In a dispute the court may apply foreign law

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An independent determination of the applicable law is crucial because foreign law may involve different criteria, evidentiary requirements and legal arguments than Polish law.

Art. 479(12) and 479(14) of the Civil Procedure Code on evidentiary preclusion in commercial cases, which have sparked extensive comment, are designed to speed up the resolution of cases by forcing the parties to formulate their complete litigation position at the outset of a judicial dispute. As a rule, all claims, allegations and evidence must be cited in the plaintiff's petition or the defendant's response, or the party will be precluded from relying on them later in the proceeding. In order to perform this task properly in a dispute with a foreign adversary, it is necessary to determine independently, at the outset, which law applies to the dispute with the counterparty – Polish or foreign – and the substance of the applicable law. This is no formal requirement, and it is not mentioned in the law. The point is to be aware that proper formulation of a litigation position is largely dictated by the requirements presented by the substantive law of Poland or the other country. Overlooking this connection in the petition or the response often leads to incurable negative effects, if a party concentrates only on its own domestic substantive law and formulates its litigation position only from that perspective. This is a common error in the courtroom not only by the parties to the proceeding, but by the courts themselves. Even though a dispute is being heard in Poland, the law to be applied by the Polish court will not necessarily be Polish law.

In a fairly recent decision (Judgment of 9 May 2007, Case No. II CSK 60/07), the Supreme Court held that the courts have a duty to apply the substantive law that is proper to the relations between a Polish entity and a foreign entity. The court cited its previous Judgment of 23 February 1999 (Case No. I CKN 252/98) and emphasized that the court is required to rule on the basis of the proper substantive law regardless of the initiative of the parties. The Supreme Court thus held that the appeal courts were in error when they held that an allegation concerning the court's application of the proper law was one of the procedural allegations referred to in Art. 479(12) and 479(14) of the Civil Procedure Code which had to be asserted practically in the initial pleadings if it were to be considered at all. The court, not the party, should know the law – Polish or foreign. Nonetheless, an independent determination of the proper law is essential, because foreign law applies different criteria and thus imposes different requirements for evidence and argumentation than Polish law. It should also be borne in mind that even though the Polish court hearing a case involving a foreign counterparty is required to apply the proper law, which often will be foreign substantive law, nonetheless, a party which fails at the stage of filing the petition or response to indicate (generally speaking) all of the facts, claims and allegations that are material under the applicable law may lose the case, if, when the court hands down its decision, it applies the evidentiary preclusion rules for commercial cases as set forth in Art. 479(12) and 479(14) of the Civil Procedure Code.

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Judicial protection of suppliers against supermarket practices

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A business injured by the actions of a retail chain primarily has the right to demand refund of "slotting" fees.

Cooperation with large retail chains may require suppliers to agree to cut their profit margins to the bone. Even though the period 2006 – 2007 witnessed a wave of court cases filed by suppliers, sharp practices by retail chains continue to be a problem.

In order to cooperate with supermarkets, suppliers are sometimes required to pay high "slotting" fees just for their products to be sold in the retail chain. A large proportion of suppliers go along with imposed terms for cooperation, figuring that regular sales, geographical reach, access to customers, and advertising will generate a profit. Sometimes these expectations prove illusory. From the legal perspective, threatening or infringing economic interests by imposing terms for cooperation is clear, and in certain circumstances may be held to be an act of unfair competition.

So, during these times of crisis, how should suppliers effectively protect themselves legally against supermarket practices forcing suppliers to pay questionable fees?

A business injured by the actions of a retail chain may seek judicial redress primarily by demanding refund of "slotting" fees – fees, other than profit margin, paid for accepting the supplier's goods for sale. In order to prevail, however, it is not enough to be right; it is also necessary to prove you're right. A supplier must prove two facts: the supermarket charged a fee other than a profit margin, and it made acceptance of goods for sale dependent on payment of the fees. If it is found in the proceeding that the purpose of the contract between the retail chain and the supplier was payment of fees, other than profit margin, for acceptance of goods for sale, then such contractual provisions are invalid, and fees paid thereunder are refundable to the supplier as undue. The supplier may demand not only refund of fees paid. It may also seek cure of the effects of impermissible actions, redress of injury it has suffered, and if it continues to cooperate with the supermarket, it may seek an order to cease and desist such actions in the future. It may also request that the supermarket be ordered to release an appropriate statement and pay a specified sum toward a given social purpose associated with support for Polish culture or protection of national heritage.

If unwarranted fees were reflected in a VAT invoice, a tax problem arises. The supplier may not set off the input VAT against its output VAT. It may, however, seek judicial redress for such losses.

The relatively brief 3-year statute of limitations for claims based on the Unfair Competition Act, or the 2-year statute of limitations for sales contracts, which may also be applicable, should be borne in mind. If extensive pre-litigation negotiations are ongoing with the retail chain, it is easy to overlook the statute of limitations.

Thus, popular belief to the contrary notwithstanding, a supplier does have a range of legal means at its disposal that offer real, financially tangible protection. In practice, as demonstrated by decisions that have been handed down by the courts, a trend may be observed toward protection of suppliers against actions by supermarkets that hinder suppliers' access to the market.

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Liquidating business activity during a crisis

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In commercial litigation practice, one party's loss of the status of a business entity, for example as a result of liquidation of the party's business activity, can be of considerable consequence. This issue raises many questions, and the resolution will determine whether the case will be conducted before the court under the ordinary procedure, or under the procedure for commercial cases. The commercial procedure imposes significant restrictions on the parties, for example involving evidentiary preclusion under Civil Procedure Code Art. 479(12).

So far the line taken in court decisions indicates that one party's loss of the status of a business entity after the given civil relation arose is of vital importance when determining whether a case is commercial in nature. This was confirmed in a resolution by seven judges of the Supreme Court on 16 December 2008 (Case No. III CZP 102/08), which holds: "A case arising out of a civil relation between the parties involving business activity conducted by the parties is not a commercial case for purposes of Art. 479(1) of the Civil Procedure Code or Art. 2(1) of the Act on Judicial Consideration of Commercial Cases of 24 May 1989 ... if either of the parties ceased to be a business entity prior to filing of the petition."

The line presented in the cited Supreme Court resolution is doubtful under the regulations in force. A civil law relation (such as a sales contract) arising between business entities within the scope of their activity has a substantive legal nature. If it proves necessary to seek legal redress as a result of a dispute arising out of such relation, it will be a proceeding in a commercial case, both under Art. 2(1) of the Act on Judicial Consideration of Commercial Cases of 24 May 1989 (*Journal of Laws* No. 33 item 175, as amended) and under Art. 479^1(1) of the Civil Procedure Code. The loss of the status of a business entity by a party to this legal relation after it has already arisen is irrelevant. It is still a commercial case, in which the provisions for proceedings in commercial cases (Art. 479(1) – 479(78) of the Civil Procedure Code) should be applied, regardless of whether a party to the proceeding lost the status of a business entity before or after the petition was filed.

This interpretation is also supported by the wording of the second sentence of Art. 479^1(1) of the Civil Procedure Code, added to the code on 20 February 2007, which provides that cessation of business activity (and thus loss of the status of a business entity) by either party to a civil relation after it has arisen does not exclude application of Chapter IVa of the Civil Procedure Code on proceedings in commercial cases. Thus also on the basis of this provision it is legally irrelevant when the party ceased to conduct business activity – before or after the petition was filed. In either case, the provisions of this chapter apply.

For these reasons, it may be difficult to select the proper procedure that should be used, despite statutory provisions that seem to be clear.

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