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Polish Commercial Law in the Time of Transformation and European Integration. Chosen Aspects

Preliminary remarks

Since the end of the 80', polish commercial law has undergone such dramatic changes, that a question arises, as to the possibility of calling this phenomenon a transformation. Transformation consists by definition of a change – an alteration of one's form while preserving its subjective continuity. However, in the case of polish commercial law, the regulations in force towards the end of the era of socialism, were merely a caricature, of what commercial law was in the free world. What is more, the business transactions were carried out mostly by peculiar, from today's perspective, entities, called units of socialized economy.

That is only one side to the story. It cannot be forgotten, that at that time, the civil code from 1964[1] was in force. It won't be an overstatement, to say that this act is unique on a world scale. In the age of primitive and mundane socialism, a group of distinguished lawyers, educated during the interwar period in Poland, achieved a great success in persuading the authorities to accept and pass a code, whose underlying assumptions were a unique synthesis of German property law, French obligation law, enriched by and adjusted to the Polish reality. This code, after many a modification has ever since been in force and, according to many researchers, is the starting point towards achieving the long-term aim of creating a common European civil law, which will surely be dominated by German and French legal thought.

What is more, at the end of 80s and at the beginning of 90s, the Commercial Code from 1934[2] was also in force. As a matter of course its practical application in the era of socialism was limited, it was however a part of the binding legal system. At that time and until today in unchanged form, there have been in force two acts of an exceptionally high legal standard – act

[1] Ustawa z dnia 23 kwietnia 1964 r. – Kodeks Cywilny, Dz. U. z 2016 r. poz. 380

[2] Rozporz№dzenie Prezydenta Rzeczpospolitej z dnia 27 czerwca 1934 r. – Kodeks Handlowy, Dz. U. z dnia 30 czerwca 1934 r. z pyuniejszymi zmianami

concerning promissory notes[1] and act concerning cheques[2]. There existed as well the acquis of the interwar doctrine and jurisprudence, which was not extensive, but of the highest standard. After all there lived people, educated in the prewar period, who preserved Polish legal traditions, including these of commercial law, whose vast knowledge and experience could not be fully employed during the socialism era.

The landscape of Polish commercial law, which was in force prior to the political and economic transformation, which began in 1989, can be compared to the tip of the iceberg. The visible part were the acts in force at the given moment, at times limited in their original scope, at times burdened with years of influence of the practice. On the other hand, there existed a rich intellectual acquis and legal acts, either in disuse (Act Concerning Promissory Notes, Act concerning Cheques, Insolvency Act[3]) or partly derogated (the Commercial Code), which at that time were modern enough, that that could be reintroduced into the binding legal system without much difficulties.

It has to be underlined however, that all of this would be insufficient, had it not been for the authorities of the People's Republic of Poland, which in 1988 passed the Act on Business Activity[4], which was exceptionally liberal as regarded conducting business activities and its regulation, which in turn created the right conditions for the small entrepreneurs to thrive. What is more this tendency was not only not halted, but through further ambitious legal reforms – it even deepened.

Until the beginning of 2000s, the Polish commercial law was developing very successfully, notable examples of which are the new Code of Commercial Companies[5] and the Act on the National Court Register[6]. In that period it can be observed a new phenomenon in the development of Polish law, caused by the necessity of adjusting Polish regulations to the European law, just before the accession of Poland to EU, and later on in the subsequent years. It is a process, which from the perspective of 12 years of membership of Poland in the EU, may be assessed objectively and with an attitude neither characteristic of unjustified excitement or unfounded fears. Naturally, detailed assessments will be objects of many research in the decades to come, but even so, certain remarks may already be made.

It seems that the Polish legislator passed and changed numerous acts with too much haste, and convinced of the superiority of European solutions over the domestic ones, which in some cases meant certain regression. Before proceeding to examples, I would like to clarify, that references are mainly made to adjusting the Polish private law according to EU directives, which by definition impose certain minimal guarantees on the Member States, which have to be fulfilled. There is no prohibition of exceeding these minimal guar-

[1] Ustawa z dnia 28 kwietnia 1936 r. – Prawo wekslowe, Dz. U. z 2016, poz. 160

[2] Ustawa z dnia 28 kwietnia 1936 r. – Prawo czekowe, Dz. U. z 2016, poz. 462

[3] Rozporz№dzenie Prezydenta Rzeczypospolitej z dnia 24 pa‰dziernika 1934 r – prawo upadio№ciowe., Dz.U.1991 nr 118, poz.512

