Legal Newsletter

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Enforcement of civil claims in the European Union

The number of Polish entrepreneurs that enter into economic relations with contractors from the European Union has been growing steadily. Thus, the courts have been more frequently passing cross-border judgements, applicable in cases where at least one party resides or stays in a member state other than that where the court delivering the judgement is situated. If a cross-border judgement is passed, an entrepreneur may choose from several modes of judgement recognition for the purposes of its enforcement from a foreign contractor, and thank to the solutions adopted in the European Union, enforcement of amounts due from unreliable contractors from other member states ceased to be highly expensive and time-consuming.

As a rule, if a dispute decided as part of ordinary proceedings ended in delivery of a judgement (other than the European small claims procedure) in one member state, such judgement may be enforced in another state only if that state recognizes the judgement (exequatur). Following recognition of a judgement passed in one state, the enforcement procedure is carried out in accordance with the provisions binding in another state with reference to the judgement recognition and enforcement.

As a result of development of cooperation between member states based on the Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (known as Brussels I Regulation), a judgement issued by the court in one member state is automatically recognised by all other member states. Recognised may also be a consent decree or an official document (e.g. notarial deed) acknowledging a claim referring to matters covered by the regulation. However, Brussels I Regulation does not cover all categories of civil and commercial matters: it does not refer, among others, to disputes concerning marital status, legal capacity or capacity to perform acts in law, or to matters related to marriage, inheritance, bankruptcy, social security and court based conciliation; neither does it apply to administration-, tax- and customs-related matters.

Judgements passed and enforceable in one state are enforced in another state where a debtor resides or where the enforcement is to be carried out, if enforceability of such judgements in that state has been declared upon the application of an interested party. A relevant application is submitted to the court or competent authority in another state, such courts and authorities listed in Annex II to the Brussels I Regulation (in Poland competent are regional courts). If a creditor submits an application to a Polish court, the fixed fee is PLN 50.

The application for recognition of the judgement’s enforceability shall be appended with an official copy of the judgement and a certificate issued on the standard form by the court in the state where the judgement was passed. Moreover, provided must be an address for service of process in the state where enforcement is sought or a process agent must be appointed there. Since the court may demand that the above-mentioned documents be translated, it is worth having them translated in advance. Declaration of enforceability is issued following the completion of certain formalities (the court verifies whether the judgement was issued in a member state with reference to a matter covered by the regulation), and then it is delivered to the other party that may appeal it (in Poland a complaint may be submitted) to a court indicated in Annex III (in Poland to the court of appeal).

The court may refuse to recognize a foreign judgement if such recognition would be contrary to public policy in the other member state or if it is irreconcilable with an earlier judgement, or if a document instituting the proceedings has not been served properly.

An alternative and simpler procedure for recognition of judgements referring to uncontested pecuniary claims is included in Regulation No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, which lifts an obligation to obtain exequatur in the state where judgements appended with the European Enforcement Order (EEO) are to be enforced. This Regulation, however, does not apply to Denmark. The EEO procedure is supplemented with local provisions (in Poland Art. 7951 - 7953 of the Code of Civil Procedure). The scope of application is similar to that of the Brussels I Regulation.

The EEO is issued by the court that passed enforceable judgement. The said judgement must refer to an uncontested claim, i.e. the one that is recognised or confirmed in a settlement, and that – within the meaning of the Regulation – covers, among others, recognition-based judgements, default judgements and court settlements. Moreover, the judgement must be enforceable in the state where it is issued.
and compliant with the provisions on exclusive jurisdiction, and relevant guarantees must be given with reference to, among others, service of process and transfer of information during the court proceedings. In addition, if a debtor has not explicitly recognized the claim or if it is a consumer, the judgement must be issued in the country of such debtor’s domicile.

