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ACCESS TO THE SUPREME COURT – POLISH APPROACH

I. In Polish civil proceedings a cassation complaint, as the most basic extraordinary appellate measure¹ enabling access to the Supreme Court, allows for engaging in polemics with regard to the manner of appropriate application and interpretation of the law. The Supreme Court is not the third instance court allowing for the presentation of one's own point of view and opinions on a given matter. The Supreme Court does not adjudicate in cases, but it exercises control over courts of general jurisdiction and it examines whether they do or do not infringe legal acts with their judgments². The institution of cassation complaint allows the Supreme Court to act as a link between the courts of general jurisdiction and it provides coherent guidelines as to how to apply the law³. Proper and efficient functioning of cassation proceedings requires the adoption of numerous mechanisms leading to the limitation of access to the Supreme Court.

A cassation complaint has always had a control-based character, although over the years it has undergone significant evolution in the Polish law. Throughout the last dozen or so years the cassation complaint evolved in a way which bears resemblance to the classic cassation⁴. In 1996 the cassation system substituted the previously prevailing revisional system⁵. In the beginning, cassation was an ordinary appellate

¹ The Supreme Court also examines complaints pertaining to the statement of inconsistencies of legally valid judgments with the law, complaints, complaints regarding the unreasonable length of the proceedings, as well as undertakes resolutions answering the appearing legal issues.

² T. Ereciński, *Entwicklung der Regelung der Kassation in Zivilsachen in Polen*, w: *Festschrift für Walter H. Rechberger zum 60. Geburtstag*, Wien 2005, p. 121.

³ Z. Hahn, *Kasacja wedle polskiego Kodeksu postępowania cywilnego [Cassation complaint in Polish Code of Civil Procedure]*, *Czasopismo Sędziowskie* 1932, nr 1-2, p. 2.

⁴ T. Zembrzuski, *Ewolucja charakteru skargi kasacyjnej w polskim postępowaniu cywilnym [Evolution of a cassation complaint in Polish civil procedure]*, in: *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych [Evolution of the Polish civil procedure in view of political, social and economical changes]*, Warszawa 2009, p. 338.

⁵ Law amendment: Ustawa z 1.03.1996 r. o zmianie Kodeksu postępowania cywilnego, rozporządzeń Prezydenta Rzeczypospolitej – Prawo upadłościowe i Prawo o postępowaniu układowym, Kodeksu postępowania administracyjnego, ustawy o kosztach sądowych w sprawach cywilnych oraz niektórych innych ustaw (Dz.U. Nr 43, poz. 189).

measure. It fulfilled the role of the third instance. Due to the protraction of the cassation proceedings and the overload of the Supreme Court⁶ with cassation complaints⁷, an additional mechanism for selecting cassation complaints was introduced in 2000⁸, i.e. a preliminary procedure designed to select cassation complaints which will be examined by the Supreme Court. This change put an emphasis on the importance of the public interest over the private interest of the parties. One can easily notice that all these changes aimed at limiting the access to the Supreme Court. As a result of this evolution, the cassation complaint was transformed into an extraordinary appellate measure in 2004⁹. As the view on the number of instances was reevaluated in relation with the notion of reliable and just proceedings, it was decided that the cassation complaint would be excluded from the so-called course of instances¹⁰.

II. The reviewed borders of accessibility to the Supreme Court are an effect of experiences from both the inter-war period as well as the last years¹¹. They are also an expression of the expectations related to the functioning of this institution.

A cassation complaint is regulated in articles 398¹ - 398²¹ of the Polish Code of Civil Procedure. As far as the cassation complaint is concerned, the access to the Supreme Court in Poland is shaped at two levels, i.e. the admissibility of a complaint and the acceptance thereof for examination¹². As a result of the abovementioned restrictions in the access to the Supreme Court, it examines only the cases of significant complexity and gravity. These mechanisms protect the Supreme Court against an excessive number of cassation complaints which would be filed on a daily basis.

