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Civil Procedure Code Changes

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Amendment to the Civil Procedure Code

The amendment to the Civil Procedure Code dated 16 September 2011, which takes effect from 3 May 2012, implements a number of changes in civil procedure, relevant from the point of view of the participants to the proceedings.

One of the key changes is the liquidation of separate commercial proceedings. From 3 May 2012 only one procedure for pursuing claims will apply in civil cases, regardless of whether a party is an entrepreneur or a person not conducting business activity. The amendment was intended to respond to criticism of commercial proceedings, in particular their formal character. However, the nature and direction of the changes causes doubts as to whether the legislator went in the right direction in response to this criticism. The amendment liquidating commercial proceedings does not remove the complexity and difficulty of these proceedings, it only modifies and expands their effect on the whole civil proceedings. The legislator goes further and limits the freedom of the parties to file pleadings - in terms of their number, sequence and content.

The current provisions of the Civil Procedure Code govern commercial proceedings separately. Its parties may only include entities conducting business activity, or entities which conducted business activity (entrepreneurs), and entered into a civil dispute with another entrepreneur in connection with such business activity. The specificity of commercial proceedings is its formalism, understood *inter alia* as an obligation to submit all claims and evidence in a case in the first pleading. The plaintiff in the statement of claim, and the defendant in the statement of defense, is required to present all claims and evidence in the case. Accordingly, this obligation applies to a person bringing allegations or complaint against an order for payment. Otherwise, the party loses the right

to refer to them in the further course of the proceedings – the so called “evidence preclusion”. The provisions of law allow for limited exceptions to the rule of evidence preclusion, such as demonstrating that the party was not able to refer to these allegations, statements, evidence in the first pleading e.g. when evidence did not exist as of the date of filing the pleading. The second exception is demonstrating that the necessity to refer to some evidence arose later e.g. when the necessity to summon witnesses in the case arose from the testimony of those witnesses already heard in the case.

Commercial proceedings are characterized by many other differences, such as the inadmissibility of a counterclaim, the necessity to prove claims with documents for the purpose of filing a plea of compensation in the course of the proceedings, or, essential from a business point of view, holding court hearings or a part thereof *in camera* at the request of a party when the circumstances constituting a trade secret may be disclosed. In addition, the court is obliged to settle cases pending in these proceedings on a fast track basis. In accordance with Article 479[16] of the Civil Procedure Code, the court should endeavour to deliver judgment within three months from the date of filing a statement of claim. Cases for the conclusion, amendment and termination of an agreement, and for establishing its content should be recognized as high priority.

After the amendment enters into force, the provisions of commercial proceedings shall no longer apply. Consequently, trials between entrepreneurs will be conducted in a normal civil action, which will also be partially changed. The amended Article 207 of the Civil Procedure Code is essential for the participants to the civil proceedings.

According to the wording of the amended Article 207 para 2 and 3 of the Civil Procedure Code, the Presiding Judge (i.e. the judge in charge of the proceedings) may order to file a statement of defence within a time limit of not less than two weeks. Before the first hearing, the Presiding Judge may also oblige the parties to file further preparatory documents, establishing the order of filing letters, the deadline for their filing and the circumstances to be explained. What is important in the course of the case, is that preparatory documents shall be filed only if the court decides so, or if the letter contains only a motion as to evidence. The court may issue this decision in a closed session.

The content of the provision referred to above means that, the parties to the proceedings may be deprived of the possibility to freely determine the trial strategy and, at best, to control it. So far, the parties were the so called hosts of the trial. They spoke freely and took a position in the trial. Based on an adopted procedural tactic, they filed pleadings in any number, at any time, and with the

content consistent with this tactic. According to the wording of the new Article 207 of the Civil Procedure Code, the court will now take control over the trial and manage it. From 3 May 2012 the court, firstly, will be able to limit the topics of the pleadings to the parties - indicating what circumstances are to be addressed in a pleading, secondly, the court will set the parties a time limit for filing a pleading, thirdly, the court will be able to prohibit the parties from filing pleadings at all. For this reason, the main criticism towards the amendment is the partial incapacitation of the parties in the trial. It is called partial incapacitation because the changes concern mainly written participation in the trial, they do not apply to actions taken by the parties orally at the hearing. In extreme cases, a party might not be able to perform certain procedural actions in writing, which in principle are available to parties, e.g. withdrawal of action, without the permission of the court. In this case, the plaintiff will not be able to withdraw an action other than at the hearing. The plaintiff will be able to do this only on the designated date of the hearing.

