecessary costs and restricts others' right of a fair trial. This should apply, for example, to situations in which a party which causes delays, or only exposes the opponent to unnecessary costs, refuses to admit certain facts and compels the opponent to take steps to demonstrate the evidence, even though it becomes clear in the light of subsequent evidence that the party knew or should have known that there were no rational grounds for refuting those facts. A similar approach should apply to situations in which a party's decision to engage in a dispute, or to continue a dispute in court,

appears irrational in view of the settlement proposal received by the party, and the outcome of the trial.

Section III
Actions at the initial stage of a trial

9.
At the initial stage of a trial, the basic duty of a professional attorney is to specify clearly the significant circumstances of the case and to highlight the issues (facts and legal issues) that are disputable between the parties. The list of contentious issues should not be disputable between professional attorneys. This is because it should follow clearly and objectively from the positions of the parties, if they have been properly formulated.

10.
The pleading in which a professional attorney presents a case to a court (statement of claim, or reply to statement of claim) should be concise. It should only quote those facts that are relevant to the case, formulate claims and their legal basis, and, if necessary, contain concise, clear and specific legal argumentation. In citing court rulings, a professional attorney should act with care and should not abuse the court's trust. He should make an accurate presentation of the deliberations and conclusions of the court which issued the cited ruling, and show its actual relevance to the case. It is unacceptable to make out-of-context and misleading references to wording contained in judgments. If the attorney is aware of significant rulings that are contrary to his position, he should cite them and state why he disagrees with them or why they should not undermine his position.

11.
A professional attorney should first cite the facts (or comment on the factual claims made by the other party), and then state the legal consequences he draws from those facts and the legal basis for those consequences. If factual assertions are excessively interwoven with legal argumentation in a pleading, it makes it more difficult to resolve the case efficiently. Each of the cited facts' significance for the case should clearly follow from the pleading. A recitation of the facts in a way that prevents or excessively hinders establishing a party's precise factual assertions and the specific significance of particular facts for the case, violates the duty of conciseness required from a professional attorney and may constitute an abuse of the right to a fair trial.

12.
In their pleadings, parties should specify clearly and directly which of the opponent's claims they refute, which they confirm, and on which they are unable to take a position (e.g. for lack of knowledge of the veracity or falseness of a given assertion) and should only demand that the opponent present evidence to support them, according to distribution of the burden of proof. As a rule, the court should not accept so-called blanket denials, i.e. statements in which a party denies all of the opponent's assertions that have not been clearly ascribed. Pleadings should be set out in a way that makes it easy to comment on the statements that they contain (numbered paragraphs or at least pages) and to make it easy to identify the disputed and the uncontested assertions.

13.
A party's factual assertions should be sufficiently detailed and specific, especially if a party is inferring serious grievances or accusations from them against the opponent, such as accusations of bad faith or dishonesty. Argumentation and objections that may violate the good name of the opponent, and rely on assertions that are described vaguely, unclearly or evasively, constitute an abuse of the right to a fair trial. In such a situation, the court may rule that those specific facts may not be relied upon.

14.
Judges should use their powers fairly and loyally, but also appropriately decisively and boldly, in order to counteract abuses of procedural rights at the initial stage of a case. They should, in particular:

- dismiss applications for evidence intended to establish irrelevant facts;
- dismiss applications for evidence submitted in support of factual claims that are incomprehensible, vague, or essentially merely legal arguments presented as factual assertions;
- adjudicate without taking evidence, if in the light of the factual claims cited by the party, there would be no grounds for the party's claims or allegations, even if the party's factual assertions could be accepted as true.

Section IV
Evidentiary proceedings and the hearing

15.
The common goal and duty of judges and professional attorneys should be to conduct proceedings in a planned, predictable and focused way that also takes into account the principle of judicial economy. Judges and parties' professional attorneys are jointly responsible for ensuring that each diligently acting party may enjoy a reasonable opportunity to collect and present all of the evidence that is significant for the case and for that material to be thoroughly considered and discussed, in principle, at one hearing. The judges and parties' professional attorneys are also jointly responsible for the proper preparation before the hearing of a case for examination, and that all organisational and procedural matters have been clarified and resolved, if possible, by agreement between the parties.

16.
Evidence should be submitted at the earliest stage of a case. However, the reporting of unnecessary evidence should be avoided. The final extent of the necessary evidentiary proceedings may be determined after establishing which factual assertions the parties contest. Therefore, a suitably early and proper presentation of concise and specific factual assertions is much more important than an early submission of evidence, as the factual assertions should, in principle, not change, as well as responding in the same way to the other party's claims. A bad faith change to one's factual position, or formulating it in a vague and evasive way, is particularly harmful and may constitute an abuse of the right to a fair trial which should be eradicated (mainly, by the wise application of provisions on formal requirements of pleadings, or procedural bar, or the possibility of adjudicating costs of proceedings against the party whose actions fail to contribute to an efficient explanation of the case, regardless of its outcome).