⁶ In 2000 the average expectation time for having a cassation complaint examined was about three years. Nowadays it is about eleven months.

⁷ J. Gudowski, *Kasacja w świetle projektu Komisji Kodyfikacyjnej Prawa Cywilnego (z uwzględnieniem aspektów historycznych i prawnoporównawczych)* [Cassation in view of the Civil Law Reform Commission (with consideration of historical and comparative legal analysis aspects)], *Przegląd Legislacyjny* 1999, nr 4, p. 4.

⁸ Law amendment: Ustawa z 24.5.2000 r. o zmianie ustawy – Kodeks postępowania cywilnego, ustawy o zastawie rejestrowym i rejestrze zastawów, ustawy o kosztach sądowych w sprawach cywilnych oraz ustawy o komornikach sądowych i egzekucji (Dz.U. 48, poz. 554).

⁹ Law amendment: Ustawa z 22.12.2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz ustawy – Prawo o ustroju sądów powszechnych (Dz. U 2005 r, Nr 13, poz. 98).

¹⁰ T. Ereciński, *Ograniczenia w dostępności do kasacji w sprawach cywilnych* [Limitations in the accessibility of cassation in civil cases], in: *Prace z prawa prywatnego. Księga pamiątkowa ku czci sędziego Janusza Pietrzykowskiego* [Elaborations on private law. Commemorative book in memory of the judge Janusz Pietrzykowski], Warszawa 2000, p. 73.

¹¹ T. Ereciński, *Kilka uwag o modelu kasacji w sprawach cywilnych* [Some remarks on the model of cassation in civil cases], in: *Studia Iuridica* 1994, book XXI, *Z zagadnień współczesnego prawa cywilnego* [From the issues of the modern civil law], p. 96.

¹² T. Zembrzuski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym*, [Cassation complaint. The availability in civil proceedings], Warszawa 2011, p. 115.

III. The cassation complaint may be used in both litigious and non-litigious proceedings¹³. However, it is not admissible in enforcement proceedings.

The criteria of admissibility of cassation complaints are varied and they include a set of prerequisites which condition the effective submission of this extraordinary appellate measure. Submission of the admissible complaint, i.e. a complaint that is appropriately drawn up by a person who is entitled to do it, opens a possibility of subjecting it to a preliminary procedure which results in selecting the cases which will be later examined by the Supreme Court.

The Code specifies the situations in which the cassation complaint can be effectively filed as well as the situations in which its submission is not allowed. This category includes the so-called legally existing judgments (*sententia existens*), entitlement to submit a cassation complaint, suitability of a judgment with a cassation complaint, limitations of *ratione materiae* and *ratione valoris*, as well as the submission of a complaint within a specified period of time. The analysis of regulations allows to ascertain whether in a given case a given entity is entitled to submit such a complaint. An admissible complaint is the one which may be filed by a given entity in relation to a specific judgment, the one which fulfils all the structural and formal elements, the one which was appropriately paid for and submitted by an attorney within a required time limit. Failure to fulfill any of the abovementioned conditions leads to the inadmissibility of a cassation complaint. As a result of it, a cassation complaint will be rejected.

IV. Submission of a cassation complaint is dependent on the exhaustion of the so-called course of the instance. In Polish civil procedure there is no possibility of submitting a cassation complaint if the appeal instance was omitted by a party (the so-called *leap-frog procedure*). The legal validity of a judgment of a court of the second instance is the precondition for the admissibility of a cassation complaint¹⁴. A cassation complaint may be filed only against a judgment which ends the proceedings in a case, i.e. which finishes the dispute. Therefore, a party cannot effectively submit a complaint against a cassatory verdict of a court of the second instance. An extraordinary appellate measure can be used exclusively against judgments of utmost procedural significance. A cassation complaint in the Polish civil procedure may be filed against legally valid verdicts of a court of second

¹³ In cases examined in non-litigious proceedings the Polish Code of Civil Procedure specifically determines the catalogue of cases in which a cassation complaint can be filed.

