

CONTEMPORARY CENTRAL & EAST EUROPEAN LAW

REPRESENTATION IN THE POLISH LEGAL SYSTEM

Aleksander Mazan

Krakowska Akademia im. Andrzeja Frycza Modrzewskiego, Uniwersytet Śląski

ORCID: 0000-0003-3160-1063

email: aleksandermazan@gmail.com

PREFACE

The following article is aimed at presenting definitions and typologies concerning the issues of representation in the Polish legal system. Synonymous or interchangeable usage of legal terminology concerning representation in economic activity may lead to considerable disruption to proper functioning of civil law entities, and especially commercial law entities.

In order to conduct business in the form of partnership enterprises, the majority of the entities of commercial law are formed and consequently registered in the National Court Register.¹ Other formations of entities of commercial law that are formed by natural persons or legal persons, including so called legal persons without corporation status, are associations, foundations and healthcare enterprises.² Operating any of these activities requires heightened activity in domains such as, e.g., commercial activity, marketing, production, contractual activity, administration, and many others, the full list of which cannot be presented here, for obvious reasons. This increased need for activities in numerous spheres, especially in the case of large entities results in the need for them to have one or more representatives,³ and frequently also apparent attorneys,⁴ who are appointed from seller/man/woman and other persons active in the business

1 Ustawa z dnia 20 sierpnia 1997 r. o Krajowym Rejestrze Sądowym [Act of 20 August 1997 on the National Court Register] [1997] JoL 121, 769.

2 Searching for an entity on the basis of data obtained from the database: Ministerstwo Sprawiedliwości, Krajowy Rejestr Sądowy [the National Court Register], <<https://ems.ms.gov.pl/krs/wyszukiwanie>> accessed 31 Jan 2019; COIG, Spis polskich firm [List of Polish companies], <http://www.coig.com.pl/spis-polskich-firm_katalog_polskich_firm.php> accessed 31 Jan 2019.

3 J Fabian, *Pełnomocnictwo* [Power of attorney] (PWN 1963) 680.

4 T Dziurzyński, Z Fenichel, M Honzatko, *Kodeks handlowy. Komentarz*, vol. 1, [Commentary on the Commercial Code] (Księgarnia Powszechna 1936) 138.

premises (Art. 97).⁵ The activity in question and its development are coherent with the relevant regime prevailing in the State, which thus influences the commercial market. The regulation of representation is associated with the development of capitalism, or strictly speaking, with the period of capitalist formation. This thesis is confirmed by the analysis of codification in some European countries. It does not seem accidental that there is a lack of regulation of representation as a separate legal phenomenon in early-capitalist codes, such as the Napoleonic Code,⁶ or the Austrian Code,⁷ whereas representation serving a role that is closest to the contemporary role of power of attorney is present in later codes, such as the German Civil Code.⁸ In the history of the Polish legal regulations concerning power of attorney, the distinction between power of attorney and a contract order, in a similar manner as in the German regulations, has existed since the Code of Obligations.⁹

1. INTRODUCTION TO ATTORNEY

However, the functioning of an attorney must be distinguished from the functioning of the bodies of the legal person.¹⁰ According to the Polish judicature,¹¹ legal persons act through their bodies, which comprise natural persons. This attitude, which is consistent with the theory of bodies, is contrary to the theory of representation¹² (*Vertretertheorie*) that was previously binding. The previously approved theory of representation was based on the assumption that, because of the legal person's inability to act independently, it had statutory agents (as it was in the case of natural persons), that is, its bodies. The accepted viewpoint entails legal consequences as a result of which, among others, liability for declaration of intent, defects of declarations of intent and the legal consequences are directly related to possible liability for the delinquency of legal persons in respect of their own acts.¹³

5 In case of doubt, a person active in the business premises intended for public use is deemed to be authorized to carry out legal transactions, which usually tend to be carried out with persons using the services of this company.

6 Code Napoléon, Code civil des Français – French civil code, enacted in 1804.

7 Allgemeines Bürgerliches Gesetzbuch – common civil code, enacted in 1811.

8 BGB (Bürgerliches Gesetzbuch) – general German civil code enacted in 1896, effective from 1 January 1900.

9 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań [Ordinance of the President of the Republic of Poland of 27 October 1933 – Code of obligations] [1933] JoL 82, 598.

