

THE CLASS ACTIONS
LAW REVIEW

THIRD EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

THE CLASS ACTIONS
LAW REVIEW

THIRD EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Camilla Sanger

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Tommy Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Janina Godowska

SUBEDITOR

Tessa Brummitt

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2019 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at April 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-020-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARENDE & MEDERNACH

ARNTZEN DE BESCHE

BAKER MCKENZIE

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

CRAVATH, SWAINE & MOORE LLP

DE BRAUW BLACKSTONE WESTBROEK

GORRISSEN FEDERSPIEL

HAMILTON ADVOKATBYRÅ

HENGELER MUELLER

KENNEDYS

KUBAS KOS GAŁKOWSKI

LENZ & STAEHELIN

LOYENS & LOEFF

MATHESON

PINHEIRO NETO ADVOGADOS

S HOROWITZ & CO

SLAUGHTER AND MAY

SQUIRE GAIKOKUHO KYODO JIGYO HORITSU JIMUSHO (SQUIRE PATTON BOGGS)

TAMAYO JARAMILLO & ASOCIADOS

URÍA MENÉNDEZ - PROENÇA DE CARVALHO

CONTENTS

PREFACE.....	vii
<i>Camilla Sanger</i>	
Chapter 1 BELGIUM	1
<i>Hakim Boularbah and Maria-Clara Van den Bossche</i>	
Chapter 2 BRAZIL.....	14
<i>Sérgio Pinheiro Marçal and Lucas Pinto Simão</i>	
Chapter 3 COLOMBIA.....	22
<i>Javier Tamayo Jaramillo</i>	
Chapter 4 DENMARK.....	33
<i>Christian Alsøe, Søren Henriksen and Morten Melchior Gudmandsen</i>	
Chapter 5 ENGLAND AND WALES.....	42
<i>Camilla Sanger and Peter Wickham</i>	
Chapter 6 FRANCE.....	58
<i>Alexis Valençon and Nicolas Bouckaert</i>	
Chapter 7 GERMANY	70
<i>Henning Bälz</i>	
Chapter 8 HONG KONG	80
<i>Mark Hughes and Kevin Warburton</i>	
Chapter 9 IRELAND.....	89
<i>April McClements and Aoife McCluskey</i>	
Chapter 10 ISRAEL.....	98
<i>Hagai Doron and Uriel Prinz</i>	

Contents

Chapter 11	ITALY	113
	<i>Gianfranco Di Garbo and Gaetano Iorio Fiorelli</i>	
Chapter 12	JAPAN	122
	<i>Yuriko Kotani and Haig Oghigian</i>	
Chapter 13	LUXEMBOURG	128
	<i>François Kremer and Ariel Devillers</i>	
Chapter 14	NETHERLANDS	133
	<i>Jan de Bie Leuveling Tjeenk and Bart van Heeswijk</i>	
Chapter 15	NORWAY	146
	<i>Andreas Nordby</i>	
Chapter 16	POLAND	155
	<i>Agnieszka Trzaska</i>	
Chapter 17	PORTUGAL	170
	<i>Nuno Salazar Casanova and Madalena Afra Rosa</i>	
Chapter 18	SCOTLAND	179
	<i>Colin Hutton and Graeme MacLeod</i>	
Chapter 19	SWEDEN	187
	<i>Magnus Rydberg and Ola Hansson</i>	
Chapter 20	SWITZERLAND	194
	<i>Martin Burkhardt</i>	
Chapter 21	UNITED STATES	196
	<i>Timothy G Cameron, Alex B Weiss and Sofia A Gentel</i>	
Appendix 1	ABOUT THE AUTHORS	207
Appendix 2	CONTRIBUTORS' CONTACT DETAILS	219

PREFACE

Class actions and major group litigation can be seismic events not only for the parties involved, but for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this third edition.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, are giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to such protections. Finally, ever-growing consumer markets of greater sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Camilla Sanger
Slaughter and May
London
April 2019

POLAND

*Agnieszka Trzaska*¹

I INTRODUCTION TO CLASS ACTIONS FRAMEWORK

In Poland, the mechanism of pursuing claims in group proceedings, which can be perceived as the ‘Polish version’ of the US class action, has been present since 2010. It was introduced into the Polish legal system by virtue of the Act of 17 December 2009 on Pursuing Claims in Group Proceedings, *Journal of Laws* 2010.7.44 of 18 January 2010 (the Act). This Act is separate from the regulation provided for by the Polish Code of Civil Procedure (CCP).² After several years, the Act was amended in 2017 by virtue of the Act of 7 April 2017 Amending Certain Acts to Facilitate the Seeking of Receivables (Amendment 1);³ the amendments have been in force since 1 June 2017.

The Polish group proceedings are a type of court proceedings facilitating the joint pursuit of many claims that are based on the opt-in model and the principle of representation.

In Article 1, the Act defines group proceedings as civil court proceedings in cases where claims of a single type from at least 10 persons are pursued, based on the same or identical actual grounds.

The Act is an example of the sectoral approach, which means that group proceedings are not permitted in every civil case (which qualifies for examination by a civil court), but in certain categories of cases (the catalogue of which was expanded by Amendment 1).

Thus, group proceedings are permitted in the following cases,⁴ which involve claims:

- a* for liability for a loss caused by a hazardous product;
- b* for torts;
- c* for liability for the non-performance or improper performance of a contractual obligation;
- d* for unjust enrichment; and
- e* in other matters with regard to claims for consumer protection.