¹⁴ T. Zembrzuski, *Skarga kasacyjna...*, p. 169.

instance, as well as some decisions completing the proceedings in a given case¹⁵. A cassation complaint may be used exclusively against the decisions which bring about the most significant procedural effects, i.e. the ones pertaining to the rejection of a lawsuit and discontinuation of proceedings.

A cassation complaint may be submitted only by a party to the proceedings¹⁶. In some cases such an entitlement is granted to the Attorney General, the Polish Ombudsman or the Ombudsman for Children, if the complaint touches upon the issues of a public character and is related to the scope of activity of these entities. The entitlement of a party to file a cassation complaint is of major relevance. If a person entitled to file a complaint does so, the entitlement of other entities to file a complaint is excluded in this regard.

V. The limitations of *ratione materiae* make it possible to conduct a qualitative decision-making policy by means of excluding specific types of cases from the control of the Supreme Court. These exclusions are of an enumerative character. They constitute a catalogue of non-cassation cases. It is assumed that some cases do not require the examination by the Supreme Court, because the priority should sometimes be granted to the efficiency and rapidity of the proceedings¹⁷.

The causes for limiting the access to the Supreme Court are varied¹⁸. One may enumerate the need for a quick adjudication of a dispute, a lower rate of complexity of certain matters or a low value of the subject matter of the dispute. A cassation complaint is not admissible for instance in cases regarding divorce, separation, alimony, lease and tenancy rent, as well as the infringement of one's possession. Automatic enumeration of the category of non-cassation cases, in which no controversies, errors or doubts exist, seems disputable.

Limitations of *ratione valoris* are of a quantitative character and relate to cases regarding property rights. The inadmissibility of a cassation complaint is influenced by the appraisal of the value of the subject matter of a claim. Its indication in the complaint is the obligation of the plaintiff. The complaint is in principle inadmissible, if the value of the subject matter of the claim is lower than 50,000 PLN¹⁹; whereas in cases pertaining to

¹⁵ R. Obrębski, *Pojęcie postanowień kończących postępowanie w sprawach cywilnych* [The notion of decisions concluding proceedings in civil cases], *Przegląd Sądowy* 2000, nr 11-12, p. 124.

¹⁶ In the previously prevailing revisional system the entitlement to submit an extraordinary appellate measure was granted exclusively to public entities. Parties could only direct a motion to prepare and submit an extraordinary revision in their case to such an entity.

¹⁷ T. Ereciński, *Kilka uwag o modelu kasacji...*, p. 194.

¹⁸ T. Ereciński, *Apelacja i kasacja w procesie cywilnym* [Appeal and cassation complaint in civil proceedings], Warszawa 1996, p. 107.

¹⁹ Around 12.000 euro.

labor law and insurance law, if it is lower than 10,000 PLN²⁰. In practice there are attempts to artificially dodge the limitations by means of increasing or modifying the value of the subject matter of the dispute. Such actions are bound to fail and the complaint is rejected.

Limitations of *ratione valoris* protect the Supreme Court against dealing with an excessive number of cassation complaints and enable the efficient functioning of this institution. The amount of the thresholds as conditions enabling the submission of a cassation complaint in property-related cases seems quite high. An assumption that judgments in “more expensive” cases are the ones which usually deserve a repeated examination is not appropriate.

VI. The access to the Supreme Court is dependent on the appropriate formulation of a cassation complaint. A party is obliged to take into account the structural (qualified) and formal (regular) requirements. The complaint should be written in Polish, and in principle it should be submitted by an attorney or a legal advisor.

The civil procedure is formalized with regard to a cassation complaint. Preparation of a cassation complaint should be conducted in a fully professional manner²¹. The formal requirements provided in the Polish Code of Civil Procedure translate to the quality of the prepared cassation complaint and are related to the access to the Supreme Court. Structural elements of a complaint characterize it as an extraordinary appellate measure. Formal elements of the complaint characterize it as a lawsuit document.