[4] Ustawa z dnia 23 grudnia 1988 r. o dziaialno№ci gospodarczej, Dz.U.z 1988 nr 41 poz. 324

[5] Ustawa z dnia 15 wrzeђnia 2000 r. – Kodeks spyiek handlowych, Dz. U. z 2013 r. poz. 1030

[6] Ustawa z dnia 20 sierpnia 1997 r. o Krajowym Rejestrze S№dowym, Dz.U.z 2015 poz. 1142

antees. Notwithstanding, no one from the political decision makers realized that the guarantees concerning warranty for physical defects and quality guarantee in case of sale agreement, existing in the Civil code from its inception, offer better protection to the buyer that the European regulations. In order to adopt the European standard, a new act was passed[1], which was meant to establish guarantees for the consumers and derogated certain parts of the Civil Code in respect to that group. However, the regulations in the act, which were automatically copied from the directive, offered lower standard of protection than the Civil Code. As a result the situation of the consumers worsened, compared to the state prior to the change.

It is not the aim of this article to thoroughly analyze chosen institutions, as such an analysis would require a separate monography about each. The aim of this article is to briefly present them, which can demonstrate the essence of evolution of certain regulations and show the positive as well as negative examples of Polish Legislator decisions. That in turn, may draw the attention of the Ukrainian Legislator, and possibly allow to avoid the same mistakes and use the positive examples from the Polish practice.

Entrepreneur and business activity

From the perspective of mass development of entrepreneurship in Poland at the end of 80s and at the beginning of 90s, two notions introduced by the Act on Business Activity were of crucial importance: notion of business subject and the business activity itself. The act was revolutionary, as it introduced, even before the transformation, actual freedom of conducting business activities for everyone on equal terms. It also made the State interference in this sphere bearable, by reducing control over it to the necessary minimum. With a hint of irony, it can be therefore stated, that the most liberal act after the Second World War, was passed still under the People's Republic of Poland, as the subsequent acts were not as beneficial as this one.

The very notion of the business subject may seem peculiar from the linguistic point of view, but it can be assumed, that given the times, during which it was introduced, had to be relatively conservative. It doesn't, however, change the fact that all of the subsequent notions of entrepreneurs were identical with the notion of business subject[2]. And so the business subject was to be understood under this act, as an entity conducting business activity. It could natural person, a legal person or a non-corporate organizational unit with legal capacity conducting economic activity on its own behalf. Such regulation, led to an unnatural in the Polish legal order consequence, of granting the status of a business subject also to these non-corporate organizational unit, which are devoid of legal personality or capacity, such as civil partnerships, which after all is merely an agreement. By creating such a broad definition of a business subject, however, it was assumed that civil partnerships are entrepreneurs, which in turn led to granting them legal capacity. Such a situation

[1] Ustawa z dnia 27 lipca 2002 r. o szczegylnych warunkach sprzedaïy konsumenckiej oraz o zmianie Kodeksu cywilnego, Dz.U. z 2002 Nr 141 poz. 1176

[2] See more: W. Katner, Pojкcie przedsikbiorcy – w odpowiedzi na artykui dr A. G. Harli , PPH 2007 nr 4; A. Kidyba, Prawo handlowe, Warszawa 2015, s. 17

on the one hand was beneficial to the development of small entrepreneurship, on the other hand however it constituted a severe constructive breach in the legal doctrine, approved of by the jurisprudence until mid-90s[1].

Apart from natural persons, commercial companies, regulated in the newly reinstated Commercial Code, were also entrepreneurs. There were types of partnership, i.e. registered partnership and limited partnership, and two capital companies: i.e. limited liability company, and joint-stock company. At this point other entities which could conduct business activity will be skipped under different legal forms. It wasn't until the introduction of the Code of Commercial Companies, when two other personal companies were previewed: professional partnership aimed at allowing partners to conjointly perform liberal professions and limited joint-stock partnership, which was devised as a way to allow bigger family companies to thrive, and which gained on popularity due to tax reasons. Recently, also due to tax reasons the company suddenly lost its appeal.

