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2013 YEARBOOK

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Dear Readers,

This is the third edition of our law firm's *Yearbook*. Once again we share with you our reflections on the law, drawn from the matters we have handled for our Polish and international clients.

The media predict that there is a difficult year ahead. In hard times, as one of our authors writes, we need to remind ourselves of the fundamental principles. One of them, clearly, is to maintain due care to avoid unnecessary problems. But it means more than that. It also means a return to values and a rededication to integrity and fair dealing, which are a necessary condition for the mutual trust that enables commerce to move forward, creating new value for all stakeholders.

The scope of personal liability of managers and board members continues to expand: for poor business decisions, for failure to seek bankruptcy protection when required, and now also for involvement in anti-competitive practices. The only sure approach is to be aware of the risks and to avoid behaviours that may result in liability.

Managers must also keep a finger on the global pulse, without limiting their attention to the immediate Polish business environment. Poland's accession to the European Union was a vast change, incomparable to any other in the last two decades. But alongside huge opportunities, it presents equally large challenges, such as the risk associated with conducting disputes before foreign courts, under foreign law.

The risk of disputes cannot be eliminated entirely, but careful wording of contracts and compliance with the unwritten rules of fair dealing and best practice can significantly limit the risk. And we must never lose sight of the fact that lengthy judicial proceedings are not always the best method for resolving a conflict. Sound legal advice has much more to offer than that.

Tomasz Wardyński

What constitutes due care on the part of a manager?

Janusz Tomczak

Most professionals operating in the commercial sphere in Poland realise that their activity may be scrutinised in light of criminal law, and poor economic decisions may bear a risk of criminal liability. Below we present a few comments on the rules governing criminal liability for business decisions.

The risk of doing business is insufficient justification for hasty, poorly considered decisions, and the fate of assets belonging to others cannot be determined solely by a manager's intuition or "nose for business."

The regulation that is the basis for the discussion below is Art. 296 of the Polish Penal Code, which applies to persons who:

- Handle the assets or economic activity of an organisation or third party
- Have an obligation to do so pursuant to a contract, statute, or decision of a competent authority
- Through abuse of the authority vested in them, or neglect of their duties, cause or threaten to cause a significant financial loss to the organisation or third party.

This provision thus applies not only to the manager of a major enterprise, but also to the heads of specific departments, members of corporate management boards and supervisory boards, proxies handling the affairs of their principal, and so on. It is broad enough to cover many different situations. It must be stressed that citizenship is irrelevant here. From the point of view of criminal law, a foreigner operating in Poland is subject to the same liability regime as a Polish citizen.

Each of the terms used in this provision has spawned volumes of legal commentary and generated numerous rulings by courts at all levels. Nonetheless, during difficult and uncertain times, it is worthwhile to review the fundamental principles under which a person could be found guilty of this offence, and which may in consequence have a decisive influence on the person's career and the fate of the assets entrusted to the person as well as the people who work with such assets.

What is meant by the notion of handling another person's assets or business?

Clearly this does not refer to every act that may involve an asset belonging to another person. It has to do rather with activities involving exercise of authority and independent decision-making.

More importantly, a person who handles the assets of another is only someone who on one hand is obligated and authorised to maintain assets entrusted to him in no worse condition and on the other hand has the right and obligation to seek to increase the assets entrusted to him, so that they grow in value. In the frequently cited order dated 27 April 2001 (Case No. I KZP 7/01), the Supreme Court of Poland clearly held that "one who has a duty only to assure that the condition of the assets entrusted to him does not deteriorate cannot be regarded as handling the assets of another."

The concept of "business activity" is generally not controversial in practice. Although this concept is defined within the legal system, the ordinary understanding of this concept to mean gainful activity conducted on an ongoing, organised and professional basis is certainly correct.

What is abuse of authority or neglect of duty?

While the notion of neglect of duty is theoretically fairly easy to define (it is sufficient to compare the scope of the person's duties against the actual performance), it sometimes is difficult to determine what is abuse of authority. This could include, for example, actions that do lie within the person's competence but are inconsistent with the tasks the person is entrusted to perform—a distortion of them.

One aspect that is controversial in practice and often presents evidentiary problems is determining the scope of duties and authority of the specific person.

Sometimes this scope is set forth in documents —a contract, a list of duties, or the decision of a competent authority mentioned in the code—but it may also be found in the principles of proper management, professional standards, the nature of the office held by the person, or industry customs and practices.

We should look to such systems of standards for patterns of proper behaviour, what a person should do in a specific situation. Efforts are often made in judicial proceedings to prove these unwritten rules, existing apart from the system of universally applicable laws, particularly when it is necessary to determine how the defendant should have acted in a specific economic situation.

An additional, secondary criterion for assessing the defendant's actions is the standard of the "reasonable person," "good steward" or "prudent merchant," derived from civil law. As Art. 293 §2 of the Commercial Companies Code provides, "A member of the management board, supervisory board or audit committee, or liquidator, shall in performance of his duties apply the diligence arising out of the professional nature of the activity."

Thus the principles of professionalism and the professional nature of the activity will play a key role in assessing whether the defendant acted properly.

When business decisions do not work out successfully, the manager's honesty and professionalism, basing his or her decisions on rational, verifiable grounds, may protect the manager from liability, because this demonstrates the necessary concern for minimising the economic risk that is an unavoidable aspect of any business decision.

The judgment by the Katowice Court of Appeal of 29 November 2006 (Case No. II AKa 96/06) is noteworthy in this respect. In that case, the court emphasised the decision-making process leading up to what proved to be an unfortunate decision entailing serious financial consequences. The court found that before taking a weighty decision, the defendant in that case, a manager of a large institution, had consulted with competent people and sought the views of external advisers. Even though in hindsight the advice turned out to be mistaken, the court could not find that the manager had acted wrongly in the circumstances.

The picture should be completed by adding that the concept of a significant financial loss, as referred to in the Penal Code, is defined to mean a loss exceeding PLN 200,000 (about EUR 50,000).

This means that in large companies, practically any significant business decision with financial ramifications could be second-guessed under the elements of the offence defined in Penal Code Art. 296.

Any person professionally involved in corporate management or supervision should also bear in mind that conviction of an economic offence (in the broader sense) automatically results in a ban on holding such offices as a member of a management board or supervisory board.

But to answer the question posed in the title of this article, it may be said that due care on the part of a manager consists of rational management in line with the professional practice accepted in the given industry and community, with respect to the tasks, authorities and duties entrusted to the manager.

A helpful tool for achieving these goals is to create control mechanisms within the enterprise to assure early discovery of irregularities and diagnosis of problems. But it cannot be a system that functions only on paper. It must be an effective structure guaranteeing a proper flow of information between the various levels of management. There is a noticeably growing role of internal audit and compliance divisions within enterprises. The patterns in this area come from Anglo-Saxon systems, where business entities are subject to immediate criminal liability.

Effective functioning of the organisation minimises the risk of abuses, liability of specific individuals, and ultimately liability of the enterprise itself, which is derivative of acts committed by persons acting for the enterprise or under its supervision.

It is obvious that even the best organisation does not excuse persons entrusted with the property of others from continually increasing their knowledge and expertise. They must be aware of the constantly evolving economic conditions and continue to improve their qualifications in order to live up to the trust placed in them as managers.

Indeed, a manager is appointed to handle the financial affairs of another primarily on the basis of trust, and it is with good reason that the offence set forth in Penal Code Art. 296 is often referred to as the offence of abuse of trust.

Janusz Tomczak, adwokat*, is a member of the Dispute Resolution & Arbitration Practice and heads the Business Crime Practice.*

Enforcement of foreign judgments in Poland is not a problem

Monika Hartung

An interview with Monika Hartung about the choice of law in a contract with a foreign business and which court will hear a potential dispute arising out of the contract.

A Polish company enters into a contract with a German company. Which country's law will govern the contract?

To start with, under Art. 3 of the Rome I Regulation (Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations), the parties themselves may select the law governing the contract. The previous version of Poland's Private International Law required the existence of a link, e.g. in the form of citizenship or residence. Now there is no such requirement, and thus the parties may freely choose the applicable law.

It is only if the parties do not make their own choice of law that the applicable law will be determined by the relevant legal regulations—one set of regulations in the case of a contract with another business from the EU and another set of regulations in the case of a contract with a business from outside the EU.

If a Polish business entity concludes a contract with a business entity from outside the EU and does not make a choice of law, but a dispute under the contract is heard by the Polish court, we then turn to the conflict of law rules in the Polish Private International law. This is because a court deciding a dispute will follow the conflict of law rules of the forum state, i.e. the state of the court hearing the case.

However, when considering a dispute between two business entities from the EU, the Polish court will determine the applicable law on the basis of the Rome I Regulation (for contractual disputes) or the Rome II Regulation (864/2007, for non-contractual obligations).

Art. 4 of the Rome I Regulation contains a set of general rules for situations in which the parties did not make a choice of law. For example, a contract for the sale of goods will be governed by the law of the country where the seller has his habitual residence.

But in fact the issue of applicable law is a derivative of the determination of jurisdiction.

So how to determine jurisdiction?

The main source of law in cases between EU business entities is the Brussels I Regulation (Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). It sets forth the rules for the existence of jurisdiction, i.e. the court's authority to decide a specific case. The relevant provision for our purposes is Art. 5, which states when a person domiciled in a member state may be sued in another member state.

If the matter relates to a contract, the court for the place where the obligation was performed or should have been performed has jurisdiction. In the case of the sale of goods, the place of performance means the place in a member state where the goods were delivered or should have been delivered, and in the case of the provision of services, the place in a member state where the services were provided or should have been provided.

This provision is often applied by the Polish courts, typically at the initiative of counsel for a foreign defendant. If there is no jurisdiction, the Polish court is required to dismiss the statement of claim. We have handled numerous cases in which the Polish courts have dismissed claims due to lack of jurisdiction under Art. 5 of the Brussels I Regulation.

What if the court decides the case even though it lacks jurisdiction?

Such a proceeding would be void. Thus from the point of view of litigation strategy, dismissal of the claim is the first order of business. We cannot allow the case to proceed, exposing the client to costs, if it may turn out later that there was no jurisdiction, and thus the proceeding was void and it is necessary to start over again before another court.

In one of our cases, a Polish company sued five defendants: an individual residing in the Czech Republic and Czech, Hungarian, Slovakian and Polish companies. Ultimately the trial before the Polish court will be conducted only on the claim against the Polish company. The court dismissed the claims against the foreign companies because they filed motions to dismiss, enclosing bills of lading showing that the goods were supposed to be delivered in the Czech Republic, Hungary and Slovakia, respectively. In other words, the place of performance of the obligation was in those countries. Thus, under Art. 5 of the Brussels I Regulation, the court found that it lacked jurisdiction. The plaintiff may still pursue its claims against the foreign companies, but only before the proper courts in each of those other countries.

It seems fairly troublesome for Polish businesses if they have to pursue cases all over the EU.

It can be burdensome, but on the other hand, if a Polish business is sued, for example, in a Hungarian court, and the contract was performed in Poland, the Polish company has the same right to seek dismissal of the claim, and the claim will be dismissed for lack of jurisdiction.

Once the jurisdiction of a specific court has been determined, this is the court that will apply the relevant regulations in order to determine the governing law. Thus to determine the applicable law, the court will follow both EU regulations and national regulations. In the case of businesses from the EU, the court will be guided by the Rome I Regulation, under the principle that EU law takes priority over national law.

It should also be mentioned that all EU courts, including Polish courts, are competent to decide a case on the basis of foreign law. A Polish court may rule on the basis of Czech law and vice versa. This does prolong the proceeding, however, because the court must seek out the foreign law and become acquainted with it before issuing a judgment on the basis of the foreign law. From the Polish point of view, I can say that if the court applies the wrong substantive law the judgment will clearly be overturned.

What happens if the parties agree to follow the law of a third country, e.g. Luxembourg?

In my experience, this most often happens when there is also an arbitration clause. It is simplest if the jurisdiction and the governing law are the same, i.e. when the Polish court rules on the basis of Polish law. This is the most efficient procedure. Therefore, if the state courts are going to have jurisdiction over disputes, it is worthwhile to select in the contract both the court that will have jurisdiction and compatible law for it to apply. In the case of contracts, it is easy to agree on jurisdiction and also to choose the law of the same country whose courts will have jurisdiction over disputes.

Naturally, in the case of businesses from different countries, each of them will seek in its own interest to have disputes decided before the courts in its own country, according to its own country's laws, which it is more familiar with. In such cases, the escape valve may be not to make a choice of law at all.

On the other hand, in arbitration, the parties often seek law from a common source. Thus, for example, a Polish company and an Austrian company might choose German law to govern their contract. These systems are not identical, but they are based on a common source. This may be the best solution when the parties cannot agree on the law of one of their own countries.

One more comment here: If the client cannot agree with the other party that Polish law will apply, then when recommending that the client agree to the law of another country, we should point out that the client should obtain advice from lawyers from the country whose law is going to be applied. A Polish *adwokat* or legal adviser cannot advise on foreign law, unless he or she has also, for example, qualified as a *Rechtsanwalt* and is advising on German law.

And what about pursuing claims before foreign courts?

This is a mirror image of what we discussed above. We also act in cases in which we support foreign lawyers by advising on Polish substantive law. The costs of pursuing such cases vary significantly, however, with respect to court costs, fees for counsel, and the costs of expert opinions. In Poland we have among the highest court costs in Europe in cases where the amount in dispute is up to PLN 2 million (about EUR 500,000). Beyond that level the court fee is a flat PLN 100,000 (about EUR 25,000) regardless of the amount in dispute. Nonetheless, the overall costs of litigation in Poland are lower than, for example, in the UK. This is an important factor that limits access by Polish companies to foreign courts.

It should be borne in mind, however, that in every case we have ready to hand the full array of interim measures. Even when a foreign court has jurisdiction over the case, we can apply first to the Polish court for interim relief to secure the claim, and then file the claim before the foreign court. While some commentators claim that jurisdiction over the main claim is also required for interim relief, I do not agree with that view. What would happen if the English court had jurisdiction and we had to seek interim relief in the UK, and then seek enforcement in Poland? That would defeat the purpose of a proceeding for interim relief.

Once a judgment is issued by a foreign court, how do you enforce it in Poland?

That is not a problem. For example, I had a case (an arbitration case actually) where a Polish businessperson had an arbitration clause in a contract with a British supplier. When the Polish party for whatever reason failed to pay, he was sued before the arbitration court in the UK. Given the costs involved, but also due to bad legal advice, he did not appear to dispute the claim, and when an award was issued he did not seek to set aside the award in the UK. As a result, the British party executed against the Polish party and collected money. A lawyer had advised him not to join issue in the case, because such an award would not be enforced in Poland. That is not true, because judgments from the EU are enforced in Poland without any difficulty.

This requires a declaration of enforceability, but for this there is a simplified procedure under EU regulations, specifically the Brussels I Regulation. At the first instance, the application for a declaration of enforceability is issued without the participation of the other party, who in effect learns only after the fact that the judgment has already been declared enforceable. Then the other party may file an appeal, which is considered by the court without a hearing, or take any actions to stay enforcement of the judgment.

The procedure for obtaining enforcement is simple because the Polish court cannot encroach on the merits of the ruling by the foreign court. The simplified procedure would apply in the reverse situation, if a Polish business obtained a judgment against a British counterparty. Then the enforceability of the judgment would be declared in the UK and enforced there. Again, the costs would differ, because in Poland the procedure for obtaining a declaration of enforceability is relatively inexpensive.

The same applies to arbitration awards, except that if the award was issued by an arbitration court in Poland enforceability is confirmed by the court without a hearing, while the enforceability of a foreign arbitration award is confirmed after conducting a hearing.

In any event, it is important to fight the merits of the case, and not count on winning at the enforcement stage.

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

High heels and on-the-job accidents

Agnieszka Lisiecka

When you're wearing high heels, it's easy to trip and fall—and it's a long way down. High heels are more problematic than flats, and not just for the wearer. The employer may also have a problem if an employee so shod slips at work and is injured. Such an occurrence will generally be regarded as a work accident, which triggers specific duties for the employer, and potentially even liability in damages. The ultimate assessment will depend on the circumstances of the specific incident.

Classification of accidents at work

Under Poland's Act on Social Insurance for Work Accidents and Professional Diseases (popularly known as the Accidents Act), a work accident is defined as a sudden event triggered by an external cause, resulting in injury or death, which occurred in connection with work. In order for an event to be regarded as a work accident, all of these conditions must be met.

The act defines the connection with work very broadly. It may be a connection in function, time or place. A work accident is not just an event that occurred during performance or in connection with performance of an employee's regular duties or instructions from superiors. A work accident may also occur during the course of performance of activities for the employer without instructions, or when the employee is on-call on the way between the employer's location and the location where the employee will perform a duty arising out of the employment relationship.

The notion of "external cause" is also interpreted broadly. Generally, any factor from outside the human organism which has caused an event to occur is regarded as an external cause. This could include tripping on a floor that does not meet occupational health and safety standards (e.g. when the floor is uneven, unstable or slippery), or a clumsy move by the employee causing him or her to fall even on a smooth surface. Generally the type of footwear the employee had on at the time of the accident is irrelevant.

However, it will not be regarded as a work accident if it was caused solely by an internal disorder of the employee, e.g. if the employee is prone to fainting

or has problems maintaining his or her balance (Supreme Court judgment of 16 June 1980, Case No. III PR 33/80). In such cases, the courts have found, there is no external cause which is necessary for the incident to be regarded as a work accident.

But if an internal factor and an external factor operate together (e.g. if an employee who has problems balancing when wearing high heels slips on an uneven surface), it will nonetheless be regarded as an external cause for purposes of the Accidents Act if it is shown that there would have been no injury but for the existence of the external factor (Supreme Court judgment of 27 April 2009, Case No. IUK 336/08).

Social insurance benefits

Classification of an event as a work accident is made by a post-accident commission appointed by the employer. A protocol finding that it was a work accident, and confirmed by the employer, constitutes the legal basis for the employee to obtain social insurance benefits for the work accident (e.g. sickness benefit, rehabilitation, equalisation benefit, one-off compensation, disability benefits or a training benefit). The type and amount of the benefits payable to the employee depend on the specific circumstances.

Benefits from accident insurance will not be owed, however, if the sole cause of the accident was a proven violation by the insured of regulations concerning protection of life and health, caused by the insured intentionally or with gross negligence. Nor will the employee receive benefits if the employee contributed significantly to causing the accident when under the influence of alcohol, narcotics or psychoactive substances.

Employer liability

If the benefits received from the Social Insurance Institution do not fully cover the loss to the employee, the employee will as a rule be able to pursue supplemental damages from the employer to make up the difference. The fact that an event is found to be a work accident does not automatically mean that the employer will be liable in damages, however. In order to obtain damages from the employer, the employee will have to prove the grounds for civil liability of the employer. In this respect, the employee bears the burden of proof.

Polish civil law provides for two liability regimes: based on fault and based on risk. Liability on the basis of fault is liability for a culpable and unlawful act or omission by the employer which resulted in the loss. Such liability may be justified by the employer's failure to comply with workplace health and safety regulations. But if the employer did comply with all of its duties under health and safety regulations, fault cannot be ascribed to the employer, and the employer will be released from liability based on fault.

Liability on the basis of risk is analysed differently. The risk-based principle is a strict liability regime, independent of fault, where the very fact of the loss is generally sufficient to demonstrate a duty to redress the loss. This form of strict liability is provided in Polish law for an enterprise operating for its own account by harnessing the forces of nature, such as steam, gas or electricity (e.g. mines, rail operators, power companies, and manufacturers), in light of the increased risk to life and health which such operations generally involve. In order to impose liability on an employer under this regime, the injury need not be directly tied in a cause-and-effect relationship to the forces of nature that are harnessed by the employer (in other words, the injury need not be caused, for example, by machinery). It is sufficient if the accident occurred in connection with the overall operations of the enterprise. Nor is it relevant in this respect whether the employer complied with all occupational health and safety requirements. The employer will be released from such liability only if it shows that the injury resulted from *force majeure* or solely from the fault of the injured party (as the sole cause of the accident) or a third party for whom the employer is not responsible.

In practice, it may be difficult for the employer to make such a showing, because *force majeure* events are rare, and accidents usually result from a combination of many causes, which in practice almost precludes ascribing fault (or cause) solely to the employee or a third party. An additional difficulty is the very narrow list of persons for whom the employer is not deemed to be responsible. It cannot be another employee, freelancer, customer or supplier, because such persons are regarded as included within the operations for which the employer is responsible.

