The dispute resolution Review

Fifth Edition

Editor

Richard clark

Law Business Research

The Dispute Resolution Review

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Richard Clark

Law Business Research Ltd

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EDITOR'S PREFACE

Richard Clark

Following the success of the first four editions of this work, the fifth edition now extends to some 58 jurisdictions and we are fortunate, once again, to have the benefit of incisive views and commentary from a distinguished legal practitioner in each jurisdiction. Each chapter has been extensively updated to reflect recent events and provide a snapshot of key developments expected in 2013.

As foreshadowed in the preface to the previous editions, the fallout from the credit crunch and the ensuing new world economic order has accelerated the political will for greater international consistency, accountability and solidarity between states. Governments' increasing emphasis on national and cross-border regulation – particularly in the financial sector – has contributed to the proliferation of legislation and, while some regulators have gained more freedom through extra powers and duties, others have disappeared or had their powers limited. This in turn has sparked growth in the number of disputes as regulators and the regulated take their first steps in the new environment in which they find themselves. As is often the case, the challenge facing the practitioner is to keep abreast of the rapidly evolving legal landscape and fashion his or her practice to the needs of his or her client to ensure that he or she remains effective, competitive and highly responsive to client objectives while maintaining quality.

The challenging economic climate of the last few years has also led clients to look increasingly outside the traditional methods of settling disputes and consider more carefully whether the alternative methods outlined in each chapter in this book may offer a more economical solution. This trend is, in part, responsible for the decisions by some governments and non-governmental bodies to invest in new centres for alternative dispute resolution, particularly in emerging markets across Eastern Europe and in the Middle East and Asia.

The past year has once again seen a steady stream of work in the areas of insurance, tax, pensions and regulatory disputes. 2012 saw regulators flex their muscles when they handed out massive fines to a number of global banks in relation to alleged breaches of UN sanctions, manipulation of the LIBOR and EURIBOR rates and money-laundering

offences. The dark clouds hanging over the EU at the time of the last edition have lifted to some degree after the international efforts in 2012 saved the euro from immediate and catastrophic collapse, although the region continues to prepare for a period of uncertainty and challenging circumstances. It is too early to tell what, if any, fundamental changes will occur in the region or to the single currency, but it is clear that the current climate has the potential to change the political and legal landscape across the EU for the foreseeable future and that businesses will be more reliant on their legal advisers than ever before to provide timely, effective and high-quality legal advice to help steer them through the uncertain times ahead.

Richard Clark
Slaughter and May
London
February 2013

Chapter 45

POLAND

Justyna Szpara and Agnieszka Kocon[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Poland is a civil law country. The Polish legal system follows the Continental, code-based tradition. The hierarchy of universally binding law includes the Constitution, treaties, statutes and executive regulations.

Judicial authority is exercised by courts and tribunals. Courts include the Supreme Court, common courts, administrative courts and military courts. There are two tribunals: the Constitutional Tribunal, which rules on the constitutionality of laws and treaties, complaints alleging violation of constitutional rights and disputes over authority between central constitutional organs of the state; and the Tribunal of State, which rules on the constitutional liability of high state officials.

Common courts exercise general jurisdiction in all matters, except for matters reserved by statute for the jurisdiction of other courts. The courts are divided into departments depending on the kinds of cases they handle (e.g., civil, criminal, commercial, labour, registry, bankruptcy). Administrative courts review the actions of public bodies. Proceedings before the common courts and the administrative courts are at two instances.

The common courts comprise district courts (first instance in smaller cases), regional courts (first instance in larger cases and appeals from the district courts) and appeal courts (appeals from the regional courts).

The jurisdiction of the Polish Supreme Court is designed to review the legality and uniformity of decisions by the common courts, including by hearing cassation appeals, which are an extraordinary avenue of review for final second-instance judgments. The Supreme Court is not a court of third instance.

1 Justyna Szpara is the managing partner and Agnieszka Kocon is a legal adviser at Łaszczuk & Partners.

The administrative courts comprise the provincial administrative courts and the Supreme Administrative Court, which hears cassation appeals.

Poland has been a member of the European Union since 1 May 2004, thus EU law has a major impact on judicial institutions in Poland. The Polish courts have become participants in the process of judicial review of compliance with EU law and judicial protection of the rights and freedom of EU residents. The courts are required to apply EU regulations directly, and where there is a conflict between national law and EU law, they are required to give precedence to EU law.

ADR methods are recognised as being an expression of parties' autonomy. Polish law regulates arbitration and mediation. In addition, other consensual dispute resolution methods, such as negotiations, expert determination, etc., are allowed and used, although they are not regulated by law.