As a rule, group proceedings may not be used to pursue claims arising out of the violation of personal rights. This exclusion does not apply to options to pursue claims in group proceedings that result from bodily harm or disturbance of health, including claims of the

1 Agnieszka Trzaska is an attorney-at-law and partner at Kubas Kos Galkowski.

2 Consolidated text of 19 January 2018 published in *Journal of Laws* 2018.155.

3 *Journal of Laws* 2017.933 of 12 May 2017.

4 Prior to Amendment 1, group proceedings were permitted in cases involving claims for the protection of consumers, liability for loss caused by a hazardous product and liability in tort, with the exception of claims for the protection of personal rights.

closest family members of the claimant, deceased as a result of a bodily harm or disturbance of health. However, this category of claims is limited to the request for the establishment of the defendant's liability. The damages in such category of claims have to be pursued in separate civil proceedings.

The entity that holds the sole mandate to institute group proceedings is known as the representative. This function can be performed by a member of the group or a *poviat* consumer ombudsman. All members of the group must approve the person who will act as the representative.

The Act is an example of solutions based on the opt-in model; only persons who directly expressed their willingness to participate in the proceedings by submitting a declaration on joining the group (before the proceedings are instituted or during the second stage, while the group is being formed, see also Section III) may become participants in a group proceeding. The very institution of group proceedings does not preclude the option for the individual pursuit of claims by persons who did not join the group or who have left the group (the admissibility of leaving the group is limited by certain time frames – see Section III.iii). A binding judgment is effective upon all members of the group, although they are not formally a party to the proceedings in which the judgment is issued. Only the group representative is formally the party to the proceedings.

Group cases belong to the functional competence of the regional courts. There is not a single court or several specialised courts competent for these types of cases. Thus, the cases may be examined by one of the 45 regional courts in the Republic of Poland. Group cases are examined by a panel of three professional judges.

Amendment 1 was primarily aimed at increasing the efficiency of group proceedings; it was the legislator's response to certain dysfunctions of the existing solutions revealed in the first years of using the collective redress mechanism.

In accordance with intertemporal regulations, group proceedings instituted before 1 June 2017 are subject to the provisions of the existing (original) Act, while for proceedings instituted after that date, the new wording of the Act shall apply.

The institution of group proceedings is moderately popular in Poland. As evidenced by the statistical data published by the Ministry of Justice, a total of 242 class actions (in the Polish form) were filed in courts from 2010 to 2017.

II THE YEAR IN REVIEW

Summarising the eighth year of the functioning of the Act in the Polish legal system, it should be noted that it was a relatively effective year with regard to resolving group cases previously initiated, at various stages of proceedings. On the other hand, 2018 was also a year in which a decrease in the number of group proceedings initiated before a Polish court was seen. In 2017, there were 17 cases in total (i.e., almost half that in each previous year between 2010 and 2016).

As far as the most interesting decisions are concerned, it is worth pointing out the following. For the sake of clarity they are categorised into phases of group proceedings (for an explanation about phases of group proceedings, see comments in Section III).

i Decisions on cases heard in phase I in 2018***Group proceedings related to Volkswagengate***

At the end of 2018, it was finally determined that the class action related to Volkswagengate would not be examined according to the Act. The Polish courts⁵ held that they had no jurisdiction to hear a case concerning liability for a dangerous product in the form of Volkswagen diesel-powered vehicles manufactured in Germany and equipped with software that manipulates the readings of the exhaust emissions, even if they were purchased in Poland. The court of first instance (and this position was fully accepted by the court of the second instance) stated that jurisdiction should be established according to Article 7(2) Brussels *Bis* (i.e., it should be determined by the place in which the event resulting in damages occurred). The claimant pursued its claim on the basis of the liability for a dangerous product or tort liability (i.e., the manufacture of defective cars and the issue of certificates of conformity for them). Both of these events took place in Germany. Thus, the place in which the event resulting in damages occurred, as the courts established, is the territory of Germany. Polish courts have referred to the achievements of the Court of Justice of the European Union (CJEU), in particular to the judgment of the CJEU of 16 January 2014, C-45/13, *Andreas Kainz v. Pantherwerke AG*, where it was assumed that in the case of an action to determine the producer's liability for a dangerous product, the place of the event giving rise to damages is the place in which the product was manufactured. Therefore, the statement of claims was finally rejected on formal grounds.

The proceedings in this case were initiated by the statement of claim of 29 September 2016. The claimant – a representative of the group – requested the total amount of 1,485,000 zlotys. This amount encompasses damages for two subgroups. In the first subgroup, consisting of 45 members, each member should have received 30,000 zlotys and in the second subgroup, consisting of nine members, each member should have received 15,000 zlotys.

The further group proceedings of the polisokolaty – savings insurance policies

In 2018, further group proceedings instituted against insurance companies in connection with insurance agreements, the *polisokolaty*, were also accepted for examination.

The class action against TU Europa No. 2 in case file No. XXIV C 709/15, by decision of the Regional Court in Warsaw, 24 Civil Division dated 1 February 2018, was accepted. This decision became final following the dismissal of the defendant's complaint by decision of the Court of Appeals in Warsaw, 1 Civil Division, of 4 October 2018, case file No. I ACz 861/18.

By the statement of claims (lawsuit) issued on 15 July 2015, the representative seeks a declaration that there is no insurance relationship between the defendant and the members of the group and that all insurance premiums paid by the members of the group are to be reimbursed or, alternatively (in the event that the above claims are not taken into account), that the provisions relating to the liquidation and administrative fee (management fee) are prohibited contractual clauses and, as such, are not binding on the members of the group and, therefore, that all amounts collected as administrative fees (management fees) by the defendant are to be paid to the group members (as benefits not due to the defendant).

