



CHANGES IN CIVIL PROCEDURE

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Changes in civil procedure: High hopes, some difficulties

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An overhaul of Polish civil procedure was published on 6 August 2019. The amending act partly entered into force on 21 August, but most of the new rules apply from 7 November. What can we say so far about the new rules, what should be expected, and what are the worries?

The Act of 4 July 2019 Amending the Civil Procedure Code and Certain Other Acts was published in this year's Journal of Laws under item no. 1469. The changes introduced by the act are extensive. There are hundreds of changes, although many of them are purely technical or editorial. The aim of the amendment, according to the justification for the bill running to several hundred pages, is primarily to improve and expedite judicial proceedings in civil cases.

It's true that court cases in Poland last very long. As practitioners, we deal with this every day. In every new case we must warn our clients that their longed-for judgment will not be handed down in a month, and probably not in one or two years. Thus any attempt to speed up the consideration of cases and cut certain formalities and activities taking up unnecessary time, which judges could devote to examining and deciding the merits of cases, should generally be greeted with approval.

Adages aside, sometimes a gift horse should be looked in the mouth. The new solutions require careful analysis, because efforts to speed up cases can affect the quality of the rulings. A judgment that is quick, but defective or unjust, has little to recommend it compared to a judgment that requires a longer wait but is fair and convincing.

Looking at the amended regulations, it should be pointed out that solutions in practically every section of the Civil Procedure Code have undergone some change. There are certain changes in the jurisdiction of the courts (e.g. in cases involving banking activity, which may have a big impact on the number of cases and the situation of both banks and their customers).

The way evidence is admitted by the courts will change. The amendment has introduced a hearing plan, as well as the possibility of submitting written witness statements, familiar from arbitration practice. This may be helpful and fast, but if open to abuse it could lead to a false picture of reality in some cases.

The separate commercial procedure, eliminated in 2012, has again been restored to the Civil Procedure Code, but in a different form (for example, it now covers disputes arising out of finance leasing agreements and construction contracts, regardless of whether the parties are businesses).

Certain changes have also appeared in the order for payment procedure (*nakazowy*) and summary procedure (*upominawczy*), and there are even changes in execution procedure.

The amendment has also introduced a number of changes in court costs (raising the maximum filing fee from PLN 100,000 to PLN 200,000, while fees for certain activities have jumped).

However, the amendment has also introduced new solutions arising from attention to comments by legal scholars, or designed to eliminate certain ambiguities or inconsistencies in the decisional practice of the courts.

The possibility of awarding interest for delay in payment of court costs has been introduced. Previously no sanctions were imposed for such delays, as confirmed consistently by rulings of the Supreme Court of Poland based on the procedural nature of claims for reimbursement of court costs. The new Art. 98 §1¹ of the Civil Procedure Code now permits interest to be awarded on such costs.

Another positive development is that the code will protect to a greater degree than before the principle that no one can be a judge in his own case. Thus if the State Treasury is a party to a case and the claim relates to the activity of the court itself, the higher court will transfer the case to another court of equal rank (Art. 44²(1) of the code). In cases of this type, applications were often filed to recuse all of the judges of the defendant court, which were denied but unnecessarily prolonged the case by at least several months.

An obvious flaw in Art. 388 §1 has been eliminated. Under this provision, if a legally final ruling was challenged via a cassation appeal to the Supreme Court, a stay of enforcement of the ruling could not be issued until the cassation appeal was filed, which in practice meant several months after the legally final ruling was issued. Following the change, a stay can be sought immediately upon announcement of the judgment, thus offering fuller protection to litigants. Regrettably, however, some of the other defects in the stay procedure were not eliminated at the same time, such as the lack of justification for stay orders and the absence of appellate review of orders issued on applications under Art. 388 §1, at least in the form of a horizontal appeal, which the amendment introduced in several new instances.

The changes now introduced will probably remain in effect for at least the next few years. Just as the proof of the pudding is in the eating, regulations should be judged by how they function in practice. Although the amendments here raise some doubts, it will take some time before they can be fairly evaluated.

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Technical improvements in procedure

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The amendment of the Civil Procedure Code introduces a few technical improvements to increase the efficiency of proceedings.

The key new tools for parties and their counsel include:

- The possibility of making sound recordings of hearings (or other court activities)
- Electronic service of documents between attorneys
- Clarifying the requirements for pleadings
- Changes in the form of filing auxiliary intervention
- Objections to the record no later than the next session
- Expansion of the list of proceedings eligible for horizontal review.

Some of the notable new tools at judges' disposal include:

- Actions by the court to prepare the case for consideration (discussed in the article "New litigation management tools for judges")
- Judicial guidelines
- Issuing of orders in camera and the possibility of not preparing a justification for certain types of orders
- Changes in the announcement, service and justification for judgments
- Introduction of standard form instructions.

Recording sessions

According to the amendment, the court will no longer have to consent to recording of court sessions (and other judicial activities) using audio devices (Art. 9¹ of the Civil Procedure Code). It will suffice for the party to notify the court of this intention, and the court may prohibit recording only when the session is held behind closed doors or when dictated for the sake of proper proceedings. This will allow parties and attorneys immediate access to the recording of the hearing, without waiting for the minutes or recording from the court, which typically are posted on the courts' websites with some delay. Some doubts are raised by the possibility for the court to oppose recording of sessions and other activities for the sake of proper proceedings. It is not clear whether the court must justify such a decision (not to mention whether it is appealable), nor the types of situations justifying a ban on recording.

Electronic service between attorneys

Professional attorneys will be able to exchange pleadings during the course of the proceeding exclusively in electronic form (Art. 132 §3 of the code).

This solution has been applied for years in arbitration, where moreover pleadings are served electronically on the court as well, but the new Art. 130 §1³ does not provide for that possibility. In our view, this will limit the actual use of this method of service by attorneys.

Clarifying the requirements for pleadings

The obligation to specify in pleadings which factual issues the party admits and which it denies may prove to be a major change (Art. 127, as amended). There is also an express new requirement to include a list of enclosures with pleadings (Art. 126).