The EEO is issued on a standard form in the language of the judgement and is non-appealable. The debtor may, however, apply for its revocation (according to the Regulation: withdrawal), if the EEO is obviously unfair. Moreover, if the judgement enforcement was revoked, suspended or limited, the debtor may apply for the issuance of a certificate confirming such status. In addition, the debtor may lodge in the state of the judgement enforcement a motion for refusal of such enforcement if previously a judgement was given with reference to the same object of dispute and the same parties, and the plea of impossibility of the judgements reconciliation was not and might not have been raised in the court proceedings carried out in the state of issuance.

As transpires from the above, enforcement of a judgement passed in one EU country with reference to a contractor from another member state does not have to be time-consuming and complicated.

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Foreign entrepreneur’s branch liquidation

Branch of a foreign entrepreneur is one of statutory forms of conducting commercial activity in Poland by foreign entrepreneurs (Article 85 and subsequent of the Freedom of Economic Activity Act of 4 July 2004, Journal of Laws no. 220 of 2010, item 1447, as amended, hereinafter the “Act”). Usually, it is applied to implementation of one-off projects.

The Act defines branch as “an isolated and organisationally independent part of economic activity carried on by an entrepreneur outside its seat or principal place of pursuing the activity” (statutory definition under Article 5 section 4). This definition is applicable also to a branch of a foreign entrepreneur regulated in chapter 6. In practice, a branch constitutes a form (unit) of organisational and legal nature, with no legal personality or capacity (except for possible status of an employer), used by foreign entrepreneurs in Poland for conducting commercial activity. Therefore, a branch is not regarded as a separate legal entity, and its separation is of organisational and economic nature.

Polish law does not determine a specific procedure of branch establishment: the Act provides only for an obligation of having a branch entered to the register of entrepreneurs (National Business Register – KRS). However, liquidation of a branch is of a more complex nature.

Voluntary and compulsory liquidation

If a foreign entrepreneur decides to terminate its activity carried out in Poland via branch, it should close the branch and have it deregistered from the KRS. The Act regulates this issue by only one provision: under Article 92 it imposes an obligation to liquidate the branch in accordance with applicable provisions of the Commercial Companies Code regarding liquidation of a limited liability company. Due to the placement of the above-mentioned provision right after the provision allowing the Minister of Economy to issue a decision forbidding the activity of a branch as well as the EU conforming interpretation of this provision and the lack of risk for creditors, carrying out a branch liquidation in accordance with the provisions on limited liability company’s liquidation should be limited only to the compulsory liquidation procedure (under decision of the Minister of Economy). Without going into detail about the issue of interpretation, it should be underlined that in the case of branch liquidation there is no risk that interests of Polish creditors of foreign entrepreneurs will be violated. It results from the previously explained organisational nature of the branch and its lack of legal personality (a branch is a manifestation of a foreign entrepreneur within the territory of Poland).

Standpoints expressed in the theory of law

Standpoints expressed with reference to this issue in the theory of law differ. Despite the fact that they refer to the obligation of applying respective provisions of the Commercial Companies Code, none of them distinguishes voluntary liquidation from compulsory one nor does it put forward any argument against the Supreme Court’s standpoint.

Court practice

The courts’ approach in this respect is not uniform. This means that local courts in one city may decide on deregistration of a branch of a foreign entrepreneur within few weeks (as a result of applying a voluntary liquidation procedure), while other would found a motion on deregistration based under the voluntary decision of entrepreneurs premature and only after liquidation procedure lasting few months they would deregister a branch from the KRS (as in the case of limited liability companies). The main disadvantage of applying liquidation procedure provided for limited liability companies is the time necessary for securing creditors’ interests, which – in the case of a branch – are in fact not endangered, as these are foreign entrepreneurs who are directly liable for obligations.