5 See decision of the Regional Court of Warsaw, 3 Civil Division dated 27 November 2017, case file No. III C 1310/16 and decision of the Court of Appeals in Warsaw, 6 Civil Division of 2 October 2018, case file No. VI ACz 537/18.

Case of Border Guard officers against the State Treasury

In spring 2018, the Supreme Court once again expressed its opinion on the prerequisites for the admissibility of group proceedings on the occasion of the case of a group of Border Guard officers against the State Treasury.

The Supreme Court once again presented a more liberal approach than the courts of a lower instance.

In the judgment of 17 April 2018, case file No. II PK 44/17, the Supreme Court decided to examine the case in group proceedings. The class action proceedings initiated by a group of Border Guard officers for payment of compensation for damages arising in connection with the non-adjustment of remuneration of group members in the years 2009–2014 were previously rejected by the court of the lower instance. The statement of claims (lawsuit) filed in April 2015 had previously been rejected in a final manner on the basis of the lack of homogeneity of claims. However, the Supreme Court explained that the premise of the homogeneity of pecuniary claims of group members referred to in Article 1. 1 of the Act should refer to the same type as regards the subject matter of the claim. This premise should not be construed according to the method of claim calculation (claims for compensation are homogeneous regardless of how compensation has been calculated).

ii Phase II

It is also worth noting that in several group proceedings in 2018, decisions on the composition of the group were issued.

iii Decisions on cases pending in Phase III of 2018

In 2018, at least four group proceedings, one of the first initiated on the ground of Act, were resolved as to the merits.

Group proceedings against the administrator of the Pobieraczek.pl website

Thus, in March 2016 the Regional Court in Gdańsk issued a judgment⁶ that takes full consideration of the action brought by a group of consumers – users of the Pobieraczek.pl website against entrepreneurs – administrators or owners of the Pobieraczek.pl website. The Court established the invalidity of Usenet service contracts concluded by 48 members of I subgroup with the defendants and ordered the defendants to pay jointly and severally the amount of 94.80 zlotys to each of the 48 members of I subgroup. This amount should be paid as reimbursement of the undue benefit. For the other subgroups, the court invalidated the service contracts.

The lawsuit initiating the proceedings in this case was filed in March 2012. After the positive certification in 2013, a total of 589 members of the group joined the case in the second phase. The case was suspended for some time, and finally ended in 2018. The defendant has not filed appeal against the decision at the first instance.

Group proceedings related to the disaster of the exhibition hall

Also in April 2018, the proceeding related to the construction disaster of the exhibition hall located in Chorzów, ended in the first instance. The proceedings were initiated by a group of

⁶ Case file No. XVC 1216/12.

persons close to the victims of this catastrophe. Apart from this, the event (which took place in 2006) was an impulse for the Polish legislator in the scope of work on the Act.

The case underwent a long certification phase. Thanks to the landmark judgment of the Supreme Court of 28 January 2015, case file No. I CSK 533/14, the case was recognised as to its merits, by the judgment of 23 April 2018 taken by the Regional Court in Warsaw, case file No. II C 127/15.

The court determined that the State Treasury represented by the President of Chorzów and the District Building Control Inspector in Chorzów is liable in connection with the collapse of the exhibition hall in Chorzów on 28 January 2006 for claims for compensation for significant deterioration in the life situation, owing to the death of the closest family members.

The case was related to a construction disaster that took place on 28 January 2006. During the exhibition of racing pigeons, the roof of the hall of Katowice International Fair in Chorzów collapsed. During the catastrophe there were about 700 people in the hall. As a result, 65 people were killed, including relatives of the group. The group proceedings covered the claims provided in Article 446, Section 3 in conjunction with Article 434 of the Civil Code (CC) and the claims provided in Article 446, Section 3 in conjunction with Article 417 of the CC. The source of claims is the same factual event (a specified construction disaster), being the cause of death of a member of the immediate family of group members.

The evidence in the case showed that the building's faulty structure (the roof and, more precisely, the insufficient strength and stability of the hall structure), overloaded with snow and ice lying on the roof, was the cause of the building's collapse. The State Treasury at the time of the catastrophe was an independent possessor of an exhibition hall that collapsed, hence it was liable under Article 434 of the CC on a risk basis for damage resulting from the collapse of buildings. According to the court opinion there were no exemption circumstances (excluding its liability). As for the second State Treasury organisational unit – the District Building Control Inspector in Chorzów – the court found it liable for the consequences of the disaster. The District Building Control Inspector in Chorzów was held liable owing to failure to fulfil statutory obligations arising under the Polish construction law.

The discussed judgment has already become legally binding – the appeal filed by the defendant was dismissed by the judgment of the Court of Appeals in Warsaw of 23 January 2019, case file. No. V ACa 630/18.

A final determination judgment shall constitute a prejudice for the members of the group to pursue individual claims for damages against the defendant, unless an amicable settlement is reached between the victims and the State Treasury.

Case against GENERALI TU insurance company in connection with polisolokaty

In 2018, the group proceeding brought by a group of clients – represented by the District Consumer Ombudsman in Pruszkowski District – against Generali Życie Towarzystwo Ubezpieczeń SA related to the *polisolokaty* – savings insurance policies ended legally.

The Court of Appeals in Warsaw dismissed the defendant's appeal against the judgment of the Regional Court in Warsaw, 24 Civil Division of 10 May 2017, case file No. XXIV C 554/14.