Under the amendment, if a pleading filed by a professional attorney cannot be processed because it fails to comply with formal requirements, the pleading will be returned without a summons to cure the defects in the pleading (Art. 130^{1a}). A corrected pleading can then be filed within one week after service of the order rejecting the pleading, in which case the corrected pleading will be deemed effective from the original date of filing. However, this effect will not occur in the case of a further rejection of the pleading, unless it is returned due to defects not previously indicated. As a new §1¹ has been added to Art. 126 expressly requiring a list of enclosures, it should be recognised that absence or incompleteness of the enclosures will be grounds for ordering the rejection of the pleading.

The obligation to admit or deny factual issues and to address the allegations and evidence presented by the adversary will consolidate the structure of

pleadings, but also, in our view, increase their length. Given the wording of Art. 127 §1 of the code, it appears that this duty does not apply to the response to a statement of claim, which is reasonable, because if the court provides the defendant 14 days to respond to the statement of claim, addressing factual issues, allegations and evidence presented in the statement of claim could be very difficult for the defendant. But if the court does not order the exchange of pleadings before drawing up a plan for the hearings, the parties must be prepared during the preliminary session (Art. 205¹ ff.) to specify, among other things, which factual issues are disputed between them.

Moreover, a party will have a minimum of three months to cure formal defects in a pleading, to pay the filing fee, or to pay an advance against expenses, if the summons to cure such defects is served outside the European Union.

Change in the form of filing auxiliary intervention

The amendment also introduces a requirement to file an auxiliary intervention on one side of the case in the form of a pleading, which should be subject as relevant to the regulations on curing formal defects, and rejection of the pleading if the intervenor does not demonstrate in the pleading a legal interest in the dispute and indicate the party it is joining in the proceeding. Objection to joining of the case by an intervenor may be raised within 14 days of service of the intervenor's application to join the case, but no later than commencement of the next session in the case. This means that the period for objecting to intervention may turn out to be shorter than two weeks. Unlike previously, the court will not necessarily have to consider the objection to intervention at a hearing, but may rule on the objection in closed session. This rule should expedite the consideration of applications to intervene in civil proceedings.

Objection to the record no later than the next session

Objections to the minutes may be raised no later than the next session in the case, also if the objections involve infringements during the course of the session at which the party appeared (amended Art. 162 §1). As the period for asserting objections has been extended, it should be expected that the objection will require justification and a precise identification of the procedural regulations allegedly violated by the court.

Expansion of the list of orders eligible for horizontal review

A significant change is the expansion of the list of orders eligible for "horizontal review" (Art. 394^{1a}), and thus limitation of the list of orders by the court of first instance, and orders by the court's presiding judge, which are

eligible for an interlocutory appeal to the court of second instance. Horizontal review is now the general rule in execution proceedings.

The use of horizontal review for a ruling on relief from court costs and on the right to appointed counsel may raise concerns, because these are decisions on fundamental procedural rights of the parties, and therefore should be ruled on by a court of higher instance. In the proceeding instigated as a result of an interlocutory appeal, the court shall provide a justification, at its own initiative, of an order ending the proceeding. In cases where the interlocutory appeal is denied, or the order appealed against is modified, a written justification of the order will be prepared only if the party asserts, and pays for, an application for service of the order with a justification (Art. 397 §2).

Introduction of “judicial guidelines”

When there is a need, judges will be able to communicate to the parties how they view the case at any stage in the proceeding, without prejudging the result. This should speed up the resolution of cases. Under the new Art. 205¹³ of the code, the judge presiding at the session may instruct the parties on the likely result of the case in light of the allegations and evidence presented so far. In our view, this should encourage the parties to settle more often. Such instructions may be shared at any session.

Moreover, if it turns out during a session that the court may decide on a party’s demand or application on a legal basis different from the one indicated by the party, the court shall warn the parties present at the session accordingly (Art. 205¹⁴). Previously this requirement was recognised in the case law, but now it has been expressly stated in the regulations. As we understand, if the court indicates such a different potential ground for a ruling, but that would require supplementary evidence (and this occurs after the preliminary session and approval of the hearing plan), the court will be able to admit such evidence on the assumption that the need to rely on the evidence arose later.

Issuance of orders in camera and elimination of the need to issue a justification for certain orders

It will be possible for any order by the court to be issued in closed session (*in camera*). Consequently, the special regulations vesting the court with this right are repealed.

The court will issue a justification for an order issued *in camera* only when the order is appealable and only at the request of a party asserted within one week after service of the order (Art. 357 § 2 and 2¹), with the exception of execution proceedings, where the court will be required to issue a justification at its own initiative. A consequence of this change is that it will reduce

the transparency of proceedings. However, for the sake of the proceeding, the amendment does authorise the judge to state the fundamental grounds for a ruling with respect to an unappealable order.

Announcement, service and justification of judgments

Under the amendment, the judgment in the case should be announced at the session at which the hearing is closed, but may be postponed for no longer than two weeks after the closing of the hearing. Nonetheless, if the case is particularly complex, the evidence is particularly extensive, or the court is greatly burdened by activities in other cases, this period may, as an exception, be extended as long as one month after the closing of the hearing (Art. 326 §1). Under the amendment, an application for service of a ruling or order with a justification will be subject to a fixed fee of PLN 100.

A judgment issued in closed session shall be served on both parties, at the court's own initiative (Art. 327 §3). A requirement has been added in Art. 327¹ §2 that the justification for a judgment should be "concise." It seems that this provision should also include an obligation to address the parties' demands in the justification, but generally the change eliminating the descriptive portion of the judgment—typically the lengthiest section—should be assessed positively.

The amendment also introduces a requirement to expressly indicate the scope of the justification in the request for a justification. Failure to do so may result in rejection of the request. It is doubtful however whether the scope of the demand for the justification is connected with the scope of appeal against the judgment, or is a purely formal requirement.

Introduction of standard form instructions

The amendment provides for introduction of uniform patterns for the courts to instruct parties on their rights, which judges may use in the interest of parties not represented by professional attorneys. Significantly, a party not instructed in the manner provided for in Art. 458⁴ (as amended) is deemed to be deprived of the possibility of defending its rights, unless failure to provide the instruction did not affect the party's behaviour in the course of the proceeding.