II THE YEAR IN REVIEW

Some of the more interesting rulings in Polish civil procedure in the past year include:

i The state court may set aside an arbitration award that is contrary to procedural public policy

The Polish Supreme Court (judgment of 9 March 2012, Case No. I CSK 312/11) held that procedural public policy may be grounds for reviewing an arbitration award in two aspects. First, the procedure that led to issuance of the arbitration award is reviewed for its compliance with fundamental procedural principles of the legal order. Second, the effects of the arbitration award are reviewed for their consistency with procedural public policy – whether they are reconcilable with the system of procedural law, e.g. whether they violate the principle of *res judicata* or the rights of third parties.

This holding was issued in a case seeking to set aside an arbitration award. The dispute arose between the Polish State Treasury and an investor participating in road construction. The investor brought a claim in arbitration against the State Treasury, seeking additional compensation under contractual clauses calling for indexing of fees based on inflation and changes in the zloty/euro exchange rate during the extended period of performance of the contracts, which claims were also characterised as claims for damages for breach of contract. In 2007 the arbitration court issued 'interim and partial' awards upholding the claims in principle (i.e., as to liability).

In 2008, the State Treasury filed a petition with the regional court to set aside the interim and partial awards on the grounds that they violated public policy. The court held that the petition was premature because the awards were interim and partial. On appeal, the court of appeal held that under the UNCITRAL Rules, a petition to set aside interim and partial awards was permissible, and remanded the case to the regional court. On remand, in 2009 the regional court denied the petition, finding that the claimants had asserted their alternative claims and the court could not set aside the awards without impermissibly reviewing the merits or correctness of the awards. The court of appeal denied the appeal by the State Treasury. The Supreme Court denied the cassation appeal, holding that the awards did not violate public policy.

ii An arbitration award may be set aside if the state court finds that the evidentiary procedure was conducted in violation of the rules of logic

The Polish Supreme Court (judgment of 15 March 2012, Case No. I CSK 286/11) held that factual findings by the arbitration court are generally binding on the state court hearing a petition by a party dissatisfied with the resolution of the case by the arbitration court. The proceeding before the state court is not in the nature of the review proper to a common court of second instance, however, but is limited to the grounds expressly stated in the regulations, which are the permissible legal grounds for setting aside an arbitration award. Only if the state court finds that the evidentiary procedure was not conducted at all or was conducted incompletely, or was clearly conducted defectively, in violation of the rules of logical understanding and linking of facts in a chain of cause and effect, with selective admission of evidence, admitting evidence only from one side, excluding without justification evidence offered by the opposing side and the like, may it be found that the requirements to set aside the arbitration award were met.

The Supreme Court held that public policy includes the principles of civil liability. The court held that regulations providing for liability in damages belong to the fundamental norms of the law of obligations and under tort liability and contractual liability may be regarded as fundamental principles of the legal order of the state.

The judgment of the Supreme Court again concerned a road construction dispute. The contractor filed a claim in arbitration for increase of its fee and sought a preliminary ruling on liability. The arbitration court issued an award in 2008 denying the claim entirely, on the grounds that the parties had agreed in annexes to a new price and a new deadline and thus there was no basis for the contractor to seek compensation for costs of reorganising the work in order to meet the deadline because, it alleged, the authority had refused to grant a further extension without justification.

The contractor filed a petition with the regional court to set aside the award, which was denied in 2009. On appeal, the court of appeal set aside the award, holding on the basis of its review of the law and the facts that the award violated public policy because the arbitration court had failed to consider the contractor's claim for contractual damages, in violation of the fundamental legal principle that damages should fully compensate for the injury suffered due to breach of contract. On cassation appeal, the State Treasury sought reversal because the court of appeal had erroneously held that the principle of full contractual damages is a fundamental element of public policy, had made new factual findings different from the findings by the arbitration court and had misapplied the constitutional right to a fair trial to an arbitration proceeding.

The Supreme Court held that while the right to full damages to compensate for injury caused by breach of contract is one of the fundamental principles of the legal system in Poland, and thus could be grounds for setting aside an arbitration award under the public policy clause, in this case, after an exhaustive consideration of the evidence, the arbitration court had found that the State Treasury was not liable for breach of contract and therefore had properly refused to consider the amount of the alleged damages. The court also held that the right to a fair trial guaranteed by the Polish Constitution applies only to proceedings in state courts and does not apply to arbitration. The court vacated the judgment of the court of appeal accordingly and denied the contractor's petition to set aside the award.

III COURT PROCEDURE

i Overview of court procedure

The principal statute governing civil proceedings in Poland is the Civil Procedure Code ('CPC'). The CPC contains rules governing proceedings before the common courts, as well as regulations governing arbitration.

