

# **ELEMENTS OF WRITTEN PRESENTATION IN POLISH CIVIL TRIALS AS THE FACTOR STREAMLINING PROCEEDINGS.**

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## **I. INTRODUCTION**

Although the principle of oral presentation admittedly pertains to trial activities in Polish civil proceedings, various elements of written presentation appear more and more often, which have the advantage that they allow to organize and to encapsulate the statements of parties as well as to establish the parties' trial standpoints explicitly – an objective that is sometimes hard to achieve while delivering addresses at the trial (especially for persons unfamiliar with the courtroom – appearing in court is a huge experience that results in chaotic and fragmentary statements).

Such solutions are applied more and more widely, although, at the same time, it must be borne in mind that delivering statements in writing may in fact not always be a simpler way for a party to present its theses (e.g. many people do not do well at filling in any kinds of forms). Therefore, applying the written, more formalized form must be coupled with an appropriate system of legal aid for people who are not able on their own to wade through the requirements for pleadings, and who cannot afford to hire a professional trial attorney.

## **II. PRINCIPLE OF ORAL PRESENTATION**

The principle of oral presentation, in express terms, was not provided for in the Act of 17th November 1964 – Civil procedure code (Journal of Laws No 43, item 296, with amendments), however, its existence in the doctrine does not evoke any reservations. This principle stipulates that in civil proceedings, the court is predominantly presented with the actual state of circumstances and with the body of evidence by the parties orally. According to art. 210 of the civil procedure code, the trial proceeds in such a way, that after announcing the case, the parties – at first the plaintiff, and subsequently the defendant – put forward their claims and motions orally, together with their statements and evidence to support them. Parties can also provide the legal bases for their claims and motions. Each party should make statements as for the claims of the opposite party, concerning factual circumstances. Furthermore, the trial includes, depending on the circumstances, the evidential proceedings followed by a discussion. Obviously, it is not possible to apply the principle of oral presentation in an absolute manner, and therefore it is not possible to ignore the paramount meaning of written pleadings submitted in the course of proceedings, which will be discussed below.

The principle of oral presentation pertains to the parties and participants in the proceedings, and as for the court, the principle of written presentation is in effect.

## **III. TRIAL PLEADINGS**

## **1. Basic issues**

Pleadings include motions and declarations of parties lodged outside the trial (art. 125 § 1 of the civil procedure code). According to art. 126 of the civil procedure code, every pleading should include:

- designation of the court to which it is addressed, the name and the surname or the designation of parties, their statutory representatives and attorneys;
- designation of the kind the pleading;
- background information on the motions or declarations and evidence to support the circumstances quoted;
- signature of the party or the party's statutory representative or attorney;
- list of annexes.

When the pleading is the first writing in the case, it should additionally contain a designation of the parties places of residence or registered seats, their statutory representatives and attorneys and the matter of dispute, while further pleadings should contain the signature code of the records (art. 126 § 2 of the civil procedure code).

In this last context it is worthwhile emphasizing that the legislator implements a written procedure of starting a civil trial. The only exceptions to this rule are cases concerning regulations related to labor law and to national retirement insurances according to which a worker or an insured person acting without a lawyer or a legal adviser may bring an action, an appeal or submit orally for protocol other pleadings at a competent court (art. 466 of the civil procedure code). At the same time the legislator determined in express terms the formal requirements a lawsuit should meet as the pleading starting a civil trial. The lawsuit should satisfy the requirements of a pleading (art. 126 of the civil procedure code), and should also contain:

- 1) accurate description of the demand, and in cases for property rights also an indication of the value of the object of dispute, unless the object of the case is a specific sum of money;
- 2) quoting the factual circumstances justifying the demand, and if necessary also a justification of the choice of court (art. 187 § 1 of the civil procedure code).

In the optional part however the lawsuit can contain motions as to securing the action, appending a writ of immediate execution and conducting the trial in absence of the plaintiff as well as motions serving for preparing the trial, particularly motions for:

- 1) summoning witnesses and experts indicated by the plaintiff to the trial;
- 2) conducting an examination;
- 3) ordering the defendant to hand in a document or an object of examination in his possession, necessary to carry out evidence proceedings;
- 4) demanding submission of evidence in possession of courts, offices or at third parties to the trial (art. 187 § 2 of the civil procedure code).