Summary

It will take some time before it can be determined whether the amendment actually improves and expedites proceedings in civil cases. The great formalism of the new regulations and the increase in court costs may be regarded as limiting parties' right of access to the courts. Paradoxically, however, this

would reduce the number of court cases, unburden the courts, and practically cut the duration of proceedings. We can only hope that the courts, now vested with great leeway in taking procedural decisions, will apply the new solutions to the benefit of the parties and without excessive formalism. In our view, the amendment has not eliminated all of the existing problems with civil proceedings in Poland, but does represent a certain point of departure for further changes.

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New jurisdiction of the courts in certain cases

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While focusing on the most notable changes in the amended Civil Procedure Code, it is possible to overlook the change in the jurisdiction of the courts in several categories of cases. But this change is vital to many litigants.

The amendment of the Civil Procedure Code introduced hundreds of changes to the code itself but also to auxiliary acts, particularly the Act on Court Costs in Civil Cases. The scope of these changes is broad, as can easily be grasped by the addition to the code of the new Art. 35¹ and 37². These provisions modify the existing jurisdiction of the courts in cases involving allegations of infringement of personal interests and cases involving banking activity.

Claims for protection of personal interests

From 7 November 2019, an action seeking protection of personal interests (i.e. involving defamation, personality rights and the like) may also be initiated before the court for the place of residence of the plaintiff, not only the defendant. This is allowed by the new Art. 35¹ of the Civil Procedure Code: “An action for protection of personal interests infringed using mass media may be commenced before the court proper for the place of residence or registered office of the plaintiff.”

This provision seems narrow, as it requires an allegation of infringement of personal interests via mass media. But there is no reason that the internet cannot be regarded as a form of mass media, as there is no statutory definition of “mass media” (as pointed out for example by the director of the Poznań Tax Chamber in the individual tax interpretation of 3 June 2016, ref. ILPB1/4511-1-298/16-2/AMN). And the encyclopaedia definition of this concept is broad enough to cover “devices and institutions through which content is transmitted to a very numerous and diverse audience; press, radio, television, also film (cinema), books (popular), music recordings (disks, cassettes), and ‘new media’: VHS, DVD, film recordings (cassettes, DVD), teletext, satellite or cable television, computer games, internet (computer)” (*Encyklopedia PWN*).

With such a broad definition, the change may prove truly significant.

Statement of claim for banking activity

But the change introduced in Art. 37² of the Civil Procedure Code may prove even more significant (at least in light of the judgment by the Court of Justice on forex mortgage borrowers in Poland in *Dziubak v Raiffeisen Bank International* (C-260/18, 3 October 2019)). Under that provision:

§1. An action for a claim arising out of banking activity against a bank, other organisational unit authorised to perform banking activities, or their legal successors, may be initiated before the court proper to the place of residence or registered office of the plaintiff.

§2. §1 shall also apply to an action against a mortgage bank or its legal successor for a claim arising out of the activity of the mortgage bank.

Unlike “mass media,” “banking activities” are statutorily defined. Art. 5(1) of the Banking Law provides:

1. The following are banking activities:

- 1) acceptance of cash deposits payable upon demand or at the end of a designated period, as well as operating accounts for such deposits;*
- 2) operating other bank accounts;*
- 3) granting credit;*
- 4) granting and confirming bank guarantees, and granting and confirming letters of credit;*
- 5) issuing bank securities;*
- 6) conducting bank money settlements; ...*

- 7) *performing other activities reserved exclusively for banks under separate acts.*
2. *The following activities are also banking activities when performed by banks:*
- 1) *granting cash loans;*
 - 2) *check and promissory note operations and operations involving warrants;*
 - 3) *performance of payment services and issuance of electronic money;*
 - 4) *term financial operations;*
 - 5) *acquisition and sale of cash receivables;*
 - 6) *storage of items and securities and offering of safe deposit boxes;*
 - 7) *conducting the purchase and sale of foreign exchange values;*
 - 8) *granting and confirming guarantees;*
 - 9) *performance of commissioned activities related to the issuance of securities;*
 - 10) *intermediation in making money transfers and settlements in foreign exchange trading;*
 - 11) *intermediation in conclusion of structured deposit agreements;*
 - 12) *advising with respect to structured deposits. ...*
4. *Economic activity having as its subject activities referred to in par. 1 may be performed exclusively by banks, subject to par. 5.*
5. *Organisational units other than banks may perform activities referred to in par. 1 if authorised to do by separate acts.*

It is apparent that the range of banking activities under the act is very broad, and practically covers the great majority of all actions which banks undertake in dealings with their customers (who are the persons primarily affected by this change in the Civil Procedure Code). Moreover, this provision consistently expands its scope of application beyond banks, taking in also other entities performing banking activities pursuant to Art. 5(5) of the Banking Law (such as cooperative savings and loan associations).

The effect of the changes?

The likely effect of these changes may be to increase the number of claims filed in both defamation and banking cases. After all, it is no secret that some potential litigants have ultimately decided not to file suit because they would have to do so before a court on the other side of the country, hiring counsel located hundreds of miles away.

The need to pursue certain cases before the most overburdened courts has also discouraged potential plaintiffs, when they learned that they would have to wait a year or longer for the first hearing in their case.

The current changes may eliminate these problems and parcel out a number of cases across various parts of Poland (considering that previously, the majority of cases involving banks, for example, were filed with the courts in Warsaw because that is where most of the banks are headquartered). The overall number of cases may increase, but they may be decided faster. A potential side effect could be unevenness in the decisions handed down by a broader range of courts (as many of these cases have in the past been limited to just a handful of courts).

For potential plaintiffs, this change represents more of an opportunity than a threat. But undoubtedly it increases the risks faced by banks and other financial institutions, which will be required more often than they have in the past to defend themselves before courts in various parts of Poland.

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The return of the separate procedure in commercial cases

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Along with the recent amendment of the Civil Procedure Code, the separate procedure in commercial cases has returned. This will undoubtedly be a major change for businesses and their counsel.

Introduction

The new regulations apply exclusively to cases commenced on or after 7 November 2019. They do not affect proceedings commenced before that date. The date when the statement of claim is filed with the court should be regarded as the date when the proceeding is commenced.

The aim of the reform is clear: to speed up proceedings. The proponents left no doubt on this score in the justification for the bill. The same conclusion can also be drawn from an analysis of the newly introduced institutions. The goal is laudable. Attempts to achieve it were made in the past, but typically

boiled down to unreasonably rigorous formalism in the procedure, which often ended up injuring the parties. An example was the rules for separate procedure in commercial cases in force from 1 October 1989 through 3 May 2012.