The courts are staffed by a panel of professional judges. They are independent and subject only to the Constitution and the laws, and enjoy judicial immunity and protection from removal from office. Poland has a limited system of lay judges, who serve on panels chaired by a professional judge in certain first instance cases (labour law and family law), but there is no 'trial by jury' as such.

ii Procedures and time frames

The CPC recognises two main types of procedures: adversarial ('trial') and non-adversarial. The default procedure is trial. For some types of cases the CPC provides specific regulations modifying provisions regarding general adversarial procedure. These modifications create specific types of proceedings, the most salient of which are proceedings for order of payment and summary proceedings.

Ordinary proceedings

A civil proceeding is commenced by filing a statement of claim with the court. The statement of claim specifies the relief demanded and the amount in dispute, and sets forth the factual allegations supporting the claim.

After reviewing the statement of claim for compliance with formal requirements, the court will schedule a hearing and order service on the defendant. Following the statement of claim and statement of defence, it is permissible to file additional pleadings only upon leave of the presiding judge or (in the course of the proceedings) the court. A pleading filed in violation of this rule will be rejected.

Civil matters are normally heard in open session. During the session, the clerk prepares a record, which is a summary of the proceedings as dictated by the presiding judge rather than a verbatim transcript. Procedural motions are decided in closed session.

During the hearing, each party makes an opening statement presenting the party's demands and motions. Each party is required to address the factual allegations by the opposing party. Then the parties introduce and argue evidence. Allegations, motions and evidence should generally be raised as soon as possible. The judge is authorised to ignore motions and evidence that are raised too late, although this is left to the court's discretion under the circumstances of the particular case. The judge has discretion to determine whether a party could have and should have presented a motion or a piece of evidence earlier, in view of its connection with previously presented material. If the court finds that there was a delay, it will be required to exclude the material, with three exceptions: (1) when the party demonstrates that it was not responsible for the delay, (2) if allowing the late motion or evidence will not delay the proceedings, and (3) in case of other exceptional circumstances. These rules will also apply if a party failed to present the motions or evidence in its statement of claim, statement of defence or subsequent pleading in the preparatory proceedings.

Particularly at the first session, the court will encourage the parties to settle. If a settlement is reached in court, it will be noted in the record and signed by the parties.

The parties are required to present evidence of factual matters that are legally relevant. The court may deem an allegation admitted if the adversary fails to address it. The court may draw inferences from established facts in order to find other relevant facts to be proved.

Evidence may include documents, testimony by witnesses, expert opinions, physical inspection and other forms of evidence. The testimony of the parties may be used as a last resort.

The court is required to consider all the evidence thoroughly, but may use its discretion in assessing the credibility and weight of the evidence. After the conclusion of the evidentiary phase, the parties have an opportunity to make a final argument, and then the case is closed. Thereafter, generally at the same session, the court issues a judgment, but in complex cases the court will often postpone announcement of the judgment for up to two weeks.

When appropriate, the judgment may be partial or preliminary, in which case the court may continue the trial with respect to other issues still in dispute.

The judgment is announced orally from the bench, together with an oral summary of the reasoning behind the judgment. A formal written justification for the judgment is issued upon demand of a party (typically as the basis for a possible appeal), which must be filed within one week after the announcement of the judgment from the bench.

At the second instance, justification is prepared by the court on its own initiative if the appeal is granted. If the appeal is denied, the appellant must demand a justification.

A right of appeal lies from the judgment of the court of first instance to the court of second instance. An appellant has two weeks from service of the judgment with written justification to file the appeal. The appeal is filed via the court that issued the first instance judgment. The respondent has two weeks from service of the appeal to file a response. The appeal is heard by a panel of three professional judges. They rule on the merits, reconsidering the case as a whole. The court will generally hold a hearing, even if the parties do not appear. When the case is called, the reporting judge will present a summary of the case and the issues on appeal. The court then rules on the basis of the record at the first and second instances. The parties may move for admission of new evidence, but the court may reject the proffer if the party could have raised the evidence in the first instance. New claims or new demands for relief may not be raised on appeal, however. The court may not vacate or amend the judgment to the detriment of the appellant.

The court of second instance will deny the appeal if it lacks merit. If the appeal is upheld, the court will generally amend the first judgment and rule on the merits. However, it will annul the first judgment and remand the case back to the court of first instance if it finds that the original proceedings were invalid, or the court below did not consider the merits, or if issuance of a judgment required a full evidentiary proceeding. If the statement of claim should be dismissed or there are other grounds to discontinue the proceeding, the court of second instance will vacate the judgment and dismiss the statement of claim or discontinue the proceeding.

A party may be able to file a cassation appeal with the Supreme Court against the judgment of the court of second instance, which is a form of extraordinary review. The

Supreme Court will accept a cassation appeal for decision only when the case presents a significant legal issue, or an issue that causes discrepancies in court judgments, or if a cassation appeal is manifestly justified or the proceeding was invalid. If the case involves monetary or property claims, there is also a threshold value that must be met.