The purpose of the amendment was to streamline and accelerate the proceedings. However, in practice, some changes may contribute to its extension. Such consequences may also be triggered by para 7 of Article 207, according to which, the statement of defence as well as preparatory documents filed in violation of para 2 and 3 shall be returned. The fact of returning the above mentioned letter by the court does not deprive the party, however, of the possibility to raise claims and evidence contained in that letter at the hearing. Likewise in a situation when the court prohibits the parties from filing letters. In practice, the party will be able to dictate the content of such a letter to the minutes. The court, on the other hand, will be obliged to minute the position of the party. The time spent by the court on taking the minutes of the position of the parties will depend on the complexity of the case as well as the extensiveness of the letters, which the parties wish to file. The practice shows that this form of exchange of arguments by the parties may cause significant delay in the proceedings. The parties may also attempt to present comprehensive positions in the appendices to the minutes of the hearing.

Contrary to the justification of the draft amendment, the system of evidence preclusion will not disappear. Para 6 of Article 207 of the Civil Procedure Code provides, that the court will skip delayed claims and evidence. The claims and evidence which the party did not refer to in the statement of claim, any statement of defense or further pleadings are delayed. The court will be able to include the delayed claims and evidence, if the party demonstrates sufficient indications of reliability of the absence of fault in delay, referring to evidence or exceptional circumstances. Consequently, we will still have to deal with evidence preclusion. Even worse, situations being an

exception to this rule were defined in general terms, the term “exceptional circumstances” raises specific doubts. This means that the presence of an exceptional situation and admitting evidence will be subject to the subjective evaluation of given circumstances by the judge. This provision also implements a presumption which is disadvantageous to the parties, that claims and evidence were submitted only at the time when they were included in the statement of claim, statement of defence or further letters filed upon request of the court. In reality, if the party is unable to gather evidence within the time limit specified by the court, the party will have to demonstrate the lack of fault or existence of exceptional circumstances. It should be added that this situation will be particularly unfavourable to the defendant, whom the court will issue a time limit to in advance (usually two-week) to take a position and file a statement of defense. Due to circumstances beyond the defendant's control, the time limit set by the court may not be sufficient to collect evidence in the case. The time limit set by the court may be too short, especially in the event of complex cases, involving a number of documents to be collected and submitted, not to mention other evidence in the case or necessity for advice and obtaining expert opinions. Moreover, due to the complexity of the case, or the legal and business relationships between entities, part of the documents constituting evidence is often not in the possession of the defendant and the defendant needs time to obtain the relevant documents or information. This gives rise to the question of whether the court will treat such situations as through no fault of the party. Whether the court will deem them exceptional, and what criteria will be taken into account in their assessment. Whether the party, which is in delay in gathering evidence, exposes itself to the risk of losing a case.

By granting the above mentioned discretionary powers to courts, the legislator has imposed on courts a duty to instruct the party acting without a professional attorney on the rules of evidence proceedings. The multiplicity of rules that the court must inform the party of (Article 162, 207, 217, 229, 230 of the Civil Procedure Code), their complexity and the variety of negative consequences arising from their improper application raises the question of whether it is an appropriate solution in order to succeed in a trial by a party without a professional attorney. The proposed change has at the same time procedural shortcomings. It leaves doubts as to how the party should be instructed. The provision implementing an obligation to instruct the parties does not specify when the party should be instructed and whether one instruction at the first hearing is sufficient, or whether the party shall be instructed at each hearing, or perhaps at the time when the party could take advantage of a given provision of law. Another issue is whether the instruction of the party will bring the intended effect in the form of understanding and ability to apply the rules.