Regardless of the liability regime, wearing high heels may nonetheless affect the amount of the damages awarded to the employee, through the process of mitigation of damages. Damages may be mitigated in proportion to the degree to which the injured party contributed to causation of the injury. This would be the case particularly where the employee did not take due precautions, for example by wearing extreme spike heels or ignoring warnings from the employer.

Claims by the employee

If an employee proves the grounds for the employer's liability for a work accident, he or she is entitled to assert a number of claims. The employee may seek damages to cover all costs incurred by the employee as a result of the accident, including costs of treatment, care by a third party, visits by family members, or retraining for another profession if the employee has become unable to perform the current job. These costs must be reasonable, justified, and documented.

If the employee has wholly or partially lost the ability to perform gainful employment, or if his or her needs have increased or prospects for the future decreased, the employee may seek an appropriate disability pension or one-off compensation. This applies more specifically to a case where the injured party has become an invalid, but an award of one-off compensation will help him or her perform a new profession.

Finally, the employee may seek monetary compensation for physical and mental pain and suffering.

How to protect against work accidents?

In practice, a work accident will first and foremost raise the issue of the health and safety conditions at the workplace. Practically any shortcoming or violation by the employer of health and safety obligations may create a realistic threat of an accident. Therefore, a *sine qua non* for an accident-free workplace is scrupulous observance of health and safety requirements.

According to accident figures from the Central Statistical Office, the most frequent cause of accidents in Poland in the 1st half of 2012 was improper behaviour by an employee. Therefore it is important to place an emphasis on raising the awareness of safety issues among employees themselves. All of the employer's efforts to comply with health and safety regulations may come to naught if the employees ignore dangers and risks in their own day-to-day work. Increasing the safety consciousness of staff may prove an effective tool for reducing the number of accidents.

It is also worthwhile to obtain civil liability insurance. Coverage of work accidents and related claims may relieve the employer of a major financial burden while also assuring an injured employee of quick compensation for his or her loss. It is important that the policy cover all types of claims that an employee could potentially assert, but first and foremost compensation for pain and suffering and disability payments. The amounts that may have to be paid for these items can be relatively much higher than other claims asserted by the employee.

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Liability of management board members for anti-competitive practices

Sabina Famirska

Anti-monopoly laws in force in Poland for over 20 years have imposed financial penalties only on business entities. A proposed amendment to the Act on Competition and Consumer Protection intends to change this.

The bill to amend the Act on Competition and Consumer Protection published on 18 December 2012 provides for introduction of personal liability for permitting a business entity to violate the prohibition on practices restricting competition.

Similar regulations operate in many other European countries, providing for either administrative financial sanctions on individuals (e.g. in Germany, the Netherlands and Spain) or criminal sanctions (e.g. in France, Greece, Ireland, Slovakia and the UK). In some jurisdictions (Latvia, Lithuania and Slovenia), violation of anti-monopoly regulations carries such far-reaching consequences as a prohibition against performing certain managerial functions for a specific period.

The proposed changes in the Polish anti-monopoly law call for liability of persons who perform a managerial function or are members of the managing body of a business entity and who in exercise of their position, through an act or omission, including by failure to perform supervisory duties, permitted—even unintentionally—violation by the business entity of the prohibition against agreements restricting competition referred to in Art. 6(1)(1)–(6) of the Act on Competition and Consumer Protection or Art. 101(1)(a)–(e) of the Treaty on the Functioning of the European Union.

The proposed regulation provides for a fixed list of violations for which an individual may bear personal liability: horizontal or vertical agreements on prices or contract terms, limitations on production or sale, market division, use of burdensome or discriminatory contract terms, tied sales, restricting or eliminating access to the market, or collusion in a public tender.

The bill refers to two groups of persons subject to this regulation: members of the management board of a business entity, and persons performing a managerial function for a business entity. The proposal may be criticised for its lack of a definition of "persons performing a managerial function." Under specific factual circumstances, a person whose job title suggests that he or she performs a managerial function may not in fact perform such functions (but rather, for example, an advisory function, without any employees reporting to him or her and not participating in the decision-making process within the company). The justification for the bill merely states that the competition authority will institute and pursue proceedings in instances where "the role of the person performing a managerial function does not raise any doubts."

It may be assumed that this is meant to refer to persons who are not formally members of the management board but nonetheless are responsible within the structure of the business for certain areas of management within the firm. This would include persons who could have a real influence on the decision to commit a violation of the prohibition against anti-competitive arrangements, or who through their acts or omissions have caused, even indirectly, employees to become involved in illegal practices. This understanding is partially confirmed by the justification for the bill, which mentions as an example of a potentially liable person someone who reaps a benefit from the violation, e.g. in the form of a bonus for increased sales achieved by the business thanks to a price-fixing agreement.

The list of persons who could be held liable under the amended Act on Competition and Consumer Protection is broad. It includes members of management and directors who are immediately involved in an illegal practice (e.g. by taking part in meetings during which illegal arrangements are made), or immediately directing persons involved in an agreement (by issuing them business instructions or indicating actions enabling conclusion of an agreement), but also persons who fail to perform their duties to supervise employees reporting to them or who establish a system of incentives encouraging employees to take a decision to become involved in an illegal arrangement.

The proposed regulation covers not only current members of the management body or persons currently performing a managerial function, but also former managers, i.e. persons who worked for the business during the period of the violation and by exercising decision-making functions permitted the business to violate the law.

Under the bill, personal liability would be derivative of the liability of the business entity that employed a prohibited arrangement. This means that a fine would be imposed on an individual only if the business entity were found guilty of an illegal practice.

The proposed changes have stirred up controversy because of the amounts of the fines threatening individuals. The bill permits imposition of fines that are relatively high by Polish standards—up to EUR 500,000, or more than PLN 2 million. While the very concept of imposing fines is nothing new in the Polish legal system, the proposed amount of the fines that could be imposed by the President of the Office of Competition and Consumer Protection seems harsh when compared to other laws in Poland authorising market regulators to impose fines on individuals (for example, the Financial Supervision Authority may impose a fine of up to PLN 100,000 (about EUR 25,000), and the President of the Energy Regulatory Office may impose a fine of up to 300% of the monthly salary of a person performing a managerial function).

It may be hoped that when due consideration is given to the circumstances, the amounts of the fines may be moderated. When setting the amount of a fine, the regulator would take into account the financial situation of the perpetrator (including his or her income), the duration of the violation, the effects on the market, and the degree of influence over the violation committed by the business entity attributable to the act or omission of the individual.

The bill includes certain mechanisms protecting the interests of board members and management. An obvious concern among such individuals is the possibility of incurring criminal liability. The proposed amendment would exclude double liability—administrative and criminal—for the same act. Under current law, this provision would have little relevance, because as a rule anti-competitive practices are not subject to criminal sanctions. There is an exception in this respect for collusion in a public tender, which is both an anti-competitive practice under Art. 6(1)(6) of the Act on Competition and Consumer Protection and a criminal offence under Art. 305 of the Penal Code.

Much more extensive protection of the interests of management board members and managerial staff is found in the proposed changes enabling such persons to make use of the leniency programme, permitting them to avoid a blow to their personal finances. The leniency programme involves notification to the competition authority of the existence of an illegal arrangement, in exchange for the possibility of avoidance or reduction of the penalty. The proposal would also introduce a procedure making it easier to decide to apply this mechanism. A leniency application submitted by a business entity would automatically cover the individual managers of the enterprise. The bill provides that in the case of filing of a leniency application by a business entity, the President of the Office of

Competition and Consumer Protection would accept the legal fiction that the application was filed on behalf of all managerial personnel against whom a proceeding could be conducted before the regulator. However, under the proposal, this mechanism would not work in the other direction: A leniency application submitted by an individual would not extend any protection to the business entity.

These proposed amendments to the Act on Competition and Consumer Protection will probably go into effect in 2013. According to the draft, the new rules will not apply to practices that ended prior to the effective date of the amending act. This follows from the constitutional rule against the retroactive effect of laws. Under this principle, events occurring under prior regulations which did not provide for personal liability for violations may not be assessed in light of new regulations introducing such liability. This principle applies particularly to legal norms of a punitive nature, as in the case of the liability regime proposed in this bill.

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What's in a company name?

Jacek Bondarewski

The name of a limited-liability company is a fundamental aspect of the legal entity and is closely identified with the company in its external dealings with individuals, other legal persons, and public authorities. For these and other reasons, a company name is subject to legal protection. It is also a mandatory element of the articles of association of every limited-liability company.

The issue of creation of the name of a limited-liability company and use of the name in commerce is governed by several legal acts in Poland. The main sets of regulations are included in the Commercial Companies Code and the Civil Code.

Permissible elements

As a rule, the name of a limited-liability company may be freely chosen, but it must include the ending "*spółka z ograniczoną odpowiedzialnością*" ("limited-liability company"). Based on the guidelines from the code, the company name may be divided into two parts: the main body of the name, and the suffix identifying its legal form. While generally allowing freedom in the choice of the body of the company name, the law does include, particularly in the Civil Code, several rules on creation and use of the company name. One of the fundamental rules is that the company name must be consistent with the factual and legal circumstances. This primarily means that the name must not be misleading, for example with respect to the nature of the company's business, the company's affiliations, or the geographical range of its operations.

The law permits inclusion within the company name of information concerning the subject of the company's business, its location, and specific organisational forms in which the company operates its enterprise. But such information may be included in the name only if it is accurate. The company name may also include the name of an individual for the purpose of showing the person's connection with the creation or operations of the company.

A limited-liability company may have only one company name. The name is established in the articles of association and entered in the commercial register (part of the National Court Register). This means that the company name is public information.

Specific provisions of the Commercial Companies Code and certain other acts provide for slight modifications of the company name in certain specific situations in which the company may find itself. For example, when a company enters bankruptcy, it includes, in commerce, the additional phrase "*w upadłości likwidacyjnej*" ("in liquidating bankruptcy") or "*w upadłości układowej*" ("in reorganising bankruptcy") at the end of the name. The law also permits the use of the abbreviated suffix "*spółka z o.o.*" or "*sp. z o.o.*"

Ban on sale

A company name may not be sold. Nonetheless, the Civil Code permits the authorisation of another business entity to use the company name if it is not misleading with respect to the identity of the entities or other circumstances surrounding the designation of the entities and their operations. The permissibility of granting a licence to use a business name is fairly complicated, however, and in some cases controversial. Moreover, Civil Code Art. 43^8 §3 provides, with respect to various types of legal entities, including limited-liability companies, that in the case of sale of the enterprise, the acquirer of the enterprise may continue to operate the enterprise under the existing name. In such case, the acquirer should include an additional element indicating the acquirer's name (if not otherwise agreed by the parties). This set of rules (beginning with the general prohibition against sale of the name) involves the fairly complex intersection of concepts and regulations concerning the name of the company, the designation or name of the enterprise, and (under separate regulations) the trademarks that may be used by the enterprise. Given the complex nature of these concepts, whenever an enterprise is sold the parties should agree on the issues related to the interconnection between the designation of the enterprise, the seller's company name, and, if necessary, the name of the acquirer's enterprise. These terms should also be reviewed for legal feasibility.

Market exclusivity

Another fairly complex issue involves the exclusivity of the company name, i.e. the requirement that the company name be sufficiently distinct from the names of other business entities operating on the same market. The courts in pre-war and post-war Poland stressed many times the principle that it should be easy for the average member of the public to distinguish between company names. However, the concept introduced in the amended Civil Code of the market in which it should be assessed whether the company is distinguishable may cause problems in interpretation.

Under the former Commercial Code, the name of a new company had to be sufficiently distinct from the company names already registered or submitted for registration in the same locality. The departure from this requirement was justified by introduction of the National Court Register, but makes it necessary to adopt somewhat different criteria than those employed in the old Commercial Code for determining when there is a conflict between similar names of different companies.

The current Civil Code provisions on company names do not indicate how to interpret the concept of the market in which the name of one business entity should be distinct from the names of other business entities. For lawyers, the touchstone for understanding the concept of a market may be the definition of a "relevant market" in the Act on Competition and Consumer Protection (with the accompanying case law and commentary). Under the wording of that act, a "relevant market" is defined as "the market for goods which in light of their intended use, price and other properties, including quality, are regarded by customers as substitutes for one another, and which are offered in an area in which similar conditions of competition prevail due to the type and properties of the goods, the existence of barriers to market access, consumer preferences, and significant differences in prices and transportation costs."

Nonetheless, this is not the only possible interpretation of the concept of the "market." Other definitions of this term are also found in the legal literature which in certain instances may also influence the interpretation of the Civil Code provisions concerning company names. For example, in terms of time, a market could be created temporarily, for a certain period, in connection with circumstances involving the sale of specific products (such as Christmas ornaments). The market could also be defined in geographical terms, as a specific area in which conditions of competition prevail among business entities (competitors) offering certain goods or services. (The notion of a geographical area is also covered to a certain extent by the definition of a "relevant market" provided above.)

For these reasons, interpreting the market in which the Civil Code requires every company name to be sufficiently distinct from other company names is a broad issue. The issue of distinguishing among business entities, their designations, company names and other elements of their identity is also the subject of other regulations, including some provisions of the Act on Combating Unfair Competition. Therefore, in order to determine whether the legal requirements for proper identification of a company have been met, it is not only necessary to review the regulations for assigning names to business entities, but also, in many cases, to consider the market and the competitive conditions under which the business will operate.

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Acquisition of real estate by foreigners: Permits are still an issue

Iwona Kasperek Tomasz Zasacki

The limitations on acquisition of land by foreigners fell dramatically when Poland joined the EU, but acquisition of agricultural land still requires a permit and causes many practical problems. It is not always clear whether land is agricultural, and if a permit was required but not obtained, the acquisition is invalid.

Poland's accession to the EU, and accompanying amendments to the Act on Acquisition of Real Estate by Foreigners of 24 March 1920, eliminated much of the requirement for foreigners who are citizens or business entities from the European Economic Area or Switzerland to obtain permits before acquiring real estate in Poland. However, this problem has not disappeared entirely and still arises in many transactions, particularly when acquiring agricultural land or woodland. The interpretation and practice of applying the act raise a number of interpretational problems and lead to some real conundrums.

We will focus on the acquisition of agricultural land, leaving aside the issue of woodland, which does not raise quite as many practical issues.

The act does not define agricultural real estate. As amended in 2004, it merely states that acquisition of agricultural property is subject to the Agricultural System Act of 11 April 2003, which defines agricultural property with direct reference to the definition in the Civil Code. Therefore, the definitions contained in both the Civil Code and in Agricultural System Act must be referred to.

Art. 461 of the Civil Code defines agricultural property as property which is or may be used for agricultural crop and livestock production, including horticultural, orchard and fish production. This definition is extremely broad, largely due to the phrase "may be used." Therefore the agricultural nature of land is determined by its potential agricultural use, rather than its current use. Thus land which could be used for agricultural purposes, but is not, including fallow and uncultivated land, still constitutes agricultural land. Parties sometimes mistakenly treat property in a contract in terms of its location, classification in land description records, mode of use and development, whereas in light of the regulations it is still agricultural property, and so its acquisition requires a permit.

Art. 2(1) of the Agricultural System Act defines agricultural property in the same way as the Civil Code, but excludes properties in areas designated in zoning plans for non-agricultural use. Analysis of both definitions leads to a clear situation if a foreigner presents the local zoning plan showing that the property is in an area designated for non-agricultural use. In other cases, a detailed examination of documents is necessary, and it can be difficult to classify the land clearly.

If no zoning plan exists for a particular property, how can one determine that the property is not agricultural? Publications by the Ministry of the Interior state that this is done using documents, which, in addition to the certificate of allocation in the local plan, include official decisions on such matters as construction conditions, location of a public construction project, or removal of land from agricultural production, and also employing land description records. In practice, it is accepted that if the first two decisions show that the property is classified for non-agricultural use, then a foreigner from the EEA or Switzerland is exempt from seeking a permit to purchase the property. This should be treated with caution. But is it possible to apply a broad interpretation to Art. 2(1) of the Agricultural System Act? And can property assigned for non-agricultural use in a decision on construction conditions or on location of a public construction project be treated as the equivalent of such designation in a zoning plan? The agricultural property definition in Art. 2(1) makes no reference to the designated use of real estate as defined under the Zoning Act, but refers to just one strictly defined planning instrument: the zoning plan.

Although in the absence of a local zoning plan, decisions on construction conditions and on location of a public construction project determine the way in which land is to be developed and the terms of land use, nevertheless they differ in nature from a zoning plan and are issued under a completely different procedure. Leading commentators argue against attempts to recognise such decisions as substitutes for a zoning plan. Similarly, they cannot be deemed to exclude the real estate from classification as agricultural property. We recommend great caution and in-depth analysis if an EEA or Swiss investor intends to purchase property for which a decision has been issued on construction conditions but the property is or may be used for agriculture.

The land description record may not be conclusive either, as the following example illustrates. Such a record described developed land of about 0.1 hectare, for which there was no zoning plan, as "other built-up areas." There seemed to be no reason to regard the property as agricultural. Nonetheless, analysis of documents revealed that the property was previously classified as pasture. The change in the land description record came about not from a change of use of the real estate, but from property tax guidelines issued by the state authorities. Under these guidelines, developed land was classified as developed agricultural land only if it was associated with operation of a farm exceeding 1 hectare in area. The change in classification in the land description record did not change the nature of the property. A cowshed was located on the land, and although it was not being used for cattle farming at the time it could have been used for animal husbandry at any time. And if this was the case, it was agricultural property.

An interesting problem also arises when a property is designated for non-agricultural use in the zoning plan, but the plan envisages leaving drainage ditches on the property serving other real estate. Pursuant to land and buildings record regulations, drainage ditches are actually classified as farmland and therefore are agricultural land.

Therefore, it is crucial to clarify the status of the property. Only a thorough analysis of each case will avoid serious consequences, such as invalidation of the property's acquisition.

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International exchange of information in tax matters

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For the past several years, there has been a noticeable increase in activity of states with respect to exchange of information in tax matters. This trend has practical consequences for taxpayers. An example is the new directive (2011/16/EU) on administrative cooperation in the field of taxation, which went into force on 1 January 2013 and provides for automatic exchange of information about selected categories of income.

The financial crisis and its negative impact on the public finances of many developed countries has encouraged them to seek ways to increase their revenues, including tax revenues. Among the measures intended to serve this purpose are efforts to improve the international exchange of tax information. In an age of increasing globalisation, such exchange is becoming an essential tool for effective enforcement of tax law by state authorities.

As the author of the Model Tax Convention on Income and on Capital, the OECD plays a leading role in efforts to achieve more effective exchange of tax information. This convention provides the grounds for exchange of information between countries, and the great majority of tax treaties to which Poland is a party are based on the convention. The OECD has also drafted the Model Tax Information Exchange Agreement, for bilateral treaties intended to be enacted with countries previously regarded as tax havens, as well as the multilateral Convention on Mutual Administrative Assistance in Tax Matters, which has so far been joined by Poland and more than 40 other countries.

Specific jurisdictions that have undertaken to implement the international standard for exchange of information are subject to a two-stage audit. In the first stage, implementation of the standard is examined at the level of the legal instruments existing in the given jurisdiction. If this phase is successful, the second stage of the audit determines whether information exchange is conducted in compliance with the standard in practice.

The standard developed by the OECD calls for full exchange of information "on request" in all tax matters, without limitations arising under banking secrecy and regardless of whether the requested state needs the requested information for its own tax purposes.

But to avoid fishing expeditions, the legal instruments serving as the basis for international exchange of information typically provide, like the OECD models, a reservation that the information sought must be "foreseeably relevant" for effective enforcement of tax law. It may be anticipated that the practice for determining relevance, which is only now developing, will in the future become one of the most important factors affecting the scope of tax information exchanged between countries.

Apart from the OECD, the European Union is also taking steps to improve the international exchange of tax information. The most important manifestation of this initiative was the adoption by the Council of the EU on 15 February 2011 of a new directive (2011/16/EU) on administrative cooperation in the field of taxation. Some of the provisions of the directive came into force on 1 January 2013, and the member states are required to implement the other provisions by 1 January 2015.