Regulations enabling the removal of formal flaws of pleadings are an essential element of the correct use of pleadings (above all art. 130 and n. of the civil procedure code) which in certain cases implement stricter criteria of professionalism on parties represented by a lawyer or a legal adviser (e.g. in accordance with art. 479<sup>9</sup> § 1 sentence 2 of the civil procedure code pleadings with no receipt of delivery or certificate of posting by registered mail attached, are subject to dismissal without summoning the party to removing the flaw).

## **2. Significance of trial forms**

The Polish legislator uses trial forms as a type of trial pleadings, which are to precipitate demanding repeatable, simple and small claims. This institution sometimes stirs up controversy, because some opponents raise the argument that official forms are not always easy and that it is necessary to introduce the right for the plaintiff to choose between the traditional form and the confined form of trial forms. However, voices against it are rare and it should be assumed that the institution of trial forms has entered into practice, ordering the statements made by parties and forcing them to include in the written pleading all the information and these necessary to hear the case at its preliminary stage.

Therefore, in cases determined in the Code of civil proceedings, the pleadings are submitted on these official forms. The scope of applying official forms can be perceived in two aspects:

1) subjective – the plaintiff is obliged to submit the lawsuit on an official form, if he or she is a contractor or a vendor demanding claims resulting from the following contracts:

- for the provision of postal and telecommunications services,
- for transport of persons and luggage in the mass communication,
- for delivering electric energy, gas and fuel oil,
- for delivering water and carrying sewage,
- for transport of waste matter,
- for delivering thermal energy.

2) objective – applying official forms is compulsory in the case of a lawsuit, a reply to a lawsuit, an objection to a judgment in default and pleadings containing evidence motions contributed in summary proceedings. These proceedings aim at efficient and effective adjudication of minor and uncomplicated cases:

- for claims resulting from agreements, if the value of the matter of dispute does not exceed ten thousand zlotys (approx. 3000 Euro), and in cases for claims resulting from a warranty, from a guarantee of quality, or from the variance of consumer goods with the consumer sale contract, if the value of the subject of the contract does not exceed this amount,

- for the payment of rent for the lease of residential premises and for the payment of fees payable by the lessee and payments for using residential premises in a housing cooperative, irrespective of the value of the matter of dispute.

The Justice Minister determines in a directive the specimens and the methods of making official forms available to parties, if special regulations

require that pleadings be filed on such forms. The specimens should meet the requirements for pleadings, special requirements for the proceedings, in which they are supposed to be applied, as well as the necessary instructions for parties as to how to fill in the forms, how to file them and what the consequences might be if the forms do not meet those requirements. Official forms should be made available in courthouses and outside courts, in ways convenient for parties, at a reasonable cost.

### **3. The acceleratory function of preparatory pleadings**

A preparatory writing is a pleading aimed at preparing the trial, in which one should describe the case concisely, provide a reply to the statements of the opposite party and evidence appointed by that party, and finally, indicate the evidence which is supposed to be presented during the trial, or enclose that evidence (art. 127 of the civil procedure code). If it does not contain these elements, it should be supplemented subject to art. 130 of the civil procedure code. Preparatory pleadings can also contain lawful argument, which is particularly desired if the party is represented by a lawyer or a legal adviser. In principle, such arguments are aimed at: firstly – facilitating adjudication of the case by the court, secondly – convincing the court to the interpretation of the law offered by the party<sup>1</sup>. Moreover, according to art. 207 § 3 of the civil procedure code party represented by a lawyer or a legal adviser, a patent agent or the General Attorney Office of the State Treasury, the presiding judge can oblige the party to file a preparatory pleading within an appointed time, in which the party is obliged to provide all statements, charges and evidence, or else shall lose the right to invoke them in the course of further proceedings.

The role of preparatory pleadings for the acceleration of a civil trial cannot be overestimated, since competent use of this possibility by the presiding judge as part of preparing the trial allows to collect a lot of information essential for adjudicating the case, as well as to clarify doubts concerning the nature and the crux of the dispute, owing to which the trial can be devoted to analysis of the remaining issues. On the other hand, however, the court is not obliged, or even authorized to accept preparatory pleadings which contain nothing essential for the case and are only a sign of an internal need of the author to write, or which clearly aim at stalling the proceedings. In such situations the presiding judge should return the pleadings to the party without calling the party to remove formal<sup>2</sup> flaws. Only such a disciplined approach to the institution of preparatory pleadings will help to accomplish its function of streamlining a civil trial.

#### **IV. SPECIAL FORMALISM OF PLEADINGS IN SEPARATE PROCEEDINGS IN COMMERCIAL CASES**

In separate proceedings in commercial cases, pleadings play a special role, because their appropriate form and content make it significantly more realistic that the case can be brought to an end in the first instance, within the time set in art.