In the justification for the bill, the proponents stated that their aim is not to restore the same state of affairs that existed at that time, which is not possible due to the changes in law occurring since 2012. In the new regulations on commercial cases, some institutions have been restored, others modified, and new solutions have also been adopted. It will take several years of practice before the effect of the changes can be assessed. For now, feelings are mixed.

The changes are so rigorous that a business will not be in a position to pursue a case in court without the assistance of professional counsel. If they do decide to go it alone, they may fall into any of the many traps posed by the amendment. To expedite the consideration of commercial cases, the lawmakers have excluded the possibility of applying mechanisms that may be time-consuming but can eliminate errors committed at the stage of commencement of the case, often not at the parties' fault.

Who is affected by the new regulations?

The amendment changes the definition of a commercial case, establishing a new range of entities affected by the new regulations. Under Art. 4582 §1 of the Civil Procedure Code, the following types of cases will be considered in the separate procedure for commercial cases:

- Cases between business entities within the scope of their business, even if any of them has ceased doing business
- Cases arising out of corporate relationships or involving claims referred to in Art. 291–300 or 479–490 of the Commercial Companies Code (this has to do with claims concerning the liability of members of a company's authorities, injury in creation of a company, injury in examining the financial report of a joint-stock company, and shareholder derivative suits (*actio pro socio*))
- Cases against businesses to cease environmental violations and restore the previous state, or to redress related loss, and to cease or limit activity threatening the environment
- Cases arising out of construction contracts or contracts related to the construction process, furthering the execution of construction works
- Cases arising under financial leasing agreements

- Cases against persons responsible for the debts of an enterprise, including secondarily or jointly and severally, by law or pursuant to a legal act
- Cases between the authorities of a state enterprise
- Cases between a state enterprise or its authorities and its founding authority or supervisory authority
- Cases involving bankruptcy and restructuring law
- Cases seeking issuance of an enforcement clause to a writ of execution which is a ruling of a commercial court that is legally final or subject to immediate enforcement, or a settlement concluded before the commercial court
- Cases to defeat the enforceability of a writ of enforcement based on a ruling of the commercial court that is legally final or subject to immediate enforcement, or a settlement concluded before the commercial court.

Cases seeking the division of the joint property of the partners in an ordinary partnership (s.c.) after it is wound up, as well as cases concerning receivables acquired from a person who is not a business entity, unless the claim arose out of a legal relationship involving economic activity pursued by all parties to the legal relationship, are expressly excluded from the scope of commercial cases (Art. 458² §2).

Example 1:

A collection company has acquired a receivable from a telecommunications operator. The case will be regarded as commercial if the debtor is a business entity. If the debtor is not a business entity, the proceeding will be conducted under the general rules.

An application to hear the case avoiding the separate regulations for commercial cases can be filed by parties who are not business entities or who operate as sole traders. If such an application is filed at the start of the case, the court will conduct the proceeding under the general rules (Art. 458⁶). Considering the severe rigours posed for business entities, this appears to be a fair solution. It also leaves it up to such persons to elect the procedure that will be the most advantageous to them under the specific circumstances.

It should also be pointed out that the amendment provides that the regulations on separate commercial procedure take precedence over other regulations governing separate procedures, except for commercial cases considered in the European order for payment procedure, the European small claims procedure, or electronic summary procedure (Art. 458¹(2)).

Expediting proceedings

The amendment entirely excludes the possibility of modifying the parties to the proceeding (by adding new persons on the plaintiff's or defendant's side) or the subject matter (by expanding or modifying the demand in the statement of claim).

From 7 November 2019 it is not permissible to change the subject matter of the action by asserting new claims in place of or alongside the existing claims. Only in the event of a change of circumstances may the plaintiff demand an equivalent or other object in place of the original subject matter of the dispute, or in cases of repetitive consideration, expand the action to include consideration for further periods.

Example 2:

The plaintiff demands the return of a bicycle he has lent to the defendant, but after filing the claim the bicycle is destroyed. In that case, the plaintiff can modify the claim and demand money damages instead of return of the physical object. But if the bicycle was destroyed before filing suit, and the plaintiff was aware of this, amending the claim will be barred and the claim will be denied.

Example 3:

The plaintiff demands payment for services rendered. The plaintiff can expand the demand in the proceeding to include fees arising on the same basis after the claim was filed. But if when filing the claim the plaintiff overlooked part of the fee that was already due, he will not be permitted to include that demand in the pending proceeding, but will have to commence a new case.

Changes in the parties to a claim as referred to in Art. 194–196 and 198 of the code are also excluded, i.e. a summons to participate in the case as a defendant, a summons to join the case as a necessary co-party, or a summons to an interested party to appear in the case as a plaintiff. Thus if it turns out that the set of plaintiffs or defendants is incomplete, the claim will be denied. Principal or auxiliary intervention, as well as impleading, will continue to be permissible. However, the defendant will no longer be permitted to file a counterclaim. Moreover, the district court cannot transfer the case to the regional court pursuant to Art. 205 of the code. Nor is it possible to suspend the proceeding due to the parties' failure to appear (Art. 458⁸).

In examining these rules, it may be concluded that although they will undoubtedly shorten the duration of individual cases, they will probably also generate a much greater number of cases. In these additional proceedings, it will often be necessary to admit evidence that was already examined by the court in another case. This may improve the statistics for case resolution

time, but overall the judicial system will have to do more work to satisfy the same legitimate interests.

Proceedings are also to be expedited by introduction of an additional formal requirement, namely the duty to provide the party's email address in the first pleading, or a statement that the party does not have an email address (Art. 458³). This rule is tied to the new Art. 132 §1³ of the code, which permits pleadings to be served between professional attorneys exclusively by electronic means, if they consent.

Evidence under the new rules

The amendment introduces major changes in the admission and consideration of evidence.

Lawmakers have placed greater emphasis on time limitations for presenting allegations and evidence. The parties to commercial cases must formulate all factual allegations and present the supporting evidence in their initial pleadings: the plaintiff in the statement of claim and the defendant in the response to the statement of claim (Art. 458⁵ §1).