Proceedings for order of payment

Proceedings for order of payment are a specific type of adversarial procedure in which the plaintiff may pursue claims for money or tangible goods only, supported by specific types of evidence annexed to the statement of claim (e.g., an official document, an account acknowledged by the defendant, a bill of exchange or a cheque). If the documents substantiate the claim, the court will issue the order of payment *ex parte*. The order constitutes an enforceable writ of attachment. The defendant then has two weeks after service of the order of payment to satisfy the claim or challenge the order by filing defences. The defendant does not learn of the case until served with the order of payment together with the statement of claim. If not effectively challenged, the order of payment has the effect of a final judgment

If the defendant files defences, the proceeding moves to the second phase, and a hearing is scheduled. The parties are precluded from raising allegations or defences not raised in the initial pleadings unless they can show that they were unavailable then or the need to assert them arose later. After hearing the case, the court will decide whether to uphold or vacate the order for payment, in whole or in part, or vacate the order and discontinue the proceedings.

Summary proceedings

The court may also issue an order of payment in a summary proceeding, based on the court's assessment of the reliability of the facts alleged by the plaintiff, but without the strictly defined requirements for the type of evidence supporting the claim in a proceeding for order of payment. The case is initially considered *ex parte*. The defendant does not take part in the first phase, but learns of issuance of an order of payment only when it is served on it together with the statement of claim. Then the defendant has two weeks to file an objection to the order. If an objection is filed to the order of payment, then the case will be heard under the standard procedure.

There is an optional procedure available for cross-border cases concerning undisputed monetary claims within the EU, under CPC provisions implementing the European Order for Payment Regulation (No. 1896/2006).

Interim relief is available to secure claims pending the ultimate resolution of the case. A motion for interim relief should be decided promptly, within one week from filing with the court.

The motion for interim relief may be filed before or after the statement of claim is filed with the court. If it is made before the statement of claim is filed, the ruling is issued *ex parte*, without notice to the defendant. Only if the defendant seeks review of the interim relief will the court hear the defendant's position. When the motion for interim relief is made while the main proceeding is pending, the court will consider all of the material in the case.

The court will issue an interim relief if the claim has been substantiated through a *prima facie* showing, and the applicant shows that satisfaction of its claim would be

hindered if an interim relief is not granted. If the injunction is granted, the court will indicate a deadline to the plaintiff, of no longer than two weeks, in which the statement of claim must be filed, or the injunction is lifted.

When interim relief is sought to secure a monetary claim, the court may attach moveables, receivables or other property, place a mortgage on real property or appoint an administrator for an enterprise. In the case of non-monetary claims, the court may grant similar relief as to secure monetary claims or other relief tailored to the circumstances, e.g., by declaring the parties' rights and duties while proceedings are pending, enjoining a sale of assets or staying execution.

iii Class actions

Class actions were introduced in Poland in 2010. The procedure is available in consumer protection, product liability and other tort cases (excluding defamation), where the claims arise out of the same or a similar set of facts. The minimum class size is 10. Filing of a class action does not bar other plaintiffs from filing suit individually if they do not join the class or if they leave the class. The amount of the claim by each member must be uniform, or the class action may be limited to a finding of liability on the part of the defendant.

The case is filed by a class representative (the name plaintiff). The class must be represented by counsel unless the name plaintiff him or herself is an advocate or legal adviser.

Class actions are heard by the regional court in a panel of three professional judges.

The agreement on legal fees is one of the documents that must be filed with the statement of claim – a new feature under Polish law. A contingency fee of up to 20 per cent of the award is permissible.

The court may direct the parties to mediation and may require security for the defendant's costs.

According to the Ministry of Justice, in the first two years after the introduction of class actions in Poland, around 85 class actions suits have been filed in the Polish courts (the number does not include employment disputes).

iv Representation in proceedings

The general rule is that parties (and their statutory representatives, such as parents or guardians of minors) may appear in court in person. Legal entities other than natural persons may be represented by their executive bodies. The party may also act through an attorney. The attorney may be an advocate or legal adviser, or in intellectual property cases also a patent attorney, and beyond that, a person who manages the party's assets or interests or a person who has a standing assignment to handle certain matters for the party, or a co-party to the dispute. An employee may also act as a legal entity's attorney.

In certain actions, a party must be represented by an advocate or legal adviser, particularly appearing before the Polish Supreme Court.

v Service out of the jurisdiction

Service of documents in other EU Member States is governed by Regulation (EC) No. 1393/2007, which provides for service of documents within the EU through a

system of 'transmitting agencies' and 'receiving agencies'. In Poland, the transmitting agencies are the district courts, regional courts, appeal courts and the Supreme Court, and the receiving agencies are the district courts. Under the Regulation, Poland does not permit direct service in its territory; documents may only be received by post.