Poland—recent changes in the legal framework for exchange of information

The Polish authorities have recently taken steps when negotiating new tax treaties or renegotiating existing tax treaties to introduce solutions concerning the exchange of tax information, in order to comply with the international standard promoted by the OECD. For example, a clause concerning exchange of information was introduced into the tax treaty between Poland and Switzerland, which had been the only such treaty containing no such provision at all. Moreover, on 7 March 2011 Poland entered into its first treaty based on the Model Tax Information Exchange Agreement—with the Isle of Man. Two more such treaties, with Jersey and Guernsey, went into effect in late 2012, and others have been signed with Andorra, Dominica, Grenada and San Marino. The Ministry of Finance has announced that it is negotiating additional treaties based on the Model TIEA with countries and territories with whom Poland does not have a treaty on avoidance of double taxation.

Moreover, regulations implementing the first set of provisions of Directive 2011/16/EU went into effect on 1 January 2013. They make it easier to pass on information to other countries that was first obtained from a member state under the directive. For example, if the Polish authorities obtain information from the German authorities, they may forward it to another EU member state after merely notifying the German authorities, who would have 10 days to object. Previously, anytime information was passed on to another country it required the consent in each case of the country from which the information was obtained.

Further provisions of the directive await implementation, particularly those providing for mandatory, automatic exchange of information concerning certain sources of income of persons residing in Poland. (Automatic exchange of information will cover employment income, directors' fees, life insurance products not covered by other EU regulations on exchange of information or similar measures, retirement and disability pension benefits, ownership of real estate and income from real estate).

Situation of taxpayers

Conclusion by Poland of new treaties providing grounds for exchange of information on tax matters, and amendments to existing treaties to include clauses on exchange of information, will expand the list of jurisdictions with which the Polish authorities will be able to exchange information about taxpayers. Significantly, the current regulations practically prevent a taxpayer from disputing the use as evidence of information obtained as a result of international exchange of tax information. Nor are there means for a taxpayer to seek judicial review of an order under which the Polish tax authorities forward information to the authorities of another country. The absence of such guarantees raises issues about protection of the taxpayer's constitutional right to privacy.

The only option taxpayers have under current law is to arrange their financial affairs so as to assure that any information provided to the Polish authorities, or shared by the Polish authorities with the authorities of another country with which Poland exchanges tax information on the basis of the available legal instruments, raises no doubts that the taxpayer has properly paid its taxes.

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Protection of confidential information shared in due diligence

Maciej Szewczyk Anna Dąbrowska

At the negotiation stage of a corporate transaction, the potential investor usually seeks access to information that constitutes a business secret of the target company. How can such information be disclosed without violating the obligation imposed on the management board to maintain the company's business secrets and without exposing the company to a loss? What guarantees are there that the information will not be disclosed to third parties?

In contemporary M&A practice, acquisition of shares, an enterprise, an organised part of an enterprise, or specific business assets is generally preceded by a legal review of the target—due diligence.

The purpose of due diligence is to provide the investor as extensive knowledge as possible about the target, its specific features, and potential legal risks that could have an impact on the operations of the target or even disqualify it from consideration by the investor.

One particular aspect of due diligence is that it is generally based on materials provided to the potential buyer by the management of the target. To a large extent such materials constitute business secrets, or at the very least are information that could expose the company to a loss if used improperly.

This problem should be considered from two perspectives:

- The duty imposed on the management board of the target to maintain the company's secrets
- The duty to protect information obtained in the course of due diligence, which is imposed more specifically on the potential investor (who commissions the due diligence) and on the persons who make use of the information during due diligence.

In Poland, the duty to maintain a company's business secrets arises out of the Commercial Companies Code, which establishes the scope of the duties and liability of members of the management board of a capital company, as well as the Act on Combating Unfair

Competition of 16 April 1993, which treats disclosure of information by the management board of the target company as an act of unfair competition.

Under the Commercial Companies Code, the management board, as a mandatory authority of every capital company, is appointed to conduct the affairs of the company and to represent the company (Art. 201 for a limited-liability company or Art. 368 for a joint-stock company). Therefore unauthorised disclosure of the company's business secrets to third parties may result in liability in damages on the part of the members of the management board. The regime of liability for injury caused by an act or omission contrary to law or the company's articles of association or charter (Art. 293 §1 or Art. 483 §1 respectively) is applicable in this respect. Moreover, under the Act on Combating Unfair Competition, providing, disclosing or using information constituting a business secret (i.e. technical, technological, or organisational information of an enterprise, or other information of economic value, which is confidential and with respect to which the business entity has taken the necessary measures to maintain its confidentiality) is an act of unfair competition (Art. 11(1)) if disclosure of such information threatens or violates the interests of the business entity.

However, it is not always easy to determine whether disclosure of information has occurred which qualifies as an act of unfair competition or gives rise to liability in damages on the part of members of the management board. A range of circumstances must be considered in each case, including the market importance of the information (in other words, to what extent disclosure of the information to unauthorised persons could cause a loss to the company), as well as the situation in which the information is disclosed. It may be argued that when the management board of the company provides information in the course of due diligence, it will not violate Art. 11(1) of the Act on Combating Unfair Competition if the management board, exercising due care, believes that providing such information to third parties will not threaten the substantial interests of the company. This assumption may be even more strongly justified if the board:

- Restricts access to the confidential information to the most limited possible group of persons, from whom it has first obtained an appropriate undertaking to maintain the confidentiality of the information
- Takes specific measures to properly protect the information (particularly by providing access to the information in a manner preventing or discouraging the making of copies, for example by using a properly secured IT platform or "virtual data room").

In turn, the source of the obligation imposed on the entity that obtains confidential information in the course of due diligence (i.e. the potential investor) may be found in the provisions of the Civil Code concerning the conduct of negotiations toward conclusion of an agreement. The rest of the discussion below will be devoted to this particular issue—with respect to cases in which the target is not a publicly listed company.

Under Civil Code Art. 72^1, if during the course of negotiations a party has provided information under a reservation of confidentiality, the other party is required not to disclose or pass on the information to other persons, or to use such information for its own purposes. It may be assumed that the limits of this duty are determined by the purpose for which the confidential information is provided, which is to carry out a transaction (or conclude an agreement). Thus it may be assumed that when the party that is bound to maintain the confidentiality of the information it has received (i.e. the potential buyer) provides the information to persons cooperating with it in the course of the negotiations (e.g. its legal advisers conducting due diligence of the target), this will not constitute a violation of confidentiality.

Civil Code Art. 72^1 is a default provision, not mandatorily binding, which means that the parties may choose to regulate the scope of liability differently, particularly by entering into a confidentiality agreement before beginning the negotiations.

The duty to maintain confidentiality referred to in Civil Code Art. 72^1 arises only if all of the following conditions are met:

- The confidential information was disclosed in the course of negotiations (e.g. in order for the potential investor to conduct due diligence of the target).
- The information disclosed is confidential in nature. (In other words, the information must not be known to a broader group of persons. This would be the case, for example, with information concerning the target's customer database, production processes, pricing policy or the like.)
- The party disclosed the information under a reservation of confidentiality.

Providing the other party with information under a reservation of confidentiality during the course of negotiations results in creation of a relationship of obligation between the parties, specifically a duty not to disclose or pass on the information to third parties and not to use the information for the recipient's own purposes.

Unless otherwise agreed by the parties, if a participant in the negotiations (or, apparently, a person acting under instructions from the participant, e.g. its financial or legal advisers) violates this obligation, the infringing party has a duty to redress the loss caused by the person who released the confidential information, or to disgorge any benefits obtained as a result of the release.

This duty to maintain confidentiality is unlimited in time and is continuous—in other words, the duty will continue to exist as long as the other party has an interest in maintaining the confidentiality of the information. Consequently, unless otherwise agreed by the parties, the obligation to maintain the confidentiality of the information will remain in force whether or not the parties finally decide to carry out the transaction.

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Infringement on the docket: Whether to seek protection of intellectual property rights before the Polish courts

Dr Monika Żuraw-Kurasiewicz Włodzimierz Szoszuk

Protection of intellectual property, such as works, inventions, trademarks and industrial designs, is vitally important for most companies. IP rights often hold the value of the enterprise, and infringement may cause serious losses. IP law defines the boundaries between exclusive use by the authorised holder of an IP right and free use by third parties. But whether or not there is infringement in a specific case is decided by the court.

Intellectual property regulations are on principle worded generally, and as a rule they do not allow unequivocal determination of infringement. It is therefore necessary to refer to the canons of interpretation developed in the case law. Moreover, many concepts in the regulations may involve an element of subjective assessment, such as a "likelihood of confusion" in the case of trademarks or a "different overall impression" in the case of industrial designs. It is particularly important for the court hearing the case to understand the special nature of intangible rights and the rapidly evolving case law.

Familiarity with the rulings by the European Court of Justice is essential, as one of the roles of the ECJ is to interpret EU regulations which cover a broad spectrum of IP rights. As a rule, it is hard to issue a correct judgment without a strong foundation in the established case law. For example, even a normative dimension like "similarity" differs depending on the particular intangible right involved. Over the past few years, it is apparent that the Polish courts have a better and better understanding of the issues peculiar to IP law, more closely follow the main stream of current interpretation, and devote extensive attention to European as well as national standards.

Intellectual property litigation also has a special flavour to it. The procedural rules, for example concerning evidence, are the same as the general rules. There are no special rules for litigation involving intangible rights. But the general rules may not be helpful in a situation where the court requires proof, for example, that specific goods were not produced by the authorised holder of the rights. Under the rule of reason, an appropriately justified statement by the holder should suffice. It sometimes happens, however, that the court orders expert testimony, which by its nature is time-consuming and expensive. But the expert must still base his or her opinion on information obtained from the holder of the rights, because only the holder knows the distinguishing features of the goods it produces.

Experts are often appointed as well to prove circumstances that are not factual in nature but involve assessment of normative criteria, which is ultimately the role of the court. In order to determine whether use of a trademark by a third party causes a risk of confusion, it should be sufficient for the plaintiff to present the certificate of registration of the trademark by the authorised holder, together with the labelling of the defendant's product allegedly infringing the plaintiff's trademark. The court will often appoint experts to assess the similarity in the designation, but an expert opinion should address factual findings, and even then only when specialised knowledge is required. Appointment of an expert is justified in certain cases, however, such as a patent infringement dispute, when specialised knowledge is truly necessary, e.g. concerning the technology used in the allegedly infringing product.

The inadequacies in both substantive and procedural law are particularly clear in the context of financial claims by holders of IP rights. Infringement of IP rights causes losses for the holder, but they can rarely be measured with any precision.

There are situations in which the infringer accepts an order to produce specific goods. One case of infringement of an industrial design involved specialised bags which proved to be goods violating the interests of the plaintiff, which was supposed to be the supplier of the goods protected by its registered design. The situation was clear: The supplier lost the benefits it would have obtained if the contract for the specific number of bags had not been concluded with the infringer. More often, however, the cases are not so obvious.

The first difficulty is in defining the scale of the infringement. This is information typically in the possession of the infringer, but only in some cases can it be determined by analysing the infringer's sales and accounting records. The next difficulty is in valuing the loss to the holder as a result of the infringement. This is not the same as the profit obtained by the infringer, which is after all, to a certain extent, the result of capital investments and other costs incurred by the infringer.

Moreover, the detriment to the plaintiff may not be noticeable immediately, but may occur over an extended time. But civil procedure requires specific evidence. Due to these limitations, holders of IP rights often give up pursuing their financial claims, concerned about a possible negative outcome at trial as well as the possibility that the cost of litigating the claims, given the evidentiary difficulties and the length of the proceedings, will exceed the compensation awarded.

Certain recently enacted regulations should help eliminate these difficulties. Informational claims are now permitted with respect to intellectual property, enabling the holder of rights to obtain information from the infringer about the scale of the infringement and the profit obtained. Calculation of damages using a "hypothetical licence" analysis should help overcome the difficulties in proving the amount of the loss. It will probably take some time before these new regulations achieve broad and effective application. For now, it is still much easier to obtain an order to cease and desist further infringement and an order to remove the effects of existing infringement than to obtain compensation.

For protection of intellectual property rights to be effective, it must be granted quickly. A judgment issued only three to five years after the launch of production under a patented technology may sometimes provide only moral satisfaction. Publication of an apology for an infringement five years after the infringement was committed will not reverse its negative effects. Indeed, it appears that the worst problem of Polish courts in IP cases is the lengthy nature of the proceedings. Plaintiffs would often rather enter into a less favourable settlement than wait several years for a win in court.

Nonetheless, there has been significant change with respect to interim injunctions granted to holders of IP rights. The courts are quick to hand down a cease-and-desist order and seize the infringing goods. If an infringement were allowed to continue for the duration of litigation going on for several years, it could effectively gut the plaintiff's exclusive rights. If a third party uses another person's trademark for several years, the trademark could begin to become associated with the infringer, which might mean that there is no likelihood of confusion by the time the judgment is issued.

Enforcement of judgments can also be problematic. Only the infringer can stop the infringement. However, more severe monetary sanctions, as well as payments directly to the plaintiff for failure to comply with an injunction against infringement, which were also introduced in 2012, should significantly improve enforcement.

When analysing litigation over protection of intellectual property rights in Poland, it must be borne in mind that this field does not have a long history here, based on many years of tradition, as is the case in some other EU member states. It is an area of litigation that essentially goes back to the early 1990s. Before that, intellectual property law had little practical significance.

Nonetheless, it may be hoped that the awareness of the nature of intellectual property has already begun to take shape and become more widespread in Poland. The next step is to make the rules of interpretation and the procedural rules more flexible, to assure that the protection offered by the regulations, which on paper meets the standards accepted within the European Union, is realised more effectively. There is a noticeable increase in the number of IP cases finding their way to the dockets of the Polish courts. It thus appears that litigation has become an effective weapon in the fight against infringement, and an alternative to settlement, which cannot be achieved in every case.

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A few words on outsourcing in Poland

Danuta Pajewska

In a world of larger and larger commercial ventures and the need to manage them rationally, they do not have to do everything for themselves. But when considering outsourcing, it is important to know what to look out for and what to protect against so that outsourcing does not become a source of additional costs instead of a way to cut costs. This is particularly important in the case of regulated institutions such as banks.

The idea of outsourcing is to conduct business operations using external resources. Large companies and capital groups pay increasing attention to efficiency and operating costs. Such activities as personnel, payroll, procurement, IT, or back-office in the case of financial institutions, are sometimes unnecessarily duplicated within a capital group or generate greater costs than if they were carried out by a specialised external firm.

Outsourcing services should be looked at from three different perspectives. First is the ability to use outsourcing by regulated institutions and the types of activities they can outsource. In the case of outsourcing by banks, investment firms and payment institutions, the legal rules are fairly clear.

The second perspective has to do with companies performing outsourcing services. It is important to note the degree of legal freedom for outsourcing companies to provide such services, which entities may perform them and what requirements they must meet. There are certain categories of services (such as accounting) that require specific qualifications.

The third set of issues that should be considered concerns the corporate aspects of outsourcing within capital groups. If a capital group establishes a company to perform certain services centrally, organise purchasing and take decisions in this regard, there may be a risk of violation of the corporate authority of board members of companies within the group, who may be personally responsible for the effects on their company of decisions they had no influence over. For the sake of the companies in the group, the rules for use of shared services should be properly addressed, particularly by providing for decision-making procedures.

In recent years, Poland has become a very attractive location for outsourcing centres due to the availability of educated staff, the ability to obtain public aid, the relatively low cost of centres, and the availability of office space. Companies deciding to set up shared-services centres in Poland include foreign banks and other financial institutions that operate in numerous countries, which in light of the nature of their back-office function may process data in a single centre created for that purpose. Banks operating in Poland also increasingly take advantage of the opportunity to outsource certain functions.

Special regulations on outsourcing

The Banking Law governs the scope and conditions on which functions may be commissioned outside the bank. A bank may outsource intermediation in banking activities, for and on behalf of the bank, as well as "factual" operations connected with banking activity. This means a bank may not outsource management of the bank, risk management, management of the bank's assets, or performance of credit analysis.

The Banking Law specifically regulates the issue of liability to customers. The bank is responsible for the actions of an agent it has hired to perform activities on an outsourcing basis just as it would be responsible for its own actions. Nor may the agent's liability to the bank for loss to customers be limited. Banks may outsource services beyond Poland, but outsourcing beyond the EU may be done only upon consent of the Financial Supervision Authority. There are analogous rules for investment firms, which may entrust operations to an outside entity so long as it does not involve outsourcing of brokerage activity or representation or management of the company.

There are also specific rules for outsourcing of accounting functions, which may be entrusted only to businesses and individuals authorised to maintain accounting books, i.e. certified accountants, auditors or tax advisers. The accounting books may be maintained outside of the registered office of the company if the tax office is notified and tax audit authorities are assured access to the books and records. The agreement with outside accountants must be made in writing and must assure that the outsourcing company will be responsible for compliance with all standards for maintaining the books.

Outsourcing contracts are subject to specific legal regulations only in the case of financial institutions. In the case of other types of entities, outsourcing contracts fall within the category of miscellaneous contracts. Such arrangements lie within the realm of freedom of contract, and may be classified as a contract of mandate, a contract to perform a specific work, or a service agreement, depending on the nature and scope of activity of the outsourcing company. Thus it is important to precisely define the scope of the outsourced activities and the related rights and obligations of the parties, as well as the liability of the outsourcing company. This is particularly important for determining whether the agreement is one for making best efforts (e.g. a service agreement or contract of mandate) or is intended to produce a specific work or result.

Protection of personal data and confidential information

If conclusion of an outsourcing agreement may result in outsourcing of the processing of personal data, the agreement should contain a provision specifically entrusting this activity to the provider of outsourcing services. The agreement should state that the service provider may process personal data only for the purpose indicated in the agreement and should require the service provider to comply with the organisational and technical requirements for data controllers as provided by law. The outsourcer will be liable for processing of the data by the outside service provider.

Proper protection should also be given to information classified as confidential or professional. Transmission of such data to an outsourcing centre must be made in the manner prescribed by law, specifically the Banking Law and the laws governing the operations of other financial institutions, which contain a number of restrictions on external transmission of such information.

Benefits for opening an outsourcing centre in Poland

The opportunity to receive additional financial benefits may be interesting for entities intending to open an outsourcing centre in Poland. Such benefits may flow from conducting operations in a special economic zone, reimbursement of job creation and training costs, and long-term direct aid.

Operating in a special economic zone under an SEZ permit provides an exemption from corporate income tax. However, SEZ benefits are not available in the case of regulated industries such as financial services.

Refunding of costs of establishing jobs is available upon application by the employer to the mayor of the locality, after conclusion of a corresponding agreement. The beneficiary is required to maintain the subsidised position for a period of two years. Such assistance is available only when hiring a registered unemployed person.

Refund of training costs is available upon application to the mayor of the locality and conclusion of a corresponding agreement. The available aid may be up to 80% (although usually it is no more than 50%) of the training costs, but no more than three times the average monthly salary in Poland.

Long-term aid is available under long-term plans adopted individually for a particular project by the Council of Ministers, for either job creation or investment expenditures. Such aid is granted on the basis of negotiations, without any specific limits in scope or time. Because of the incentive nature of the aid, any expenditures pertaining to the investment should be incurred only after obtaining the green light—typically a letter confirming the aid from the government. This is also the first step in the procedure to determine the final amount of state aid. The aid will also be subject to notification to the European Commission.

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Problems with chargebacks

Krzysztof Wojdyło

In Poland, 2012 produced unprecedented growth in interest in chargebacks. This previously obscure legal mechanism received great attention in the media, chiefly thanks to the spectacular insolvencies of well-known travel companies. These events made the broader public more aware of the concept of chargebacks and the issues raised by this mechanism.

A proper understanding of the chargeback requires some introductory remarks concerning the specifics of the regulations governing payment instruments. It may come as a surprise to learn that most of the rules governing the use of payment instruments (which still to an overwhelming degree means payment cards) are not adopted by the Polish Parliament. Rather, the driving force in creation of these rules is payment organisations—primarily Visa and MasterCard. These organisations have developed an extensive set of rules that are binding on issuers of payment instruments covered by the specific payment organisation (primarily banks) and by entities settling transactions made using payment instruments (known as "acquirers"). These entities in turn carry over some of the solutions from the rules of the payment organisations into contracts with their own customers (cardholders in the case of issuers, and merchants in the case of acquirers).

As a result of this complex arrangement, holders of payment cards and entities accepting payment using cards (e.g. retailers) are subject to rights and obligations under certain legal solutions adopted in the rules of payment organisations, even though they have no direct legal ties with these organisations. Chargeback provides an excellent illustration of this arrangement.