The judgment of the court of first instance adjudged, in favour of individual group members (divided into subgroups). The court granted reimbursement of the amounts unduly collected from group members by the defendant on the basis of prohibited contractual clauses

in life insurance contracts, 'buyout fees' (collected in the event of termination of investment life insurance contracts).

The statement of claims in this case was filed in 2014. The court found that all 165 members of the group had concluded life insurance contracts with insurance capital funds with the defendant.

The court assumed that the provisions regulating the redemption fee/fee for the total redemption of the policy value do not specify the main benefits of the parties in insurance agreements concluded by the parties with insurance capital funds. The provisions governing the redemption fee/fee for the total redemption of the policy value do not affect the essence of the legal transaction itself. The elimination of this fee from the content of the contract will not render it unenforceable. At the same time, the court assumed that these provisions were contrary to good practices. Having found that the clause relating to the redemption fee is abusive, the general terms and conditions of the agreement and the general provisions on obligations are inapplicable.

The court found that members of the group should be reimbursed on the basis of the provisions on undue performance – Article 410 of the CC.

Customers of Duo Express (consumers) against Getin Noble Bank SA

In autumn 2018, the case against Getin Noble Bank related to the actions of its agent was also finally concluded.

In its judgment of 29 April 2015, the court of first instance, case file No. I C 709/12, awarded the amount of 5,665,040 zlotys with statutory interest from 4 March 2013 until the date of payment, determining the amounts due to individual group members allocated to 44 subgroups. Court of Appeals in Gdańsk, 5 Civil Division, by judgment of 26 September 2018, case file No. V ACa 722/15 dismissed the defendant's appeal.

The case concerned claims for damages of group members who suffered damage as a result of fraud committed by the agent Duo Express, a franchisee of the defendant bank, while performing activities entrusted to it by the bank in franchise outlets of the bank that resulted in the fact that the members of the group, entrusting Duo Express with their savings, remained convinced that they concluded agreements on savings products with the defendant bank, and not with Duo Express as its franchisee. The court found that the bank is liable for damages suffered by the claimant and members of the group on the basis of the provisions of Articles 429 and 415 of the CC (i.e., the bank is liable in tort).

The defendant bank entrusted the performance of certain banking activities to an agent by concluding an agency agreement with him of 15 October 2008. The agreement included the performance of certain banking activities in the name and on behalf of the defendant. The agent, on the other hand, also concluded agreements in the outlets operated by the agent, to which the defendant bank was not a party, designated as an investment loan. Following the conclusion of those agreements, the claimant and the members of the group suffered damages and the damages were functionally linked to the activities entrusted to the defendant bank agent by the defendant bank on the basis of an agency agreement. The court assumed that the agent of the defendant bank caused damage to the claimant and members of the group while performing the activities entrusted to it under the agency agreement. Such activities were functionally related to the banking activities performed.

The agent intertwined prohibited activities with banking activities performed under the agreement. As a result, the injured parties believed that the agreement concluded by

them concerned a banking product. The court found that the defendant failed to prove the circumstances excluding his liability (i.e., that he took due care when selecting an agent).

In 2018, the provision concerning the limitation period was amended (see Section III.i: Limitation).

III PROCEDURE

Polish group proceedings are court proceedings described by specific stages; the legal regime of the proceedings is prescribed by the provisions of the Act and the provisions of the CCP.

Apart from group proceedings, which is a mechanism for the collective pursuit of claims, the provisions of the CCP provide for certain institutions related to the number of entities in court proceedings.

Under the CCP, collective actions by representative bodies, for example, consumer organisations or interest groups, are not possible.

The CCP allows for actions to be brought by non-governmental organisations regarding their chartered objects in specific categories of cases (e.g., environmental protection and consumer protection), but these proceedings involve an individual action for a specific natural person that may be, in addition, submitted only with the written consent of such a person.

The institution of ‘co-participation’, where multiple entities are present on one side of the litigation (the claimant’s or defendant’s side), features among typical institutions that tackle the issue of multiple entities, as part of the classic bilateral process. The CCP distinguishes between formal and material co-participation. The first occurs when the subject of the litigation involves claims or liabilities of a single type, based on the same factual and legal basis if, in addition, the jurisdiction of the court is justified for each separate claim or liability as well as for all of them jointly. Material co-participation takes place if the subject of the litigation involves joint rights or obligations of several entities or rights or obligations based on the same factual and legal basis.

In addition, several individual cases can be merged procedurally for joint examination and resolution or for examination only. Such merging is merely technical in nature, the cases still have a stand-alone nature and maintain their separateness.

i Types of action available

In accordance with the wording of provisions of the Act (Articles 1 and 2) the following premises (preconditions for the admissibility of group proceedings) should be met:

- a* homogeneity of claims of the group members;
- b* identical (the same) or, similar (equal) factual grounds (basis) of claims (common factual grounds for claims sought);
- c* size of the group (number of members);
- d* whether the claims can be examined in group proceedings given their object (whether the claims belong to one of the categories of cases – see above); and
- e* in addition, for pecuniary claims, Article 2.1 of the Act provides for standardisation of the amount of the pecuniary claims of individual group members.