In its first pleading, a party is also required to make a statement that it has asserted all its allegations and evidence. If the first pleading does not contain such a statement, the court will summon the party to assert all allegations and evidence under the sanction of loss of the right to assert them later in the case. Such a pleading will have to be filed within one week from the summons.

Late allegations and evidence will be ignored unless the party demonstrates that timely assertion of the allegations or evidence was not possible or the need to assert it arose later. In such case, further allegations and supporting evidence must be raised within two weeks after the date when it became possible to assert them or the need to assert them arose.

This is a major change from the prior regulations. Under the former Art. 207 §6 of the code, repealed by the amendment, the court would consider late allegations and evidence if their assertion would not delay consideration of the case. This was often exploited by counsel as a loophole, which now will be closed.

The amendment also introduces the principle of the primary of documentary evidence (Art. 458¹⁰). Under this rule, witness testimony can be admitted only if after exhausting other forms of evidence, or in the absence of such evidence, there are unexplained factual issues remaining that are relevant to deciding the case.

This means that at the stage of drawing up the hearing plan referred to in Art. 205⁹ of the code, the court will have to decide to what extent the documentary evidence provides a complete and clear picture of the facts. In practice, it may prove crucial in specific cases to see how the courts interpret the notion of “remaining unexplained factual issues.” For now it is hard to guess how much doubt the court will have to have with respect to the reliability and completeness of the documents before it will admit witness testimony—whether this will be possible even for minor doubts, or the doubts will have to be significant. It may be expected that within the next few years this issue will be the subject of a ruling or resolution of the Supreme Court of Poland.

It can also be expected that the bar will be set high in this respect, primarily in light of Art. 458¹¹ of the Civil Procedure Code. That article provides that an action of a party, particularly a declaration of will or knowledge, which the law connects with the acquisition, loss or change in the rights of the party (and thus all relevant circumstances) may be proved only by a document referred to in Art. 77³ of the Civil Code, i.e. a carrier of information enabling an examination of its contents. This means that in practice, the weight of witness testimony in most instances will be only supplemental to documentary evidence. Witness testimony could thus establish the context for documentary evidence but would not serve as proof of specific actions.

The rationale for introducing these provisions is that business entities should be held to a higher standard of diligence. They should maintain control over the documentation connected with their commercial activities. It is likely, however, that before businesses grow accustomed to this standard, many unjust decisions will be handed down by the courts.

Another new solution for commercial proceedings is the possibility of concluding an evidentiary agreement (Art. 458⁹). As this is a new institution for Polish law, for now it has been limited to the parties’ exclusion of certain types of evidence. If the parties reach such an agreement, the court will on its own initiative exclude such evidence. However, an evidentiary agreement does not deprive the force of evidence admitted by the court before the agreement was concluded.

This new institution is intended to encourage the principle that the parties are the masters of a commercial dispute. But the proponents admit the risk of complicating the procedure. Moreover, if the parties exclude evidence that would demonstrate certain factual issues, the court will have to determine in some other way what happened. In that case the court would judge the parties’ allegations based on the overall circumstances of the case. With respect to the measure of a monetary award, the court could draw upon Art.

322 of the code, awarding a certain sum based on the court's own assessment of the case.

It may be anticipated that in practice evidentiary agreements will be used fairly rarely. We may imagine that they could function in certain contracts in the form of a merger clause, as in common-law jurisdictions, stating that the contract supersedes any earlier agreements between the parties. In that case, the parties might conclude an evidentiary agreement excluding evidence from documents predating the contract, or witness testimony on facts preceding conclusion of the contracts. This would be a risky approach, however, because in the absence of evidence the court will have to rely on assumptions.

New time periods

The amendment shortens a range of time periods binding on the court.

If the commercial court finds that a case before it is not a commercial case, or conversely if the civil division finds that a case before it is a commercial case, the deadline for transferring the case to the proper court will be one month after the defendant joins issue on the merits of the case (new Art. 458⁷ §1). But an otherwise commercial case that is not forwarded to the commercial court before that deadline will be considered without following the commercial procedure (Art. 458⁷ §2). This solution is justified by the need to limit multiple transfers of cases between courts or divisions, as well as transferring cases with undue delay.

Another limitation for the court is the obligation to act in the case so that a resolution is reached no later than 6 months after filing of the response to the statement of claim (or the deadline for filing a response, if no response is filed).

Although the 6-month period indicated in the code is only instructive, it does stress the priority of speed in commercial proceedings by obliging the court to take actions enabling the case to be heard within the period stated in the law. It is stated in the justification for the amending act that under the current reality of the functioning of the commercial courts, until the existing backlog is cleared it would be an obvious fiction to set a rigid deadline for reaching a judgment in new cases.

Nonetheless, once the courts do make up for the existing backlog, meeting the 6-month target will be possible if the scope of witness testimony is radically reduced.

Judgments

Changes have also been introduced at the final phase of the proceeding.

The commercial courts have been vested with a wide range of possibilities for ruling on costs. Regardless of the result in the case, the court will be empowered to assess trial costs against a party which failed to attempt to resolve the dispute out of court prior to filing of the suit. The same sanction can be applied to a party refusing to participate in such attempts, or participating in bad faith, thus causing unnecessary filing of the suit or erroneous determination of the amount in dispute (Art. 458¹²).

Moreover, a judgment issued at the first instance in a commercial case in which money or fungible goods are awarded is deemed to be a writ of security. Previously this treatment applied only to an order for payment issued in an order for payment procedure. This means that as soon as the judgment is issued at the first instance, the prevailing party will be entitled to apply to the bailiff to establish security against the losing party's assets up to the amount awarded. The security may consist for example of freezing a certain sum in a bank account or establishing a mortgage on designated property, and it will last until the legally final conclusion of the case, when execution may be commenced (Art. 458¹³).

Both of these changes should be regarded favourably. The first increases the chance for amicable resolution of disputes before suit is filed. The second should result in more effective satisfaction of claims covered by a judgment of the court of first instance, and discourage filing of appeals solely to prolong the case.

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New procedure for service of documents under the Civil Procedure Code

AGNIESZKA PACHLA

Electronic service between attorneys, and the end of fictitious service. The amendment to the Civil Procedure Code has brought

numerous changes to the service of legal documents.