Structural elements of a cassation complaint include the indication of the judgment in relation to which it is submitted, whether it is questioned partially or entirely; indication of the grounds for cassation and their justification; request for accepting the cassation complaint for examination and its justification; application for annulment or annulment and change of the judgment in question. Formal elements signify the requirement pertaining to the conditions for ordinary pleadings, as well as require the indication of the value of the subject matter of the claim.

If a party has failed to fulfill the regular requirements of the cassation complaint, the court will call a party to do so. There is no such possibility in the case of structural elements. In such a case the court rejects the cassation complaint *a limine*. These

²⁰ Around 2.400 euro.

²¹ Ł. Błaszczak, *Dopuszczalność skargi kasacyjnej w procesie cywilnym ze względu na wymagania formalne i konstrukcyjne* [Admissibility of the cassation complaint in civil law proceedings on account of formal and structural requirements], *Radca Prawny* 2008, nr 3, p. 8.

deficiencies of a complaint cannot be remedied²². An improper preparation and submission of a cassation complaint closes the access to the Supreme Court.

The increase of the formalism of cassation proceedings and the introduction of severe sanctions is also exemplified by the deprivation of the parties of the capacity to appear as litigants and by the requirement of being represented in the proceedings before the Supreme Court by professional legal representatives - attorneys and legal advisors²³. What is also of importance is the professionalism, quality and competence of preparation of a cassation complaint. This limitation contributes to a significant improvement of the quality of the proceedings²⁴. The party may not personally prepare and submit a cassation complaint. The necessity to use the services of professional legal representation comprises not only the preparation and submission of the cassation complaint, but also includes all activities in the proceedings before the Supreme Court. The advantages related to the validity of the obligation to use attorney's or legal advisor's services prevail over the increase of the costs of such proceedings.

VII. A cassation complaint should be submitted within two months²⁵ of the date of delivery of the judgment of the court of the second instance together with the grounds of the judgment in question. The date is not subject to any modifications. Nonetheless, in the event of infringements a party may request the court to reinstate the missed deadline.

Submission of a cassation complaint is dependent on the so called cassation complaint announcement. The party should first file an application for preparation and delivery of the grounds of the judgment of the court of the second instance. The application should be filed within a week of the announcement of the verdict of the court of the second instance. The delivery of the grounds of the judgment in question commences the period for delivery of the cassation complaint. Such a requirement enables and imposes on the party the obligation to acquaint themselves with the motives of the verdict of the court of

²² A. Zieliński, *Zasada formalizmu procesowego w nowelizacjach kodeksu postępowania cywilnego* [The principle of procedural formalism in amendments of the Polish Code of Civil Procedure], in: *Ewolucja polskiego postępowania cywilnego wobec przemian politycznych, społecznych i gospodarczych* [Evolution of the Polish civil procedure in view of political, social and economical changes], Warszawa 2009, p. 112.

²³ T. Zembrzuski, *Skarga kasacyjna...*, p. 276.

²⁴ T. Ereciński, *Kilka refleksji o przymusie adwokacko-radcowskim* [Some remarks on the principle of compulsory representation by a lawyer], in: *XX lat samorządu radców prawnych*, Warszawa 2002, p. 59; T. Zembrzuski, *Kilka uwag o przymusie adwokacko-radcowskim w postępowaniu przed Sądem Najwyższym po nowelizacji Kodeksu postępowania cywilnego* [Some remarks about representation by a lawyer in the Supreme Court after the amendment of the Polish Code of Civil Procedure], *Przegląd Sądowy* 2006, nr 1, p. 122.

²⁵ A longer –six-month period is provided for the Attorney General, the Polish Ombudsman and the Ombudsman for Children.

the second instance. It induces additional afterthoughts and considerations on the advisability of the submission of the cassation complaint.