The requirement of homogeneity means that a representative should apply to the court on behalf of each member of the group for legal protection in the same form, for example, for establishment or for payment (sometimes there is a requirement that the claims result

from the same type of legal relations). As the Supreme Court explained in its decision of 28 January 2015, Case File No. I CSK 533/14:

[i]n this provision, the legislator used the 'claim' term in the procedural meaning, namely as seeking of adjudication of a performance or establishing the existence of a legal relation or law or the formation of a legal relation or law. The need to pursue a 'single type of claim' in group proceedings, within the meaning of this provision, means that all claimants should seek the adjudication of the performance or the establishment or formation of a legal relation or law.

In the last decision issued on 17 April 2018, case file No. II PK 44/17, the Supreme Court additionally indicated that the premise of homogeneity should be understood functionally. It means that the type of claim and the method of its calculation are two separate things, therefore the duality of the mechanism used to calculate it (common to all participants) does not oppose the homogeneity of the claim.

Next, claims by members of a group sought in group proceedings, should be based on the same (identical) or similar (equal) factual grounds. Fulfilment of this premise usually raises most doubts in practice. It is assumed that the factual ground of a claim is the main set of facts constituting the basis for the disputed legal relationship and a specific claim; however, the scope of the factual grounds of a claim does not include factual circumstances that affect the amount, objective scope or maturity of the claims.

The requirement for the size of the group means that the proceedings should encompass at least 10 claims.

From the viewpoint of interpretation of the provisions that lay down the premises for the admissibility of group proceedings, the first statements of the Supreme Court based on the Act were of particular importance. The following decisions are of note: the judgment issued in the case of a group of closest persons injured as a result of a disaster construction (i.e., decision of the Supreme Court, Civil Chamber, of 28 January 2015, Case File No. I CSK 533/14); judgment of the Supreme Court, Civil Chamber, of 14 May 2015 Case File No. II CSK 768/14 issued in the case involving a group of consumers pursuing the establishment of liability for damages of a bank for the improper performance of the contract (more precisely, provisions on the method in which interest was accrued on the bank loan); and the resolution of the Supreme Court of September 2015 regarding the case of a group of local government units against the State Treasury related to the incorrect implementation of the EU law (fees charged in connection with vehicle records).

In the first of the judgments mentioned above, the Supreme Court stressed the need to take the essence, purpose and functions of group proceedings in the course of interpretation of provisions of the Act into account.

When the Supreme Court issued these rulings, the courts examining Polish class actions began to be more open in their judicature towards group solutions for pursuing claims, while the interpretation of the provisions of the Act became more in favour of certification. Since mid-2015, and in particular in 2016, a number of cases have been positively certified, for example, a series of cases against insurance companies related to unfair contractual clauses (pertaining to insurance of a low down payment for a mortgage loan, the liquidation fee).

The group proceedings have no limitations as to the method of shaping the demand for the statement of claim; a class action may be an action for performance (adjudication). In the case of adjudication, the amount of claims sought by various group members must be standardised. A class action may take the form of an action for establishing the legal relation

or the right (Article 189 of the CCP) or an action for establishing liability (Article 2.3 of the Act). It is also possible that the demand for a class action involves the demand for shaping the right or legal relation (only in such cases where filing such an action is permitted).

Currently, after Amendment 1, standardisation of the amount of claims means that group members have to, altogether or in at least groups of two, seek payment from the defendant in the equal amount (previously the Act required that the standardisation took place after the consideration of the ‘common circumstances of the case’, which gave rise to doubts and resulted in a different approach of the courts to the interpretation of common circumstances). Now, a sufficient criterion for standardisation is the criterion of the amount.

Action for establishing liability

An institution unique to group proceedings is the action for establishing liability; the essence of this action was explained by the Supreme Court in the said ruling of 25 January 2015, arguing that:

In these proceedings, the declaratory judgment regarding a large group of persons is aimed solely at establishing defendant's liability for a specific event and does not concern establishing whether damage was incurred by each of the individual group members. This may, but does not have to be, the subject of assessment only in individual trials, as long as, after the statement of claim for establishing liability is accepted, no individual out-of-court settlements are concluded, which is one of the purposes of issuing such a judgment. If individual trials take place, where a judgment issued on the basis of Article 2.3 is a precedent, then, in such proceedings, individual circumstances will be examined, such as the origin of the damage and its amount, causal link, contribution or limitation if any, as long as it applies to individual claims only and not to all group members. The subject of group proceedings for the demand for establishment are only circumstances that are common to all group members and not individual circumstances of individual members to be examined during individual trials at a later date.

As regards the action for establishing liability, the issue of the defendant's liability is separated from the size of such liability.

The legislator essentially ‘implemented’ the solutions proposed by the Supreme Court to the Act in the form of Amendment 1 to Articles 2.3 and 2.4 of the Act, where it was specified that the purpose was to establish the defendant's liability for a specific event or events. The statement of claim should indicate the pecuniary claim for which such a claim is pursued. When accepting the action, the court establishes circumstances that are common to group members.

Limitation

The institution of limitation in the Polish law is an institution of substantive law and not of procedural law. The provisions of substantive law determine the deadline after which, in the event of inaction of the entitled party, specific claims expire (strict time limits) or lose their ability to be enforced (limitation periods). In 2018, the provisions of the Civil Code defining the length of general limitation periods were amended. And so, currently, unless specific provisions provide for different periods, the general period of limitation for all property claims is six years (not 10 years), and for claims for periodic performance and claims related to business activity – three years. The limitation period for claims for compensation under tort liability is specifically regulated. A claim of this sort lapses, in principle, after three

years since the date on which the injured party established the damage and the identity of the perpetrator. However, this period may not be longer than 10 years since the date of the event giving rise to the damage.