We should first point to the interim provisions in Art. 14 of the amending act (Act of 4 July 2019 Amending the Civil Procedure Code and Certain Other Acts), which requires Art. 132 §1 of the Civil Procedure Code to be applied from 7 November 2019 in cases commenced and not completed before entry into force of the amending act. This means that when serving court papers between professional attorneys, a statement must be included on dispatch of a copy of the pleading by registered post with respect to all cases, and not, as before, only with respect to cases commenced after 8 September 2016.

The amendment added Art. 132 §1³ to the Civil Procedure Code, enabling electronic service between professional attorneys in place of traditional service. But for electronic service to be effective, a statement on electronic service must be submitted, providing the attorney's contact details to the court, including email address or fax number. It should be stressed that such statements are not revocable, and reservations of conditions or periods are deemed void. Upon mutual application of the parties, or in other justified instances, the court may order the parties not to use this form of service.

The wording of Art. 133 has also changed. Section 1 governs service on natural persons, and in the first order they should be served personally. Section 2 provides for service on legal persons or organisations without legal personality, with respect to which service is made personally upon an authorised employee or body. Section 2¹ governs service on businesses entered in the Central Registration and Information on Business (CEIDG), who are served at the address provided in the register unless the business operator has indicated another address for service. Section 2² in turn provides that pleadings and rulings are served on a business entered in the court register at the address provided in the register, unless the business has indicated another address for service. If the last available address has been deleted as inconsistent with the actual state of affairs and no application has been filed providing a new address, then the deleted address is regarded as the address provided in the register. Under Art. 133 §2³, documents for persons representing entities entered in the National Court Register, liquidators, commercial proxies, members of corporate authorities, or persons authorised to appoint the management board, are served at the address for service designated according to Art. 19a(5)–(5b) and (5d) of the National Court Register Act of 20 August 1997. If an attorney ad litem has been appointed, or an agent for service, then papers are served on that person, except for a summons for a person to appear in person, which is served only directly on the party (Art. 133 §3 of the Civil Procedure Code). This rule does not apply, however, to a

party without a place of residence or habitual abode in Poland or other EU member state.

The end of fictitious service

The most impactful changes for litigation practice in serving documents are introduced by the amended Art. 139 and the newly added Art. 139¹ of the Civil Procedure Code.

Under Art. 139, when personal service as indicated in Art. 133 and substitute service under Art. 138 cannot be effected, the document is submitted to the post office and notice is placed on the door of the addressee's home or in the addressee's mailbox, indicating where and when the document was left, with an instruction that the document should be collected within 7 days after placement of the notice. If the document is not collected by that deadline, the operation should be repeated. The document may also be collected at the post office by a person authorised to collect postal items through a postal power of attorney within the meaning of the Postal Law.

Under prior law, after such notice was given twice, there was deemed to be fictitious service, which in practice meant that if a court paper (including the initial pleading in the case) was not collected within the designated time, the document was treated as effectively served. The new Art. 139¹ departs from this rule by providing that if despite repeated notice the defendant has not collected the statement of claim or other pleading giving rise to a need to defend his rights, no pleading in the case has been served on him before in the manner described above, and neither Art. 139 §§2–3¹ nor other specific regulation providing for the effect of service is applicable, the presiding judge of the court will notify the plaintiff accordingly by sending the plaintiff a copy of the pleading for the defendant, obliging the plaintiff (in the form of an order) to serve the pleading on the defendant through the bailiff. The plaintiff then has two months from service of such order to file proof of service of the pleading on the defendant by the bailiff, or return of the pleading with an indication of the defendant's current address or proof that the defendant is staying at the same address as that given in the statement of claim.

The law does not specify what evidence may be regarded as sufficient in this case, but it should be recognised that such evidence could be confirmation of receipt of other correspondence (such as courier items) at the existing address, a writing from the defendant indicating his residence address, or a detective's report. Moreover, under the regulations on population records, upon demonstration of a legal interest it is possible to seek information about the defendant from the PESEL register. In order to satisfy the obligation imposed by the court, the plaintiff should apply to the bailiff to serve

the pleading. The bailiff may not refuse to serve such documents, but may assign this duty to an assistant (asesor).

The sanction for the plaintiff's failure to comply with this procedure is that the court will stay the proceeding under Art. 177 §1(6) of the Civil Procedure Code. The aim of the new method for service governed by Art. 139¹ is to ensure a more effective right to a defence, as according to the lawmakers, previously addressees of court correspondence often did not learn that a ruling had been entered against them until they were notified of the commencement of execution. The procedure for service via the bailiff was introduced to eliminate situations where service was made to outdated addresses.

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New litigation management tools for judges

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Two conditions must be met for a civil dispute to be resolved effectively: at the earliest stage of the case it must be precisely defined what is truly disputed between the parties, and the proceeding should be planned so that those issues can be focused on. If this can be achieved, the parties and the court can devote their energy and attention to the truly relevant issues. This will improve the speed and quality of judicial decisions, legal certainty, and security of commerce.

This is why in countries where civil trials function well, the procedure forces the parties to formulate their positions (also before the case reaches the court, in pre-suit correspondence), and behave throughout the litigation, so that the essence of the dispute is identified early and the course of the proceeding can be planned. If the parties present their positions objectively, it usually turns out that the dispute between them boils down to just a few essential issues. This means that even in complex cases, the number of cases the court must resolve is usually short. Many cases never reach the court at all or end with withdrawal of the claim or settlement at an early stage, and cases that still require hearings and involvement of the court are heard in accordance with a plan prepared in advance, and with due attention.

Hearing plan

The reform of Polish civil procedure also aims in this direction. It assumes that in every case the court and the parties will plan the course of the entire proceeding. To this end, after exchanging their positions in the statement of claim and the response, the parties are to meet at a preliminary session. In a less formal process, they should discuss the possibilities for amicable resolution of the dispute, and if that is not possible they should define the true nature of the dispute between them and plan the course of the rest of the proceeding. The hearing plan should identify the essence of the dispute, the evidence to be introduced, and the timetable for the case.

This is a beguiling vision. The question, however, is what has truly changed in the procedure to enable this vision to be achieved. Proceedings will not be conducted efficiently and according to plan just because it is so decreed in the Civil Procedure Code. Without concrete tools motivating the parties to formulate their positions clearly, objectively and consistently, and enabling the court to combat abuses, it will not be possible to properly conduct a preliminary session and plan the course of the proceeding.