The liquidation of commercial proceedings and changes in civil proceedings raise a number of different concerns and comments. Assumptions that guided the changes of commercial proceedings i.e. to cease to require the same knowledge of the law from entrepreneurs as from professional attorneys, to streamline and accelerate the trial, should be evaluated positively. The question is whether this required a complete liquidation of commercial proceedings and the raising of requirements of legal knowledge for ordinary people.

Entrepreneurs are worried about the lengthiness of the proceedings, which is commonly attributed to civil proceedings. Other changes also cause reasonable doubt whether the trial will be faster. Time is money in the case of proceedings involving entrepreneurs, because waiting for a judgment e.g. ordering payment of due remuneration/other payment may result in the deterioration of the financial situation of an entrepreneur and, in extreme cases, lead to bankruptcy. The legislator's good will towards entrepreneurs is to let the commercial courts continue to function, whose experience will be used in implementing the new civil procedure, and which may still examine cases regarding claims between entrepreneurs.

Change of the rules of civil procedure also have an impact on the predictability and continuity of courts' judgements. Hitherto commercial proceedings, perhaps not perfect, have been embedded in the law. A significant number of the Supreme Court's decisions interpreting its provisions affected the predictability of judgments. When new provisions of law enter into force, earlier jurisprudence of the Supreme Court is useless and it takes several years to develop a new one.

Non-governmental organizations in civil procedure after the amendment

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The amendment to the Civil Procedure Code dated 16 September 2011 implements new rules for the participation of social organizations in civil proceedings. The term “social organizations” used so far was replaced by a new term “non-governmental organizations” as defined in Article 3 Section 2 of the Act of 24 April 2003 on public benefit activity and voluntary work (Journal of Laws of 2010, No. 234, item 1536, as amended), as entities not belonging to the public finance sector and acting as non-profit making organizations.

According to the legislator’s intent, the concept of non-governmental organizations should be broadly interpreted, covering trade unions and foundations among others.

The change of the name aims at creating order, as the term non-governmental organizations also appears in lieu of social organizations in other legal acts.

The amendment to the Civil Procedure Code also implements new rules in relation to procedural rights of non-governmental organizations. So far, social non-profit organizations, in certain cases, have had the right to start proceedings in situations requiring protection of citizens’ rights, without having to give notice or obtain the consent of an interested party.

Meanwhile, the amendment deprives non-governmental organizations of the right to institute proceedings to the benefit of third parties without their consent. In order to institute proceedings to the benefit of a natural person by a non-governmental organization, it is necessary to obtain the written consent of such a person. The requirement to obtain the approval of a natural person will also apply in the event that the organization joins any pending proceedings.

Providing the written consent of the person in whose name the proceedings shall be instituted or conducted, after the amendment, will be treated as one of the formal elements of a statement of claim of a non-governmental organization; or the letter on joining pending proceedings. In the absence of such consent, the court will demand that the missing information be completed or else the statement of claim, or letter, will be returned.

The amendment also applies to further effects of a non-governmental organization’s participation in the proceedings pending to the benefit of a natural person. So far, the provisions of the Civil

Procedure Code regarding the Prosecutor applied both in order to institute legal action by the organization and to participate in the proceedings by such organizations. Particularly applicable is Article 58 of the Civil Procedure Code which sets forth that the final judgment delivered in a case brought by the prosecutor has the force of *res judicata* between the party, to the benefit of whom the prosecutor instituted the proceedings, and the opposing party.

The amended provisions also refer to this principle, with one reservation. In the event of bringing action by non-governmental organizations, Article 58 sentence 2 of the Civil Procedure Code, which provides for the right of an interested party who did not participate in the proceedings, to assert its pecuniary claims, in whole or in part in which they had not been adjudged, shall not apply.

If a non-governmental organization joins pending proceedings, an interested natural person shall remain an administrator of the proceedings. In such a case, a non-governmental organization should be subject to the provisions on secondary intervention, which are not governed by the provisions on uniform participation.