10 A Klein, 'Charakter prawny organów osoby prawnej' [Legal nature of the organs of a legal person] in J Bleszyński, J Rajska (eds) *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego* [Publications about civil law. Book in honor of Witold Czachórski] (PWN 1985) 124

11 Judgment of PSC III CZP 8/90 [1990] (1990) OSN 10-11, item 124.

12 W Muller-Freienfels, *Die Vertretung beim Rechtsgesellschaft* [Representation in the legal society] (Mohr 1955) 13.

13 M Pazdan, 'Dobra i zła wiara osoby prawnej' [Good and bad faith of a legal person] in A Szpunar et al. (eds.) *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-*

As a result of such an assumption, declarations of intent of the bodies of a legal person apply to the legal person and are considered statements made on its own behalf. This view is different from the previously applied theory of representation, according to which declarations of the attorney are regarded as his/her statements that are only statements made on behalf of the legal person (the principal).¹⁴ In favour of accepting the viewpoint of the theory of bodies are the code¹⁵ regulations. Due to the current regulations, the rules governing the functioning of the bodies of legal persons without corporation status have not been individually regulated, and the legislator refers to the rules applicable to the bodies of legal persons. The type of regulations concerning entitlements of the bodies of legal persons that are contained in the Code of Commercial Companies is different in relation to/comparison with the competences of attorneys (including attorneys of legal persons), whose entitlements (*in principle*) come from the power of attorney granted by the principal.¹⁶

2. TO HOLD A TITLE AT SOURCE ATTORNEY

Diverting attention somewhat away from the question of the bodies of legal persons and the theory of representation, we should focus on the issue of the authorisation by law of the representatives of legal persons and on the construction of representation. This issue is extremely common among legal persons or legal persons without corporation status who have a partner not being a natural person. What may help proper understanding of legal nuances and distinctions is an analysis of the construction of representation in the Polish law and, therefore, in Polish economic relations.

According to the construction of representation regulated by the Civil Code¹⁷, a representative is a person who takes legal action on behalf of another person, that is on behalf of the representee. Due to the way the representative acts within his/her authorization, activities undertaken by them will result in legal consequences not for them but for the representee. The above described regulation significantly affects the possibility of accepting or submitting declarations of intent by representatives on behalf of the represented partnership enterprises. Because of these individual features related to accepting and making statements of intent, there are two types of representation. The first one is constituted by passive representation wherein the authorised person has competence to accept third parties' declarations of intent on behalf of the representee; whereas the second one is an

Petrakowskiej [Studies on private law. Book in honor of Professor Biruta Lewaszkiwicz-Petrakowska] (WUŁ 1997) 195.

14 M Pazdan in Z Radwański (ed), *Prawo cywilne – część ogólna* [Civil law - general part 2] (C.H. Beck 2008) 467.

15 Ustawa z dnia 15 września 2000 r. – Kodeks spółek handlowych [Act of 15 September 2000 - Commercial Companies Code] [2000] JoL 94, 1037.

16 R Longchamps de Barier, *Studia nad istotą osoby prawniczej* [Studies on the essence of a legal person] (Drukarnia Jakubowskiego i Sp. 1911) 206.

17 Ustawa z 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 Civil Code] [1964] JoL 16, 93.

active representation consisting in being empowered to make declarations of intent on behalf of the representee. Representation in Polish law may also be categorised by the source of authorisation. According to this criterion, representation is divided into two types, i.e., statutory guardianship and the power of attorney.¹⁸ The first group of statutory guardians comprises the following types of authority: parental authority over a minor, authority of a guardian or legal guardian, of a trustee of a common thing established by the court, or any of the partners of a civil partnership.¹⁹ At this point it is worth focusing attention on the evolution concerning private companies in relation to the functions that are performed by the partners competent to represent them. During the time when the Commercial Code²⁰ was in force, and in the early years of binding force of the Commercial Companies Code, partnerships of private companies were treated as statutory attorneys.²¹ This standpoint changed following the amendment of the Civil Code, Art. 33 [1] § 2.²² As a consequence of such regulation, in the case of representation of commercial partnerships, the theory of the bodies of a legal person, and not of representation,²³ should be applied. What is important is that in the current legal situation, the liquidator of the registered partnership is not considered to be a statutory representative, although they were considered as such in the days of the Commercial Code. The second group of representation, which is in effect not because of the binding regulations but because it has been authorised due to the declaration of intent of the represented, includes the power of attorney and procuration, being a peculiar variation of the power of attorney.