In simple terms, chargeback is a solution enabling the holder of a payment instrument to assert claims against the issuer of the instrument for irregularities connected with payments made using the instrument. The irregularities may involve various different circumstances. The rules of the payment organisations provide for dozens of events that may lead to a chargeback claim. Unauthorised use of a payment instrument is one of the better-known reasons for chargeback. Assertion of a claim launches a complicated procedure, which—if the holder's claim is upheld—leads to a refund to the holder of amounts collected from the holder's account in order to carry out the defective transaction using the payment instrument. As a result, the merchant that accepted payment using the card must refund the payment to the cardholder.

Chargeback is clearly a solution that is extremely beneficial to holders of payment instruments, providing an additional tool for protection of consumer rights. It is also a solution that should help foster the growth of cashfree forms of payment. Chargeback gives payment instrument a certain added value not available with more traditional forms of payment. By contrast, if someone steals cash and uses it to make purchases, the victim of the theft does not obtain a claim against the bank that issued the cash.

Notwithstanding its undoubted benefits, chargeback generates a number of objections by merchants accepting payment using such instruments. Based on our experience, it appears that most such controversies result in large part from insufficient knowledge about chargebacks among merchants—probably ultimately caused by inadequate communication between acquirers and merchants. It should be stressed again that merchants are not a party to any direct agreements with the payment organisations. Nor are the rules of the payment organisations directly binding on the merchants. But the great majority of rules concerning chargeback are found in the rules of the payment organisations. This gives rise to a peculiar situation. Merchants incur the greatest economic risk in connection with chargeback—if the cardholder's claim is upheld, the merchant is required to refund the payment—but in most cases merchants are not aware of the rules governing chargeback.

Agreements on acceptance of payment cards, concluded between merchants and acquirers, typically have little to say about chargebacks. In more specific matters, they often cross-reference the rules of the payment organisations, with which the merchant is unfamiliar. Moreover, the merchant is not the one who decides on chargeback claims. The rules provide for special procedures in this respect, under which the decisive role belongs to the issuers and the payment organisations. The merchant may participate in the claims investigation procedure, but cannot take a final decision on the claim.

Consequently, the merchant may be forced to refund a payment received using a card even if it does not agree with the resolution of the chargeback claim. Chargeback claims based on defects in supply of the goods or services by the seller may be particularly controversial. It should be pointed out that a chargeback claim may in this case be a separate claim apart from an ordinary guarantee or warranty claim which the buyer has against the seller. A situation cannot be ruled out in which the chargeback claim is upheld even though there are no legal grounds for pursuing a guarantee or warranty claim. In such case, the merchant's liability will be a particular form of risk-based liability (directly referred to in some agreements on acceptance of payment cards), and in extreme cases may result in a requirement to refund the price even though the goods or services sold are not returned.

Such controversies may be considered inherent in the very essence of chargeback, under which any merchant deciding to accept payment cards assumes certain risks. At the same time, it is hard to imagine the existence of a system of cashfree payment without chargeback rights. They are an essential element for guaranteeing the protection of the consumer's rights in certain instances. With this in mind, it would be worthwhile to develop more effective means of communication, to provide merchants a thorough understanding of chargeback and the related obligations, as well as the systemic importance of this institution.

The controversies surrounding chargeback have been known for a long time. But the bankruptcies of prominent travel companies in Poland revealed new, previously unnoticed risks connected with chargeback. As it turns out, in certain circumstances the principal risk of chargeback claims must be borne by the acquiring bank. This will happen in a case where the basis for the chargeback claim is improper performance of a sale or service paid for in advance using a payment instrument because the seller or service provider has been declared bankrupt. In such case, if the chargeback claim is upheld, the party required to refund the amount paid using the payment instrument will be the acquirer, which will then potentially be able to pursue a claim for reimbursement against the bankruptcy estate of the merchant. This means that acquirers assume the risk of significant financial obligations with little chance of recouping the amounts refunded to the merchant's customers.

In Poland, there is yet another aspect to the matter. Because there is a system of mandatory insurance or financial guarantees on the part of travel companies, a client of a bankrupt travel company who paid for a future trip with a payment card will in practice be entitled to pursue three independent claims when the trip is cancelled: the principal claim against the bankruptcy estate, the chargeback claim, and a claim under the insurance or financial guarantee purchased by the travel company that subsequently went bankrupt. Conceivably, there is a real risk that the same amount could be paid out to the same person more than once. There are no clear rules on how to proceed in such situations. For example, it is difficult to determine what happens if the chargeback amount is paid out before payment is made e.g. under a travel agency's financial guarantee. Does the acquirer then assume the rights of the travel agency's customer? The existing regulations and the rules of the payment organisations do not provide clear answers to these questions.

There have also been controversies concerning situations in which payments for a cancelled trip were accepted by agents of a bankrupt travel company. It is not entirely clear whether agents who forwarded the payments they received to the now-bankrupt travel company should be required to refund the same amounts on the basis of chargeback. The existing regulations do not provide clear rules for proceeding in such cases either.

The bankruptcies of travel companies revealed gaps and imperfections in the existing legal framework for chargeback. Drawing on the lessons learned from these events, it would be worthwhile to consider developing a chart of the risks connected with chargeback, which could serve as a reference for improving the existing system. Specifically, this would require creation of procedures to prevent unscrupulous cardholders from obtaining multiple satisfaction of their claims. It is also important to create clear rules with respect to payments accepted by agents of businesses that subsequently become insolvent. This would help rebuild trust in the institution of chargeback among participants in the system of cashfree commerce.

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Why does the bank care about reprivatisation?

Krzysztof Wiktor Leszek Zatyka

Some well-located properties in Poland still suffer from unclear title. Their location increasingly makes them the subject of interest among developers. And because acquisition of real estate is typically financed by banks, banks have joined the group of entities interested in obtaining a thorough understanding of the validity of any reprivatisation claims asserted against a property.

The wartime destruction in Poland, particularly in large cities, was so vast that even down to the present, not all of the properties devastated during the war have been redeveloped. Many of these properties were taken over by the state in post-war nationalisation covering numerous properties all over the country. After 1989, many of them were communalised or appropriated by state enterprises or residential cooperatives.

Now, thanks to the huge growth in residential and commercial construction over the past two decades, most properties with clear title, located in city centres, have already been redeveloped or acquired by developers for this purpose. Thus developers more and more often plan to build projects on sites which former owners have asserted claims to, or which are undergoing administrative or judicial procedures to regain the property. This primarily has to do with real estate currently owned by the State Treasury or territorial governmental units, but also privatised state enterprises or their legal successors.

Because the great majority of acquisitions of commercial real estate are financed by banks, the banks are now interested in learning as much as they can about the nature and validity of reprivatisation claims that have been asserted.

When conducting its analysis of the borrower's creditworthiness and the current legal status of the real estate before granting a loan to purchase real estate encumbered with reprivatisation claims which is to serve as security for the loan, the bank should examine not only the current entries and notations of motions in the land and mortgage register for the property, but also the correctness of acquisition of ownership rights and the basis for entry in the land and mortgage register. This is particularly important if the rights to the real estate being acquired are still held by the State Treasury or a territorial governmental unit. This means that it is necessary to analyse the documentation concerning the real estate and the administrative proceedings that were conducted during the more than 60 years since the end of the Second World War. The legal succession of those asserting reprivatisation claims derived from the former owners of the property should also be checked. Historical mortgages entered in the land and mortgage register prior to nationalisation are irrelevant, however, even if never formally deleted from the books.

The bank may not be in a position to examine the issue of reprivatisation claims itself, but it must establish its own policy in this respect as part of its credit risk management procedures. It has a choice between abandoning financing of the deal when the property is subject to reprivatisation claims, or issuing a loan only after conducting procedures to minimise the credit risk.

As a rule, it will need to be determined whether the property is being acquired by the borrower in good faith or not, and thus whether the actions of the buyer will be covered by the warranty of public reliance on the land and mortgage register. This rule protects the acquirer of ownership (or perpetual usufruct) of the property from a person who did not hold the right to sell it.

In the context of reprivatisation claims, acquisition in good faith means acquisition of the rights to the real estate in the belief that they are being acquired from the authorised holder of the rights, combined with a lack of awareness of claims asserted by former owners and the lack of awareness of proceedings commenced to regain the property. A person who knew or easily could have learned of the reprivatisation claims and their basis is purchasing in bad faith. The good or bad faith of the acquirer of real estate is determined based on the buyer's awareness as of conclusion of the agreement transferring ownership. (But there is a significant difference in the case of perpetual usufruct, where the good or bad faith of the acquirer is determined as of the date of entry of the right of perpetual usufruct in the land and mortgage register, which means it is also necessary to examine entries and notations arising between conclusion of the contract and entry of the right of perpetual usufruct in the land and mortgage register.)

Often, however, the subject of the transaction is real estate with respect to which claims have already been asserted, proceedings to regain the property are already pending, and there are notations in the land and mortgage register of motions for entry of reservations. In that case, the subject of the analysis will be to assess the validity of the claims, and the decisions by the developer and the bank on whether to invest and lend will be subject to a business risk. It should be borne in mind that any entry in the register of a notation of an application for entry of reprivatisation claims will exclude operation of the warranty of reliance on the register until the entry is removed with legal finality as a result of denial of the application. Thus the mere appearance of a notation of an application for an entry of reprivatisation claims in the register does not automatically mean that the warranty of reliance on the register will be excluded. But the notation always requires careful examination of the merits of the application.

The need to analyse reprivatisation claims is particularly evident when the borrower is acquiring property in perpetual usufruct. Perpetual usufruct may be established only on land owned by the State Treasury or a territorial governmental unit. If the former owners of the real estate succeed in challenging and setting aside the acquisition of ownership of the land by such public entities, and regaining title to the land, it may result in extinguishment of the right of perpetual usufruct of the land, because perpetual usufruct may not be established on land that is privately owned. While it is true that the Supreme Court of Poland and the lower courts more and more often hold that acquisition of the right of perpetual usufruct from a person not authorised to sell it is protected by the warranty of public reliance on the land and mortgage register, this position is not firmly grounded, and raises doubts both in the case law and in the legal literature—mainly because the warranty protecting the new perpetual usufructuary serves, incidentally, as ratification of the acquisition of ownership of the property by the State Treasury, even if the nationalisation of the property was invalidated many years later as a gross violation of law.

The validity of reprivatisation claims may therefore present a double risk to the bank. First, if the former owners take effective action and regain the property, it will deprive the borrower of its rights to the property as a result of extinguishment of the right of perpetual usufruct as well as the mortgage established against such right, preventing the borrower from proceeding with the development and negatively impacting the borrower's capacity to perform its own obligations, including its capacity to repay the loan. Second, extinguishment of the bank's mortgage as a result of extinguishment of the perpetual usufruct deprives the bank of its security. The bank will then be in a position to enforce its claims only against the borrower's other assets—including the borrower's claims connected with extinguishment of the right of perpetual usufruct. The result of judicial and execution proceedings in such case will be less certain than would be the case with execution against the property secured by the mortgage.

In the case of financing of acquisition of real estate exposed to reprivatisation risk, only a thorough analysis of the validity of the claims to the property, presenting the potential future legal scenario, will enable the bank to take a rational decision on the loan application.

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Employment outsourcing

Dr Szymon Kubiak

Outsourcing has conquered the hearts and minds of businesses. It is one of the hottest topics—especially during an economic crisis, when everyone is seeking new ways to cut costs. Perhaps that is why the *Harvard Business Review* has recognised outsourcing as the biggest discovery in the business world of recent years. What exactly is outsourcing, and what risks does it present in the employment context?

There are numerous definitions of outsourcing. Under one definition, outsourcing means entrusting functions previously performed in-house by employees of a company (the buyer of outsourcing services) to an external firm (the seller of outsourcing services), where the seller is generally not directly affiliated with the buyer but typically specialises in a particular field, such as administration, business processes, infrastructure, or IT.

An outsourcing agreement is not defined in Polish statutory law—in the Civil Code or elsewhere—but is regarded as a miscellaneous type of agreement. It is difficult to identify a set of common characteristics unique to outsourcing agreements. There is no standard pattern for outsourcing agreements. There may never be one, because the economic realities in which outsourcing is used are too varied.

Employment outsourcing (sometimes referred to imprecisely as "employee leasing") is often confused with hiring of temporary employees. This is a fundamental mistake, so we will try to clarify the concept.

Hiring of temporary employees

This area is regulated in Poland by the Act on Hiring of Temporary Employees of 9 July 2003. This is a form of "atypical employment" involving three entities. In simple terms, it means that work is performed at the premises of the "temp" customer and under the customer's supervision. A temp agency acts as the employer and fulfils the obligations of hiring, insurance, holiday leave and so on. The third party is the temp worker himself. Thus, although there is an employment relationship between the temp worker and the temp agency, the work is performed for and under the direction of the temp customer. The act nonetheless contains provisions requiring equal treatment of temp workers and the temp customer's regular staff—including with respect to pay. Moreover, the Labour Code applies to this form of employment when it comes to matters not provided for by the act. Apart from the short-term convenience, this frustrates the business expectations of the temp customer that this form of alternative employment will reduce the immediate employment costs—particularly when the customer factors in the temp agency's fee. For this reason, in the longer term it is not and cannot be a cheaper form of employment.

Employment outsourcing

Employment outsourcing is covered by the general principle of freedom of contract provided in the Civil Code. An employment outsourcing agreement is typically similar in structure to a service contract or mandate contract. It involves provision of specific services by one entity (the seller of the services) to another entity (the buyer of the services), but the services are actually performed by the seller's employees or the seller's own outside contractors, under the immediate control of the seller of the services and not under the control of the buyer of the services. Subordination is the key issue here. For the entire duration of the employment outsourcing, the person actually performing the work reports directly to the seller of the services as his or her own employer (or, for example, under a service contract or other civil-law agreement if this person is self-employed and hired by the seller of the services on a non-employment basis).

If an employment outsourcing agreement is properly drafted and performed, it should not result in creation of an employment relationship or service relationship between the buyer of the outsourcing services and the worker.

In other words, the fundamental difference between employment outsourcing and hiring of regular or temporary employees is that the persons performing the work are not subordinated (legally or factually) to the buyer of the outsourcing services.

A key issue in this context is whether employment outsourcing, when properly conducted, requires equal pay for employees of the buyer of the outsourcing services and employees of the seller of the outsourcing services.

Examining a case of employment outsourcing, the Supreme Court of Poland liberalised the requirement of lack of subordination in the judgment of 5 November 1999 (Case No. I PKN 337/99, published at OSNAP 2001 No. 6 item 186). The court held in that case that performance of work at a location designated by the true employer (using the terminology above, the seller of the employment outsourcing services), at the premises of another entity and under its direction (i.e. the buyer of the outsourcing services), does not in and of itself create an employment relationship between the worker and the other entity. In this ruling, the Supreme Court rejected the view that an employee must perform work at the employer's premises and solely under its direction, holding that no such requirement is imposed by Polish employment regulations. An employee must comply with the instructions from his or her superiors (see Labour Code Art. 100 §1), but in commercial practice the instructions from his or her superiors may be to follow on a temporary or regular basis the directions of other persons (e.g. another entity or employer—here, the buyer of the outsourcing services).

Risk of transfer of workplace

Nonetheless, in the context of employment outsourcing, it is important not to overlook the material risk of a finding that conclusion of an outsourcing agreement may result in transfer of all or part of the workplace. The consequence would be transfer of the employees of the seller of outsourcing services to the buyer of the services (or the reverse at the end of the outsourcing agreement).

There is no regulation in EU employment law providing immediate grounds for protection of employees from the effects of outsourcing. This does not mean, however, that in the case of outsourcing the employees are not subject to any protection whatsoever against organisational changes and/or termination of their employment relationship in connection with the outsourcing process. Entrusting to outside entities tasks previously performed by the employer itself may constitute transfer of the workplace for purposes of the Transfer of Undertakings Directive (2001/23/EC), as implemented into Polish law in Art. 23[1] of the Labour Code.

Pursuant to the directive, transfer of a workplace may not constitute grounds for terminating employment or changing the terms of employment. Thus, as of the transfer, the employees become employees of the acquirer (in this example the buyer of the outsourcing services) by operation of law. Application of the protection provided for in the directive could thus wipe out the benefits flowing from employment outsourcing, such as the reduction in employment costs. Therefore, it is in the interests of the parties concluding an outsourcing agreement to specify the scope of the tasks undertaken in order to exclude application of the regulations concerning transfer of part of the workplace.

Neither the directive nor Labour Code Art. 23[1] defines the concept of transfer of a workplace or part of a workplace to another employer. Under the Polish regulations, there is no fixed list of events that cause such transfer. Nor would it possible to generate such a list, as the European Court of Justice and the Supreme Court of Poland adopt a very broad interpretation of this concept.

Indeed, the Polish Labour Code treats this concept even more broadly than the directive. This is because Labour Code Art. 23[1] does not include a requirement that the acquired unit maintain its identity. But under Art. 1(1)(b) of the directive, "there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."

Unfortunately for all concepts of outsourcing, in which acquisition of the employees was never the intention of the parties or even would destroy the business goals of this approach, until recently the Supreme Court of Poland had expressly held that the element of identity is irrelevant to the application of this provision. But there is light at the end of the tunnel. In one of its more recent rulings under Labour Code Art. 23[1] (Supreme Court judgment of 13 April 2010, Case No. I PK 210/09), the court attempted to limit such a broad construction of transfer of a part of the workplace. The court stated that the determination of whether a transfer of part of the workplace has occurred in the case of outsourcing of specific tasks to an external entity requires a holistic and comprehensive assessment of such factual circumstances as the type of establishment, acquisition of intangibles and other assets, acquisition of a majority of the staff, assumption of customers, and, in particular, the degree of similarity between the activity conducted before and after assumption of the tasks.

In short, even though employment outsourcing is increasingly common, no uniform practice (particularly in the case law) has developed yet in assessing such agreements. Thus only a well-drafted agreement, adapted to the factual and legal situation of both the buyer and the seller of the outsourcing services, can safely and effectively meet the business goals of the parties by protecting them against lengthy, costly disputes.

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Liability of management board members for the obligations of a limited-liability company

Natalia Kobyłka Kinga Ziemnicka

Under Polish law, members of the management board of a limited-liability company should face the fact that under certain circumstances they may be personally liable for the company's obligations. Such liability may not be excluded in the articles of association.

The scope of the liability of the members of the management board of a limited-liability company to the company's creditors is regulated quite extensively under Polish law. Such liability may arise under several legal acts. Art. 299 of the Commercial Companies Code of 15 September 2000 sets forth the rules for management board members' liability for the company's debts when execution against the company is ineffective. Art. 21(3) of the Bankruptcy & Rehabilitation Law of 28 February 2003 provides for the management board members' liability in damages for failure to file a timely bankruptcy petition for the company. Management board members' liability is also provided for in specific acts, such as the Tax Ordinance of 29 August 1997, Art. 116 of which provides for the management board members' liability for the company's tax obligations, and the Social Insurance System Act of 13 October 1998, Art. 31 of which provides for management board members to be liable for social insurance and public health insurance premiums. Management board members' liability for the company's debts is also provided for in the Penal Code of 6 June 1997.

Liability under the Commercial Companies Code

The liability of the management board members of a limited-liability company under Commercial Companies Code Art. 299 carries far-reaching consequences. While the shareholders of the company are not liable for the company's debts, in certain situations the members of the management board may be held personally liable for the company's debts. Thus the management board members should pay particular attention to the related risks. They are jointly and severally liable for the company's debts if execution against the company proves ineffective.

This liability is based on the condition of ineffective execution, which in practice means that the management board members will be liable only if the creditor demonstrates that it cannot satisfy its claims out of the company's assets through execution proceedings. It is not necessarily required for the specific creditor to pursue execution against the company first, before it may assert claims against the management board members. It is sufficient if the creditor shows that it is not possible to satisfy its claims against the assets of the company because other creditors have conducted execution proceedings against the company which proved ineffective, and therefore it is unlikely this creditor's claim would be satisfied through execution against the company either.

It should also be pointed out that the liability of the management board members is based on a presumption of fault, which means that the creditor is not required to prove fault in the proceeding against the management board member. A member of the management board may be released from liability, however, by showing that he or she filed a timely bankruptcy petition for the company, or was not at fault in failing to file a timely bankruptcy petition, or despite failure to file a timely bankruptcy petition the creditor has not suffered any loss. A bankruptcy petition is timely for purposes of the Bankruptcy & Rehabilitation Law if it is filed within two weeks after the company becomes insolvent. However, lack of fault in failing to file a bankruptcy petition may not be demonstrated by relying on the anticipated revenue and profit the company might have achieved. As the Supreme Court of Poland has held, "A subjective assessment of the financial condition of the company does not demonstrate a lack of fault. Lack of fault may be addressed only to exceptional situations in which the member (or president) of the management board has no knowledge of the actual situation with respect to the company's payment of its obligations, for justified (objective) reasons, and with due diligence could not have obtained such knowledge or taken the appropriate measures" (judgment of 10 February 2011, Case No. II UK 265/2010).