Poland is also a party to the Hague Service Convention and a number of bilateral treaties related to service out of the jurisdiction. The Hague Convention calls for appointment of a central authority to accept applications from abroad for service in the country, and foreign courts submit their applications directly to the central authority. In Poland, the central authority is the Ministry of Justice.

The Polish internal regulations concerning legal assistance, including foreign service of documents, were amended in 2009 and are now patterned on Regulation No. 1393/2007. There is a rule of direct dealings between Polish courts and the courts and other authorities of foreign countries, replacing the former rule of service through the Ministry of Justice as the central authority. A rule was also adopted permitting a Polish court to effect service abroad by post, if permitted by the particular country. Polish courts may also apply to the Polish diplomatic or consular post to serve a document on a Polish citizen who is abroad.

Generally, following service of an initial pleading, further court papers are governed by the institution of the 'agent for service'. Under the CPC, if a party registered or domiciled abroad (or a Polish resident who is staying abroad for an extended time) has not appointed an attorney who resides in Poland to handle the case, the party is required to appoint an agent for service. This obligation applies equally to Polish citizens and foreigners. If no agent for service is appointed, the document will be left in the case file and deemed served.

The rules for service apply in the same way to both natural and legal persons.

vi Enforcement of foreign judgments

Enforcement of judgments issued by EU Member States is governed by Regulation (EC) No. 44/2001. In relations with Iceland, Norway and Switzerland, the enforcement of judgments is governed by the revised Lugano Convention.

Under Regulation No. 44/2001, a judgment given in one Member State is recognised in another Member State without any special procedure being required. A judgment given and enforceable in that state shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. The application in Poland should be submitted to the district court with local jurisdiction based on the domicile of the party against whom enforcement is sought, or the place of enforcement. The proceedings are conducted *ex parte*, without the debtor's participation. The judgment should be declared enforceable immediately.

Book Three of the CPC applies to the recognition or enforcement of foreign judgments outside the scope of Regulation No. 44/2001 or a treaty, or if these regulations have to be supplemented by national law. This section of the CPC was amended in 2009 and is now based on Regulation No. 44/2001.

Under the CPC, rulings of foreign courts in civil cases are now subject to automatic recognition, unless a statutory ground for non-recognition arises. This means that any public authority before whom the issue of the effectiveness of a foreign judgment may

arise will be able to determine, for the purposes of that proceeding, whether a foreign judgment is recognised. Nonetheless, there is an option to conduct a separate proceeding to determine whether a given ruling is subject to recognition.

The Polish procedure is designed to supplement Regulation No. 44/2001. A person relying on a foreign ruling must present an official copy of the ruling, a document confirming that it is final and a certified Polish translation.

A ruling of a foreign court may be enforced in Poland after the issuance of an enforcement clause by a Polish court. The district courts issue enforcement clauses in EU-related judgments. Other foreign judgments in civil cases that are capable of enforcement by execution become writs of enforcement when held by the regional court to be enforceable. This is also done by issuance of an enforcement clause, provided the judgment is enforceable in the country of origin and the barriers set forth in the CPC do not apply.

A foreign ruling may be enforced when the order issuing the enforcement clause becomes final.

vii Assistance to foreign courts

In Poland, legal assistance to foreign courts includes taking evidence and carrying out procedures as well as serving court papers (see above). The main provisions in this respect are Council Regulation (EC) No. 1206/2001, the Hague Evidence Convention and other treaties. National law in this area is included in the CPC. As with the service of documents, the national rules were amended in 2009 to follow the EU pattern.

Regulation No. 1206/2001 governs the taking of evidence by the 'requested' court itself, as well as the taking of evidence in the requested Member State, at its consent, by the 'requesting' court in accordance with the law of the requesting Member State. Requests and notices are submitted on official forms, and the general rule is direct communication between the requesting court and the requested court. The courts appointed in Poland to take evidence in such cases are the district courts. Requests submitted to Poland must be made by post and must be in Polish. The central authority in Poland appointed to provide information to courts of other Member States and resolve specific situations is the Ministry of Justice. The ministry may conduct its functions in this respect in Polish, English, German or French.

The Hague Evidence Convention provides for the taking of evidence as well as the performance of other judicial acts. Under the Convention, requests are submitted to the designated central authority of the requested state, which in Poland is the Ministry of Justice.

Poland is also a party to numerous bilateral treaties in this respect. The other party may apply to the Polish courts for assistance under the procedures set forth in the treaties. The lack of a treaty does not prevent legal assistance; in that case, the relevant CPC provisions will apply.