The amended provisions concerning non-governmental organizations in civil proceedings shall apply in cases which are initiated after the amendment enters into force, i.e. after 3 May 2012.

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Effect of declaring bankruptcy on civil proceedings

One of the most important changes made under the amendment of the Civil Procedure Code dated 16 September 2011 is the repealing of Article 182^1 of the Civil Procedure Code, which provided for **discontinuation** of civil proceedings in the case of declaring liquidation bankruptcy of a defendant.

Hitherto the provision of the Civil Procedure Code on discontinuance of the proceedings caused undesirable consequences. For example, in the case of refusal to include the plaintiff's claim on the list of claims in bankruptcy proceedings, the creditor (plaintiff), for whom the proceedings were discontinued, was forced to reinstitute proceedings for its claim, which involved additional costs. Therefore, according to the provisions of the law, this meant the necessity to institute proceedings again, even if they were proceedings pending in the second instance or even cassation proceedings before the Supreme Court!

Pursuant to the provisions of the amended Civil Procedure Code, declaration of the defendant's bankruptcy will only result in **suspension** and not, as yet - discontinuance of civil proceedings.

Following the suspension, the official receiver or court administrator of the bankrupt entity's assets (as is the case of a claim that cannot be lodged on the bankrupt entity's assets, or in the case of refusal to enter a claim on the list of claims) will join the proceedings, or the proceedings will be discontinued (as is the case of entering the plaintiff's claims on the list of claims in bankruptcy proceedings).

Benefits from the amended provisions of the Civil Procedure Code include mainly an end to the practice of discontinuing proceedings which were overused by the courts and, instead, introducing the solution of suspending the proceedings until the official receiver joins the proceedings, or the plaintiff's claim is entered into the list of claims in bankruptcy proceedings.

The change of the provisions will be beneficial both to the creditor (plaintiff) who will avoid re-initiation of the proceedings for its claim and expenses related thereto, and to the courts, which will avoid conducting the proceedings again in the same case.

The amended provisions concerning the effect of declaring bankruptcy on civil proceedings shall apply as of the date the amendment enters into force, i.e., on 3 May 2012, which means that they will also apply to cases already pending.

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Is the era of "appendix to the minutes" approaching?

The act of 16 September 2011 on the amendment to the Civil Procedure Code and certain other acts come into force, with some exceptions, from 3 May 2012. One of the key changes implemented is the limitation of the possibility to file pleadings in writing by the parties. The new wording of certain provisions, particularly of Article 127 of the Civil Procedure Code, 207 of the Civil Procedure Code and 217 of the Civil Procedure Code will significantly affect the manner of conducting evidence proceedings, and according to the legislator, will significantly accelerate the recognition of civil cases through the concentration of evidence. The change of the above mentioned provisions should equip judges with tools for concentration of evidence and prevent extension of trials due to the filing of further pleadings.

In order to eliminate cases of abuse, the legislator introduced the principle providing that further preparatory letters, other than a statement of defence, may only be filed if the Presiding Judge or the court in the course of the case requires so. Filing of a preparatory letter without the appropriate requirement will result in its return. This does not mean, however, that the parties will lose the possibility to present their positions on the case in a manner other than orally at the hearing or in preparatory letters filed at the request of the Court. The parties will be able to file an appendix to the minutes. An appendix to the minutes is part of the minutes of the hearing and serves to complement its content with a more accurate and more complete presentation of motions (arguments, conclusions) and declarations (statements and opinions) of the party filing an appendix. In particular, it may contain more complete legal arguments presented at the hearing, clarifying evidence theses and conclusions, and referring to the statements and arguments of other participants to the proceedings made at the hearing. Its content must always be related to the statements of the author of the appendix filed at the hearing, and such appendix shall be connected with the statements.