Liability under the Commercial Companies Code is borne by persons who were members of the management board of a limited-liability company when the debt arose and when the company also became insolvent.

Liability under the Bankruptcy & Rehabilitation Law

Under the Bankruptcy & Rehabilitation Law, members of the management board of a limited-liability company are liable for failure to file a bankruptcy petition for the company within two weeks after grounds for declaration of bankruptcy arose—i.e. when the company became insolvent. The company is considered insolvent if at least one of the following conditions is met:

- The debtor is not capable of paying its debts as they fall due.
- The debtor's total liabilities exceed the value of its assets, even if the debtor is meeting its financial obligations on a timely basis.

The liability of management board members under the Bankruptcy & Rehabilitation Law is liability in damages, and therefore a condition for liability is the occurrence of a loss on the part of the creditor. Such loss is understood to mean the diminution in the debtor's assets as a result of delay in filing a bankruptcy petition, or an increase in the number and value of creditors' claims beyond what existed as of the date when the bankruptcy petition should have been filed. Thus if a liquidating bankruptcy is declared, in order to measure the loss it will be necessary to prepare a plan for distribution of the bankruptcy estate, because only then will all of the creditors be identified whose claims arose after the date when the management board had an obligation to file a bankruptcy petition for the company.

Unlike the Commercial Companies Code, the Bankruptcy & Rehabilitation Law does not provide grounds for releasing management board members from liability, but a creditor seeking damages against the members of the management board of a limited-liability company under the Bankruptcy & Rehabilitation Law will have to demonstrate that the management board members were at fault in failure to file a timely bankruptcy petition. The burden of proof in this respect is not shifted to the management board members. However, as under the Commercial Companies Code, the management board members are personally liable.

Criminal liability

Criminal liability is always determined in relation to a specific person and is based on the principle of fault. It should be pointed out that regulations providing for criminal liability are found not only in the Penal Code, but also in other legal acts, such as the Commercial Companies Code and the Bankruptcy & Rehabilitation Law. Under the Commercial Companies Code, the members of the management board are criminally liable for failure to file a timely bankruptcy petition despite the existence of grounds for filing a petition. This offence is punishable by a fine, probation or up to 1 year in prison. As an additional sanction for failure to file a timely bankruptcy petition, the court may issue an order prohibiting the management board member from conducting business activity for his or her own account or serving as a member of the management board or supervisory board or a proxy for a commercial company for a period of 3 to 10 years.

The Penal Code provides for a separate offence of hindering satisfaction of creditors of the company when it is threatened by insolvency, by encumbering the assets, intentionally causing the company to become insolvent, or arbitrary payment of only certain creditors. Fault is a condition for liability on this basis, and therefore criminal liability will not attach to every act by a management board member in this context, but only an act for which the management board is at fault.

Liability for public charges

The liability of management board members for the company's public charges is provided by Art. 116 of the Tax Ordinance. Under this provision, the members of the management board of a limited-liability company or a joint-stock company (including in both instances a company in organisation) are personally liable, jointly and severally, for the company's tax arrears if execution against the company is ineffective in whole or part and the management board member:

- Fails to demonstrate that a bankruptcy petition was filed at the proper time, or a proceeding was commenced to head off a declaration of bankruptcy (arrangement proceedings), or failure to file a timely bankruptcy petition or commence arrangement proceedings occurred without his or her fault, and
- Fails to indicate assets of the company which could be executed against to satisfy the company's tax arrears to a significant extent.

It follows that a management board member cannot be liable for the tax arrears of the company if the grounds for declaration of bankruptcy arose at a time when the member had no influence over the decision to take steps to file a bankruptcy petition (Supreme Administrative Court judgment of 11 March 2010, Case No. II FSK1857/2008), and thus fault could not be ascribed to that member. However, the circumstances excluding fault for failure to file a bankruptcy petition or commence arrangement proceedings should be demonstrated by the board member. The liability of a member of the management board covers arrears in tax liabilities that fell due at a time when the person was a member of the management board, and applies also to former board members, not just persons currently serving on the management board.

Another example of the liability of management board members for public charges is provided in Art. 31 of the Social Insurance System Act, which provides that the rules set forth in Tax Ordinance Art. 116, discussed above, shall apply as relevant to arrears in payment of social insurance and public health insurance premiums.

Summary

Members of the management board of a capital company, particularly a limited-liability company, must accept the risk that they will be held liable under certain circumstances for the company's obligations to its creditors. These regulations are mandatorily applicable and cannot be excluded by agreement with the company.

The company may undertake to reimburse a management board member for any amounts he or she is required to pay for the company. But such an undertaking is of little practical importance, because, by definition, the board member's liability will not arise until execution against the company proves ineffective, and thus when the company's financial condition is so difficult that it can no longer pay its debts.

In practice, civil liability insurance policies (directors and officers coverage) are used to reduce this risk on the part of management board members. The D&O policy may cover injury to the company in connection with serving on the management board as well as losses suffered by third parties, including the company's creditors, significantly limiting the consequences of such liability.

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The role of Natura 2000 and other forms of conservation in M&A and real estate development

Bartosz Kuraś Izabela Zielińska-Barłożek

Restrictions on areas covered by various forms of nature conservation, such as Natura 2000, national parks and landscape parks, may have a major impact on the ability to develop real estate or conduct M&A transactions.

Often the buyer of real estate is unable to carry out its intended greenfield development because the location is subject to some form of conservation. It may also turn out that the operations of an existing enterprise are conducted in areas where there are special prohibitions or requirements, or the operations have a negative impact on Natura 2000 areas, and consequently the investor cannot restructure the enterprise or increase its capacity after the acquisition.

Even when it is known that the investor's plans may conflict with the goals of protection of specific areas, it may be possible to find solutions enabling the project to go forward. It must be borne in mind, however, that violation of restrictions for the protection of nature may in some circumstances lead to issuance of an order to cease operations by the enterprise.

Forms of conservation and examples of restrictions

The forms of conservation in Poland are a system of administrative measures designed to meet the goals of protecting nature. They arise chiefly under the Nature Protection Act of 16 April 2004. The system may be broken down into forms of protection of natural areas, forms of individual protection, and protection of species of plants and animals.

Forms of protection of natural areas—Polish national parks, nature reserves, landscape parks and protected landscape areas, as well as areas protected under the European Union's Natura 2000 network—are fundamentally important for real estate development projects and transactions involving real estate (or shares in companies holding real estate).

The specific prohibitions and requirements faced by the investor will depend on the specific protected area—with the exception of Natura 2000 areas, where the restrictions and exceptions are generally uniform for all such areas.

Most frequently encountered in practice are restrictions on development in the area of landscape parks or protected landscapes—which, according to some estimates, take up nearly a third of the land in Poland. Under certain conditions, however, it is permissible to conduct business operations in such areas, and the restrictions in force there are not as severe as in the national parks.

Of particular importance in this respect is the ability to introduce a prohibition on carrying out ventures that may have a significant environmental impact, and this is the prohibition that is most often imposed on protected areas.

Pursuant to the Act on Access to Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and Assessments of Environmental Impact of 3 October 2008, ventures with a significant impact on the environment are divided into those that may always have a significant environmental impact (generally this means large-scale ventures) and those that may potentially have a significant environmental impact, when it is found that there is an obligation to conduct an environmental impact assessment. These are identified in detail in the Government Regulation of 9 November 2010 on Ventures That May Have a Significant Environmental Impact.

Importantly, the prohibition on carrying out projects that could have a significant environmental impact does not apply when carrying out a project for which preparation of an environmental impact assessment is not mandatory, and an environmental impact assessment found a lack of negative impact on nature in the landscape park. Thus it will not always be necessary to prepare an environmental impact assessment for an amusement park or golf course. If not (which is decided by the authority issuing the decision on environmental conditions), and even though the prohibition is in force, it is still possible to carry out such a project in a landscape park. However, it must be demonstrated that there will be no negative impact on the given area. Nor may any other prohibitions in force in the given area be violated.

It should be borne in mind in this respect that there is a complicated procedure for establishing the boundaries of conservation areas, and the legal basis for the procedure is subject to frequent revisions. It thus sometimes happens in practice that there are defects in the procedure for designation of a given landscape park or nature reserve. In some cases the defects may be so serious that there is actually no prohibition in force because the protected area was not properly designated.

Restrictions under the Natura 2000 network

Particularly severe restrictions may arise if Natura 2000 areas have been established in the vicinity of the planned development—and they need not be in the immediate vicinity. Unlike other types of conservation areas, it is irrelevant whether the given venture is located within the boundaries of a Natura 2000 area or outside the area. It is sufficient that the planned activity will have a significant negative impact on the purposes of protection of Natura 2000 areas.

Under the Nature Protection Act, as a rule, it is prohibited to take actions that (individually or in combination with other actions) may have a significant negative impact on the purposes of protection of a Natura 2000 area. This applies more specifically to a situation in which such actions may worsen the condition of natural habitats or the habitats of species of plants or animals for which the Natura 2000 area has been established, or negatively impact species for whose protection the Natura 2000 area was established, or injure the integrity of the Natura 2000 area or its connection with other areas. It should be stressed that this does not mean any impact of whatever sort, but only significant negative impacts on the environment. As the Supreme Administrative Court pointed out (judgment of 10 March 2011, Case No. II OSK 2561), this means that not all negative impacts can prevent realisation of a venture, but only those where the scale of the impact is regarded as significant. “Significant negative impact” is an imprecise notion. The administrative authority conducting the proceeding should also precisely indicate the grounds it relies on when finding a specific impact to be negative and significant. Such factors as the intensity and duration of the interference may be relevant for this inquiry.

There is a Natura 2000 area or there may be a Natura 2000 area—the same restrictions

Natura 2000 areas are established through a complex procedure requiring cooperation and agreement on proposed areas with the European Commission and other stakeholders, but the final regulation is issued by the Polish Minister of the Environment. Significantly, the restrictions applicable to existing Natura 2000 areas also apply to proposed areas which have not yet been included in the Natura 2000 network.

The point from which an area should be regarded as “proposed” for Natura 2000 is not entirely clear. However, a recent ruling by the Supreme Administrative

Court (judgment of 10 July 2012, Case No. II OSK 708/11) is helpful in this regard. According to the court, protection should be afforded to an area at least from the date when information concerning the area is submitted to the European Commission. But the mere undertaking of social consultation on proposal of an area to the EC appears to be too early a stage to regard the area as "proposed" for Natura 2000 (Supreme Administrative Court judgment of 17 April 2012, Case No. II OSK 146/12).

In consequence, it should be borne in mind that in order to determine whether a given area is subject to Natura 2000 restrictions, merely reviewing the regulations issued by the Minister of the Environment designating Natura 2000 areas is insufficient.

When Natura 2000 restrictions do not apply

Under certain conditions, it is possible to carry out activities that may have a significant negative impact on the purposes of protection of Natura 2000 areas. First, it must be necessary "for imperative reasons of overriding public interest, including those of a social or economic nature." Second, there must not be an alternative method for carrying out the activities. Third, the member state must "take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected." The cost of compensatory measures should be borne by those carrying out the venture.

There are additional restrictions on actions having a significant negative impact on priority habitats and species. Actions of this type are permissible only in consideration of human health or public safety, beneficial consequences of primary importance for the environment, or, based on an opinion from the European Commission, other imperative reasons of overriding public interest.

In the case law, there is a highly rigorous approach to the permissibility of ventures that may have a negative impact on the values protected by Natura 2000 areas. As the Province Administrative Court in Warsaw has held (judgment of 26 April 2007, Case No. IV SA/Wa 2319/06), the administrative authority must consider the existence of alternative solutions, weighing also the environmental and social costs of their implementation. The existence of an alternative solution should be considered in light of the particular need to protect the values covered by special forms of environmental protection, without overlooking the need for a reasonable balance between the need for protection of such areas and other considerations, as well as principles of sustainable development.

Final comments

The current system for protection of natural areas provides for a number of prohibitions and obligations which limit the ability to conduct certain types of activity in specific areas, or, in the case of Natura 2000 areas, activity exerting a negative impact on those areas.

Therefore, when conducting due diligence of real estate where a project is planned, or a company whose operations have an environmental impact, it should also be determined whether the current or planned activity violates restrictions arising out of area-based forms of conservation. If so, it should then be determined if any exception from the restrictions is available in order for the intended venture to be realised or for the current operations to be continued.

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Prospects for extraction of unconventional fossil fuels in Poland: A lawyer's view

Weronika Pelc Radosław Wasiak

According to estimates by the Polish Geological Institute, shale gas resources in Poland may be between 346 billion m^3 and 768 billion m^3. On top of that there are petroleum deposits roughly estimated at 268 million tonnes. Although previous estimates by the US Energy Information Agency were more optimistic, the excitement among industry investors has not waned. The estimated resources, combined with documented conventional deposits, would enable Poland to fully meet its internal gas demands for 50–60 years, and for petroleum for 10 years. What is needed, however, is a transparent and stable system of legal regulations securing the long-term interests of investors, the Polish State Treasury, the environment, and local communities.

Current regulations and calls for change

The main legal act now governing exploration, identification and mining of fossil fuels in Poland is the Geological and Mining Law of 9 June 2011. The law governs such issues as the ownership of mines and the ability to dispose of them (mining usufruct), the right to use geological information about mining deposits, the rules and procedures for granting geological concessions, and the rules and procedures for conducting extraction operations in what are known as mining establishments.

Fossil fuel operations are also subject to regulation under a number of other legal acts. The most important of these include environmental laws, e.g. on environmental impact of projects, the Water Law, governing issues of the ability to use water in hydraulic fracking, acts on waste and mining waste, which impose numerous requirements for storage and use of liquids left over from the extraction process, land use and zoning laws imposing a duty to reflect mining activity in planning documents with the status of local law, and provisions of the Act on Chemical Substances and Mixtures applicable to chemical additives that are combined with water and sand to create fracking liquid.

These laws, together with secondary regulations issued pursuant to them, should form a clear and consistent system of regulations.

Although the new Geological and Mining Law and numerous amendments to other acts were introduced after activity in the area of unconventional fossil fuel deposits had already begun, and after allocation of the majority of the most promising concessions among interested investors, the common view is that the new law does not entirely suit the specific methods for exploitation of such deposits. Like the regulations previously in force, the new regulations do not distinguish between deposits of conventional and unconventional fossil fuels. Thus, despite significant differences in how the geological work is conducted, the same regulations, which are not always suitable, must be applied to both types of activity.

Methods for extracting fossil fuels from unconventional deposits raise serious concerns about the safety of the environment, particularly supplies of drinking water. In order to maintain a climate friendly to shale gas, the law should therefore create clear rules for monitoring the condition of the environment during the process of exploiting these deposits and post-completion. This demand is particularly pressing in light of the allegation by ecologists of unequal treatment of projects of the same type by environmental protection authorities operating in different areas of the country.

Exploitation of unconventional fossil fuel deposits also has an important economic dimension. Extraction of shale gas is supposed to increase Poland's energy independence, freeing it from dependence on external supplies of commodities. It is also supposed to cut energy prices and thus increase the competitiveness of the Polish economy. At the same time, it is argued that special taxes should be imposed on fossil fuels, which would translate into increased governmental revenue and a reduction of the budget deficit.

Therefore, in the near future it is anticipated that new laws or amendments to the current ones will be adopted. The new regulations may arise out of domestic legislative plans as well as expectations raised at the European Union level.

Legislative plans of the Polish government

In October 2012, the Polish Ministry of the Environment presented the guidelines for a new act on fossil fuels. The proposed solutions head in the direction of increased tax burdens on extraction. (It should be pointed out that such tax burdens in Poland have so far been among the lowest in the world.) Apart from the planned increase in the revenue of the State Treasury, a key goal of the new regulations is to increase the State Treasury's control over the process of exploration and extraction of fossil fuels and the process of trading in concessions issued for this type of activity.

Under the proposal, most of the burdens of higher taxes and fees imposed on companies conducting mining activity would be at the level of 40% of their gross profit. These burdens would comprise, among other elements, a new tax on extraction from certain mines (5% of the value of gas extracted and 10% of the value of oil) and a cash flow tax of 25%. It is also proposed to raise operating fees, the amounts of which would be differentiated depending on the type of fuel and the type of deposit from which it is extracted.

In order to increase the control of the State Treasury over the process of exploitation of fossil fuels, the system of concessions for such activity would be revised again. The obligation to hold a concession for exploration conducted without boreholes would be eliminated, as would the rule of priority in obtaining a concession for identification and extraction after completion of exploration work. A pre-emption right for concessions would be introduced, as well as the ability to transfer a concession only to specific, pre-screened entities. Additionally, a company would be established, wholly owned by the State Treasury, known as the National Operator of Energy Mines (NOKE). The company would participate in the exploitation process as a capital shareholder of the mining consortium.

Many of the guidelines presented are too general to evaluate what effect they would have on the position of investors. It is not known, for example, what would be the role of NOKE in the development process. Would the company participate only in the profits from exploitation of fossil fuels, or also in the costs, and thus would it have an influence over the business decisions of private enterprises? Nor is it clear how the new regulations would affect the rights and obligations of current concession holders. The proposed guidelines for the new act appear to suggest that they would retain their vested rights on the basis of the existing regulations.

These and other issues will certainly be clarified when the Minister of the Environment presents a detailed draft of the new law, which if it goes as promised should see the light of day in the 1st quarter of 2013, but given the importance and complexity of the issues to be governed by the act the draft may not be released until later.

EU aspects

Essential information on the likely direction of legislative changes at the EU level is included in the European Parliament resolution of 21 November 2012 on the environmental impacts of shale gas and shale oil extraction activities (2011/2308(INI)).

Although the resolution of the European Parliament is not binding, it summarises the debate between supporters and opponents of shale gas extraction and their jointly developed position. The resolution recognises that the member states have the exclusive prerogative to exploit their energy resources, but stresses that any development of unconventional fossil fuels should be conducted in full compliance with relevant EU safety and environmental protection laws. The resolution lists 17 different EU directives and regulations that currently apply to extraction of shale gas. Most of them deal with environmental protection issues.

The resolution also details various doubts and concerns with respect to the environmental effects of extraction of shale gas and shale oil. It recommends adoption of additional regulations to assure the proper level of environmental protection in extraction of unconventional fossil fuels. The resolution points out that the development of shale gas is controversial, the sustainability of shale gas is not yet proven, and an increase in the consumption of fossil fuels may be inconsistent with the United Nations Framework Convention on Climate Change.

The resolution identifies such needs as:

- Requiring an environmental impact assessment for exploration and exploitation of shale gas
- Development and implementation of best available practices in this area
- In the context of liability, reversal of the burden of proof for shale gas operators when the balance of probability indicates that shale gas operations were the cause of environmental damage
- A ban on hydrofracking in drinking water protection areas and coal mining areas
- Requiring the use of on-site closed-loop water recycling, using steel storage tanks, for treatment of flow-back water
- A minimum safety distance to be maintained between drilling pads and water wells
- Mandatory use of completion combustion devices for all shale gas wells in the EU.

The resolution also raises many other aspects of this activity that should be regulated in more detail, and at several points calls on the European Commission to present legislative proposals. Thus it is possible that a directive on unconventional fossil fuels may be proposed which would impose stricter conditions on these operations. Such regulations would obviously have an impact on Polish law, where the EU rules would need to be implemented.

Summary

The work being done to explore and identify unconventional gas deposits may soon provide answers concerning the true extent of such resources in Poland. By that time, a uniform system of legal regulations should be in place which will ensure profit for investors conducting extraction of shale gas, provide increased revenues to the State Treasury, and guarantee environmental safety. Creation of such a system may allow Poland to join the group of countries that have used the wealth of their natural resources to achieve significant economic growth and stability.

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Solvent and insolvent at the same time?

Michał Barłowski

In the judgment of 22 November 2012 in *Bank Handlowy w Warszawie SA v Christianapol sp. z o.o.* (Case C-116/11), the European Court of Justice addressed several interesting legal issues under the EU's Insolvency Regulation (1346/2000): How to determine when insolvency proceedings have concluded? What is the relationship between main and secondary proceedings?