Respective application of the Commercial Companies Code

What the “respective application of provisions of the Commercial Companies Code regarding liquidation of limited liability company” actually means. First of all, the most important issue to be considered by foreign entrepreneurs is a minimum time for a branch liquidation, which usually takes from 8 to 9 months, where 6 months is a suspension time...
for disposing of the so-called liquidation dividend. Moreover, a liquidator, under Polish accountancy law responsible for keeping separate books of account, is obliged to draw up balance sheets of liquidation opening and closing. It is also crucial to notify the creditors on opening liquidation and possibility of raising claims to have them secured or satisfied.

Thus, in the case of voluntary liquidation, considering the position of the Supreme Court, the above listed actions would not be necessary and the procedure could be finished within few weeks.

Also proposed amendments of Article 92 of the Act should be mentioned. Despite quite clear position of the Supreme Court, the Ministry of Economy announced on its official website (http://www.mg.gov.pl/node/12794) that Article 92 of the Act should be made more precise by imposing an obligation of performing liquidation of a branch of a foreign entrepreneur under the Commercial Companies Code rules applicable to the liquidation of a limited liability company, irrespectively of the type of procedure (voluntary of compulsory). No official draft or the Act amendment has been announced yet.

The above recommendation of the Ministry will certainly affect the courts’ practice, which is not uniform anyway.

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Amendment to the Public Procurement Law

On 11 May 2011 entered into force Act on Amendment to the Public Procurement Law dated 25 February 2011 (Journal of Laws No. 87, item 484), based on which new Article 24 section 1 subsection 1a was added to Act on Public Procurement Law. The amended Article 24 section 1 of the Public Procurement Law sets out a catalogue of premises, which – when fulfilled with reference to the economic operator – result in obligatory exclusion of such economic operator from participation in the contract award procedure.

The amendment at issue extends the said catalogue by a new premise for the economic operator’s exclusion from the contract award procedure. In accordance with the new regulation, obligatory exclusion from the above-mentioned procedure applies also economic operators, with which an awarding entity has dissolved or terminated a public procurement contract or if an awarding entity has withdrawn from a public procurement contract due to reasons attributable to an awarding entity, provided that the dissolution or withdrawal took place within 3 years preceding initiation of the procedure and the value of an unexecuted contract amounted to at least 5% of that contract.

Economic operator’s exclusion from participation in the public procurement procedure refers only to the procedure carried out by the awarding entity, for the benefit of which the same economic operator executed a public procurement contract in the past. The aim of the new regulation is to eliminate from the procedure unreliable economic operators, which within 3 years preceding initiation of the procedure seriously violated their obligations towards a certain awarding entity, i.e. they failed to perform a public procurement contract or performed such contract improperly, as a result whereof such contract was dissolved and the awarding entity did not obtain performance constituting the object of the contract.

In order to exclude the economic operator from the public procurement procedure based on the new premise, the awarding entity is not required to prove that it suffered damage as a result of undue actions on the part of the economic operator, nor is there any need to have a breach of the economic operator’s obligations confirmed by a final court judgment.

The new premise for excluding economic operator from the public procurement procedure applies also to a consortium of economic operators, which jointly apply for award of a certain contract, if a public procurement contract was dissolved, terminated or withdrawn from for reasons attributable to least one member of the consortium.

The above-discussed premise of exclusion of an economic operator from participation in the public procurement procedure does not apply to procedures initiated before new regulation’s entry into force, i.e. before 11 May 2011.

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New Geological and Mining Law