The partnerships are characterized in polish law by the following qualities (with different intensity in each type)[2]. Firstly they are not complete legal persons, which manifests itself in the fact, that its members have subsidiary responsibility for its debts, as well as the fact that these companies are not subject to the Corporate Income Tax, thanks to which only its members pay either PIT or CIT taxes[3] (depending on their legal personality). The partnerships have no organs, and their affairs are conducted by the partners, whose position as a partner as a rule does not change. Partnership have legal capacity, which means that they can in its own name, acquire rights, including the ownership of real property and other property rights, to assume obligations, and to sue and be sued. Their creation is deformalized and there's no minimal contribution obligation for the partners. Interestingly enough, the courts were reluctant to introduce the partnerships in the land registers as land owners, as they labored under misapprehension that it was the partners, who were owners of the land. Due to this fact, in the Code of Commercial Companies the provision includes, apart from the capacity to acquire rights, special capacity to acquire real property, which from today's perspective is redundant, but at its time, was passed as an answer to a need expressed by jurisprudence[4].

On the opposite pole there the capital companies, whose creation process (notably in the case of joint-stock company) and their functioning are far more formalized.[5] They have legal personality and their partners and shareholders are not responsible for their obligations. The price for lack of the obligation is the fact that these compa-

[1] See more: A. Herbert, Spyika cywilna, [w:] System Prawa Prywatnego t. 16 – Prawo Spyiek osobowych, red. Andrzej Szajkowski, Warszawa 2008

[2] See more: A. Szajkowski, Konstrukcja prawna spyiki osobowej, [w:] op.cit., red. A Szajkowski

[3] See more: A. Bartosiewicz, Komentarz do art.14 ustawy o podatku dochodowym od osyb fizycznych, LEX 2015

[4] See more: S. Wiodyka, Komentarz do art. 8 KSH, [w:] System Prawa Handlowego, red. S. Wiodyka, Warszawa 2012

[5] See more: A. Soitysicski, *Ogylna charakterystyka spyiek kapitaiowych*, [w:] System Prawa Prywatnego t. 17a – Prawo Spyiek osobowych, red. A. Soitysicski,, Warszawa 2008

nies are subject to the CIT, which, given additional analogous taxation of dividends distributed to the partners, makes conducting business in this form safer, but more expensive. The companies conduct their affairs through organs such as management board, supervisory board, audit committee and shareholders' meeting. The companies have share capital, which is the manifestation of the positions of each shareholder in the company (their share is proportionate to the number of shares, which in turn is tied to the number of votes they have, as well the exact share in the company's gain and its post liquidation value).

It is important to note, that in Polish law there is no single definition of the notion of entrepreneur. Each act contain its own regulation in this respect. The best example of the contradictions this situations leads to, is deeming the partnership as entrepreneurs, but not its partners, according to the current Act on the Freedom of Business Activity[1], but on the other hand deeming the partners as entrepreneurs by the virtue of other acts. The influence of this discrepancies have to assessed as being negative, although, admittedly, it can at times (however not always) be justified – e.g. in the law concerning competition.

Due to social and political reasons, but surely not without legal reasons as well, agricultural activities have been excluded from the scope of the Act on the Freedom of Business Activity. In the Polish law, farmers are not entrepreneurs within the meaning of this act, although from the economic point of view, their farms have to be deemed as an enterprise, and they themselves as entrepreneurs.

The business activity itself has been differently defined in various acts, although their evolution is not as significant, which means, that the definition adopted in 1988 was suitable and required no significant modifications. And so it was defined as any profit-making activity related to manufacturing, construction, trading, provision of services. Today's definition is largely similar to it, as it reads that business activity is a profit-making activity related to manufacturing, construction, trading, provision of services, identification and extraction of minerals, as well as professional activity conducted in an organised and continuous fashion[2]. The legislator extended it somehow to include the mining activities and also added certain features to it, in order to distinguish it from one-time activities.

Currently, the demarcation line between one-time enterprise and business activity can prove problematic. This problem could not have been anticipated by the legislator in the 1988, and neither was it in 2004 when the act was passed. In practice the issue concerns people frequently selling items via Internet. As far as lack of intervention of the Legislator can be understood, the lack of definite answer provided by the jurisprudence is astonishing given the meticulousness of the tax organs in finding possible tax evasions.

Since 1988, conducting business activities in Poland has been free, but not unlimited. New acts introduce further limitations as regards certain fields of

[1] Ustawa z dnia 2 lipca 2004 r. o swobodzie dziaialnoњci gospodarczej, Dz.U. z 2015 poz. 584

[2] See more: M. Sieradzka, *Komentarz do art.2 ustawy o swobodzie dziaialnoњci gospodarczej,* LEX 2013

business activity, and the freedom of business activities is further hindered by overgrowth of administrative regulations concerning audits. To offer a comparison, the act from 1988, which freed the Polish business contained 5 pages, and the current one contains 77. On the additional 72 pages, there hardly are only provisions aimed at assisting the entrepreneurs.