In the case before the ECJ, Christianapol, a company registered in Poland, commenced a *procédure de sauvegarde* at a court in France, where its primary business was conducted (i.e., for purposes of the Insolvency Regulation, where its "centre of main interests" was found to be). *Sauvegarde* proceedings are "rescue" proceedings initiated to prevent insolvency, and are one of the proceedings listed in Annex A of the Insolvency Regulation. Pursuant to Art. L.620-1 of the French Commercial Code in force at the time, the proceedings were commenced at the request of a debtor demonstrating the existence of difficulties which it is not able to overcome and which may lead it to the cessation of payments. In this case the French court confirmed that the debtor was therefore not insolvent. The main purpose of the *sauvegarde* proceedings was to prevent the company's insolvency: "to carry on its business, to save jobs and to settle liabilities."

Meanwhile, domestic creditors sought to commence secondary insolvency proceedings before a national court in Poland. The Polish court sought guidance from the ECJ. The first question raised by the Polish court concerned the legal grounds to determine when insolvency proceedings have ended: Should this be resolved on the basis of national law, or should the answer be found in the Insolvency Regulation itself? In this regard, the ECJ held that the time when insolvency proceedings are terminated should be determined by applying Art. 4(2)(j) of the Insolvency Regulation, which provides that "the conditions for and the effects of closure of insolvency proceedings, in particular by composition," are determined by the law of the state of opening of proceedings, which in this case was France.

The regulation itself does not define the time when main proceedings end.

The other two questions in the reference for a preliminary ruling concerned the relationship between main proceedings and secondary proceedings. The second question concerned the ability to initiate secondary winding-up proceedings in a country where the debtor has a branch if the main proceedings pending before a foreign court have a protective nature and thus seek to achieve a different goal than the secondary proceedings. The third question was whether a national court considering an application to initiate secondary proceedings is empowered to review the issue of the debtor's insolvency.

The bottom line is that in addressing these issues, the ECJ did not directly respond to the second question, i.e. what to do when the purpose of the main proceedings, which is to forestall insolvency and save a debtor from liquidation, and the purpose of the secondary proceedings, which is winding up, to satisfy creditors through liquidation of the debtor's assets and bring the debtor's legal existence to an end, are conflicting. The ECJ did not resolve whether it is possible in such a situation to commence secondary proceedings or not, but left the decision in the hands of the national court.

The ECJ also did not directly resolve another key practical problem, namely how to reconcile the fact that a debtor is regarded as solvent under the domestic laws of the country where the main proceedings have been opened (and a judgment in such a case is also automatically recognised in the country where secondary proceedings are sought) with the possibility of commencing secondary winding-up proceedings in relation to the debtor, where a precondition to commence such proceedings is the debtor's insolvency.

The ECJ, as it appears, adopted a literal interpretation of the Insolvency Regulation. Since Annex A to the regulation includes *sauvegarde* proceedings, such proceedings are therefore insolvency proceedings within the meaning of the regulation, and thus the debtor is deemed insolvent for purposes of the regulation. If so, there is no legal basis in light of Art. 27 of the regulation to interpret this provision differently than in the case of any other insolvency proceedings that are main proceedings. In other words, there are no provisions in the regulation making the commencement of secondary proceedings dependent on the nature of the main proceedings. Art. 27 does not address the issue of secondary proceedings being dependent on the objectives that the main proceedings seek to attain. It may be added that it also does not regulate the possibility of opening secondary proceedings dependent on whether the main proceedings in question were included in Annex A (insolvency proceedings), or for that matter in Annex B (winding-up proceedings). In consequence, the ECJ assumed that Art. 27 (in connection with Art. 3(3)) of the regulation allows for the opening of secondary winding-up proceedings irrespective of the nature of the main proceedings.

Having said that, the ECJ nonetheless perceived the problem of a contradiction in the purposes of the main and secondary proceedings, pointing out the risk of the conflict of purposes, in which the secondary proceedings may run counter to the purpose of the main proceedings. However, it left it up to the national court considering an application to commence secondary proceedings whether to proceed with opening of the secondary proceedings, obligating the local court to take into account certain principles that arise from interpretation of the regulation:

- The aims of the main and secondary proceedings
- The systemic nature of the regulation, and thus issues regarding:
    - uniformity of proceedings
    - consistency of proceedings
    - efficient and effective conduct of cross-border insolvency proceedings
    - sincere cooperation.

The ECJ pointed out that the liquidator in the main proceedings has certain prerogatives at his disposal which "allow him to influence the secondary proceedings in such a way that the protective purpose of the main proceedings is not jeopardised." These include the ability to stay the secondary proceedings (Art. 33) and to propose other measures for closing the secondary proceedings (Art. 34).

The opinion issued in the case by the advocate general before the judgment was issued drew attention to the conflict discussed above in a much more comprehensive manner, pointing for example to the weakness of the measures referred to in Art. 33 and 34. The opinion stated that these measures are not the right tools to deal with the problem and ultimately avoid a contradiction between the main (protective) proceedings and the secondary (winding up) proceedings (par. 63 of the opinion dated 24 May 2012). The ECJ judgment does not go as far as the advocate general did in addressing this problem.

On the third question, the ECJ held that a national court considering an application to commence secondary proceedings cannot examine the debtor's insolvency. On this issue as well, the ECJ based its position on a logical, grammatical interpretation of the Insolvency Regulation that is consistent with the justification for the response to the second question. The ECJ explained that the court commencing the main proceedings had examined the debtor's financial situation on the basis of the definition of insolvency applicable under national law (thus confirming the general understanding that there is no separate meaning of the term "insolvency" under the regulation) and that "the examination of the debtor's insolvency by the court having jurisdiction to open main proceedings is binding on any other courts before which an application to open secondary proceedings is made." Therefore, in light of the automatic recognition of judgments rendered in main proceedings when they become effective in the state of opening of proceedings, as well as the principle of "sincere cooperation" on which the regulation is based, a local court considering an application to commence secondary proceedings cannot examine the debtor's insolvency, even if the main proceedings are proceedings designed to prevent insolvency.

The court examining the debtor's solvency in the main proceedings evaluates the "entire" debtor, since the main proceedings encompass all of the debtor's assets. If examination were authorised at the time a local court considers an application to commence secondary proceedings, such examination would have to be limited to the condition of the local establishment—the assets situated in the state where the opening of secondary proceedings is sought.

Could the ECJ have gone further in its responses?

Only the response to the first question appears to be clear and unequivocal. In its reply to the second question, the ECJ only partially addressed the problem presented. It merely reiterated what appears from the wording of the Insolvency Regulation: All proceedings, even protective proceedings, are based on the debtor's insolvency. Secondary proceedings may in principle be opened under the regulation irrespective of the nature of the main proceedings. It is thus up to the local court to decide whether to open secondary proceedings and whether it makes sense to do so in the specific situation. To that end, the court must take account of the general scheme of the regulation and the objectives it is designed to achieve. The ECJ thereby bypassed the problem that was raised and partially clarified by the advocate general, pertaining to insolvency in the event that a debtor is not insolvent under national law but is nonetheless deemed to be insolvent when applying the Insolvency Regulation. This is a contradiction which remains unsolved.

As it appears, the ECJ did not want to go too far in bending the existing Insolvency Regulation, and probably could not do so, given the nature and role of the ECJ's rulings. The systemic problem of the contradictory purposes of main and secondary proceedings when the opening of the proceedings deemed to be the main proceedings requires that the debtor not be insolvent should be eliminated when the Insolvency Regulation is amended on the basis of the European Commission's report on application of the regulation, as provided under Art. 46 of the regulation (point 3.4.2, p. 22, of the Commission Staff Working Document: Impact Assessment accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, published at http://ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf).

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Deemed collection: An appealing solution for buyers of receivables?

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In complex transactions involving the sale of bundled receivables, it may turn out, for various reasons, that after the claims are acquired and the price is paid, the face value of some of the receivables differs from the value that was used to determine the price of the claims.

In some sales of receivables, the transaction is preceded by a lengthy tender process. When filing offers to acquire a portfolio of claims, the bidders are requested to propose a binding price for the portfolio. The proposal is based on the condition of the portfolio as of a specific date. Several months may pass between the valuation and payment of the price and effective acquisition of the portfolio, during which time the value of specific receivables may change. Some of them may even cease to exist—for example because the debtor has paid the claim to the original creditor, who subsequently sells the package of receivables.

Differences in the face value of receivables taken into consideration during the valuation may also arise after they are acquired by the buyer but before the receivable becomes due and payable. This may occur, for example, because of a set-off by the debtor, which may also be effective against the acquirer of the claim. Or the value of the claim could be reduced by a rebate from the seller of the receivable to the debtor. (This often happens in the case of commercial receivables from regular customers.)

Economic risk for the buyer

Such situations create an obvious economic risk for buyers of receivables. The buyer pays for a claim whose face value turns out to be lower than assumed. This can even defeat the economic purpose of the transaction. In a specific transaction, this risk may be contractually covered by the buyer. However, in the great majority of cases the buyer will probably want to compensate for its loss incurred by paying the purchase price for a claim that turns out to have a much lower face value or, in an extreme case, has ceased to exist altogether. To this end, the agreement on sale of receivables may provide for various solutions to compensate the buyer for this risk.

Every potential legal solution carries with it specific civil-law and tax consequences. Unfortunately, we have seen that the parties to agreements on sale of receivables typically do not give due weight to this issue. Practice in Poland, particularly in the courtroom, teaches that uncritical adoption of solutions from agreements governed by foreign law (typically English law or New York law) often leads to negative consequences when there is a dispute between the parties.

The main goal of these legal solutions is to compensate the buyer for losses incurred in connection with acquisition of the receivables. To this end, the agreement on sale of the receivables must first and foremost provide for mechanisms enabling identification of the claims whose reduced value has caused such a loss. Here the drafters of the agreement on sale of receivables must resolve the first major legal dilemma involving structuring of the agreement.

Sale of a collection of receivables or specific receivables

It should be determined whether the agreement on sale of a bundle of receivables is a single legal relationship involving the whole set of claims, or a number of different legal relationships corresponding to the number of assigned claims. The latter approach raises the dilemma of how extensively the specific claims should be individualised.

Under Polish law, there is no legal definition of a receivable, and thus it may be problematic to determine what exactly is the subject of the specific legal relationship (e.g. in the case of several claims arising under a single contract with a given debtor). Following the conception of a multiplicity of legal relationships, the agreement under which the claims are assigned should contain a mechanism enabling a specific portion of the price paid for the entire set of claims to be allocated to specific claims. Under this conception, the price for the package is, in practice, the sum of the individual prices for specific claims included in the portfolio. It is beyond the scope of this article to indicate all of the pros and cons of specific conceptions or the related legal dilemmas. For the purposes of this article, we have assumed that, as a rule, either of the two main concepts may be considered.

Depending on which conception of the agreement on sale of receivables is adopted, there are several possible solutions for compensating the buyer's losses in connection with reduction in the face value of the claims. Below we mention the two models that in our view are the most typically followed.

Reassignment of claims

The first set of solutions is based on the concept of reassignment of the claims whose face value has been reduced. The claims are assigned back to the seller in exchange for a refund of the price originally paid by the buyer. Most of the agreements based on patterns from foreign jurisdictions do not define in detail the nature of the reassignment, which under Polish law may create serious problems for the parties, particularly with respect to tax. The basic issue is whether to treat the reassignment as a separate, standalone transaction of sale of the claims (with the parties reversed), or, for example, as renunciation of the original sale agreement. It appears that treating the reassignment as a separate sale of the receivables will result in the ordinary tax consequences for this type of transaction (e.g. in terms of the civil transaction tax). This could prove quite surprising to the parties.

An alternative is to treat the reassignment of claims as the result of renunciation of the agreement. However, this solution requires introduction in the sale agreement of appropriate provisions directly addressing the institution of renunciation, including first and foremost the deadline by which the parties may exercise this right. In our view, this would enable a reduction of the tax risks connected with reassignment of the claims. It would be easiest to apply this solution in transactions based on the conception of a multiplicity of legal relationships. In such case, specific agreements on sale of receivables would be renounced without affecting the agreements for the other claims.

Requiring the seller to cover the buyer's loss

Another set of solutions is based on the conception under which the reduction in the face value of the assigned claims gives rise to an obligation on the part of the seller to make up the buyer's loss (e.g. if the face value of the claim fell by 10%, the seller is required to pay the buyer an amount corresponding to the 10%). Many contract patterns used on the Polish market uncritically copy provisions in this respect from contracts drafted for use in other jurisdictions. As a result, problems may arise in defining the legal nature of the seller's obligation. For example, many contracts use the concept of "deemed collection." This is a certain abstract assumption that the equivalent of the decline in the face value of the claim is treated as if it was received by the seller from the underlying debtor as a payment of the claim. In certain instances, the decline in face value of the claim will indeed be the result of payment by the debtor to the seller. In many other instances, however, the decline in face value of the claim will not be accompanied by actual payment by the debtor (for example, where the amount of the claim is reduced by awarding a rebate). In such cases as well, the concept of "deemed collection" also calls for the seller to pass on to the buyer an amount corresponding to the amount of the decline in the face value of the assigned claim.

Providing the right legal framework for the seller's obligation may be vitally important for determining the tax treatment of the payment made to the buyer. A contractual penalty, a warranty claim, or an adjustment to the purchase price will each be treated differently. In this case, it is also important to include appropriate provisions in the agreement to protect the parties from unfavourable tax consequences.

Solutions based on requiring the seller to compensate the buyer for losses in connection with a reduction in the face value of claims are easier to apply in an agreement based on the concept of a single legal relationship. In the case of agreements based on the concept of a multiplicity of legal relationships, such solutions may lead to peculiar situations, particularly in the case of portfolios of distressed assets or non-performing loans, where the price paid for the claims is typically much less than their face value.

Imagine, for example, that the portfolio includes a non-performing loan with a face value of 100. The buyer pays 20 for the claim. But between the valuation date and the sale, there is a partial payment of the claim in which the seller obtains 50 from the debtor. Thus at the time of the sale, the face value of the receivable is 50. If the agreement on sale of the receivables provides that the 50 paid by the debtor is to be passed on to the buyer of the claim (without reassignment of the claim), it would exceed the price paid for the claim. This situation could be avoided if the sale is regarded as a single legal relationship. In that case, the amount refunded by the seller would probably not exceed the total price paid for the portfolio.

Suggestions

We present above only an attempt to address some of the issues connected with the change in the face value of receivables included in a portfolio of assigned claims. Our purpose is to encourage drafters of agreements on the sale of receivables to think more deeply about the legal and tax dimensions of the solutions they apply. This should help protect the parties against the negative consequences of imprecise definition of the nature of the legal structures used.

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When greenfields are battlefields

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Much has been said in Poland about environmental activists blocking major infrastructure developments. Such comments can be unfair, but it is true that successful completion of environmental administrative formalities is challenging even for the most seasoned investors.

The entry into force in 2008 of Poland's new law on environmental impact assessments and public participation broadened the rights of NGOs, specifically in administrative procedures preceding issuance of formal consent for development of a project (e.g. a building permit).

Environmental groups pursuing their statutory objectives now have access to proceedings requiring public participation. In practical terms this means that they can become involved in proceedings during which an environmental impact assessment is conducted. In such cases they also have a right to appeal and to seek review in the administrative court, even if they did not take part in the earlier proceedings and even if they do not allege violation of their individual rights by the authorities. Granting such broad powers to organisations is intended to encourage the authorities to take environmental considerations into account when approving developments. But it also leads to many environmental decisions being challenged before the administrative authorities and the administrative courts. That, combined with the complex system of two instances of administrative proceedings and a two-tier system of review by the administrative courts, results in very time-consuming resolution of cases.

Significant industrial and infrastructure projects require public participation. Otherwise, there is a risk that the public interest and the environment will not be sufficiently protected during the proceedings. This is because the public authorities and the investor often have overlapping interests. The authorities welcome an investor who is willing to implement a project, upgrade the local infrastructure, create employment opportunities, and so on. For both the investor and the authorities, protection of nature is not a primary target. This blurring of roles means that there is a risk of the public interest being ignored and environmental principles not being given due consideration. Participation by environmental NGOs should therefore result in greater attention to detail and ensure balanced treatment of the interests of the investor, the authorities and the environment.

Difficulties in development of industrial, energy and infrastructure projects in Poland attract much media coverage. Often environmental associations are accused of abusing their rights, causing projects to be delayed or even abandoned. Indeed, not every vociferous protest is justified by environmental ideals and protection of nature, or supported by persuasive reasoning. In practice, however, the most common cause for delays is not environmental activists themselves, but the lack of sufficient attention by the authorities and the investor to all the legal requirements applicable to environmental impact assessment procedures prior to granting approval for project development. Many errors can be avoided by following the recommendations below.

Compliance is the key

If an environmental decision is appealed, the case is reconsidered by a higher administrative authority. If the decision at that level is still not satisfactory, the NGO can file a claim with the administrative court. It should be borne in mind that under Polish law, the administrative court can overrule an environmental administrative decision only if it finds a breach of law. In other words, the judge cannot second-guess expert opinions or the results of the environmental impact assessment other than through a finding of non-compliance with the law. In practice, attempts by the administrative court to review the merits of the case, by questioning the knowledge of the experts or drawing its own conclusions from the assessment of the environmental conditions, are rejected by the Supreme Administrative Court. Therefore, the judge may only verify the formal correctness of the procedures and determine whether the wording of the decision complies with statutory requirements and whether the legal prerequisites for granting approval for the development were met.

Consequently, if the administrative procedures and the environmental approval are overruled by the court, it is because they did not comply with the legal requirements or there was an error by the authorities when conducting the proceedings—not because of the actions of environmental NGOs as such.

This means that to minimise the risk of setting aside of the decision on environmental conditions and to avoid significant delays in implementation of the project, it is essential to ensure that from the formal point of view, the proceedings are conducted from the very beginning in full compliance with the law.

Trust but verify

In accordance with general administrative principles, the authorities are responsible for conducting the proceedings in full compliance with the law. An investor wishing to implement a specific construction project is in principle only required to submit a complete application for an environmental decision and, if necessary, prepare a report on the impact of the project on the environment and respond to any requests from the authorities for additional documents or clarifications.

This approach is often the source of problems. Proper conduct of environmental procedures is in the interest of the investor. It should therefore actively participate in every stage of the proceedings and exercise the right of access to the case file to verify the correctness of actions taken by the authorities, so that it can immediately identify irregularities and take remedial action, which may no longer be available at later stages. For example, there is a short period after receipt of an environmental decision in which the applicant may request that the authorities supply information that is missing in the decision, without initiating appeal procedures or referring the case to the higher authority.

An investor should, more specifically, verify whether the authorities have properly provided the required information to the public (in the public information bulletin, by notice at the site, and so on). Experience shows that even routine documentation prepared by the authorities requires double-checking, because there may be errors in the wording of the standard notice on the availability and timing of an appeal, or calculation of the 21-day period for submission of comments and requests by the public. Further, in practice, the authorities often do not maintain the distinction between the rights of the public and the rights enjoyed only by the parties to the proceedings. The two groups have different rights, and depriving a party of its rights may be considered a gross violation of law, providing grounds to set aside the decision in extraordinary proceedings even if the statutory period for claims has already lapsed.

Mistakes are made not only by officials. Environmental impact assessment reports often include conflicting statements or misleading wording. Experience shows that any ambiguities, contradictions or gaps (e.g. omission of an attachment), even as a result of an innocent oversight by the investor, may be seized on by opponents of the project and environmental NGOs as an attempt to hide inconvenient facts, manipulate the public, or falsify the results of the study.

It is therefore advisable before submitting the report to the authorities to have it reviewed by a layman who was not involved in preparing the report and is in a position to assess the report much as the general public might.

Professional opponents

As environmental organisations have become increasingly well-versed in the legal requirements, they more and more often challenge environmental decisions on the basis of purely legal arguments, asserting procedural irregularities, failure to implement EU law, and contradictions between the interpretation of law by the authorities and the holdings in the most recent court decisions. This results in increasing success of administrative appeals and, particularly, review by the administrative courts, where environmental proceedings are generally considered only from the formal legal perspective.

This demonstrates that environmental impact assessment procedures require active participation by the investor, which should monitor the proceedings and take the required steps to eliminate any irregularities as soon as they are identified. This approach will head off legal arguments opponents may have for challenging the environmental approval of the project and therefore minimise the risk of administrative decisions being overturned by the court.

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Insurance coverage in the context of criminal liability

Michał Steinhagen

When providing coverage against civil liability, should the insurer also expect to be required to cover amounts paid by the insured to persons injured as a result of a criminal act?