17.
In civil cases, the right to a fair trial and the right to be heard require that a party be given access to significant evidence that is in the possession, or at the disposal of the other party. A party should have the right to demand such evidence from the opponent, if it is able to state with good reason and precision the type of material requested and its significance to the case. The duty of the court and professional attorneys is to ensure that this right is not prejudiced. This means, among other things, that the attorney does not have

the right to participate or assist in the destruction or removal of evidence (including especially that which is unfavourable to his client), which, if necessary, should be forwarded to the court and the other party.

18.
Professional attorneys should formulate applications for evidence in ways that clearly set out the significant circumstances for the case that are to be established by means of the requested evidence. Good sense and judicial economy should be followed in this.

19.
Documentary evidence should be cited and attached to pleadings in such a way that its location and review will not cause any difficulties to the court or to the attorney of the opposing party. Each attachment should be numbered separately and should be physically marked with the number. Consecutive numbering of attachments is recommended. It is unacceptable to attach documentary evidence to pleadings without appropriate numbering and physical organisation, and without precise references that enable the court to easily find the appropriate documents and the factual statements that they are to prove. If the evidence is presented in a way that makes it more difficult for the court and the opposing party to attribute it to specific factual assertions, the court may, after unsuccessfully summoning the party to rectify the failure, rule that evidence has not been provided in a particular respect. Neither the court nor the opposing party is obliged to guess or enquire about the circumstances for which a professional attorney of a party has provided particular evidence.

20.
An application for evidence to be taken from a witness's testimony or from a party's explanations should clearly state the circumstances (factual assertions of a party) that the given person should confirm with his testimony or explanations. If possible, it is advisable to obtain a written statement from such a person about significant circumstances for the case and to include it in the case files. If it is not possible to obtain such a statement, it is advisable that a professional attorney should instead file his own statement to the files regarding the explanations he intends to obtain from the given person during that person's hearing. The putting forward of too many witnesses for the same circumstance should be avoided, and likewise submitting unnecessary documentary evidence.

21.
When hearing or obtaining a written statement from a person who is to testify or provide explanations that are favourable for his client, the attorney may not ask that person leading questions, unless they relate to uncontested issues between the parties and serve to provide a clearer transition to the discussion of disputed issues (e.g. questions regarding age, occupation, the witness's role in the case—if undisputed, and important for the further course of the hearing concerning contested issues, etc.)

22.
When hearing a person who has testified or submitted written explanations that are unfavourable for his client, the attorney may confront that person with particular hypotheses, or ask whether that person agrees with them in order to test the credibility, consistency and objectivity of the earlier statements of the person being questioned, and at the same time, allow that person to respond to the factual hypotheses on which the attorney intends to base his argumentation. For this purpose, the attorney may use the closed question (leading) technique.

23.
Judges should be wary of excessively questioning witnesses and parties. This task should rest primarily on professional attorneys. A judge should, of course, monitor the propriety of a witness's questioning and, if necessary, disallow questions put to that person. However, the judge should be aware that the legitimacy and purpose of asking certain questions which may seem at first unnecessary may become apparent as the examination progresses. For example, when hearing a witness who is testifying against his client, the attorney may want the witness to provide explanations about specific circumstances that are incontestable or that follow from documents, or to repeat previous explanations in order to ask the witness about other facts in the context of those explanations. The attorney may also want to confirm the witness's explanations of certain circumstances, in order then to confront them with the witness's other statements or other evidence. The attorney may want to, say, highlight and ask the witness about inconsistencies between the witness's statements that could contribute to a better explanation of the case and a better assessment of the credibility of the witness's testimony.

24.
The above principles should apply accordingly to evidence from an expert's opinion and hearing.

25.
There are no reasons why an expert whom one of the parties has commissioned to provide an expert opinion (private expert) should be less credible or helpful in explaining a case than an expert appointed by the court. The credibility and reliability of a particular private expert's opinion should be checked via an appropriate examination at a hearing; combined, if necessary, with a confrontation with the private expert of the other party. If such hearings are conducted effectively, private experts will realise that if they prepare biased and unreliable opinions, they will be acting only to the detriment of their client and their own professional credibility.

26.
Whenever possible, the court should plan proceedings together with the parties. To this end, after sufficiently explaining the dispute, as a result of an exchange of pleadings, the judge should contact the attorneys to plan the course of the hearing. It is not only acceptable, but also advisable that the judge should make all appropriate organisational arrangements with the attorneys by telephone (e.g. in a teleconference) or by e-mail, both at this stage, as well as earlier.

27.
The judge should expect that professional attorneys will be prepared jointly to plan the proceedings, namely, that as far as possible, they will be able to agree and declare their own availability and the availability of witnesses at specified times and establish the time that will be required to hear witnesses or experts. Any culpable shortcomings in this area should be reflected in the adjudication of costs.

28.
The attorney is obliged to ensure the attendance at a hearing of persons whose hearing he has applied for, or to inform the court and the opposing party with appropriate notice that he is unable to ensure the attendance of a given person at a hearing by himself and that the court's powers will be required to ensure the presence of that person at the hearing.