The difference between the two sources of authorization by law entails different frames and bases for the authorization. Depending on whether it is a statutory representation or a form of the power of attorney, the very authorization will be regulated either by law or by the intention of the represented. Due to the needs that are particularly common among subjects managing enterprises, what is especially important is the granted power of attorney and procuration - that is, representation granting authorisation that is dependent on the will of the principal.

3. POWER OF ATTORNEY

While dealing with the issue of the power of attorney, it should be emphasized that it is a unilateral legal transaction. As a result of this legal act, which is a declaration of intent

18 A Wolter, *Prawo Cywilne. Zarys części ogólnej* [Civil law. Outline of the general part] (PWN 1986) 342.

19 M Pazdan in Z Radwański (ed) 2008, 460.

20 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 czerwca 1934 r. – Kodeks handlowy [Ordinance of the President of the Republic of Poland of 27 June 1934 – Commercial Code] [1934] JoL 57, 502.

21 B Gawlik in Z Radwański (ed) 2008, 736; S Sołtysiński, *Kodeks handlowy. Komentarz* [Commercial Code. Commentary] vol. 1 (C.H. Beck 1997) 602; K Nędza in A Kappes (ed), *Prawo spółek* (Zakamycze 1997) 308.

22 Art. 33[1] § 1 CC. In the case of the organizational units that are not legal persons, who are granted legal capacity by law, relevant provisions regarding legal persons are applied respectively.

23 M Pazdan in Z Radwański (ed) 2008, 461.

of the principal, the third party becomes entitled to act effectively on behalf of the represented.²⁴ Because of its legal nature, in order to effectively authorize someone there is no requirement to make a declaration of intent to third parties, or even to the attorney in question.²⁵ In the mentioned case of the absence of a declaration of intent as for the power of attorney granted to the attorney, it is particularly relevant to apparent authorities.²⁶ Apparent attorneys, who are people active in the business premises of the entrepreneur, carrying out the function of representative of the entrepreneur, actually are not authorized in the strict sense on the basis of the granted authorization, but, in the vast majority of cases, due to their being subject to concluded contracts of employment or managerial contracts, and others, such as, e.g., civil law contracts.

Because of the binding legal conditions, although the represented has not granted power of attorney to the representative and instead signed a different agreement, *de facto* the relation of representation is established under the law, although none of the parties may be aware of its existence.²⁷ Quite different, however, in terms of the characteristics of performed activities, is the situation of the attorney (excluding apparent authority). In order to make his/her declarations of intent result in legal effects directly for the represented, there are several conditions that must be fulfilled. It may be assumed that there are cardinal conditions for power of attorney, under which the declaration submitted by the representative will have legal effects in relation to the principal. The canon of the aforementioned features being part of the actions of the attorney comprises; having authority and acting within its limitations, having the ability to represent, acting on behalf of the represented and performing legal actions that are within the scope of the type of activities for performing which the attorney may be authorized.²⁸

In the field of economic activity, what entrepreneurs are especially interested in is representation based on their intent, that is, the power of attorney. The scope of the authorities granted to the attorney depends on the principal's will. In the declaration of intent, the principal decides both about investing somebody with the power of attorney and its scope. An important component of the power of attorney consists of the impossibility to establish authority exercising unlimited power, that is, so called *omnipotency*. This limitation results from the necessity to protect the interests of the represented.

Because of the necessity to protect the principal, the scope of the power of attorney must be defined.²⁹ According to objective criteria, representation may be divided into three types, which are the following: a limited power of attorney, a special power of attorney, and a particular power of attorney.