The period of limitation for compensation for damage resulting from infringement of competition law is longer, amounting to five years, and its course does not begin to run as long as the infringement is still ongoing and is suspended (the limitation period) for the time of duration of proceedings before state or EU authorities concerning the infringement of competition law.

In addition, also in 2018 a change was introduced in the scope of counting the end of the limitation period – according to the newly introduced rule – the limitation period takes place on the last day of the calendar year. This rule does not apply to limitation periods of less than two years.

The Act itself contains no specific regulation on the limitation period for the claims of particular group members. The Act provides that, for a claim of such person, the effects of filing a claim in group proceedings (i.e., primarily an effect of suspension of the limitation period for such claim) shall remain only in the following situations: (1) when a group member files an individual group statement of claims covered by the rejected statement of claims, within 12 months of the decision on the rejection of a group action becoming final; and (2) when a person who joins the group but is not covered by the final court decision on the composition of the group files an individual statement of claims within six months of such decision.

Before 2018 the court was never required to consider the consequences of the lapses of limitation periods *ex officio*, but only when such defence (objection) is raised by the opposite party. As of 9 July 2018, special rules on the consequences of limitation periods apply to consumers. Thus, in accordance with the new Article 117.2, Section 1 of the CC, after the expiration of the limitation period, no claim against the consumer can be claimed. The statute of limitations on a claim against a consumer therefore deprives the claim of its actionable nature. This means that the court is obliged to take into account the limitation period of the claim against a consumer *ex officio*. In addition, in certain special circumstances, the court may disregard the statute of limitations for consumer claims

ii Commencing proceedings

The entity exclusively mandated to institute group proceedings is the representative, which acts on its own behalf but in the name of all the group members. This function can be performed by a member of the group or a *poviat* consumer ombudsman. Group members agree that a certain person should act as a representative. From a procedural viewpoint, that person is solely a claimant in the group proceedings. The Act introduces the requirement for the representative to act via a professional legal counsel. Apart from that, the Act does not regulate the internal relations between the representative and group members; in practice, an agreement is usually concluded to regulate such issues.

Current solutions are based on the opt-in model. Group proceedings are open only to persons who express their willingness to join the group clearly. The Act does not require the group or class to be defined or specified. The announcement on the commencement of proceedings (see below) should basically provide what claims can be referred to the proceedings by submitting a declaration on joining the group. Such a declaration can be submitted by every person (as long as such a person is capable of acting in court proceedings) and, of course, provided such a person has a claim that can be covered by group proceedings.

The provisions of the Act do not provide for limitations as to nationality or place of domicile of persons joining the group (for example, as regards claims for damages, where the loss was incurred on the territory of Poland, the place of domicile of the group member is irrelevant). The Act does not provide for specific provisions as to jurisdiction; general rules prescribed by EU legislation or relevant provisions of the CCP apply.

Costs

The Act does not include any specific regulations pertaining to the financing of group proceedings; in general, the Polish provisions lack regulations on the financing of proceedings by third persons.

The loser pays the costs rule is in force. The group representative is the sole claimant, and he or she is formally required to bear the costs of the proceedings.

The Act does not regulate the rules for the redistribution of the costs related to the group proceedings (including the costs of legal services) or any allocation to common costs and the costs attributable to each individual claim inside the group. These issues are left to be arranged between the group members. In practice, usually all group members participate in the costs related to the commencement and conducting of the group proceedings, but the Act does not provide for such a requirement. Group members may freely agree on internal relations among them. It is usually agreed that each member pays a fixed or lump-sum amount or it is agreed that such costs are incurred by an entity in proportion to the value of the claims pursued by them.

The CCP's provisions define the costs of the proceedings not as the costs actually incurred by a party, but the costs necessary for the reasonable pursuance of rights or reasonable defence. These costs also include fees paid to legal counsel, but may not be more than six times a specific minimum rate. The court decides on the cost of proceedings in the decision concluding the case in the given instance.

iii Procedural rules

Group proceedings are divided into stages. Compared to an ordinary individual trial, there are four stages, including two specific stages that precede the substantive examination of the merits of the case that can be distinguished for group proceedings: stage one is the certification stage and stage two involves shaping the composition of the group.

The first stage, namely the certification stage, is when the court examines whether a specific case can be examined as a class action. A statement of claim in group proceedings should contain a motion to examine the case in this procedure with substantiation. Based on these arguments, the court examines whether the premises for admissibility of the group proceedings are met (as discussed above). If the result of the examination is positive, the court issues a decision on examination of the case in group proceedings, and if the result is negative, the court rejects the statement of claim. Previously, the Act required the decision on this subject to be passed after the court hearing (which prolonged this stage). Currently, for statements of claim brought after 1 June 2017, such a decision may be made at a closed session. Before a decision on this subject is made, the court orders that the defendants submit a response to the statement of claim, where the defendants may object to the case being examined in this procedure.

The 'certification' decision may be challenged in the court of appeals. In accordance with Amendment 1, when the decision on the examination of the case in group proceedings

becomes final, the admissibility of group proceedings is not subject to re-examination in the further course of the proceedings.

The decision on the dismissal of the complaint on the decision to reject the statement of claim may be appealed against with a cassation complaint in the Supreme Court. In admitting the cassation complaint, the Supreme Court may repeal the appealed decision and issue a ruling on examination of the case in the group proceedings.

The second stage is shaping the group. This stage begins with an announcement on the commencement of the proceedings and ends when the decision of the court on final group members becomes valid. As regards the method of announcement publication, at present, the provisions of the Act let the court choose the method most appropriate for the given case.