An insurer's obligation to cover amounts the insured is required to pay under rulings by criminal courts has recently raised serious doubts. They primarily concern the permissibility of a demand by the insured that the insurer under a civil liability policy reimburse amounts the insured has paid pursuant to a court order to pay restitution or exemplary damages on the basis of criminal regulations.

In the context of obligations imposed on perpetrators of traffic accidents, this issue has in recent years been the subject of two conflicting resolutions issued by the Supreme Court of Poland. The holdings by the Supreme Court may be applied not only to mandatory automotive coverage, but also to other types of civil liability coverage.

In the resolution dated 21 December 2006 (Case No. III CZP 129/06), the Supreme Court held that the perpetrator of a traffic accident who has been ordered to pay exemplary damages pursuant to Penal Code Art. 46 §2 and 48 may not demand reimbursement of the exemplary damages paid to the injured party pursuant to a motor insurance policy for injury caused by operation of the motor vehicle. But in the resolution of 13 July 2011 (Case No. III CZP 31/11), the Supreme Court held that the perpetrator of a traffic accident who has been ordered in a criminal trial to pay restitution pursuant to Penal Code Art. 46 §1 in connection with Art. 39(5) may seek reimbursement for the amount paid to the injured party from the perpetrator's insurer under the motor insurance policy for injury caused by operation of the motor vehicle.

In both cases the Supreme Court found that based on the structure of civil liability insurance, the insurer's responsibility applies only to civil liability in damages on the part of the perpetrator of the loss, and not to the perpetrator's potential criminal liability. The main reason for the discrepancy in the two resolutions was the differing interpretation of the regulations of the Penal Code providing for payment of exemplary damages and restitution.

In the resolution of 21 December 2006, the Supreme Court stressed that the duty to pay restitution or exemplary damages is a criminal sanction, imposed on the basis of criminal law. The court also reasoned that the purpose of imposing such sanctions is primarily punishment and deterrence, as in the case of other penalties provided for in criminal statutes. Compensating the injured party for its loss is not the main purpose for applying these criminal sanctions. Although civil provisions on damages have auxiliary application when imposing such sanctions, this does not alter the criminal nature of the sanctions.

In turn, in the resolution of 13 July 2011 the court pointed out that there are inadequate grounds for finding that a criminal sanction in the form of an obligation to pay restitution fulfils solely a penal function, or even that the penal function predominates over the compensatory function. Referring to the title given to this sanction, the court found that its essence is to redress the loss caused by the perpetrator. The court also reasoned that a condition for an order imposing this sanction is the existence of a loss as of the time of the ruling, and it thus may not be imposed if the loss has already been redressed by the perpetrator or a third party. Moreover, under Criminal Procedure Code Art. 415 §5, neither restitution nor exemplary damages are awarded if a claim arising out of commission of a criminal offence is the subject of another proceeding or the claim has already been decided in a legally final ruling. Additionally, although the criminal sanction must be performed by the perpetrator, who cannot demand that another person perform it, the injured party may assert a claim for redress of its loss directly against the insurer. The situation may thus arise in which the insurer pays the claim before the criminal sanction is performed.

In the conclusion of the resolution of 13 July 2011, the court stressed that it is irrelevant for the ability of the insured to seek reimbursement of amounts paid to the injured party for redress of loss whether the perpetrator has paid such amount voluntarily or pursuant to an order imposed in a criminal judgment. Because the insured has redressed the loss, it may demand a refund of the amount from the insurer.

These resolutions by the Supreme Court are crucial for determining the scope of insurers' responsibility under civil liability policies. On the one hand, it may be found that the insured may not demand that the insurer assume liability for purely punitive sanctions imposed on the insured as the perpetrator of a criminal offence. Even if it is a monetary sanction (e.g. a fine), the perpetrator should bear it personally because it is in the nature of a punishment for a crime committed by the perpetrator. If it is not also in the nature of civil liability (e.g. for damages), the insured perpetrator generally may not then demand reimbursement from the insurer equal to the amount of the sanction paid. It should be pointed out in this regard that a specific contract for voluntary civil liability insurance may provide for reimbursement of payments of this type. In such case, it could be argued that the contractual clause is inconsistent with the nature of the insurance relationship and with statutory principles of criminal law.

On the other hand, performance of monetary penal sanctions which are also in the nature of civil liability may justify a demand by the insured against the insurer to reimburse the amounts paid. What is key here is that the main characteristic of the sanction was to satisfy claims of a civil nature. Then it may be said, as stated by the Supreme Court in its resolution of 13 July 2011, that the nature of the payment made by the insured is more important than the type of proceeding (civil, criminal or administrative) in which the sanction was imposed on the insured.

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Purchase and sale of renewable energy projects

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The final wording of the new Renewable Energy Sources Act has not been determined yet. But based on the existing draft, the issues that will require particular attention when deciding to acquire a renewable energy project are already clear. The current draft also provides the main guidelines for the future system of support for renewables.

Companies interested in carrying out renewable energy projects in Poland are still not certain what the conditions for conducting their operations will be. The long-awaited Renewable Energy Sources Act is now available in draft form on the government pages of the *Biuletyn Informacji Publicznej*. The latest version is dated 9 October 2012, but as of the end of 2012 it was still not possible to predict when the act would be adopted by Parliament and enter into force, or what the final wording of the act would be. The government's work on the draft has been extended. When the bill is submitted to Parliament, it is expected to undergo further revisions during the legislative process there. This will in turn lead to delays and difficulties in obtaining financing for renewable energy projects and in transactions involving existing projects, but that does not mean that such ventures cannot go forward at all.

New system of support for renewables

The current draft of the act provides some guidance on the revised structure of support for renewables, but it is not yet possible to estimate the feasibility of carrying out large-capacity renewable energy projects because of uncertainty surrounding the value of green certificates. The basic change is differentiating in support depending on the type and scale of the project. When the new regulations go into force, the projects that will probably gain the most are small photovoltaic projects of up to 10 kW installed exclusively on buildings. The installations that have the most to lose are those for production of electricity using co-firing of biomass, and land-based wind projects above 500 kW. Under the draft, the period of co-financing through green certificates of projects based on co-firing would be reduced to 5 years from the date of the first generation of electricity for which certificates of origin are issued. Other projects would have support guaranteed for 15 years.

The highest and most certain support would be enjoyed by small renewable energy projects, i.e. with an installed capacity of up to 100 kW. Electricity would be purchased from micro-installations (up to 40 kW) and small installations (up to 100 kW in general, or 200 kW if producing power from agricultural biogas or 75 kW for hydropower) at a fixed price set by the Minister of Economy and in force through the entire period of operation of the installation. For now, the draft regulations introducing the "Energy Trio" of laws provide for prices per kWh in the range of PLN 0.45 (for electricity produced from biogas from raw materials from wastewater treatment plants) to PLN 1.30 (for photovoltaic installations of up to 10 kW installed only on buildings) (about EUR 0.11-0.32). Purchasing of electricity from such installations would be made at fixed, unchanging prices in force as of the date the installation is put into operation. The owner of the installation would thus not have to worry about changes in the price at which it sells its output.

The prices at which power would be purchased from small renewable energy projects would be set by 30 September of each year by the Minister of Economy, but would apply only to newly launched installations. The act will also define an entity required to purchase electricity at mandatory fixed prices. This "obligated seller," designated by the President of the Energy Regulatory Office, would be the largest seller of electricity operating within the territory of a given network operator.

Projects above 100 kW (200 kW if producing power from agricultural biogas or 75 kW for hydropower) would be supported under rules analogous to the current rules, which means that they would receive revenue from the sale of electricity and green certificates. But here there is to be an adjustment to the system. The price for sale of electricity is set in the draft act at PLN 198.90 (about EUR 50) per MWh. This price would then be adjusted each year by the consumer price index determined by the President of the Central Statistical Office. If electricity were sold at a price greater than 105% of the purchase price determined in this manner, the producer would not be entitled to green certificates. The substitution fee of PLN 286.74 (about EUR 72) per MWh would not be indexed, however. If the price of green certificates declines, and for two successive quarters is less than 75% of the substitution fee, the Minister of Economy could, but would not be required to, increase the required share of energy from renewable sources in the total sales of electricity. Meanwhile, the draft regulations introducing the act provide that support would be available for renewable energy installations put into operation prior to the effective date of the act for a period of 15 years after they were put into operation, and in the case of installations that exercise the possibility to obtain green certificates, the adjustment factor would be 1. This means that the drafters of the law are seeking to guarantee continuation of the current support conditions for installations that have already been launched, as far as possible. Nonetheless, a decline in value of certificates is probably unavoidable due to the lack of indexation of the substitution fee and an increased supply of green energy on the market. This is the area of greatest uncertainty for investors.

When considering purchasing a renewable energy project, the support system in place for the project should be considered, as well as the consequences of introduction of adjustments to the system.

Connection to the grid

Connecting a project to the grid is essential for operation of the facility and obtaining support. In Poland, in most regions there is currently a lack of free connection capacity for large and medium-sized renewable energy facilities. Contrary to expectations, changes in the regulations introduced in 2010 did not solve this problem. Moreover, because the courts have consistently ruled that grid operators must finance the expansion and modernisation of the grid associated with the connection, operators are much more conservative in estimating the possibilities for connection to the grid, as they are aware that ultimately the connection will be paid for by customers. Thus it is worthwhile to purchase projects only if they have an agreement on connection to the grid already in place with the grid operator. Even if the project has valid connection conditions in place, conclusion of a connection agreement is not certain, because in the negotiation phase the parties may not be able to reach agreement.

The new regulations should make it much easier for micro-installations to connect to the grid. No fees are to be charged for connecting a micro-installation to the grid, and if the installed capacity is no greater than specified in previously issued connection conditions (e.g. issued at the stage of construction and connection to the grid of the building on which the micro-installation is established), only notification of the connection would be required. A smart meter would be installed by the grid operator at its own cost.

Duration and correctness of rights to land

It should be stressed that the draft act does not address many issues connected with implementation of renewable energy projects that are vital for their operations. These issues include the legal basis for use of the real estate. Despite the passage of time, properly structured title to real estate is more the exception than the rule. This partially results from the specifics of Polish law, which does not exhaustively regulate long-term use of land when the parties are not exclusively business entities. A ruling was issued by the Supreme Court of Poland in the autumn of 2012 partially undermining the ability to use tenancy agreements for renewable energy projects because of the absence of the element of reaping the fruits of the land. This ruling may result in increasing attempts to undermine the duration of contracts already in place or newly concluded contracts, as well as the rights of the investor. This is inspiring demands to address selected issues in this regard in the Renewable Energy Sources Act.

Investors also make many mistakes in the form and content of contracts for the use of land. They may not precisely identify the subject of the contract, by failing to precisely define the section of the property covered by the contract, or the contract term, so that it is unclear whether it is a contract for a definite or indefinite period, or may improperly identify the parties, fail to enter the contract in the land and mortgage register, and so on.

Proper administrative decisions

In order to carry out renewable energy projects, it is necessary to obtain numerous administrative decisions. These include planning permission for location of the project in a specific area (reflecting the project in the local zoning plan, or if there is no zoning plan in force, obtaining a decision on construction conditions), environmental permits (a decision on environmental conditions), building permits, and permits for operation of the completed project.

First it should be checked whether the decisions were properly issued, in formal terms, and whether they properly identify the subject matter. All of the administrative decisions and permits obtained during the development process should be consistent with one another. Fairly often there are errors resulting from oversights, e.g. an inaccurate identification of the project or the real estate, or discrepancies resulting from changes introduced during the preparation stage.

It should also be checked whether the obligations imposed on the investor in the decisions have been properly performed, with attention as well to the period of validity of the decision or deadlines for carrying out the project. It may turn out that because of errors in the project, omissions by the investor, or the fast-approaching end to the validity of the decision, the buyer will have to apply for amendment of the decision or issuance of a new decision. This process could even derail the whole project. It must be borne in mind that obtaining the relevant permits depends to a certain extent on administrative discretion, and, once issued, decisions may also be appealed by other parties, such as unhappy neighbours.

Proper transfer of rights to the project in the past

Sometimes the seller of a project is not the original owner. In such case, it should be checked whether in the previous acquisition of the project all agreements and administrative decisions concerning the project were properly assigned to the new investor. In the case of contracts, it is important to verify that all formalities connected with obtaining consent of other parties to the contract for assignment of rights and obligations under the contract were complied with. In the case of administrative decisions, it should be verified that all of the obligations with respect to the authorities issuing the decisions, as provided in the regulations or in the decision itself, were performed.

Acquisition of a special-purpose vehicle company established to carry out the specific project requires somewhat less work. In such case, however, it is important to note any change-of-control clauses in the project contracts and to check all corporate-law aspects of the transaction.

Acquiring an existing renewable energy project enables the investor to save the time and money required to organise a project from scratch. It also allows the investor to take advantage of the support system of guaranteed purchase of the output of energy from renewable sources and additional funds awarded above the market price of the energy, whether in the form of a fixed, guaranteed price for installations of up to 100 kW (200 kW if producing power from agricultural biogas or 75 kW for hydropower), or through the system of green certificates. Nonetheless, acquisition of the project should be preceded by a careful analysis of the feasibility of the acquisition in light of the planned adjustments to the support system, as well as a review of the proper acquisition of rights to the project by the current owner.

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Can corporate disputes be resolved in arbitration?

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Because corporate disputes can have a direct impact on business operations and often are highly complicated, they may seem like ideal candidates for arbitration. Polish law does permit such disputes to be decided in arbitration, but subject to major restrictions which must be taken into consideration when deciding whether to include an arbitration clause in a company's statute or articles of association.

The option of arbitrating corporate disputes has many advantages that are not available in proceedings before the state court. An arbitration proceeding is generally much faster than the comparable judicial proceeding. This is particularly important because many corporate disputes need to be resolved more quickly than the state courts are typically capable of doing. Another argument in favour of arbitration in corporate matters is the confidentiality of arbitration. Arbitration proceedings provide a much greater guarantee that sensitive data or information that could be harmful to the shareholders or discouraging to potential investors will not be released to outsiders. This is particularly important in the case of corporate disputes, which by their nature have to do with the company's internal affairs.

It is also significant that arbitration offers a neutral forum for conflicts involving foreign shareholders or investors. For them, the ability to avoid wrestling with a foreign judicial system is a fundamental advantage that may influence their decision on where to invest. Finally, use of an arbitration clause offers the crucial ability to submit a dispute to professionals, through selection of an arbitration court or individual arbitrators who specialise in resolving disputes of a specific type.

Arbitrability under Polish law

Under Art. 1157 of the Civil Procedure Code, the parties may submit any dispute to an arbitration court involving property matters (including financial) or non-property matters (with the exception of disputes involving spousal and child support), but on the condition that it would be permissible to enter into a judicial settlement of the dispute. The capacity of a particular dispute to be resolved in arbitration is referred to as the "arbitrability" of the dispute.

Submission of a matter to the jurisdiction of an arbitration court is done through conclusion of a written arbitration clause. Depending on when the parties enter into the arbitration clause, the clause may identify a specific existing dispute, or a legal relationship out of which a dispute may arise in the future. The arbitration clause may also set forth specific procedural rules to be followed in arbitration, and may appoint a specific permanent arbitration court.

The code directly provides for the possibility of submitting corporate disputes to arbitration, in both partnerships and corporations. Under Civil Procedure Code Art. 1163 §1, this may be done by including an arbitration clause in the articles of association or statute of the company. By operation of law, such a clause will be binding on all shareholders as well as the company itself. In this context, "corporate disputes" are understood to mean disputes concerning the relations between shareholders and the company arising out of the existence of the company and participation in the company by the shareholders.

However, this does not cover matters arising under other civil-law relationships between the company and the shareholders, or between the company and members of its authorities (e.g. for a loss suffered by the company as a result of actions by corporate officers). Such disputes may generally be resolved in arbitration if there is an arbitration clause in separate agreements between the company and its shareholders or members of the corporate authorities.

These comments are addressed to the general rules of arbitrability. The possibility of seeking arbitration in practice, and limitations on arbitration, may arise in connection with specific types of corporate disputes.

Disputes that are not arbitrable

Perhaps the most serious restriction on arbitration of corporate disputes in Poland is exclusion of the arbitrability of claims to set aside or hold invalid resolutions of the shareholders' meeting of a limited-liability company or joint-stock company. Although this is a fairly natural consequence of the inability to conclude a settlement in such a case, efforts have been made to find an exception to this rule in Civil Procedure Code Art. 1163 §1, concerning an arbitration clause in the articles of association or statute of the company. According to some commentators, this provision creates an exception to the requirement that a dispute must be susceptible to a judicial settlement in order to be arbitrable, and permits any dispute arising out of the corporate relationship to be submitted to arbitration so long as the relevant arbitration clause is included in the company charter. This argument may be supported by the fact that Art. 1163 §1 was introduced in connection with the reform of Polish arbitration law in 2005, and there was no comparable provision under prior law, when the issue of the arbitrability of corporate disputes in general was debatable. Moreover, during the legislative process, a provision was dropped which would expressly prohibit arbitration of disputes concerning the validity of resolutions of a company's authorities, which was originally proposed for inclusion in Art. 1163. This could indicate that the legislative intent was to permit arbitration of all disputes arising out of the corporate relationship, including claims to set aside or hold invalid resolutions of the shareholders' meeting.

The Supreme Court of Poland rejected this interpretation, holding in the resolution of 7 May 2009 (Case No. III CZP 13/09) that cases seeking to set aside or hold invalid a resolution of the shareholders' meeting are absolutely not arbitrable. The court found that Civil Procedure Code Art. 1163 does not provide special grounds for arbitrability of corporate disputes, but only sets forth the legal consequences of including an arbitration clause in the articles of association or statute of a company, and more specifically the set of persons bound by the arbitration clause. As a consequence of this ruling by the Supreme Court, under current law cases of this type may be heard only by the state courts. This rule is unfavourable to investors and departs from the contemporary standards in such countries as France, Germany, Switzerland, the UK and the US, which do not prohibit arbitration of disputes concerning the existence or validity of resolutions by corporate authorities.

Although the regulations and the case law do not directly say so, the same fate must be shared by cases involving the validity (or, more precisely, the existence) of resolutions of a company's management board or supervisory board. These are disputes in which it is essentially impossible to conclude a judicial settlement, and therefore they are not arbitrable. Cases under the jurisdiction of the registry court are not arbitrable either. This applies to cases seeking entries in the commercial register, as well as non-register cases, such as an action by a shareholder seeking to exercise oversight of corporate matters or seeking judicial approval to sell shares in a limited-liability company when the company refuses to consent. Cases seeking to dissolve a limited-liability company or to exclude a shareholder are also not arbitrable. As in the other cases mentioned above, the justification for exclusion of arbitration is that the parties could not conclude a judicial settlement in such cases. This is because the state court hearing such cases has discretion (although not unlimited) on whether or not to order dissolution of the company or exclusion of a shareholder, and the parties to the dispute cannot usurp such discretion by concluding a settlement to that effect.

Arbitrable disputes

Despite the numerous exclusions, many categories of corporate disputes may be submitted to the jurisdiction of an arbitration court. These include all types of disputes in which one party seeks monetary or non-monetary relief from another party. Examples would include claims related to contributions to the company, for payment of dividends, for payment of surcharges in a limited-liability company, or for performance by a shareholder of other obligations connected with its shares in the company. Such disputes may assume various party configurations, i.e. involving claims by the company against a shareholder or by a shareholder against the company or other shareholders. In such cases the arbitration clause may be included in the company's articles of association or statute, or in a separate agreement, such as a shareholders' agreement—particularly common in joint ventures between entities from different jurisdictions.

Summary

The current arbitration law in Poland, and its interpretation by the courts, establishes major limitations on use of arbitration to resolve a wide range of corporate disputes. Nonetheless, arbitration can still be a useful tool for companies, shareholders and investors active on the Polish market. But to use arbitration effectively, it is important to remember the limits within which it is permissible and to draft the arbitration clauses accordingly.

Given the increasing criticism of the current rules, which are not well-suited to the realities of the market, there is a genuine chance for modification of the current approach to arbitrability of corporate disputes. There is hope that the Parliament will decide sooner rather than later to bring Polish law into line with current international trends in which arbitration is treated as the natural forum for resolution of all types of disputes in the business world, including corporate disputes.

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Effective debt restructuring outside bankruptcy

Łukasz Szegda

An interview with Łukasz Szegda on how to avoid bankruptcy by agreeing with creditors on modification of financing terms.