Insolvency law

As stated above, at the time of the transformation in 1989 there was in force insolvency law, which in all likelihood had not be used for 50 years. It was an act dating as far back as to 1934 and, like all legal acts from that period, was succinct and of highest legal level.

The problem was that there was no qualified staff of judges or trustees of insolvency and not even insolvency courts, and the entrepreneurs themselves had no awareness, as to how employ the regulations in this act. What is more, insolvency law is every legal system a very specific branch of law, and is regarded as more obscure than e.g. law of commercial companies. From that follows, that in 1989 there were good regulations, but Poland lacked infrastructure and lawyers, which could enable proper management of insolvency cases. The problem was solved by rapid changes in the organization of the courts, coupled with necessary training. The trustees of insolvency were attracted by high earning possibilities. The public attention was drawn to insolvency law and its procedure by first notable cases of bankruptcy.

The main trait of the insolvency practice in Poland is the majority of proceedings aiming at liquidation of the bankrupt's property, while the accord proceedings, whose purpose is to preserve the bankrupt's enterprise by the virtue of concessions made by the creditors, are still a rare occurrence. It is a negative phenomenon which has no economic justification. Its causes are likely the immaturity of both the debtors and creditors, who can perceive striking an accord as something "shameful". As a rule, debtors were unwilling to cooperate with the creditors, and the latter preferred to see the debtor's downfall, rather than to participate in the conversion of the liability into shares, which would in turn mean that both creditor and debtors would have to cooperate in respect to the saved business venture.

For approximately 10 years, there has been noted an increase in the accord proceedings, which can only be assessed positively. The abovementioned example clearly shows that the law alone is not sufficient to ensure a proper functioning of a certain aspect of economic life.

It is necessary to build certain awareness among addressees of the legal norms concerning that aspect and preserving the culture of law, both at the level its creation, as well as its execution.

Insolvency law has undergone many a change. The act from 1934 was replaced by the Act on Bankruptcy and Composition from 2003[1]. Currently, from the beginning of 2016 there are two separate acts: Act on bankruptcy[2] and Act on restructuring[3]. The upcoming years will show if the

[1] Ustawa z dnia 28 lutego 2003 – prawo upadiоњciowe i naprawcze, Dz. U. z 2015 r., poz. 233

[2] Ustawa z dnia 28 lutego 2003 – prawo upadiоњciowe, Dz. U. z 2015 r., poz. 233

[3] Ustawa z 15 maja 2015 – prawo restrukturyzacyjne, Dz. U. z 2015, poz. 978

change is a positive one, but there can be many doubts if that is the case[1].

One of the main problems of the Polish insolvency law, with which the Polish practice has not come to terms with, is the notion of bankruptcy, which is necessary for a declaration of insolvency. While the previous definition of bankruptcy, which had been in force until the end of 2015, had some imperfections, with which the jurisprudence and the doctrine tried to cope with difficulties, the new definition is far more complicated, even though it does refer to the previous definition. Only time will show if the new definition will be a better solution to the existing problems, which were considerable. For example according to article 11 (1) of the Act on Bankruptcy and Composition from 2003[2], a debtor was bankrupt, if he permanently ceased to fulfil its due pecuniary obligations.

Not addressing the details, certain obvious points need to raised. Firstly, the Legislator has not mentioned debts at issue. Practice decided that the debts at issue need to be excluded, which was beneficial to the debtors, who tended to file a suit to establish inexistence of an obligation, just to make a debt a debt at issue. This led to sorrowful consequences for the creditors, as it effectively prevented them from starting the insolvency procedures, if they sued the debtors, and they decided to defend their position. Taking into account, that proceedings before Polish courts last for years, the situation of the creditors was unenviable. Secondly, it is incomprehensible, why the debtor who does not fulfill his pecuniary debts can be perceived as a bankrupt, but not a debtor who fails to fulfill the non-pecuniary ones. The new regulations, far more complicated than the previous one, was meant to address these issues but it is far too early to assess its effectiveness.

It needs to be noted that the sanctions for not submitting a petition for bankruptcy by a debtor, are insignificant, as it is up to two years of imprisonment. Interestingly, the penalty for stealing an item of a value exceeding 100 EUR is more severe. On the nationwide scale, the unconditional convictions for imprisonment because of abovementioned crime of not submitting a petition for bankruptcy are alarmingly few. Neither are there effective mechanism to involve a civil liability of those, who failed to fulfil that obligation.