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<sup>1</sup> ZIELIŃSKI, A., [w:] *Kodeks postępowania cywilnego. Komentarz*, red. ZIELIŃSKI, A., Warszawa, 2008, p. 233

<sup>2</sup> JĘDRZEJEWSKA, M., [w:] *Kodeks postępowania cywilnego. Komentarz*, red. ERECIŃSKI, T., t. 1, Warszawa, 2007, p. 342

479<sup>16</sup> of the civil procedure code, according to which the court should seek to pronounce a sentence within three months from the date of submitting the lawsuit. In commercial cases the legislator particularly stressed the need to take pre-trial attempts at solving the dispute by conciliatory means. Additional obligations, essential for an effective action, and particularly interesting in view of these deliberations, have been imposed on the plaintiff. Specifically, according to art. 479<sup>12</sup> § 2 of the civil procedure code the plaintiff should enclose a copy of a written complaint or call for the defendant to voluntarily comply with the plaintiff's demand, together with a statement of the defendant's stance in this matter, as well as written information or copies of documents confirming attempts to clarify arguable issues by means of negotiations. This regulation lists a whole catalogue of documents which are supposed to demonstrate explicitly that the plaintiff wants to bring an action after attempting all other, non-legal possibilities of settling the dispute.

The procedure discussed here imposes particular burdens on the parties to the trial (assuming their professionalism), which are not present in other civil cases. In accordance with art. 479<sup>12</sup> of the civil procedure code, in the lawsuit, the plaintiff is obliged to give all statements and evidence to support those statements under discipline of loss of the right to invoke them in the course of proceedings, unless the plaintiff can prove that it was not possible to invoke those statements in the lawsuit or that the need to invoke them arose later. In this case further statements and evidence supporting them should be invoked within two-weeks from the day, on which invoking them became possible or the need to invoke them arose. On the other hand, art. 479<sup>14</sup> § 1 and 2 of the civil procedure code stipulate that in lawsuits, in which the court did not issue an order of payment under proceedings by writ of payment based on documents or on the plaintiff's statements, the defendant is obliged to reply to the lawsuit within two weeks from the day of receiving the lawsuit. Any response to the lawsuit contributed after that time is subject to remission.

In reply to the lawsuit, the defendant is obliged to give all statements, claims and evidence to support those statements and claims under discipline of loss of the right to invoke them in the course of proceedings, unless the defendant can prove that it was not possible to invoke those statements in reply to the lawsuit or that the need to invoke them arose later. In this case further statements and evidence supporting them should be invoked within two-weeks from the day, on which invoking them became possible or the need to invoke them arose.

To sum up, with regard to art. 479<sup>14</sup> § 1 of the civil procedure code, the limitation on the sued party includes all statements, charges and evidence for supporting them, irrespective of their meaning for adjudicating the case. Possible statements or charges, i.e. quoted only in case the statements invoked first turn out to be ineffective or are not taken into consideration by the court. Subject to art. 479<sup>14</sup> § 1 of the civil procedure code, the limitation on the sued party includes all statements, charges and evidence supporting them, irrespective of their meaning for adjudicating in the case. This is also applicable to possible statements or charges, i.e. invoked only in case the statements presented first turn out to be ineffective or are not taken into consideration by the court. At the same time art. 479<sup>12</sup> § 1 of the civil procedure code, addressed to the plaintiff party, obliges the court to omit belated statements, that is treat them as if they had never been lodged and dismiss belated evidence submissions. As a consequence of a

misfeasance consisting in omitting all statements and all evidence to prove those statements the party loses the right to invoke them in the further course of the lawsuit.

The effects of the limitation extend not only onto new statements and new evidence to support them, but also onto new evidence submitted further in the course to support statements contained in the earlier lawsuit. The austere consequences of the limitation system were alleviated by excluding its application in cases where it was not possible for the party to invoke all statements or evidence in advance or when the need to invoke them arose later. Although the decision as for accepting and recognizing belated statements about facts as well as belated evidence motions was left to the court, the act nonetheless imposes strict limits on the confidential power of the judge<sup>3</sup>.

