LEGAL & REGULATORY

LITIGATION

Limitation in Polish commercial proceedings – the risks for foreign entities

BY ARKADIUSZ RADWAN

Unless otherwise agreed by virtue of the jurisdictional choice or arbitration clause, the disputes between entrepreneurs in Poland are examined within special commercial proceedings by the commercial divisions of state courts. In these proceedings, the parties face many formal requirements. Failing to observe those requirements may result in losing the case, irrespective of the legal evaluation of the merits of the case. Awareness of the existence of such limitations is of special significance for each plaintiff who submits a statement of claims to the Polish court, as it definitely indicates the scope of statements and evidence which have to be presented in full along with the initial petition.

Polish civil procedure has recently taken an increasingly formalistic approach with regard to disputes between commercial entities. This apparent tendency has been further aggravated by frequent opportunistic behaviour on the part of commercial courts: whenever possible on formal grounds, judges became tempted to dismiss the case, curb the claims or disregard evidence and other fillings in order to reduce efforts needed to solve the case, based on merits of the claim and on legal analysis supporting the allegations. As a result, the principle of 'procedural truth' has prevailed over the 'material' one. The goal of such a formalistic approach was to increase procedural efficiency and to accelerate the proceedings. The underlying idea was a legitimate assumption that belated justice usually equals injustice. However, as legitimate as the aforementioned objectives might be, the tools adopted by the legislator appear to miss the goal. This inclined the Constitutional Tribunal to intervene in order to reinstate the balance between the valid goals of procedural efficiency, on the one hand, and the associated side-effects of strict formalism on the other. This spot-intervention by the Constitutional Tribunal contributed to a partial alleviation of the strict formalism as designed by the legislator. Foreign companies are thus well advised to have a look both at the legal provisions of the Polish civil procedure and at the judicial practice, including leading cases by the Constitutional Tribunal and the Polish Supreme Court. The following analysis briefly discusses the issue, taking into account recent developments.

In the commercial proceedings, the plaintiff is obliged to include in his initial statement of claims all the facts, allegations and pleads as well as to present all relevant evidence in support of these claims, facts and pleads (Art. 47912 § 1 Polish Civil Procedure Code). This is the realisation of the concentration-principle evidence. Any failure in that regard shall result in precluding the plaintiff from bringing the evidence and from making the allegations at any later stage. Hence any mistake in the preparatory stage might be severely punished by a perpetual deterioration of the claimant's procedural position and, in fact, of the actual access to justice. The issue was subject to the Constitutional Court ruling, but the court confirmed the constitutionality of the provision in question (judgment of 26 February 2008, [SK 89/06]). It is important to note that the preclusion does not apply to evidence and allegations that became known to the party after filing the suit, but only if the plaintiff proves he could not reasonably be expected to be aware of those facts and allegations beforehand. Another exception is made for the situations, when the necessity to present given evidence was established only at a later stage of the trial. A typical case in practice would embrace situations when the stance taken by the defendant could not be reasonably expected by the claimant at the time of lodging her petition (cf. Supreme Court rulings of 12 May 2006 [V CSK 55/06] and of 8 February [I CSK 435/06]). Nonetheless the available case-law produced by lower courts on the extent of these exceptions is far from clear and the opportunistic attitude of courts continues to pose a substantial legal risk on the parties to the dispute. Thus, for the sake of enhancing the prospects of the success of her claims, a cautious plaintiff would reasonably bring and present as much of the evidence and allegations as possible already at the initial stage of the trial.

Even worse is the position of the defendant. Not only is the defendant subjected to the same limitations as the plaintiff, but also to additional requirements applicable to the defendant – the law provides for a 14-day period within which the defendant is supposed to lodge

the statement of defence under threat of disregarding his allegations. The asymmetry, also known as the 'inequality of weapons', becomes apparent when we consider that the plaintiff remains in control of the point in time when he decides to file the suit, whereas the defendant is limited to the two-week preclusion period. In more complicated cases with intricate factual basis and demanding legal reasoning, the time frequently proves unduly short, in particular when the company needs to invest extra time in finding a competent and reliable law firm specialised in a given field. This is even worse for foreign entities operating in Poland, when decision makers might not speak Polish, which would entail the necessity to produce a translation of the statement of claims and the accompanying legal documents. Hence it is recommendable for a foreign company doing business in Poland to have knowledge of a reliable local law firm that can be promptly involved if the situation requires a swift reaction.

The Polish Supreme Court held that trial courts are free to admit evidence ex officio, but this can only occur in exceptional situations (cf. judgment of 22 February 2006 [III CK 341/05]). This opinion has been subsequently confirmed in further decisions by the Supreme Court (cf. judgment of 4 January 2007 r [III CZP 113/07]). The trial court practice reveals that the exception enabling the judge to admit certain evidence on his own initiative (ex officio) is hardly ever used by courts.

Yet another risk may be associated with an incorrect computation and consequent improper prepayment of court fees by the appealing defendant. Here again, the plaintiff enjoys the privilege of re-filing suit, whereas the defendant does not have a second chance to challenge the plaintiff's statement of claims. Nonetheless, the law provided for a draconian sanction of the dismissal of the defendants' statements and allegations brought against the plaintiff's claims, if the fees had not been paid correctly. However, this hard-line solution has been declared void by the Polish Constitutional Tribunal as far as it pertains to a claimant acting without a professional attorney (judgments of 20 December 2007 [P 39/06] and of 26 June 2008 [SK 20/07]). At the same time, the Tribunal ruled that the alleviation does not apply to companies represented by a professional attorney (judgements of 17 November 2008 [SK 33/07] and of 28 May 2009 [P 87/08]). Juxtaposition of these recent rulings leads to a somehow perverse conclusion, namely for a company it appears reasonable to act without a professional attorney, rather than to hire one. That is because in the Tribunal's view, only the former cases justify a more lenient approach to the formalism of the civil procedure. It must be noted that the present formalistic approach is subject to fierce criticism by the legal profession. One of the proposals is to give up separateness of commercial proceeding as a sui generis subcategory of civil procedure. On the other hand, it is always worth considering subjecting future disputes to the cognition of arbitration court, where no such formalism exists. ■

Dr Arkadiusz Radwan is of counsel at Kubas Kos Gaertner. He can be contacted on +48 22 321 83 00 or by email: arkadiusz.radwan@kkg.pl.

An expert in the field of Polish, comparative, European and international company law. He is also interested in capital market law, economic analysis of law, European commercial law and international trade law. He is the President of the Allerhand Institute and the Director of C-Law.org European Centre for Comparative Commercial and Company law and chief editor of the HUK Law quarterly for the entire commercial, insolvency and capital market law.