The appendix to the minutes of the hearing does not have an autonomous meaning; its role is ancillary with respect to the existing principle of the oral character of the hearing. In general, an appendix should only summarize the oral arguments and conclusions presented previously at the hearing. Nevertheless, its role will soon have a more considerable meaning. In light of recent

legislative changes it should be expected that the parties and their attorneys *at litem* will even more willingly exercise the right to file an appendix to the minutes, “smuggling” their statements, conclusions, and additional arguments of their current legal position into the evidence material. Will this trend spread? Such a question cannot be answered unambiguously. The position of the courts will certainly be important in this scope as they are the ones that will address this practice and *sui generis* “circumvention attempt” of restrictions on filing pleadings by the parties.

Wider protection of trade secrets

The new amendment introduces a number of significant changes in civil procedure. One change concerns the legal possibilities of limiting the openness of the Court hearings.

In light of the previous wording of Article153 of the Civil Procedure Code, the court ordered *ex officio* to carry out the entire hearing or part thereof *in camera* if the public hearing of the case threatened public order or morality, or if circumstances covered by the protection of classified information could be disclosed. Moreover, the Court at the request of a party could order to hold a hearing *in camera*, if it deemed the circumstances indicated by the party as justified, or if the hearing involved the details of a family life. In addition, in commercial proceedings in accordance with Article 479^{10} of the Civil Procedure Code, the Court at the request of a party ordered to hold a hearing or part thereof *in camera*, also when the circumstances constituting a party's trade secret could be disclosed. The most significant change within the scope of the possibility to limit the openness of the hearings consists in adding § 1^1 in Article 153 of the Civil Procedure Code. The new provision introduces an additional basis for holding a hearing or part thereof *in camera*, which is the risk of disclosure of the circumstances constituting trade secrets of the parties. This provision corresponds to Article 479^{10} of the Civil Procedure Code, repealed in connection with the liquidation of one of the separate proceedings (commercial proceeding).The effect of this amendment will be an extension of the application of this legal norm to all civil cases, including non-commercial cases.

The amendment of the content of Article 153 § 2 of the Civil Procedure Code has both an editorial as well as an ordering character, since it specifies that in a situation when the reasons given by the parties are deemed justified by the Court, or if the details of a family life of the parties might be discussed, the court may order to hold not only the entire hearing but also a part thereof *in camera*. This is a discretionary power of the Court.

Extending the catalogue of circumstances that constitute the basis for exclusion of openness in hearings in civil cases should be assessed positively. The broader scope of possible application should, among others, better protect the interests of entrepreneurs in civil cases, including for example in disputes with consumers and in cases concerning the protection of personal interests. On the other hand, the real effects of the above mentioned legislative changes can be assessed only several months after the new provisions enter into force.

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Transitional provisions – the effects of the amendment to pending proceedings

Inter-temporal principles of applying provisions of the Civil Procedure Code as amended by the Act of 16 September 2011 on the amendment to the Civil Procedure Code and some other acts (Journal of Laws 2011.233.1382) were regulated in Article 9 of the abovementioned Act.

The general principle adopted by the legislator is the principle of applying the amended provisions to the proceedings initiated after the Act enters into force (Article 9.1 of the Act), i.e. on 3 May 2012. Proceedings initiated after that date (i.e. those instituted from 4 May 2012 inclusive) will be held under new conditions.

Initiation of proceedings

As a rule, the proceedings are initiated by filing a pleading (statement of claim or motion). An exception consists in the regulation of Article 466 of the Civil Procedure Code, which provides for an opportunity to bring an action by an employee or an insured person orally to the court in labour or social insurance cases.

The letter instituting the proceedings may be filed directly to the court registry office or sent via Polish Post. In the latter case, submitting the letter to a Polish Post Office is equivalent to filing it to the court (Article 165 § 2 of the Civil Procedure Code). Therefore, technically speaking, the date indicated on the court confirmation stamp attached by the registry office of the competent court, or the date of posting a statement of claim or a motion via Polish Post indicated on the acknowledgement of receipt will determine whether the case is pending according to the new provisions or not.