5 August 2011 was the date of publication of the act of 9 June 2011 – Geological and Mining Law (Journal of Laws No. 163, item 981), which will enter into force on 1 January 2012. The new Law will supersede the Act of 4 February 1994. New provisions are to simplify business activity within the scope of geology and mining, including lifting of obligation to obtain a licence for exploration and appraisal of mineral deposits located within privately owned land. The provisions are aimed at limiting bureaucracy, facilitating management of the entrepreneurs’ own funds and opening access to mining professions. The new Act adjusts Polish law to the EU provisions. As a rule, the subject-matter of the Act does not depart from the scope of the currently binding one. It specifies the terms and conditions of taking up, carrying out and closing business activity within the scope of: geologic works, minerals extracting from deposits, underground no-tank storage of substances and underground storage of wastes. Documented mineral deposits and documented underground waters will be disclosed by the commune authorities in studies of conditions and directions of spatial development, local zoning plans and designs of Voivodeship zoning plans. Novelty introduced in the Act and awaited by real estate owners, is possibility of using by natural persons small amounts (up to 10 m³ a year) of sand and gravel for their own purposes. Another new solution is exclusion of the Act’s applicability with reference to the extraction of aggregate necessary to carry out urgent protective works during the state of emergency introduced due to natural disaster. Deposits of other minerals (i.e. those not subject to mineral deposits ownership) will still be subject to provisions on ownership of land, and with reference to these minerals the requirements will be eased, e.g. their exploration (appraisal) will be possible based on a geological works plan (and not a concession, as it is the case at present). The Act sustains – with certain amendments – the currently binding scope of obligation to obtain a concession. It covers business activity within the scope of: exploration and appraisal of mineral deposits, minerals extracting from deposits, underground no-tank storage of substances and underground storage of wastes. New provisions are also aimed at stimulating business within the scope of extraction (appraisal) of mineral deposits. Just like at present, the application for the concession for exploration of minerals will have to be appended with a deposit development plan, yet an opinion of the mining supervision authority will not be required. Having been granted a concession, an entrepreneur will be able to change the plan and present it to a concession-granting authority, which will have 30 days to lodge an appeal, if any. Moreover, the Act, which to a wider extent bases on the Civil Code, enhances instruments counteracting illegal extraction of minerals and introduces regulations on redressing mining losses favourable to the injured parties. The Act introduces numerous instruments aimed at improving security in the mining industry and implements a subsequent stage of task decentralization. Proceeds from service charges and geological concessions have been distributed in such a way that 60% constitute income of the commune, within the territory of which the business is run, and 40% are transferred to the National Fund for Environmental Protection and Water Management. Members of Parliament accepted also the proposal of setting a two-year period, within which a commune will be required to introduce the mineral deposits to the study of conditions and directions of spatial development, which is to counteract the investment paralysis caused by postponing by communes a decision on making a relevant entry.

Banking outsourcing

Limitation of the banks’ information obligations and easier access to outsourcing are the solutions provided for in the Banking Law amendment passed by the Sejm on 28 July 2011. The amendment adjusts the currently binding regulations to the financial market’s needs. The amendment is aimed at limiting administrative barriers and burdens, including the banks’ information obligations, and providing easier access to outsourcing. Liberalization of the principles binding so far with reference to banking outsourcing and possibility of entrusting entrepreneurs with a wider scope of banking activities should result in limiting of banking activity costs and thus cause reduction of costs of banking services and increase credit availability (including availability of credits and loans for micro and small entrepreneurs). Simultaneously, new solutions ensure proper supervision over activities outsourced by banks. The most vital of adopted amendments are:

- extension of the entrepreneur’s definition in the Banking Law in such a way as to enable outsourcing of activities to natural persons being partners in civil law partnerships,
extension of the catalogue of activities, whose outsourcing to domestic or foreign entrepreneur does not require consent of the Financial Supervision Commission,

limitation of requirement to outsource by the banks their activities to entrepreneurs under contracts of agency,

regulation of the terms and conditions of sub-outsourcing (outsourcing by an entrepreneur being a party to an agreement with a bank, to another entrepreneur certain activities covered by an outsourcing agreement),

limitation of the bank’s information obligation related to the conclusion of an outsourcing agreement – superseding the requirement to notify the Financial Supervision Commission of an intention to conclude an outsourcing agreement, with a requirement to keep by the bank a record of such agreements,

amendment of provision referring to foreign outsourcing – no requirement to obtain the Financial Supervision Commission’s consent with reference to agreements that provide for the performance of certain activities within the territory of the European Union member state.