The contents of the announcement are proposed by the claimant, and the court orders the announcement to be published. The publication of the announcement on the commencement of group proceedings⁷ is to facilitate notification of all those potentially interested in joining the group. In particular, the announcement may be published on the pages of the public information bulletin of the competent court, on websites of the parties or their legal counsel or in the nationwide or local press. The announcement on the commencement of group proceedings can be skipped if the circumstances of the case show that all group members submitted declarations on joining the group.

Declarations on joining the group from new members are referred to the representative. Based on such declarations, the representative prepares a letter with a list of group members and the declarations. The court delivers a list of group members to the defendant and sets the date for filing objections as to the membership of individual persons in the group. The defendant may challenge the membership of a person in the group by arguing that the claim of that person is different from the claims of other members, for example, that it is based on different factual grounds or does not meet other criteria that the court considered during the certification. Then, the court issues (at a closed session or during the court hearing) a decision on the composition of the group, where it lists, by full name or business name, the persons who are members of the group and specifies membership in subgroups if the group members are divided into subgroups. This procedural decision can also be challenged with a complaint.

As regards proving that a person belongs to the group, for cases involving pecuniary claims, the Act requires the claimant (representative) to prove such a membership, in other cases making the fact plausible is sufficient.

Filing a complaint against the decision on the composition of the group does not suspend the substantive examination of the case.

When the decision on the composition of the group becomes final, attempts by members to leave the group becomes ineffective.

The third stage of the proceedings is the examination proceedings as to the merits of the case. In this scope and with regard to the manner of conducting the proceedings to take evidence, the Act introduces no provisions that would be different from those in force for

7 The announcement on commencement of group proceedings should include (Article 11.2 of the Act): (1) identification of the court before which the group proceedings are conducted; (2) designation of the parties to the proceedings and designation of the subject of the case; (3) information about the possible joining the group by persons whose claims may be included in the class action by presenting the group representative, by the prescribed time limit not shorter than one month and not longer than three months from the announcement date, with a written declaration on joining the group; (4) rules of remuneration of the legal counsel; and (5) a mention of the binding effect of the judgment on group members.

ordinary proceedings. The progress of the proceedings depends on the subject of the case – Polish procedure does not provide for a disclosure institution.

Certain differences are evident at the stage of issuing the judgment. First, the court is obliged to list all the members of the group or subgroup in the judgment (operative part). If the judgment involves pecuniary performance, the court should determine the amount attributable to each member of the group or subgroup separately.

Second, in each case involving a pecuniary claim examined in group proceedings, where the amount of the claim of any of the group members cannot be precisely proven or proving it is particularly difficult, the court may adjudicate, in the judgment, at its own discretion, the amount in favour of that group member that is not greater than the standardised amount of the claim (given the prohibition to make a judgment in excess of the demand). The court may adjudicate based on consideration of all the circumstances of the case and based on the accumulated evidence. To use such an option, the court should hear the parties on the amounts adjudicated in favour of members of the group or subgroup. If the parties present agreeing motions on the amounts attributable to members of the group or subgroup, in accepting the statement of claim, the court shall be bound by such motions, in accordance with Article 20a.2 of the Act, with regard to the amount attributable to members of the group or subgroup.

The fourth stage is the stage of performance of a final and binding judgment. As regards the enforcement of a pecuniary performance, the enforcement can be instituted by any member of the group or subgroup to the extent of the amount adjudicated in their favour, based on the excerpt from the judgment (Article 22 of the Act). As regards cases involving non-pecuniary performance, enforcement of the adjudicated performance is instituted upon the motion of the representative of the group. Six months after the day on which the judgment becomes binding, if the representative of the group does not put forward a motion for instituting the enforcement, the enforcement is instituted upon the motion of any of the group members.

The speed of proceedings was unsatisfactory in the first years; it is evident that, at present, the cases are processed much faster.

An institution unique to group proceedings is the option for the defendant to demand that the claimant pay the deposit to secure the costs of proceedings. The intention of the legislator was to introduce the deposit as an instrument to deter claimants from rashly bringing class actions.

From the moment the Act came into force, the institution of the deposit is optional, which means that if the defendant files a motion, the court may, but does not have to, commit the claimant to deposit a relevant cash amount as the deposit to secure the costs of proceedings. Initially, the Act did not specify the criteria to be followed by the court in reviewing the motion; such criteria were introduced by Amendment 1. Based on the current wording of the Act (Article 8), the court may issue a decision to oblige the claimant to submit a deposit to secure the costs of proceedings if the defendant makes plausible that the action is groundless and that the lack of the deposit would prevent or considerably hinder the execution of the ruling on the costs of proceedings if the action is dismissed. Circumstances that justify imposition of the obligation to submit the deposit can be, among others, the poor financial situation of the representative (a party) and the lack of regulations applicable to the rules of payment of the costs of proceedings within the group. The court decides on the amount of the deposit in its decision, having regard to the likely sum of costs to be incurred by the defendant. The deposit cannot exceed 20 per cent of the value of the object

of the dispute. Although the motion for obliging the claimant to submit the deposit should be placed by the defendant at the first procedural action, the court adjudicates on the deposit when the decision on the composition of the group becomes final. Amendment 1 introduced this rule so that the deposit can be incurred equally by the group although formally only the claimant (i.e., the representative is obliged to pay it). If, during the case, it transpires that the deposit is insufficient to secure the costs of proceedings, the defendant may demand an additional security. If the deposit has not been submitted during the time frame set by the court, the court suspends the proceedings, and if the deposit is not paid within the next three months, the court rejects the statement of claim or the appeal.

iv Damages and costs

The issues related to damages and their legally permitted amount are governed by substantive law. Polish law incorporates a principle that the damages must not exceed the loss actually suffered by the claimant. Therefore, the damages should correspond to the amount of the loss, and the amount of the damages is determined on a 'differential method' basis. This is based on comparing the assets that would have existed had there been no event causing the loss to the current state of affairs. The principle of *compensatio lucri cum damno* also applies. It is essential that the court may adjudicate, in favour of each group member, an appropriate amount (not greater than the standardised amount) pursuant to Article 322 of the CCP in conjunction with Article 20a of the Act.