Combating abuse of procedural rights

The amendment to the code has introduced instruments to combat abuses of procedural rights. This primarily has to do with situations where clearly groundless claims are filed with the court, which nonetheless have to be processed, and situations where the parties pursue measures aimed purely at prolonging the proceeding and not at protecting their legitimate interests.

The amendment has introduced a general ban on abuse of procedural rights. This is intended to shut down the previous disputes over whether the conception of abuse of rights applied at all in procedural law. The very fact that this was disputed and had to be explicitly laid down in the code demonstrates what a long way we still have to go. In most Western countries and in international law there has never been any doubt that procedural rights can be abused, and that such abuses are unlawful and prohibited.

The reformed code in Poland provides concrete sanctions for abuse of procedural rights.

For pursuing measures aimed at delaying resolution of the case, the courts can primarily order financial sanctions, by imposing fines on the parties or charging them with trial costs regardless of the result in the case. On top of this, trial costs can be increased (as much as doubled), as can the interest on delay (to as high as twice the maximum statutory rate). These financial sanctions are mainly intended to exert a deterrent effect, so that the use of

dilatory tactics ceases to pay off. The effectiveness of these solutions will largely depend on how judges employ the instruments entrusted to them. To date, judges have very cautiously applied instruments for punishing disloyal parties.

The amendment has also introduced tools for dealing with plainly groundless claims and repeated interlocutory appeals impeding consideration of the merits of the case. If an obviously groundless claim is filed, the court will no longer have to process the claim further, but will be authorised to reject it. The court's decision will be subject to appellate review, but nonetheless this should cut the need to schedule hearings in cases that are obviously groundless. The same will be true in the case of a "chain" of interlocutory appeals. When repeated review is sought, adding nothing to the case but delay, the amendment allows the court to refuse to consider such appeals. With such instruments as well, judges will need to bravely but responsibly exercise the powers vested in them. This approach should unburden the legal system from handling gratuitous matters asserted only for delay.

What is the amendment lacking?

We regard the changes introduced in the amendment as a step in the right direction. But they leave much to be desired, and raise concerns that this step was not adequately prepared. There are several tools missing which have been tested abroad and in arbitration and which could contribute to efficient handling of proceedings. Their absence may result in the overall reform hindering rather than helping the efficient conduct of cases.

The courts should have more weapons at their disposal to combat abuses of the right to resort to the courts. The possibility of denying an obviously groundless claim or appeal in closed session is not enough. The court should be authorised to grant a claim against which the defendant has not raised any meaningful arguments. The court should also be able to reject elements of the party's position that are obviously unwarranted or not stated objectively enough. In the UK this is done through an order to "strike out" an entire statement of claim or defence, or only certain clearly meritless arguments by the party.

Amicable resolution of disputes should be encouraged by a more effective system of incentives and sanctions. The solutions introduced in the amendment are inadequate. An effective mechanism sanctioning unreasonable rejection of settlement offers is needed. Such a mechanism functions in English civil procedure, where it is called a "Part 36 offer." In this solution, a party may submit a settlement to the adversary with the reservation that it will remain confidential until the case is resolved, and after the judgment it

may be disclosed to the court. A party who does not obtain a resolution at trial more favourable than the earlier settlement proposal may then, in a separate ruling, be charged with much higher trial costs of the adversary. This encourages reasonable settlement offers and discourages hasty rejection of offers. It forces litigants to calculate whether their case is strong enough that they will receive more than offered, and how much they can lose if the court awards less than now being offered by the adversary. This encourages amicable resolution of disputes while unburdening the courts of cases that can be settled.

The number of unnecessary court cases would also decline if the law required the parties to exchange arguments and basic evidence before taking the case to court. Solutions of this type known as “pre-action protocols” also function well in the UK.

Better means of interim protection are also needed. Today it takes too long to obtain temporary legal protection. An application for interim relief may not be considered for weeks or even months. Such applications should be considered immediately, in urgent cases even the very same day by the judge who is on duty. Interim relief granted weeks later often proves moot.

There is also no justification for applications for interim relief to be considered, as a rule, without the participation of the opposing party (*ex parte*). Involvement by the adversary should be the rule, while maintaining the possibility of granting relief *ex parte* in exceptional circumstances—for example when it is necessary to surprise the adversary by seizing assets which it might conceal if it knew of the pending application. But in many cases involving interim relief, when there is a need to regulate the status quo pending resolution of the principal dispute, both parties should have a right to be heard. The time allowed to present the parties’ positions should be brief, but this would eliminate the unevenness in granting security, often resulting from selective presentation of the facts.

Another trend that is functioning well around the world is establishment of specialised courts. In foreign jurisdictions commercial courts are sprouting up where the proceedings can be held in English, as well as cyber courts specialising in high-tech cases. The option for commercial courts to handle cases in English would raise the confidence of foreign businesses in entrusting their disputes to Polish jurisdiction. Such businesses would better understand the course of the proceedings. The scale of foreign investments in Poland and its strong position in the EU allows us to consider establishing such a court. Specialised courts would also foster the development of precedent-setting rulings and attract specialised judges and lawyers, which would

in turn foster scientific innovation. The speed of technological changes is forcing courts to rule on issues which the legislature has not yet had an opportunity to address.

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Direct compensation from insurers under the new commercial procedure

MATEUSZ KOSIOROWSKI

Will the amended civil procedure rules improve the litigation position of people suffering a loss in motor vehicle collisions?

A further portion of the changes in the Civil Procedure Code introduced by the amending act of 4 July 2019 entered into force on 7 November 2019. Among other changes, the act introduced a separate procedure for commercial cases notable for its rigorous formality. Will these changes impact cases seeking insurance compensation for motor vehicle collisions under the direct compensation system?

Shared liability of driver and insurer

As a rule, in the event of a collision between two motor vehicles, the injured party will turn to the insurer of the driver who was responsible for the accident (from whom the driver who caused the collision has purchased civil liability insurance) seeking payment of compensation for the injury suffered (damage to their vehicle, hauling charges, personal injury, and so on). The injured party may seek compensation from the individual who caused the injury or that person's insurer, or against both of them together (although the accepted practice now in litigation is to seek compensation exclusively against the insurer).