The economic slowdown in Poland in 2012 caused financial problems for a growing number of businesses, particularly in their ability to repay financing for their operations. What steps are available to the management of a company in that situation, and what may they expect from the company's lenders?

It is true that last year brought many financial difficulties for companies, particularly in the construction industry. Problems in performing major construction and infrastructure contracts, including in connection with the Euro 2012 football championship, caused many larger and smaller players to lose their financial liquidity. Companies with worse prospects were forced to file for bankruptcy. Those who saw no opportunity to continue their operations had to choose a liquidating bankruptcy. Others, who saw solutions enabling them to stay in business, preferred the option of a bankruptcy for restructuring, presenting a specific restructuring plan to their creditors.

Fortunately for some companies with better prospects, temporary liquidity problems did not have to mean the necessity of filing a bankruptcy petition or commencing rehabilitation proceedings. Such companies typically have a chance to restructure their debt, by modifying the terms of their debt outside of bankruptcy through negotiations with their creditors. The management boards of some companies, aware of the obligation to file a bankruptcy petition, decide on out-of-court restructuring. Several companies succeeded in following this route. Apart from the obvious advantage of avoiding the negative reaction to a bankruptcy filing on the part of customers and suppliers, this option has several other major advantages, particularly greater control of the parties over the process of agreeing on new terms for financing. They are free from the restraints imposed by the bankruptcy procedure and the related time constraints. It also avoids interference by a third party (a judicial supervisor, bankruptcy judge or bankruptcy trustee) in the terms agreed with the creditors.

How does the process of debt restructuring outside of bankruptcy work?

It is not a formal process, so it can work in different ways. Typically, when a company sees that it is losing liquidity and will not have funds on hand to make upcoming payments on loans or bonds, it will ask the creditors to negotiate a modification of the repayment terms.

If the company has numerous creditors, it is recommended that the parties be given an opportunity to negotiate new conditions calmly, without the fear that some creditors may take steps during that time to satisfy their claims ahead of others. To this end, a standstill agreement is reached under which the creditors (e.g. banks and bondholders) promise not to accelerate or demand repayment of their claims or enforce their security (e.g. mortgages or pledges) for a specific period necessary to agree on restructuring. They also agree that during the standstill period, they will not commence judicial, execution or bankruptcy proceedings against the company. In other words, they agree to preserve the status quo with regard to the creditors' rights in order to give the company a chance to negotiate new terms.

After entering into a standstill agreement, the parties move to the next stage—negotiating the actual restructuring agreement.

How long does it take to work out the new payment terms, and how do the negotiations go?

The time it takes to agree on the terms of restructuring can differ greatly, depending on several factors. First, it depends on the financial condition of the debtor, the number of creditors and the various interest groups among the creditors. Second, there are factors peculiar to the company itself. Typically the parties to the standstill agreement accept a period of several months, perhaps three months, which is necessary to conduct a financial analysis of the company in order to determine what kind of modification to the terms of the debt would be appropriate for the company and—first and foremost—feasible for it to bear under the anticipated market conditions. If the conditions are too strict or the assumptions made are too optimistic, the company's financial problems may quickly return and the parties will then have to go back to the bargaining table. Often the creditors have to extend the standstill agreement because the parties were unable to reach agreement during the time originally provided.

Meanwhile, the debtor is continuing to operate, and sometimes before reaching final agreement on the restructuring terms it needs to obtain bridge financing for its current operations until it is able to obtain new financing after the restructuring.

Reaching a final agreement is usually very complicated. Apart from business issues, such as selecting the optimal restructuring approach and establishing the right financial covenants, reflecting the interests of each group of creditors and oftentimes the unique interests of specific creditors, it is necessary to address many difficult legal issues that come up as the process is underway. In most instances these are non-standard agreements, tailored to suit the specific situation of the debtor and its creditors.

How are the financing terms typically modified in a restructuring agreement?

First it should be said that modifying the terms of existing financing (e.g. by extending the payment deadlines) is not the only method of restructuring. Often debt-to-equity conversion is used, in which the creditors take shares in the restructured company in exchange for their claims against the company (or a part thereof). This means that the shareholding structure of the company changes with the accession of a new shareholder or shareholders, e.g. banks and bondholders, who often remain creditors of the company at the same time. Their rights within the company may be established in various ways depending on the percentage of the equity taken by the creditors (which depends on the financial assessment of how much of the debt should be converted into equity to fit the debtor's repayment capacity). Typically when such a creditor joins the company as a shareholder, it is given rights to oversight and a limited influence over the operations of the company, whether in the form of the right to appoint a member of the supervisory board or management board, or by way of special contractual rights. Conversion of debt into equity means a much greater risk for the bank, but also provides influence over the company and potentially greater profit. Often when such a creditor takes an equity position, it will reserve the right to exit the company if there is improvement in certain financial covenants.

Naturally, an essential negotiating issue is the participation by the current shareholders in the process of support for the indebted company, by providing additional financial support or additional security.

The restructuring agreement may also provide for new financing if, apart from easing the repayment terms of existing debt, the company needs a further injection of cash. Often a creditor offering new financing (which may be one of the existing creditors, a group of creditors, or an entirely new entity) receives special treatment, and its loan and the security granted to the lender receive the highest "super senior" priority for repayment.

With respect to modification of the existing debt, practice shows that the range of potential solutions is also very broad. In addition to postponing repayment or changing the repayment schedule (often in different ways for different categories of creditors), it may include, for example, establishment of additional security, consolidation of the terms of the debt held by various creditors, and sometimes a "haircut" on the face value of the debt or reduction of the interest rate. Often additional obligations are imposed on the debtor in connection with the agreed operational restructuring of the company, such as implementation of an action plan to cut costs, improve efficiency, and divest certain assets that are not vital to the debtor's core business.

You mentioned legal issues. What legal traps lurk for the parties to a restructuring agreement? Which issues require special attention?

Here everything depends on the specific situation. It would be hard to say that there are any standard issues. Because there are so many issues, I can just mention a few examples that come up in practice. These include issues connected with the structuring of the transaction and the security, in order to limit the risk of a "clawback" on the new security established as part of the restructuring if the company goes bankrupt soon after establishing the new security, despite the restructuring. Another example would be how to establish security on the revenue obtained by the debtor from its customers (e.g. using a separate escrow account). Issues of the relations between creditors and their categories also require special attention, and often must be governed by a separate intercreditor agreement.

From the more technical issues, I could mention the need to address the potential risk connected with releasing the priority of mortgages in the land and mortgage register if new mortgages are established in place of released existing mortgages that secured bilateral credit.

What prospects do you see in 2013 for debt restructuring? Are there any trends at the moment?

It is expected that in 2013–2014 Europe will hit a "refinancing wall," when many leveraged loans taken out on a broad scale before the crisis, particularly in 2006–2007, mature at about the same time. Under current market conditions, refinancing all of such large amounts of debt may not be possible using traditionally available sources and existing solutions. This may also translate into problems for Polish companies who took out such loans or guaranteed them (e.g. as a member of an international group). We anticipate increasing problems arising out of this phenomenon.

Looking at the Polish market alone, in 2012 there was a noticeable increase in the degree of complexity of restructuring transactions, in connection for example with the ongoing process of diversification of sources for financing of businesses, which results in greater variety in the categories of creditors participating in such processes. Thus, apart from the banks traditionally involved here, we should increasingly see bondholders, factoring firms, mezzanine funds and other providers of alternative sources of financing participating in restructuring. Last year there was also a noticeable increase in the participation by the state and state-affiliated entities in restructuring initiatives for major Polish companies, but it is hard to say whether this will become a long-term trend.

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Terms of reference: The perfect dispute management tool

Stanisław Drozd

Resolution of a dispute is a project, and it deserves a clear project definition at the outset for all of the stakeholders.

A recent survey by the School of International Arbitration at Queen Mary, University of London, found that the most effective method of expediting arbitration, according to practitioners, is "identification by the tribunal of the issues to be determined as soon as possible after constitution." The study joins the chorus of arbitrators and counsel calling for a more pro-active approach to arbitration and greater efficiency in managing disputes.

Commercial disputes are part of business life. Like all problems businesses face on the market, conflicts with customers, suppliers or business partners need to be treated in a professional and efficient manner. The significance of conflict management skills is widely recognised in the business community, and appropriate training in this area is a basic element of every manager's professional education. Thus the vast majority of commercial disputes are most efficiently resolved by the parties themselves, through business negotiations. Approaching a conflict from a commercial point of view, managers are best able to focus on the essence of the dispute and engage in a constructive controversy to solve it, releasing the positive potential of the dispute or at least mitigating its negative effects.

When parties resort to legal arguments, things tend to get more complicated. Somehow many parties do not see a legal dispute as an extension of their original discussion about what is right and fair in the situation. Instead, invoking the law is often seen as an opportunity to gain an advantage over the other party by bringing up new issues the parties would not even have thought of when originally considering how to solve the conflict. Clients expect their lawyers to outperform the other side's lawyers in proliferating legal issues and eagerly rise to the challenge. As a result, what started as, say, a discussion on renegotiating a contract due to changed market conditions, or a claim by the buyer of a company that the company did not live up to the seller's representations and warranties, can suddenly turn into a court battle over a mosaic of issues under antitrust law, tax regulations, criminal charges—you name it.

This mechanism has a clear psychological explanation. A party that finds itself in a conflict feels threatened and vulnerable. It feels that its interests and wellbeing are at risk. This causes a natural desire by the party to strengthen its position and enhance its power over the other party. In search of arguments to give them a sense of superiority, legitimacy and security, the parties tend to explore all possible areas regardless of their relevance to the true cause of the dispute. The law seems to offer an unlimited source of such power-enhancing and position-strengthening arguments—inexhaustible ammunition for the power struggle between the parties.

Although understandable from a psychological viewpoint, this process can have a devastating effect on the parties and on the process of resolving their dispute. If the dispute is allowed to take this route, the litigation or arbitration process in which the parties find themselves suddenly becomes an end in itself. It gets out of control, taking on a life of its own, consuming increasing amounts of the parties' resources, the most significant of which are the time and energy spent by management on the dispute rather than on the company's core business. The parties have the false impression that they are in control of this process, but in reality they are being led by it. Due to the vicious circle of multiplying legal arguments and issues to be resolved, the outcome of the dispute becomes less predictable and more detached from the true essence of the case. The more numerous, diverse and inventive the issues put before the judges or arbitrators are, the less clear the true essence of the parties' problem is for them. The final ruling will then be more or less accidental, and the parties often realise that despite spending substantial time and money on the process, the real issue that brought them before the court or arbitration panel was not even considered, not to mention resolved.

Today's economy, with its preponderance of complex, cross-jurisdictional, multiparty business relations, provides a perfect setting for this nightmare scenario to play out. But the business community has also developed tools to prevent this from happening. The users of commercial dispute resolution services constantly push for greater efficiency in how their conflicts are resolved by the professional providers of such services. This demand goes far beyond the mere use of technological tools for saving time and money, such as conducting hearings with the use of videoconferencing, storing evidence in virtual data rooms or the like. As commercial relations and the disputes arising out of them become more and more complex, it becomes clear to the parties that the process of dispute resolution is in fact a project. Like any other project, it requires skilled management, effective communication, accurate scheduling and budgeting, but first and foremost a precise and practical project definition.

This trend is particularly visible in commercial arbitration, the essential purpose of which has always been to provide practical methods for efficient resolution of disputes within the business community. Probably the first international arbitral institution to realise the importance of having the essence of the dispute defined and approved by all participants at the very outset, and then programming the arbitral proceedings in view of this definition, was the Court of Arbitration at the International Chamber of Commerce. Its rules of arbitration provide in all cases for drawing up "terms of reference," which in essence are a description of the background of the case, a summary of the parties' positions, and a list of key issues to be resolved. Save for exceptional situations, the terms of reference are signed by the parties and the arbitrators and serve as the basis for the procedural timeframe and estimation of the arbitration costs. In other words, the terms of reference fulfil virtually all criteria of a good project definition. They not only greatly facilitate the efficient organisation of the proceedings, but perhaps most importantly let the parties look at the dispute through the eyes of the arbitrators and discipline them to focus on the issues the arbitrators see as truly relevant.

Similar instruments are envisaged in other arbitration rules and guidelines on best practice in international commercial arbitration (such as the UNCITRAL Notes on Organizing Arbitral Proceedings, which recommend drawing up a "list of points at issue"). Even where no formal provisions applicable in a given case provide for preparation of terms of reference, arbitrators skilled in the craft of dispute management use them anyway, in the form of appropriate "procedural orders," "letters to the parties," or even oral presentations made for the record and for the parties' consideration (as the author witnessed in one arbitration where terms of reference were not envisaged in the arbitration rules). Such an initiative is probably the best possible exercise an arbitrator can undertake to facilitate settlement. It happens often that parties coming to the arbitration table with an aggressive attitude and an arsenal of legal arguments settle the dispute quickly after the arbitrators communicate to them which issues they see as truly relevant for resolution of the dispute.

Although the idea of an arbitrator explaining to the parties what he or she sees as the key issues in the dispute has been controversial for some practitioners, it is probably the predominant view today that an arbitrator cannot properly fulfil his or her function without engaging in such an open discussion with the parties. It is certainly in both parties' interest to insist that terms of reference or a similar document be prepared in their dispute, just as it is in the interest of all stakeholders in a project to insist that a project definition and plan be drawn up. At the same time, it is a professional obligation of a litigator to be prepared to participate constructively in drawing up such a definition and plan and, in fact, to prepare one for the client in the first place, in order to allow him to make an informed decision on how to best approach the problem and what to expect.

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Global risks, local remedies: Cross-border M&A issues in the New Europe

Izabela Zielińska-Barłożek Anna Dąbrowska

The authors report from the IBA European Regional Forum conference in Warsaw on a discussion among lawyers from throughout Central & Eastern Europe on the best ways to minimise common risks encountered in international transactional practice.

The expanded membership of the EU and the growing number of cross-border transactions in Europe have naturally led to the standardisation of M&A procedures within the member states through use of similar documentation and action lists across various EU jurisdictions. But every international project includes elements of local law that require special attention. Cultural differences can also have a bearing on the transaction.

An opportunity to exchange views on this subject was provided during the International Bar Association European Regional Forum conference in Warsaw in November 2012. Lawyers attending the conference from almost 30 different countries in CEE and elsewhere in Europe debated the opportunities and challenges for growing businesses in the new EU member states. A more detailed analysis of the issue of risks in multinational projects took place at a workshop entitled "Assessment of Risk in Cross-Border M&A Transactions." The discussion was led by a panel of lawyers practising in Bulgaria, Hungary, Poland, Russia and Sweden.

Common risks

Knowing how to identify and deal with the risks that may arise in a given jurisdiction is vital to achieving the desired effect of an international transaction. Success depends on skilful and efficient handling of all features of the project.

There are certain risks that are common across jurisdictions, but the same risk may bear different consequences and be treated differently depending on where it arises. Indeed, as became apparent at the workshop, different approaches to a specific risk may be found even within a single country, as transactions vary and local practice does not always provide a common approach to legal problems.

For example, some of the typical risks in almost any jurisdiction concern proper title to shares (for share deals), the effect that debt of the target company may have on the transaction, proper title to real estate and the effect of disclosure in the land register, and labour law issues such as the risks connected with the use of traditional employment contracts versus alternative forms of employment. Another interesting aspect is the approach to certain information about the target company gleaned from due diligence that may pose a risk for the transaction, in the form of "sandbagging" provisions existing in various jurisdictions.

Title to shares

An assessment of whether the sellers of a limited-liability company (or equivalent in the specific European jurisdiction) hold proper title to their shares may often necessitate looking at the effect of entry of the shareholders in the commercial register or equivalent and the required form of transfer documents in the given jurisdiction.

This is especially important in some European countries, such as the Czech Republic, Germany, the Netherlands and Poland, where transfer of shares requires a more rigorous form, with notarised signatures or the form of a notarial deed. In other countries, such as Belarus, Lithuania, Romania and Switzerland, ordinary written form is sufficient to convey title to shares.

Most of the European practitioners at the workshop stressed the need to examine the source documentation behind past share transfers. This is a necessity in countries, such as Poland, where the commercial register does not provide a warranty of public reliance on the register. But also in other jurisdictions, for example Russia, where entry of the holders of title to shares is deemed to provide security to third parties, potential buyers are nonetheless encouraged to review past transactions closely.

A panellist from Budapest explained at the IBA workshop that although in the case of a Hungarian limited-liability company (Kft) shares are transferred upon entry in the commercial register, the entry is made by the court on the basis of the list of shareholders provided by the managing director of the company, who, in turn, acquires information on the transfer directly from the new shareholder. Presentation of the document which was the basis for the transfer of shares is not mandatory. In consequence, it is not possible to rule out a risk of false or inaccurate information being entered in the company register without the court being able to verify it—hence checking the source documents for prior share transfers in the course of due diligence might be advisable.

Too much debt

It is commonly indicated that excessive debt of the target company, a situation disadvantageous for the entity itself, may also pose some risk for the buyer. Therefore certain measures should be undertaken before the transaction in order to improve the financial standing of the company, or the transaction should be structured to deal with this risk optimally.

If the target company is insolvent, the law usually requires the management board of the company to file for commencement of insolvency proceedings within a certain period. For example, in Poland there is a time limit of 2 weeks, or 30 days in Bulgaria, as pointed out by a panellist from Sofia. Creditors may also file bankruptcy petitions.

The panellist from Bulgaria went on to explain that if the target is in poor financial condition, its position may be made more secure before carrying out the sale of shares, for example by increasing the share capital through a capital increase or conversion of debt to equity, or restructuring the existing debt.

An asset deal may also be considered—provided that the assets have not been pledged as collateral, or the consent of the secured creditors is obtained. The risk of anyone challenging the transfer of assets by a distressed company may be mitigated to some extent by obtaining an independent valuation of the assets to ensure that they are being sold at fair market value.

Participants representing most of the CEE countries present at the workshop shared a common perspective in this matter.

Sandbagging

Due diligence is designed to provide the potential buyer an opportunity to identify certain risks related to the target. Once the risks have been identified, the parties can make an informed decision on whether to proceed with the transaction, and if so, how to address any risks that are identified in due diligence.

As the participants at the workshop pointed out, some risks identified in due diligence cannot be eliminated prior to the transaction, but the parties may nonetheless decide to proceed with the deal anyway, making relevant provisions to cover the risks in the transaction documents.

This raises the issue of "sandbagging." Depending on the applicable regulations in the specific jurisdiction, the buyer's knowledge of risks acquired prior to signing the agreement may be an obstacle to effective assertion of a claim under the contractual representations and warranties. With "pro-sandbagging" provisions, the buyer may be given the right to seek indemnity regardless of its knowledge of the risk, while "anti-sandbagging" provisions make the buyer's right to seek indemnity dependent on the state of the buyer's knowledge.

For example, in Sweden, according to an M&A practitioner from Stockholm, under statutory law a buyer may not assert an effective claim for an inaccuracy which the buyer had knowledge of at the time of signing. Under the principle of freedom of contract, however, the parties often include provisions in the transaction documents determining what effect the buyer's knowledge will have on the parties' rights. More often than not, anti-sandbagging provisions are used.

According to studies cited at the conference, in European jurisdictions anti-sandbagging provisions are perceived as more common (51% anti-sandbagging v 7% pro-sandbagging), while in the United States, pro-sandbagging provisions are more common, meaning that the representations and warranties are absolute and unaffected by the buyer's knowledge (41% pro-sandbagging v 5% anti-sandbagging).

The participants at the workshop were evenly split on whether their home jurisdictions governed this issue by statute. There was also a split, although a positive answer seemed to be more common, on whether it was customary across different jurisdictions to include provisions in the transaction documents limiting the seller's liability based on knowledge obtained by the buyer during due diligence.

In the case of Poland, the statutory provisions generally exclude the seller's liability under the warranty for defects if the buyer was aware of the defect at the time of the sale. However, it is generally possible to extend, limit or exclude liability under the warranty for defects, and therefore the parties will usually address this issue in the share sale agreement.

As was clear from the discussion at the IBA conference, ultimately the success of any international transaction, large or small, will depend on proper identification of current and potential risks at the local level and the ability to deal with the risks appropriately. An issue regarded as immaterial in one jurisdiction may turn out to be a deal breaker just across the border.

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2013 Yearbook

For the third year, we share with you an annual publication in which we compile some of the knowledge and experience our lawyers have developed during their work for the firm's Polish and foreign clients.

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