24 Judgment PSC of IV CR 368/76 [1976] (1977) OSNC 9, item 167.

25 R Longchamps 1887.

26 Judgment of the Court of Appeal in Katowice I ACr 323/92 [1992] (1993) OSA 7, item 47.

27 Judgment of PSC I CKN 323/99 [2001] (2002) OSNC 7-8, item 94.

28 M Pazdan in Z Radwański (ed) 2008, 469.

29 Ibid 475.

The individual types of power of attorney differ in terms of the areas of the activities they refer to.

A limited power of attorney consists of granting the attorney the power to carry out activities concerning ordinary management. The activities of ordinary management usually comprise activities related to current management of the company resources lying within the competence of the represented.³⁰ There is no specific list of activities constituting ordinary management, merely that acts that go beyond the scope of ordinary management have been precisely defined, and this may be a base to make *a contrario* assumptions about whether a particular activity is within the scope of ordinary management. What the scope of ordinary management does not include is the arbitration covenant, therefore *per analogiam* it must be assumed that issuing a plaint note³¹ is beyond the scope of ordinary management. Likewise, activities consisting in the sale of property/assets or establishing the limited property rights³² do not belong to the scope. This type of viewpoint, limiting the scope of activities to ordinary management, certainly serves to protect the principal's interests against the risk of damage that might be caused by the attorney. Otherwise, there would be a real threat to the principals due to the fact that a limited power of attorney is very popular, and therefore it is granted most frequently. The reasons for this popularity does not result from the entitlements granted to the limited power of attorney by legislature, but from the widespread availability of this solution and a lack of awareness of the possibility of granting another type of representation among those people interested in it. For these reasons, it is natural that it would be pointless to grant broad entitlements to a limited power of attorney, such as authorization for property charges by establishing the limited property right or sale of the property. It has been assumed, however, that in the case of representation granted by the board of the association engaged in business activity, a limited power of attorney constitutes authorisation sufficient for entering into a civil partnership agreement³³ and there is no need to grant additional power of attorney for this purpose. The viewpoint concerning entering into an agreement of civil partnership has been justified by the necessity for establishing civil partnerships as typical contracts occurring in business.

Another type of power of attorney is a special power of attorney. The special power of attorney, just as the name suggests, comprises authorization to perform special actions specified in the content of the power of attorney. Competent authorisation to carry out activities resulting from the power of attorney should specify the type of the action covered by the power of attorney and its subject. In the absence of unambiguous definition of the type of the action that is to be covered by the power of attorney, the rules that are applied

30 W Robaczyński in M Pyziak-Szafnicka (ed), *Kodeks cywilny. Komentarz, Część ogólna* [Civil Code. Commentary General part] (Wolters Kluwer Polska 2009) 970.

31 Resolution of PSC III CZP 8/02 [2002] (2002) OSNC 2002 11, item 133.

32 Judgment of PSC II CKN 866/97 [1998] (1999) OSNC 3, item 66.

33 Judgment of PSC II CKN 362/97 [1997] (1998) OSNC 2, item 33.

for the interpretation of declarations of intent³⁴ should be followed. The special power of attorney is not accompanied by any catalogue of the purpose of the activities for which the attorney can be authorized. Special power of attorney may be granted for the purpose of doing activities that are within the scope of ordinary management, as well as activities falling outside the scope of ordinary management³⁵. However, an interpretation aimed at justifying a position accepting the possibility of granting specific power of attorney for all legally permitted purposes would be incorrect. The special power of attorney, in Poland also referred to as a generic power of attorney, is subject to a restriction that boils down to excluding all actions that require special power of attorney from the scope of the purposes of granting it. Special power of attorney constitutes authorization of an attorney to take specifically defined, definite legal actions. The scope of the special power of attorney may comprise a single or a fixed number of legal actions. In the absence of an indication of the number of legal actions for the purpose of which the special power of attorney has been granted, its character changes and it becomes a particular power of attorney³⁶. Special power of attorney also includes actions related to signing a contract. Importantly, concluding a contract considered as a legal action for the purpose of which the scope of authorization is wider, should be distinguished from signing of a contract treated as a technical operation³⁷. The solution adopted in practice based on the special power of attorney is investing the power of attorney to a member of the management board of the partnership enterprise. The justification for this type of power of attorney lies in the record of the partnership agreement, which authorizes two or more members of the management board to make declarations of intent on behalf of the partnership enterprise. This record may result in curbing activity in the sphere of the company's current business, and overcoming this problem may consist of authorizing a board member to perform particular actions³⁸. Despite the apparent overlapping of the entitlements resulting from granting a special power of attorney to a member of the body authorized for representation, this provision is often used in practice, thus simplifying the procedure for decision-making in the field of minor or current affairs of the company.