In Polish civil law, the general assumption behind the liability for damages is to reinstate the condition that would have existed had the loss event not occurred (Article 361, Section 2 of the Civil Code). The damages remedy the loss and, as a rule, the amount must not exceed the amount of the loss. This also applies to remedying a non-pecuniary loss; the cash compensation for the claimant for the loss incurred should correspond to the size of the loss.

Polish law does not include the concept of punitive damages.

One of the elements of the costs of proceedings are the costs of court representation – the losing party does not refund the winning party for the costs actually incurred but the costs recognised on a lump-sum basis, being the amount of the specific minimum rate (in the range from one to six times the amount). The Act provides for the option to pay the success fee.

v Settlement

The progress of mediation proceedings is governed by provisions of the CCP. The Act stipulates that in group proceedings, the court may refer the parties to mediation at any stage (Article 7). There are no specific rules for conducting mediation proceedings in group proceedings. It should be assumed that the representative will participate in the mediation. In entering the mediation, the representative should consider that it should obtain the consent of at least half of the group members to reach a settlement and for other dispositive actions.

In accordance with Article 19 of the Act, withdrawal of an action, withdrawal or limiting the claim and conclusion of a settlement require the consent of more than half of the group members.

A settlement is subject to control by the court, which may find reaching the settlement inadmissible if circumstances of the case show that this stands in conflict with the law or good manners, aims at circumventing the law or is a gross violation of interests of group members.

To date, only a fraction of class actions have ended with a settlement. At least one of the cases brought against an insurance company and one against a developer ended with a settlement: the former at the preliminary stage of the certification and the latter at the stage of merits.

IV CROSS-BORDER ISSUES

The Act may be quite attractive considering the fact that nine Member States of the EU still have no mechanisms of pursuing claims in group proceedings, for example, with regard to pursuing claims for infringement of the competition laws.

The Polish class action is available to overseas claimants, as long as they have claims included in the proceedings and as long as they are willing to participate in the case by submitting a declaration on joining the group.

To date, case law has not considered the issue of whether a judgment issued in a foreign class action procedure would be recognised or subject to an execution clause in Poland. It should be noted that Polish provisions are quite liberal. As regards the legal order clause, it should be noted that the Polish law follows the principle that the damages must not exceed the loss and the judgment adjudicating punitive damages would certainly be met with the refusal to be recognised or declaration of enforcement as being in contradiction of the proportionality principle of civil law measures against the perpetrator of the damage.⁸

V OUTLOOK AND CONCLUSIONS

Currently, more than 50 class actions (approximately) are pending in Polish courts (at various stages of the proceedings). Considering the number of all cases brought, it could be said that the institution of group proceedings is relatively popular.

Undoubtedly, the changes introduced in Amendment 1 eliminated the shortcomings that were identified as reasons for excessively lengthy group proceedings. In the future, considerable improvement in this regard should be expected.

In addition, the introduction to the Polish legal system of group proceedings based on the opt-out model for the same types of cases is still being considered at the ministerial level.

8 See the judgment of the Supreme Court of 11 October 2013, Case File No. I CSK 697/12.

ABOUT THE AUTHORS

AGNIESZKA TRZASKA

Kubas Kos Gałkowski

Agnieszka Trzaska is an attorney-at-law and partner at Kubas Kos Gałkowski. Agnieszka specialises in civil substantive and procedural law. She represents clients in court proceedings, including group proceedings, and provides consultancy services to commercial entities in the scope of the widely understood civil, commercial and companies law. She has extensive experience in complicated civil cases, in which problems in the scope of private international law and international commercial arbitration occur, as well as in business matters, including disputes between company shareholders. She is always concentrated on implementing an effective procedural strategy, tailor to a given dispute and client. In her practice she has conducted successful negotiations aimed at the amicable settlement of disputes. An effective consultant and negotiator. She has participated in dispute resolution for clients from the telecommunications, industrial and FMCG sector. She is also experienced in projects in the scope of bankruptcy proceedings as well as in the works of a team ensuring the comprehensive provision of legal services to one of the leading banks in Poland. She possesses vast knowledge in the scope of group proceedings, currently heading the team conducting group proceedings of flood victims from Sandomierz and Płock against the State Treasury and the remaining relevant entities. She also represents one of the largest banks in Poland in a group action of the group of Franc-debtors – persons that took out a mortgage loan denominated to the Swiss francs. Agnieszka is the main editor of the portal on class actions in Poland and worldwide: www.classaction.pl.

KUBAS KOS GAŁKOWSKI

Al. Armii Ludowej 26
00-609 Warsaw
Poland
Tel: +48 22 206 83 00
Fax: +48 22 206 83 02
agnieszka.trzaska@kkg.pl
www.kkg.pl

Law
Business
Research

ISBN 978-1-83862-020-2