#### V. SEPARATE PROCEEDINGS WITH SEPARATE WRITTEN STAGE

##### **1. Proceedings by writ of payment based on documents**

The first example of proceedings that assume the written form in their fundamental phase are proceedings by writ of payment based on documents. According to art. 484<sup>1</sup> of the civil procedure code, the case in these proceedings is heard during a closed session. In order to start proceedings by writ of payment based on documents the plaintiff must file a written motion in the case, included in the lawsuit. In proceedings by writ of payment based on documents, it is possible to issue an order of payment only as for pecuniary claims and fungible things (as distinguished from specific things). In these proceedings an order of the payment is issued only when any of the following documents, which are clearly specified in art. 485 of the civil procedure code, is enclosed:

1) if the circumstances justifying the claim are proven by an enclosed – a) official document, b) bill accepted by the debtor, c) a default notice and the debtor's written declaration of recognizing the debt, d) request for payment accepted by the debtor, returned by the bank and not paid because of a lack of money in the bank account.

2) order of payment against the obliged from a bill of exchange, a check, a warehouse warrant (part of a warehouse certificate which states that a pledge has been established on the goods stored at the warehouse) or a properly filled warehouse receipt (part of a warehouse certificate which confirms possession of the goods stored at a warehouse) – if their authenticity and content are beyond doubt; if rights resulting from a bill of exchange, a check, a warrant or a receipt are passed on the plaintiff, in order for the court to issue an order, it is necessary to provide documents to justify the claim, provided the passage of the said rights to the plaintiff does not result directly from the bill of exchange, the check, the warrant or from the receipt;

3) a contract enclosed with the lawsuit, a proof of performing a mutual nonfinancial service and a proof of delivering an invoice or a bill to the debtor, if the plaintiff is claiming payment of p benefits or interest in business transactions

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<sup>3</sup> Wyrok SN z 24.2.2006 r., II CSK 143/05, LEX nr 180201 (ruling of the Supreme Court)

specified in the Act of 12 June 2003 on the due payment days in business transactions (Journal of laws No 139, item 1323);

4) if the bank makes a claim on the basis of an excerpt from bank registers signed by persons authorized to make declarations regarding property appurtenances of the bank, with the bank's seal and a proof of delivering a written default notice to the debtor.

Not always, however, will the plaintiff present the required documents, or other circumstances may arise (e.g. missing a distinct motion of the plaintiff), making it impossible to adjudicate the case during the closed session. In such a situation, the presiding judge appoints the trial on the basis of general principles, unless the case can be heard in a closed session for other reasons (e.g. it is possible to issue an order of payment in proceedings by writ of payment based on the plaintiff's statements – art. 498 § 1 of the civil procedure code).

The catalogue of documents required in these proceedings shows that they play a special role in commercial relations, because it is most often used in the separate proceedings in commercial cases for settling disputes between entrepreneurs that arose within the framework of their business activity. By issuing the order of payment the court rules that within two weeks from the day of delivering the order, the defendant must satisfy the demand in full, including expenses, or must lodge an appeal in the form of charges within that period.

If the defendant submits an effective counterclaim against the order of payment, the proceedings enter a second phase – based on general principles, because the presiding judge orders a trial and serves charges on the plaintiff. In this way begin the proceedings, in which the court declares the order of payment to be legally valid or rescinds it.

Moreover, an order of payment in proceedings by writ of payment based on documents can be rescinded:

1) if the order of payment cannot be served because the whereabouts of the defendant are not known, or if the order could not be served on the defendant in domestic territory;

2) if, after issuing an order of payment, it turns out that at the time of bringing the lawsuit the defendant did not possess court capacity, capacity to stand trial or a representing body and these flaws had not been removed within the time limit set in accordance with the regulations of the civil procedure code.

## **2. Proceedings by writ of payment based on the plaintiff's statements**

Proceedings by writ of payment based on the plaintiff's statements are less formalized hence their wider application as for pecuniary claims (as for other claims – if so determined by special regulations). The court hears cases in closed sessions and in the course of these proceedings, orders can also be issued by justices' clerks.

According to art. 499 of the civil procedure code, an order of payment in proceedings by writ of payment based on the plaintiff's statements cannot be issued, if according to the content of the lawsuit:

1) the claim is evidently groundless;

2) the circumstances quoted raise doubts;

3) satisfying the claim depends on a mutual service;

4) the whereabouts of the defendant are not known or if the order could not be served on the defendant in domestic territory.

If there are no grounds for issuing an order of payment, the presiding judge orders a trial, unless the case can be heard in a closed session as a result of other circumstances (e.g. the defendant in a commercial case recognized the lawsuit – art. 479<sup>17</sup> of the civil procedure code).