A particular power of attorney is informally particularized in two cases. The first one is the power of attorney endorsement regulated in art. 18 of the Law on promissory notes.³⁹ The usage of the power of attorney endorsement entails entitlements for the endorsee. As a result of this legal procedure, the endorsee will be given the power to exercise all rights granted by the promissory note, including its endorsement, however only along

34 Judgment of PSC II CKN 866/97.

35 S Rudnicki in S Dmowski, S Rudnicki, *Komentarz do kodeksu cywilnego. Księga 1. Część ogólna* [Commentary on the Civil Code. 1st Book. General part] (LexisNexis 2007) 409

36 W Robaczyński in M Pyziak-Szafnicka (ed) 972.

37 Judgment of PSC I CSK 406/06 [2007] LEX 274237.

38 Judgment of PSC III CZP 68/06 [2006] (2007) ONSC 6, item 82.

39 Ustawa z dnia 28 kwietnia 1936 r. - Prawo wekslowe [Act of 28 April 1936 – Bills of Exchange Law] [1936] JoL 37, 282.

with the consequences of the power of attorney.⁴⁰ The second of the aforementioned cases of particularised particular power of attorney is a general power of attorney (in Polish - procuration). However, because of the scope of the entitlements of an attorney and the characteristics of this power of attorney, it is not possible to give a complete description of the regulations concerning the particular power of attorney, and thus it becomes necessary to carry out a separate analysis of this type of power of attorney.

4. GENERAL POWER OF ATTORNEY

Procuration (general power of attorney) in the legal regulations in Poland emerged soon after independence was gained, that is in 1919. The legislator decided to unify the rules in the territory of the Republic of Poland, starting from the sphere of the economy. Procuration was regulated together with the introduction of the commercial register, which was crucial for creating the opportunity for trade and industry to flourish in the recreated country. Along with the Decree of 7 February 1919 on the commercial register⁴¹ coming into force, the institution of procuration was regulated for the first time in Polish law. Another normative act regulating the issue of procuration was the Commercial Code. The articles referring directly to the issue of procuration also remained in force after the introduction of the Code of Commercial Companies, and until the amendment where the Civil Code and some other laws of 14 February 2003⁴² were introduced. Bringing the amendment into force resulted in the abolition of the provisions of the Commercial Code, which regulated procuration. Another consequence of this amendment was the introduction of Chapter III into Book I of the Civil Code, which was entitled *Procuration*. In the doctrine, it is questionable whether procuration constitutes a subtype of power of attorney or not, and thus, as a consequence of such assumptions, whether there is an occurrence of the superiority of the power of attorney over procuration. Apart from the aforementioned digressions on the superiority and relationship between procuration and the power of attorney, which existed at the time of the Commercial Code, it should be assumed that procuration is in many respects similar to the power of attorney. Procuration lies in the empowerment of an authorized agent (*prokurent* in Polish) to act on behalf of the principal, whereas the scope of procuration *ex lege*⁴³ encompasses the empowerment of an authorized agent to act in all legal relationships concerning managing an enterprise

40 A Szpunar, *Komentarz do prawa wekslowego i prawa czekowego* [Commentary on the bill of exchange law and check law] (Wydawnictwo Prawnicze 1994) 72.

41 Dekret z 7 lutego 1919 r. o rejestrze handlowym [Decree of 7 February 1919 on the commercial register] [1919] JoL 14, 164.