The 2009 amendment to the CPC introduced the rule of direct contact with courts and other authorities of the requested state, the possibility for a foreign judge to be present when evidence is being taken by a Polish court and even the possibility for a foreign court to take evidence directly in Poland. Evidence may be taken via

telecommunications (e.g., video-conferencing). Assistance may be denied on certain grounds, including public policy and lack of reciprocity.

viii Access to court files

Non-parties may obtain information about pending proceedings by attending court as a member of the public. Sessions are generally open, including sessions when the judgment and oral justification are announced. The court may order that the entire case or specific sessions be closed in consideration of public order, trade secrets or the like. Generally, only the parties and their attorneys have access to the case file (except as allowed under the laws on access to public information).

Public access to information about completed proceedings may be obtained through the procedures for public information, under the Polish Constitution and the Act on Access to Public Information, which defines 'public information' broadly to include judgments issued by the courts, but judgments are redacted to remove information identifying the parties.

ix Litigation funding

There are no specific regulations in Poland regarding funding of litigation by a disinterested third party. However, Polish law allows for insurance services for litigation costs, as well as for acquiring the claims by a third party as a funding mechanism. Contingency fees are generally considered to be against advocates' and legal advisers' codes of ethics.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The rules governing conflicts of interest are set forth in acts governing the practice of the law by Polish advocates and legal advisers and, in the case of foreign lawyers, by the Act on Provision of Legal Services in the Republic of Poland by Foreign Lawyers. The topic is also addressed in the codes of ethics of each of the legal professions.

Avoiding conflicts of interest is a basic obligation of advocates and legal advisers, and they are barred from providing legal assistance where there is a conflict of interest. Situations that present a conflict of interest are defined in detail in the codes of ethics.

In the case of advocates, in addition to the ban on representing a party in a case where the advocate has previously represented the opponent in the same or a related case, an advocate cannot represent a party in a case in which the advocate has testified as a witness.

In the case of legal advisers, the rules spell out that a lawyer may not represent a party where there is a significant risk that a conflict will arise, or where the client's interest may conflict with the legal adviser's own interest. A legal adviser also may not take on a matter for a new client if there is a risk of violating the confidentiality of a former client or the knowledge of the former client's affairs would give the new client an unfair advantage, but in this case the legal adviser may take on the new matter if both clients give their informed consent.

Foreign lawyers providing legal services in Poland are subject to the same rights and duties as Polish advocates and legal advisers, including compliance with the codes of ethics and avoiding conflicts of interest.

In Poland, Chinese walls within a law firm do not eliminate a conflict of interest. It is spelled out in the legal advisers' code of ethics that a conflict of interest on the part of one legal adviser is attributed to other legal advisers in the same firm at the time the given matter is handled, even if the others were not involved in the matter. The same rule applies in practice among advocates, although it has not been explicitly set forth in the advocates' code of ethics.

ii Money laundering, proceeds of crime and funds related to terrorism

The Act on Counteracting Money Laundering and Financing of Terrorism imposes certain obligations on advocates, legal advisers and foreign lawyers in Poland.

The lawyer is required to maintain a register of transactions where the circumstances indicate that the assets involved may derive from illegal or unreported sources. In such cases the lawyer must identify the client in order to register the transaction.

The lawyer is required to notify the Inspector General for Financial Information of registered 'suspicious' transactions as well as planned transactions where there is a suspicion that they may be connected to the crime of money laundering, and other information covered by the Act requested by the Inspector General. The Act releases the lawyer from professional confidentiality with respect to such information.

The reporting requirement does not apply to cases where the lawyer is retained to represent the client in relation to pending proceedings.

Other obligations under the Act include a ban on disclosing to other persons, including parties or account holders, the fact that the Inspector General has been notified of the transaction; an obligation to refrain from carrying out a transaction, or to block an account, upon written demand of the Inspector General; an obligation to retain the transaction register and related documents for five years; and an obligation to submit to inspections by the Inspector General.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The duty to maintain confidentiality is set forth in the acts governing practice by advocates and legal advisers as well as in codes of proceeding.

An advocate or legal adviser may not be heard as a witness with respect to facts the lawyer learned of when providing legal assistance or conducting a matter, and may not be released from the confidentiality obligation (except, by extraordinary means, for criminal matters). Privilege extends to the lawyer's files, documents provided to the lawyer by the client and any other documents, notes or materials recorded in electronic or other form. The lawyer is required to take measures to protect such materials from unauthorised disclosure. If the means of communication do not guarantee confidentiality, it is necessary to inform the client. If a search is conducted, the advocate or legal adviser is required to demand the presence of a representative of the bar association. Privilege

includes a ban on the use of information obtained for the lawyer's own or a third party's interest. Privilege may not be limited in time.

An advocate or legal adviser is not permitted to call an advocate or legal adviser as a witness in order to seek disclosure of privileged information.

Privilege does not extend to information provided under the Act on Counteracting Money Laundering and Financing of Terrorism.