By issuing the order of payment the court rules that within two weeks from the day of serving the order, the defendant must satisfy the demand in full, including expenses, or must lodge an appeal within that period (art. 502 of the civil procedure code). If the defendant submits an effective counterclaim, the order of payment ceases to be effective, and the presiding judge orders a trial and orders the appeal and a summons to court to be served on the plaintiff. The order of payment ceases to be effective to the extent of the counterclaim. An appeal on the part of only one of the co-defendants against the same claim and against one or some of the claims results in the order ceasing to be effective for those defendants or claims only.

Moreover, an order of payment is rescinded:

1) if the order of payment cannot be served because the whereabouts of the defendant are not known, or if the order could not be served on the defendant in domestic territory;

2) if, after issuing an order of payment, it turns out that at the time of bringing the lawsuit the defendant did not possess court capacity, capacity to stand trial or a representing body and these flaws had not been removed within the time limit set in accordance with the regulations of the civil procedure code.

If an order of payment issued in proceedings by writ of payment based on the plaintiff's statements ceases to be effective or is rescinded, the proceedings enter a phase of trial based upon general principles, unless other reasons for closed proceedings arise.

Both these proceedings, by writ of payment based on documents, and by writ of payment based on the plaintiff's statements, have functioned in the Polish civil procedure for a long time, although political and economic transformation has obviously left a mark on the regulations governing these proceedings, adjusting their stipulations to the requirements of legal transactions. However, the problem of effectiveness of those proceedings is not in the efficiency of those proceedings themselves in their written stage, but in the scope of actions taken after the defendant submits an appeal, and, most of all, in enforcing orders of payment, which takes a long time and is too often ineffective.

## VI. CONCLUSIONS

To sum up, the courts should use trial instruments with elements of written presentation that will speed up and streamline civil trials, also with reference to parties of proceedings. Admittedly, K. Piasecki stresses that the civil trial, as an intricate system, is not devoid of an inclination to lengthiness. It is not bad itself but is to be used against evil. Therefore, it should be improved and is worthwhile

improving also in terms of freeing it from the organic condition of lengthiness<sup>4</sup>. To this purpose, the suggestions of K. Korzan should be acted upon, who showed in his research on trial efficiency that making proper use of trial regulations may significantly increase the speed of handling civil cases<sup>5</sup>. Implementing electronic communication media on an increasingly larger scale as means of replacing pleadings in their traditional form is one example of such an approach. At the moment, however, the costs of applying such a solution are a basic barrier (the party must possess an electronic signature, which means an expense of about 150 Euro). This barrier is to some extent eliminated by the recently published project of Electronic Proceedings by Writ of Payment Based on the Plaintiff's Statements, which, according to its authors' assumptions, is to contribute to simplification and acceleration of adjudicating certain civil cases by courts<sup>6</sup>. This purpose may be achieved by liberalizing judicial proceedings and automating the court's activities as much as possible. In such proceedings, the plaintiff submits the lawsuit by means of an electronic form. The plaintiff is identified in the system by the PESEL (personal identification) number, and the order of payment is issued without conducting any evidence proceedings, and after it has become binding, the court issues a writ of execution. The project is not free from real dangers and it is well to identify them at the stage of designing the system itself. Above all, it is necessary to remember that a quite large group of citizens exists, who will never use computer tools (older persons, some disabled persons etc.). Certainly, the security of a system based on PESEL (personal identification number) identification is another problem, owing to frequent cases of unauthorized access to personal details. Nevertheless, it cannot be denied that this is a valuable initiative, which can be an excellent starting point for working out an effective, cheap and secure system.

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<sup>4</sup> PIASECKI, K., *Przewlekłość sądowego postępowania w sprawach cywilnych – przyczyny i środki zaradcze*, Nowe Prawo, 1989, p. 29

<sup>5</sup> KORZAN, K., "Cel i przyczyny wpływu ustawodawstw obcych na kształtowanie się systemu prawa postępowania cywilnego w Polsce a zagadnienie odrębności narodowych", *Jednolitość prawa sądowego cywilnego a jego odrębności krajowe*, red. SAWCZUK, M., Lublin, 1997, p. 250

<sup>6</sup> GOŁACZYŃSKI, J., ADAMSKI, D., ŁUKOWSKI, W., KOTECKA, S., SZOSTEK, D., KUTYŁOWSKI, M., <http://cbke.prawo.uni.wroc.pl/modules/Projects/files/EPU.31.01.pdf>, p. 1