A cassation complaint is submitted to the Supreme Court through the court of the second instance, which has issued the challenged judgment. The court of the second instance is not entitled to substantively control the cassation complaint. It exclusively performs the formal control, without analyzing the essence of the cassation complaint. After the expiration of the period for submission of the answer for the cassation complaint or after the delivery of the answer to the other party, the case files are transferred to the Supreme Court. The Supreme Court investigates the admissibility of the cassation complaint for the second time.

VIII. Admissible cassation complaints which were not rejected are subject to the procedure of preliminary cassation acceptance in order to accept them for consideration. This pertains to the selection of complaints conducted for the purpose of advisability of their essential examination, i.e. whether there is a need to express an opinion in the case by the highest court instance. This selection is performed exclusively by the Supreme Court. The preliminary acceptance is of a *sine partes* character. This is a preliminary proceedings²⁶. The court issues a decision on either the acceptance or refusal of examination of the complaint. Exclusively accepted complaints will be subject to substantive control.

The party should include an application for the acceptance of the cassation complaint therein and justify it. The applicant should cite legal argumentation which should demonstrate that one of the preconditions specified in the act appears in the complaint. The complaint is accepted for consideration if the Supreme Court ascertains the existence of a significant legal issue, the need for interpreting legal regulations which inspire doubts or cause divergences in courts' judgments, the proceedings turned out to be invalid or when the cassation complaint is clearly justified. Otherwise the Court will refuse to accept the cassation complaint for examination. It is assumed that essential legal issues are those which represent a legal problem that has not yet been settled by the Supreme Court or when there are significant divergent opinions in this regard. The need for interpretation of legal regulations exists when there is no unified or determined jurisprudence or when the adopted interpretation is evidently wrong. A clear legitimacy of

²⁶ J. Gudowski, *Kasacja...*, p. 37, T. Zembruski, *Skarga kasacyjna...*, p. 415.

the cassation complaint is related to a situation when the infringement of the law is evident and visible *prima facie*²⁷.

Although the prerequisites for preliminary acceptance which condition the access to the Supreme Court, are formulated in a general manner, one may appoint specific meaning to them. The appraisal of these prerequisites depends on the analysis of an individual case. Thanks to this, the mechanism proves to be efficient in different, complicated cases and does not require corrections depending on the changing circumstances.

The procedure of preliminary acceptance of cassation complaints most efficiently selects the cases deserving a third essential examination. This is performed from the perspective of circumstances closely tied with the most basic tasks of the Supreme Court. Only the most complicated, gravest, precedent cases which may serve the purpose of developing the law as well as unifying jurisdiction are directed to the Supreme Court. This mechanism eliminates complaints which lack juridical gravity. Only those complaints which serve the public interest are accepted for examination. On the other hand the selection also allows for the protection of private interest of the parties.

The preliminary acceptance procedure does not constitute a limitation of the admissibility of the complaint. It is an additional, independent instrument regulating the access to the Supreme Court. Selection of admissible complaints with regard to preliminary acceptance is a better solution than developing limitations related to the admissibility of cassation complaints.

IX. The examination of the admissibility of cassation complaints and performance of preliminary acceptance procedure are conducted in cassation proceedings in a specific order. All prerequisites enabling the access to the Supreme Court and aiming at the verification of the legally valid judgment of a court of the second instance are significant from the very beginning of the proceedings before the Supreme Court. A cassation complaint which passes both stages positively will be admitted to the last stage, consisting in the substantive examination of the merits of a complaint.

The cassation complaint should be based on the grounds enumerated in article 398³ of the Polish Code of Civil Procedure. The party should indicate errors made by the court of appeal that pertain to the judgment in question. The cassation complaint may be based on an infringement of the substantive law due to an incorrect interpretation or application of legal provisions. It may also be based on the infringement of procedural law, if such an

²⁷ T. Zembrzuski, *Skarga kasacyjna...*, p. 415.

infringement may have had a significant influence on the result of the case²⁸. Infringements of the law which cannot be included in any of these two bases will not be subject to the evaluation by the Supreme Court. For instance objections pertaining to the determination of facts or evaluation of evidence cannot constitute the grounds for a cassation complaint. The scope of control performed by the Supreme Court is specified by the parties. The Supreme Court is bound by the findings made by the courts of the first and second instance.