The rulings by the Supreme Court of Poland have adopted the term “*in solidum* liability” to describe the joint liability existing between the responsible driver and his insurer (also referred to as “irregular,” “incomplete” or “incidental” joint liability). According to the Supreme Court, in the case of *in solidum* liability, satisfaction of the claimant's demand by one of the parties obligated to fulfil it (the responsible driver or his insurer) releases the other one from the obligation to the injured party, even though they are not re-

garded as jointly and severally liable co-defendants because of the lack of a relevant statutory or contractual basis (Supreme Court resolution of 17 July 2007, case no. III CZP 66/07).

It should be borne in mind that under Art. 20(2) of the Mandatory Insurance Act (the Act on Mandatory Insurance, the Insurance Guarantee Fund, and the Polish Motor Insurers' Bureau of 22 May 2003), in judicial proceedings seeking compensation for loss covered by mandatory motor vehicle civil liability insurance, the court is required to implead the responsible party's insurance company as a third party, while the insurer may also join the litigation as an auxiliary intervenor. Thus the seven-judge resolution of the Supreme Court of 13 May 1996 (case no. III CZP 184/95), holding that "in a trial for redress of injury arising as a result of a traffic accident, the relationship of necessary co-parties does not exist between the insurance company and the possessor or driver of the motor vehicle," continues to hold true.

Direct compensation system

The direct compensation system (known in Polish as BLS [*bezpośrednia likwidacja szkód*]) was introduced with the aim of improving the market competitiveness of insurance products while simplifying and expediting proceedings seeking insurance compensation. Thanks to the BLS system, in the event of the collision of two motor vehicles, the injured party may seek compensation directly from his own insurer (with whom the injured party has concluded a mandatory civil liability policy for possessors of motor vehicles), rather than against the insurer of the other driver responsible for the accident. This allows the injured party to assess the quality of service of their own insurer in providing compensation for losses.

The BLS system has not arisen from statutory solutions, but was established by a decision of the Polish Chamber of Insurance (PIU), and consequently is provided for in contracts for mandatory civil liability insurance for possessors of motor vehicles. To further improve the competitiveness of their coverage, some insurance companies offer to compensate for loss under the BLS system even if the insurer of the driver responsible for the accident does not offer compensation in the BLS system.

But redress cannot be sought under the BLS system for all types of injury. Among other things, the system does not cover personal injury, or collisions involving more than two vehicles. The injured party may, however, demand compensation for loss in the form of the costs of hauling the damaged vehicle, parking fees for the damaged vehicle, and the cost of hiring a replacement vehicle for the period required to repair the damaged vehicle. Additionally, the amount of the loss must not exceed PLN 30,000.

It must be stressed that the BLS system does not shift civil liability for the accident onto the insurer providing compensation for the loss. For purposes of contractual and tort law, the relationship between the injured party and the perpetrator of the loss (and the perpetrator's insurance company) remains unchanged. Therefore, in the event of litigation seeking damages, only the perpetrator of the injury, and his insurer, have the capacity to be appear in the civil proceeding as defendants.

Changes involving parties to civil proceedings

If the injured party believes that he has not received adequate compensation from his own insurer under the BLS system, he may file a claim for payment against the persons obligated to redress the loss, i.e. the perpetrator of the injury or that person's insurer.

In practice, insureds sometimes sue their own insurance company which has paid out an undisputed amount of compensation under the BLS system. Because that insurer does not have the capacity to be sued as a defendant with respect to the event causing the injury, the plaintiff may lose that case and be charged with paying the insurer's trial costs.

Nonetheless, filing suit against the wrong person can be partially cured through the appropriate procedural initiative, applying the institution of impleading. Under the first sentence of Art. 194 §1 in connection with Art. 198 §1 of the Civil Procedure Code, if it turns out that the claim has not been filed against a person who should be a defendant in the case, at the request of the plaintiff or the defendant the court will summon that person to appear in the case as a defendant. Such a summons by the court takes the place of filing suit against that defendant. The persons summoned by the court as defendants are served with copies of the pleadings and enclosures.

Impleading the perpetrator's insurer also modifies the proceeding seeking damages by joining in the case an entity which should have been sued from the beginning (as the insurer has the capacity to be sued as a defendant). But notwithstanding this procedural move, the plaintiff will still be required to cover the trial costs of the original defendant if it files the appropriate application by the statutory deadline.

Separate commercial procedure

Effective 7 November 2019, a separate procedure for commercial cases was introduced into the Civil Procedure Code. Under Art. 458² §1(1), commercial cases include cases between business entities within the scope of their business.

Thus if a business operator injured in a traffic accident sues an insurance company, the trial will be conducted according to the rules for the commercial procedure. In that situation, Art. 458⁸ §2, which concerns commercial cases, becomes problematic. That provision prohibits modification of the parties (as it excludes application of Art. 194 and 198, among other provisions of the Civil Procedure Code). Thus if the plaintiff sues an entity that does not have capacity to be sued as a defendant in such a case, the plaintiff will not be permitted, through the procedural initiative described above, to implead the proper person. This exposes the plaintiff to the risk of losing the case and incurring additional costs. It should also be pointed out that filing suit against a person who is not the proper defendant does not interrupt the running of the limitations period on the claim. Consequently, the defence of the statute of limitations could potentially be successfully raised by the insurance company in a future suit against the proper defendant.

Nevertheless, it is important to consider the institution provided for in Art. 458⁶ §1, under which, at the application of a party who is not a business entity or who is an individual business operator, the court will hear the case without applying the provisions of the chapter on commercial procedure. If the compensation was paid under the BLS scheme, and it is uncertain whether the insurer can properly be sued as a defendant in the case, it would be worthwhile to file the application provided for in this section, so that, continuing the case under the ordinary procedural rules, the plaintiff could benefit from the ability to implead the proper defendant.

Summary

The peculiarities of the direct compensation system used by Polish insurers create a risk that the injured party will file a suit seeking damages against the insurance company that does not bear civil liability for the loss. The procedural restrictions imposed in commercial cases would not allow the parties to be modified in such case, ultimately causing the plaintiff to lose the case.

Thus before filing suit for losses arising out of a motor vehicle accident, it is essential to verify whether compensation has been paid out under the BLS scheme. Otherwise, the injured party could be exposed to a financial loss.

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Dispute Resolution & Arbitration practice

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