However, in the case of posting a letter at a post office abroad, the date of filing a statement of claim will be determined not by the date of posting the letter abroad, but by the date of its submission to the Polish Post Office. Therefore, it is possible in some cases that a statement of claim posted in a foreign post office before 4 May 2012 will be submitted to the Polish post office

by a foreign post office operator on 4 May 2012 or later. In such a situation, the proceedings shall be pending according to the amended provisions of law. The same may happen in the case of a letter initiating the proceedings sent via courier. If a statement of claim is sent via courier on 2 May 2012, but the courier files it with the court on 4 May 2012, such proceedings shall be subject to the amended provisions of law.

It may also happen that the amended provisions will apply to cases where a letter instituting the proceedings has been filed before 4 May 2012. For example, in the case when a letter instituting the proceedings contains formal defects required by the Court to be removed, but not removed by the party within the prescribed time limit. According to Article 130 § 2 of the Civil Procedure Code after expiry of the time limit, the Presiding Judge returns the letter to the party. The letter returned in such a manner does not produce any effects of its filing in accordance with the Act. Therefore, briefly speaking, such a letter does not initiate proceedings. It is common practice that in such cases, a party may, however, remove any defects after the expiry of the time limit, requesting the court at the same time not to return the letter, but to register the case under a new file number (as a new case). In this case, the initiation of proceedings (under the new file number) will take place on the day of filing/posting the letter containing the above mentioned application, together with the removal of any formal defects. If such a letter is filed on 4 May 2012, then the amended provisions of law will apply to such initiated proceedings.

Effects of amendments to pending proceedings

In sections 2 to 7 of Article 9 of the amendment, the legislator introduced exceptions to the abovementioned rule of applying the provisions of the amendment to initiated proceedings after the date the Act enters into force.

These exceptions provide for applying amended provisions to pending proceedings or to court decisions issued after the date the Act enters into force. Essential changes, that will affect pending proceedings, were indicated above.

Firstly, appeals filed after the date the amendment enters into force (i.e. as of 4 May 2012) might be filed directly to the court of second instance (new Article 396 § 3 of the Civil Procedure Code).

Secondly, the decisions of the court of first instance issued after the date the Act enters into force (therefore, issued on 4 May 2012 and afterwards) rejecting a complaint for declaring a legally binding decision unlawful might also be appealed against (new Article 394^1 § 1 of the Civil Procedure Code).

Thirdly, the judgement of the court of second instance issued after the date the Act enters into force (therefore, issued on 4 May 2012 and afterwards) quashing the judgement of the court of first instance and referring the case for re-examination might also be appealed against to the Supreme Court (new Article 394^1 § 1^1 of the Civil Procedure Code).

Fourthly, complaints against the decisions of the court of second instance as to the reimbursement of the cost of court proceedings, issued from 4 May 2012 shall be examined by a different composition of the court of second instance, the so-called horizontal complaint (new Article 394^2).

Fifthly, due to new rules on the manner of examination of an application for exemption of a court referendary (an application will be examined by the Court not by the President of the court in administrative mode as it was so far), it will be possible to appeal against a court decision dismissing the application for an exemption of a court referendary.

Sixthly, from 3 May 2012, Article 182^1, which provided for termination of the proceedings in the case of liquidation bankruptcy of the defendant, will not apply. From 3 May 2012 the new regulations contained in Article 174 § 1 point 4 and § 3 together with Article 180 § 1 point 5 of the Civil Procedure Code, which introduce a mandatory suspension of the proceedings in the case of liquidation bankruptcy (of both plaintiff and defendant) shall apply in its place.

Seventhly, the decisions of the Presidents of competent offices issued before 2 May 2012 in cases relating to competition, energy regulation, regulation of telecommunications and post and rail transport regulation should be subject to the provisions of Article 479^{1}-479^{2}, Article 479^{4}, Article 479^{6} and Article 479^{6a}, Article 479^{8}, Article 479^{9}-479^{14b}, Article 479^{16}-479^{19a} and Article 479^{22} of the Civil Procedure Code.

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