The Senat expressed its favourable opinion on the proposed provisions, yet it pointed out that the amendment should be extended in such a way as to cover the Consumer Credit Act of 12 May 2011.

Commercial Companies Code

The Sejm adopted regulation which is to simplify the company merger and division procedure. The above-mentioned regulation is the Act on amendment of the Commercial Companies Code, the bill whereof was submitted by the Government. The regulation is aimed at relaxing provisions referring to audit of financial statements by chartered accountants, transfer of information on changes in the company’s assets and liabilities, and announcement of a merger or division plan. The Act provides, among others, that a chartered accountant will not be required to audit a financial statement of the company’s founders with reference to in-kind contributions including, for example, transferable securities or other financial instruments if their value is established based on weighted average price they had on regulated market within 6 months preceding the contribution-making day. Moreover, the chartered accountant’s opinion will not be required with reference to other assets if their fair value transpires from a financial statement for a previous year reviewed by an auditor. The audit will be necessary in two cases:

- if there occurred extraordinary circumstances that changed the price of transferable securities or other financial market instruments at the moment of their contribution (this in particular refers to circumstances related to a loss of liquidity on regulated market);
- if there occurred new circumstances affecting fair value of contributions at the moment of their contribution. A chartered accountant will not be required to review a merger plan or to draw up an opinion in that respect. Announcement of a division or merger plan will not be necessary if within a certain time limit a company makes its plan available free of charge on its webpage. In addition, lifted will be an obligation to provide information on a change of the company’s assets and liabilities that took place between day when the plan was drawn up and the day when a resolution on merger was passed. Another adopted solution provides for a possibility of giving up preparation of a report justifying the companies’ merger. Moreover, in accordance with the proposed amendments, shareholders will be able to obtain excerpts of various documents in soft copies. The amendment implements the provisions of Directive 2009/109/EC of the European Parliament and of the Council on reporting and documentation requirements in the case of mergers and divisions. The Act was transferred to the Senat.

Protection of employees’ claims

Employees will obtain performances even if the company’s bankruptcy is declared by a court in another member state. This will be possible under amendment of the Act on the protection of employee claims in case of employer’s insolvency adopted on 28 July 2011. Amendment of the above-mentioned Act and some other acts was passed at 97th session of the Sejm. The Act was sent to the Senat. The new provisions are aimed at facilitating the payment of unsatisfied claims, for example in a situation where the bankruptcy of an entity situated within the territory of Poland was declared by a court of the EU member state (other than Denmark). Under the new provisions it will be possible to the Guarantee Employee Benefits Fund to pay due performances to the employees of such an entity. Moreover, under the Act, a receiver, liquidator
or other person administrating the employer’s estate will have one month for preparing and submitting to the head of a local branch of the Fund a comprehensive list of employees. Important amendments were introduced with reference to reimbursement of the performances paid. Pursuant to the Act, the Fund will be able to set conditions of reimbursement of due amounts. The above-mentioned provisions are addressed to both entrepreneurs having poor financial situation and those of good financial standing, aid to whom will be provided in accordance with de minimis principle. Moreover, it will be possible for the Fund to conclude a new arrangement specifying favourable conditions of repayment of the performances paid – on instalments or based on postponement of repayment of due amounts with simultaneous accrual of interest. Conditions of repayment will be set based on assumption that they will not constitute state aid. Another new solution will be the possibility of cancelling due amounts if the Fund requests repayment or carries out enforcement proceedings with reference to natural persons or employers that permanently ceased to run their business activity as a result of the company liquidation or declaration of its bankruptcy. Simultaneously, lifted was the obligation to cancel debts if the entire enforcement proceedings were discontinued ex officio. In such a situation a choice is to be made by the Fund, thus it will be possible to subsequently claim the amounts due. The adopted amendments include a provision pursuant to which a Fund employee may be delegated to work outside the Fund’s seat. The above is connected with the Funds’ takeover by Voivodeships marshals, which is to take place next year.
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