The duty to maintain professional confidentiality generally covers all qualified lawyers, including legal advisers employed as in-house counsel. However, in this respect it is crucial to indicate the judgment of the European Court of Justice (Grand Chamber) of 14 September 2010 in case C-550/07 P Akzo Nobel, which has an influence on the Polish legal system. The ECJ held that written communications that may be protected by legal professional privilege must be exchanged with 'an independent lawyer'. The requirement of independence means the absence of any employment relationship between the lawyer and his or her client, so that legal professional privilege does not cover exchanges within a company or group of in-house lawyers.

Generally, foreign lawyers practising in Poland are subject to the same rights and duties as Polish advocates and legal advisers, including those related to privilege.

ii Production of documents

Under the CPC, parties are required to present relevant evidence for factual allegations that give rise to legal effects (i.e., the burden of proof). Evidence is generally admissible if relevant. No proof is required for facts that are common knowledge or known to the court *ex officio* (judicial notice), or facts admitted during the course of the proceeding by the opposing party.

During the course of litigation, any person (including parties as well as third parties) may be ordered by the court to present documents in his or her possession that are relevant to resolve a case. A person may refuse to produce documents if the person would be entitled to refuse to testify as a witness as to the facts covered by the document. Failure to produce a document in the case of a third party is subject to a fine, and in the case of a party the court may draw an inference against a party. A third party is any entity other than a litigant, regardless of whether it is controlled by a litigant (e.g., being a litigant's subsidiary).

The court will exercise its authority to demand production of documents when the party, by motion, persuades the court that the specific evidence indicated is necessary to prove a fact relevant to determination of the case. The court will refuse the request if it is deemed too burdensome to the person summoned, the evidence is not relevant or the request is made solely in order to prolong the proceeding. The court will also refuse to order production if the applicant fails to identify the evidence it requires precisely. This prevents parties from conducting a 'fishing expedition', but vital documents may also be missed because the opponent is not in a position to identify them specifically enough.

Significantly, under the Polish practice, US-style 'discovery', in the sense of a broad right of the parties to require production of documents prior to trial that could lead to relevant evidence, is unknown.

There are no specific regulations regarding documents stored overseas, electronically or otherwise. A court may seek legal assistance in obtaining evidence

from abroad under Regulation No. 1206/2001 (within the EU), the Hague Evidence Convention and bilateral treaties.

There are no specific regulations regarding documents stored electronically or obligations to reconstruct back-up tapes, or other electronic media that are not readily accessible.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The alternatives to litigation before state courts in Poland are arbitration and mediation.

ii Arbitration

Polish domestic arbitration law is contained in Part V of the CPC, which is based on the UNCITRAL Model Law on International Commercial Arbitration. Unlike the UNCITRAL Model Law, Polish arbitration law applies to all arbitrations, regardless of whether they are commercial or international.

Generally, Polish arbitration law applies only to domestic arbitration proceedings (with certain exceptions).

Poland is a party to the New York Convention, the European Convention on International Commercial Arbitration, the Energy Charter Treaty and a number of bilateral treaties relating to arbitration.

The most prominent commercial arbitration institution in Poland is the Court of Arbitration at the Polish Chamber of Commerce.

An arbitration award issued in Poland may be challenged in court by any of the parties. The motion must be filed within three months from service of the award. Appeal is available from the decision of first instance, and the final decision may also be subject to cassation appeal (depending on the nature of the case in dispute).

There is an exhaustive list of grounds for vacating an award, which are in line with Article 34 of the Model Law, with two additional grounds: the award was obtained by means of a crime or the basis for issuance of the award was a forged document; or a final and binding judgment was already issued in the same case between the same parties. If the motion to set aside the award is based on either of these additional grounds, the period for filing the motion runs from the date the party learned of such grounds, up to five years from service of the award.

Enforcement and recognition of awards is primarily governed by the New York Convention. Poland has adopted the Convention with the reciprocity and commercial reservations, which means that the Convention is applicable in Poland only to awards issued in commercial matters in another state which is also a party to the Convention. Other foreign awards are subject to rules set forth in domestic law (CPC).

Enforcement or recognition of a foreign arbitral award requires a court decision. 'Enforcement' pertains only to awards that may be enforced by execution (e.g., ordering the payment of money or release of goods). Other awards are subject to 'recognition'.

Refusal may be based on one of the grounds indicated in Article V of the New York Convention. In the case of non-Convention awards, the grounds for refusal as set

forth in the CPC, are, in line with Article 36 of the Model Law, essentially identical to those under the Convention.

The decision of the court of first instance is appealable. The decision of the court of second instance may be subject to a cassation appeal to the Supreme Court.