The indication and justification of at least one basis is the structural element of a cassation complaint, although the evaluation of this element is of relevance with regard to the substantial examination of the cassation complaint. While examining a cassation complaint the Supreme Court checks whether the indication of the infringement of the law, as a basis for cassation, was legitimate. The proceedings are exclusively limited to the investigation of the indicated grounds, with consideration of the circumstances, which the court is obliged to take into account *ex officio*, i.e. the invalidity of the proceedings. As a result of the examination of the cassation complaint it is possible to set aside the challenged judgment or to issue a judgment on the merits.

X. The requirements for cassation complaints are high and difficult to fulfill. The special character of the cassation complaint, the relevance of the institution of the preliminary acceptance²⁹, as well as other limitations which may appear, justify the thesis that Polish civil litigation law provides only a narrow access to the Supreme Court.

The regulation of the access to the Supreme Court is the result of a compromise between the colliding public and private interests. The entirety of the limitations and the character of the cassation complaint indicate a strong domination of the public interest³⁰. The Polish civil procedure ensures protection of the rights of individuals before the Supreme Court against evident errors of the judicature. However the admission and examination of the essence of the cassation complaint is possible when public functions of the Supreme Court may be realized.

The essence of the cassation complaint and the narrow access to the Supreme Court should be interpreted jointly with the appeal *cum beneficio novorum*, which as an ordinary appellate measure, serves to amend the legal and factual errors. The appeal *cum beneficio*

²⁸ In the case of the Attorney General, the Polish Ombudsman and the Ombudsman for Children the basis is narrower. It is related to the scope of activity of these entities.

²⁹ As a result of the preliminary acceptance procedure about 70% of all cassation complaints are refused to be examined.

³⁰ T. Zembrzuski, *Ewolucja charakteru skargi kasacyjnej...*, p. 337.

novorum allows a party to have their case examined substantively two times. The cassation complaint in the Polish legal system and the regulation of access to the Supreme Court, as in many other legal systems, aims at ensuring an appropriate interpretation of the law by courts of general jurisdiction, as well as serves the purpose of providing and maintaining the unity of courts' decisions. The Supreme Court should serve the stability, durability and reliability of the law. It should be the counterweight to the variability and randomness of statutory regulations. The consideration of cassation complaints should actively serve the development of the law, although it is related with the existence of a system which significantly limits the access to the Supreme Court.

The evolution of the character of the cassation complaint in Poland and the access to the Supreme Court has brought them closer to the standards adopted in other member states of the European Union³¹. The transformation of the cassation complaint into an extraordinary appellate measure, as well as the previously existing limitations, are not inconsistent with the solutions proposed in the recommendations of the Committee of Ministers of the Council of Europe. On the contrary - they constitute their practical realization³². The development of conditions of admissibility of cassation complaints, or selecting admissible complaints during the preliminary cassation acceptance procedure is also not an isolated phenomenon. Such legislative procedures are an indication of the general tendency present in numerous European countries, whose systems and institutions mutually affect each other and lead to the improvement of civil law proceedings being carried out.

³¹ T. Ereciński, *Kilka uwag o modelu kasacji...*, p. 97; T. Ereciński, *O nowelizacji kodeksu postępowania cywilnego w ogólności* [About the amendment of the Code of Civil Procedure in general], *Przegląd Sądowy* 1996, nr 10, p. 8.

³² K. Kołakowski, *Refleksje wokół kasacji w procesie cywilnym* [Remarks on cassation in civil proceedings], *Przegląd Sądowy* 1997, nr 7-8, p. 20, T. Wiśniewski, *Problematyka instancyjności postępowania sądowego w sprawach cywilnych* [Issues of the existence of instances in court proceedings], in: *Ars et usus, Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego* [Ars et usus, Commemorative book in memory of the judge Stanisław Rudnicki], Warszawa 2005, p. 320.