Another issue, faced by the Polish commercial law is a not entirely adequate regulation of the liquidation proceedings, regarding the commercial companies. While a company is easy to be created, it is very challenging to terminate its existence. And what's more it is challenging even if it is not the case of a bankrupt company, subject to insolvency proceedings aiming at liquidation of the bankrupt's property, but merely a company which intends to close its operations, e.g. as a result of fulfilling its original economic purpose[3]. It seems that the current regulations are not

[1] See more:J. Kruczalak-Jankowska, Tendencje zmian regulacji prawnych niewypiacalnoњci przedsiкbiorcyw w prawie polskim, PPH 2016 Nr 1

[2] See more: S. Gurgul, *Komentarz do art. 11 ustawy prawo upadioњciowe i naprawcze*, Warszawa 2004, s. 41

[3] See more: S. Wiodyka, Komentarz do art. 67 KSH, [w:] System Prawa Handlowego, red. S. Wiodyka, Warszawa 2012 oraz A. Soitysicski, Komentarz do art. 2 70 KSH, [w:] Komentarz do Kodeksu Spyiek handlowych, red. A Soitysicski

adjusted to the rapidity of today's business reality, in which companies are treated instrumentally and very often are created to perform only one legal act. The regulations however, seem to be treating them as institutions with yearlong tradition, which simply seems unnecessary.

Consumer

Consumer law is one of the best examples of the evolution of Polish law in the last three decades. Of course, it can be argued, if the consumer law forms a part of commercial law, or it the latter should be interpreted narrowly and limited only to B2B relations. For the purposes of this article it is not important. During the socialism reign, the notion of consumer was not known. Neither were there regulations which would protect the buyers. It has to be admitted, that the regulations of the Civil Code from 1964 and jurisprudence of the courts in the times of Gomułka, Gierek and Jaruzelski protected the buyers as well as the current European directives, regulations, registers and offices. The consumer law is a great example, of the simple truth that thoughtless and automatic copying adjusting of Polish law to Western novelties is not always the way to go. The issues concerning warranty were described above, and thus there is not necessity to discuss them anew.

Another regulation, introduced to adjust Polish legal system to its European counterparts is noteworthy, i.e. the responsibility for dangerous consumers' products. There are many doubts as to, whether the adjustment was at all necessary, and it has been performed correctly.

At this point two problems should be addressed. The first is the notion of the consumer and the second is the register of the abusive clauses and their economic meaning. The defitnion of a consumer has been added to the Civil Code in 2003, it defined the consumer as a natural person who carries out a juridical act which is not directly related to his economic or professional activity[1].

This formulation casued the following problems. Firstly, the Legislator forgot to add that the status of a consumer can only conceivable in confrontation with an entrepreneur, which could suggest – obviously incorrectly – that it is possible to have a C2C (consumer with consumer). This shortcoming was later on erased by the modification from 2014. Secondly, by indicating that only a natural person can be consumer, other entities, which would from teleological standpoint merit a similar protection, were excluded from it. Consumer is by nature a weaker entity than a professional, as a consumer does not have an equal economic power or professional knowledge as a professional, with whom consumer deals. Thus, a group of residents renovating flight of stairs in a building would be perceived as consumers, but the community of residence would never attain such a status.

Of importance are also the register of abusive clauses administered by the Polish Office for Consumer and Competition Protection[2]. The mere assessment of a philosophy of creating a list of abusive clauses is arguable. Personally, I am a declared

[1] See more: T. Pajor, Komentarz do art. 22(1) Kodeksu Cywilnego, [w:] Kodeks Cywilny – Komentarz, red. M. Pyziak-Szafnicka, P. Ksikïak, LEX 2014

[2] See more: A. Olejniczak, Komentarz do art. 385(1) Kodeksu Cywilnego, [w:] Kodeks Cywilny – Komentarz, A. Kidyba, LEX 2014

opponent of limiting the freedom of contracting in general, and in such a way in particular. There are two basic reasons for it. Firstly, a clause may be abusive in one contract (assessed taking into the account the whole agreement), but an identical one in a different contract does not have to have such a character. Besides, a register of clause is a collection of expression, sentences and words, while one thought can be expressed in countless ways. It seems that the register policy is both axiologically (limitation of freedom of contracting and decidedly overprotection of consumers) and methodologically (for the two abovementioned reasons) unfounded.

From the point of view of entrepreneurs the situation is even more disadvantageous, given that they are frequently sued by consumer associations, who demand small sums of money for giving the claim up. Of course, it does not mean, than in the light of how law and contracts themselves are complicated, the consumers do not deserve certain protection and mechanism to ensure it.