In a recent order related to the New York Convention (Case No. I ACz 1627/11), the Warsaw Court of Appeal held that while a ruling setting aside an arbitration award is grounds to refuse enforcement of the award if a proceeding to set aside or stay enforcement of the award is only pending, that does not justify refusal to recognise or enforce the award, but may justify postponing a decision on the matter.

There is a general pro-arbitration trend, especially in high-profile commercial cases. It is perceived as an efficient tool in cases where high expertise and knowledge of the business environment are required. The popularity of arbitration is also reflected in increased interest by scholars and practitioners in this area, which may be measured by the number of publications and seminars on arbitration held in recent years.

iii Mediation

Mediation is governed by CPC Part I, in the section dealing with proceedings before courts of first instance. It is relatively new legislation, introduced in 2005.

Mediation is voluntary and is based on a mediation agreement, or a court order directing the parties to mediation, which the court may issue through the end of the first session in the case, or later upon joint motion by the parties.

Mediation is confidential and privileged. A settlement offer, proposals for mutual concessions, or other statements made in a mediation proceeding, are inadmissible as evidence in a judicial or arbitration proceeding. If the parties reach a settlement before the mediator it is included with the record and signed by the parties. The mediator then submits the settlement to the court that would otherwise have jurisdiction over the dispute. Upon motion of a party, the court will confirm the settlement unless it is contrary to law or the principles of community life, is intended to circumvent the law, is unclear or is internally inconsistent. After confirmation by the court, a settlement made before a mediator has the legal effect of a settlement concluded before the court, particularly if it constitutes enforcement title.

In recent years there has been a growing acceptance of mediation as a form of ADR.

iv Other forms of alternative dispute resolution

Other ADR mechanisms, although not legally regulated, are also used. Expert determination is frequently used in construction matters or whenever highly technical matters are in question. It is also used for contract gap filling. Methods such as negotiations are frequently used in multi-tiered arbitration clauses.

VII OUTLOOK AND CONCLUSIONS

Litigators in Poland are waiting to see how the practice evolves following recent major amendments to the CPC that entered into force on 3 May 2012. The most significant was the elimination of separate procedures for commercial cases.

The amendment was meant to grant judges in all civil matters more powers with respect to case management, but also to impose obligations on judges to adjust the procedures to suit the specific case, in order to secure speed and efficiency.

Appendix 1

ABOUT THE AUTHORS

JUSTYNA SZPARA

Łaszczuk & Partners

Justyna Szpara is the managing partner of Łaszczuk & Partners. She heads the firm's dispute resolution practice group. She specialises in arbitration and litigation.

She advises and represents domestic and international clients in litigation and commercial arbitration as well as investment treaty arbitration proceedings. She has also represented clients in several high-profile post-arbitration litigations in Poland.

Justyna Szpara is a listed arbitrator for several permanent arbitration courts, including the largest in Poland, the Court of Arbitration at the Polish Chamber of Commerce. She is a member of the board of the Polish Arbitration Association and Co-President of the Law Course Committee of the International Association of Young Lawyers.

She is the author or co-author of numerous publications on arbitration, as well as a lecturer on arbitration-related topics.

Justyna is a 2001 law graduate of the University of Warsaw and also studied law at the University of Regensburg, Germany. She began working with Łaszczuk & Partners in 1999 and became a partner in the firm in 2005 and managing partner in 2010. She is an advocate and a member of the Warsaw Bar.

She is recommended by the *Best Lawyers in Poland* 2012 ranking in the field of arbitration and mediation and in the field of litigation. In 2012, she placed in the top position in 'Rising Stars', a ranking of young Polish lawyers organised by the largest Polish legal daily, *Gazeta Prawna*, and LexisNexis publishers.

AGNIESZKA KOCON

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Legal adviser Agnieszka Kocon specialises in dispute resolution and arbitration. Her practice includes, among other areas, representation in litigations regarding trademarks, new technologies and the internet as well as combating unfair competition. She is a

member of the firm's dispute resolution practice group and intellectual property and new technologies practice group.

Agnieszka is a 2003 law graduate from the University of Łódź, and also studied law at Radboud University Nijmegen, the Netherlands. In 2008, after completing her training and passing the state examination, she was admitted to the practice of law as a legal adviser. She has worked with Łaszczuk & Partners since 2008. Prior to that, she worked as an in-house lawyer in the telecommunications sector.

Agnieszka Kocon is the editor in chief of the arbitration.pl web portal – a comprehensive information source on arbitration available at a single internet address with a special focus on Poland. It contains Polish and international arbitration legislation, a collection of judicial decisions of Polish and EU courts and a bibliography of Polish publications on arbitration, as well as interesting publications on arbitration and important news. The portal's goal is to promote arbitration as a method of dispute resolution. The portal now covers more than 300 court decisions, making it the largest database of Polish case law available in English at a single web address.

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