29.
In accordance with the principle of trust, a judge should be able to rely on the statements of a professional attorney regarding organisational and formal issues and to assume that they are truthful. All manifestations of

abuses of this trust, which involve misleading the court, should be penalised accordingly.

Section V
Justifying and appealing against court rulings

30.
The justification for a judicial decision (judgment, order) should be brief, concise, compact, and written in clear and understandable wording. The justification serves the party's attorney not only to bring an appeal or raise a complaint, but serves above all to convince the parties that the decision is well founded and to prove that the court has thoroughly considered both parties' arguments.

31.
The following constituent parts must be clearly distinguished in the justification for the decision:

- a presentation of the substance of the case—the factual background and subject matter of the dispute;
- a description of the principal points of dispute between the parties (factual and legal) and a description of the parties' positions on those points of dispute;
- the court's resolution of individual points of dispute, together with their justification—a discussion and assessment of the evidence concerning disputed factual issues, and a presentation of the legal position with a citation of provisions, case law and doctrinal views justifying the adopted interpretation of the disputed legal issues;
- a presentation and justification of the decisions regarding other points of dispute (e.g. regarding trial costs, court costs, immediate enforceability, partial discontinuance of proceedings, etc.)

32.
The reasoning should avoid mixing explications of factual findings with assessments of evidence and legal deliberations. These elements of a justification should be clearly separated in order to enable the parties' attorneys to construct appropriate objections (in an appeal or complaint) or the grounds for a complaint (in a cassation or an unlawfulness appeal).

33.
It is admissible to refer to the views of experts of legal doctrine, but this should not involve quoting large fragments of commentaries, academic textbooks, or other statements, instead of presenting one's own views to the court (judge).

34.
It is admissible to refer to decisions of the Supreme Court, the Supreme Administrative Court, the Constitutional Tribunal, the Court of Justice of the European Union, the European Court of Human Rights and other courts, but the whole discussion of the legal basis for the judgment should not be limited only to extensive quotes from the judgments of those courts. If an established line of jurisprudence does exist, it is sufficient to cite several of the most important judgments that best describe the given issue, in the way that is most relevant to the case.

35.
It is also desirable to provide margin numbers for particular paragraphs (for example, as do the CJEU and the ECHR). This makes it easier for parties' attorneys to refer to specific parts of the justification in their appeals and complaints, and it enables the appeal court or the Supreme Court to discuss and refer to the views of the lower courts efficiently.

36.
A judge should be cautious in commenting in the justification on any possible lack of professionalism of the parties' attorneys. The judge should bear in mind that an attorney has no option of defending himself against criticism contained in a justification, and that the attorney's procedural actions or omissions may have followed from circumstances of which the court is unaware. The criticism of parties' positions, their demands, submitted evidence, etc., should be based on facts.

37.
One of the basic duties of a professional attorney is to support the client in making a reasonable and honest decision as to whether to challenge the court order issued in the case. The professional attorney is obliged to provide the client with reliable information on all expected costs of appeal proceedings and the chances of success of the considered appeal remedy, and also to remind the client of the possibility of attempting to resolve the dispute amicably at this stage. The professional attorney is also obliged to ensure, at

this stage, that his client does not involve the justice system without having a legitimate need.

38.
In providing his client with the motives for the ruling given in his case and possible objections, a professional attorney should maintain professional independence and objectivity. Professional attorneys are jointly responsible for caring for the image of and trust in the justice system. Any criticism that professional attorneys make of court judgments should be strictly objective.

39.
In challenging a court order, a professional attorney should formulate clearly the specific objections against the ruling and justify them accordingly. At the same time, he should focus on the matters that are truly important.

40.
It is unacceptable to reproduce the same objections under allegedly different legal grounds, or to make manifestly unfounded objections. The judges have the right and obligation to enforce the requirement that professional attorneys should be concise in formulating and justifying appeal objections.

41.
Pleadings which contain appeal measures, just as all pleadings, should be, above all clear, understandable, and helpful in resolving the case. Tradition and established practice regarding how they should be formulated cannot constitute justifications for violating this principle.

Katarzyna Gonera, Supreme Court judge
Dr Aneta Łazarska, regional court judge
Tomasz Wardyński, *adwokat*
Stanisław Drozd, *adwokat*
Dr Bartosz Karolczyk, attorney-at-law
Piotr Golędzinowski, attorney-at-law
Dr Arkadiusz Turczyn, attorney-at-law
Dr Maciej Plebanek, *adwokat*
Dr Steve Terrett, *adwokat*
Ewelina Milan
Łukasz Lasek, *adwokat*

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We also point to alternative methods of funding litigation, analyse the future of investment disputes in a world without bilateral investment treaties, criticise the habit of likening arbitration to litigation in the state courts, and examine the advantages offered by alternative dispute resolution in public administration.

We present a proposal for a set of practical principles that should guide judges and attorneys in their mutual dealings. We believe that spreading and implementing best practice in this area would be beneficial for the Polish justice system.

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