42 Ustawa z dnia 14 lutego 2003 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw [Act of 14 February 2003 on the amendment to the Act – the Civil Code and some other acts] [2003] JoL 49, 408.

43 According to Art. 109 § 1 CC, procuration is the power of attorney granted by the entrepreneur subject to mandatory entry in the register of companies, which includes authorization to perform judicial and extrajudicial documents, which are related to the business.

regardless of the provision or the will of the principal. One of the features distinguishing procuration from the power of attorney is the person who has the legitimacy to grant it. According to the regulations in force, procuration may be granted by a registered entrepreneur.⁴⁴ This regulation has nowadays been extended in comparison with this type of authorization in the past. Before the question of procuration was regulated in the Civil Code, the doctrine had conveyed the view that the entitlement to grant procuration belongs exclusively to commercial partnership companies,⁴⁵ whereas currently, because of the wording of Art. 109 [7] § 4 of the Civil Code,⁴⁶ it should be assumed that procuration may be granted by an entrepreneur who is a natural person, being a person who is registered in the Central Register and Information on Economic Activity.⁴⁷ Another difference between procuration and the power of attorney lies in its extent. Procuration ensures the entitlement to carry out activities related to managing an enterprise, and this difference is determined by the law, not by the will of the principal, as in the case of power of attorney granted through the intent of the principal. The last of the major differences between procuration and power of attorney is a lack of possibility of limiting procuration in relation to third parties.⁴⁸ With regard to the substance of the regulations relating to procuration, it may be noted how it is divided into individual and joint procuration. Independent procuration consists of an individual entitlement according to which each of the authorized agents is competent to act independently. Joint procuration, however, grants the empowerment to a few people to act as one authorized agent.⁴⁹ The distinction between joint procuration and joint representation should be recognized, and the formulations cannot be used interchangeably since they relate to different legal forms.

Joint representation is a type of representation consisting of an authorized agent acting together with, e.g. one of the guardians of the body of a partnership company. However, it is not a type of joint procuration, since the entitlements that are exercised by both persons do not result from procuration. It may be assumed that the joint representation is especially favourable to the partners who, because of various reasons, avoid performing

44 Entrepreneurs are registered: in the case of legal persons and legal persons without corporation status in the National Court Register, in the case of natural persons - in the Central Register and Information on Economic Activity.

45 SMachalski, 'Stanowisko prokurenta według k.p.c. z uwzględnieniem prawa upadłościowego' [Commercial proxy's position under the Code of Civil Procedure including bankruptcy law] (1936) PPH 2, 70; ARakower, 'Objaśnienie prawa wekslowego' [Explanation of the bill of exchange law] (1939) MPHiW 4, 47.

46 Art. 109 [7] § 4 CC. The death of the entrepreneur or the loss of his/her legal capacity shall not terminate the prokuration.

47 Ustawa z dnia 2 lipca 2004 r. o swobodzie działalności gospodarczej [Act of 2 July 2004 on freedom of economic activity] [2004] JoL 173, 1807, Art. 14.

48 Art. 109 [1] § 2 CC. Procuration cannot be limited when it affects third parties, unless a specific provision provides otherwise - restriction applies to Art. 109 [5]. Procuration can be reduced to the scope of issues listed in the register of the division of the enterprise.

49 Resolution of PSC III CZP 34/14 [2015] (2015) OSNC 7-8, item 80.

management functions in a partnership company. To provide a more detailed description of this method of managing the company, I will present in a schematic way the whole process from the founding of the company to its functioning. Starting from the moment of founding the company, in which the partner wants to avoid serving as a member of the management board, the whole process, simplified to some extent, is as follows: during the registration of the partnership enterprise, the partner appoints the management board and establishes himself/herself as the authorized manager, and makes the provision, according to which the representation of the company is given to the authorized manager, who acts jointly with a member of the board. Consequently, such a model of regulation does not result in limiting the powers of the authorized manager, but it contributes to limiting the entitlements of the board, which is obliged to act in certain situations together with the authorized manager. When the partnership agreement is properly defined, the authorized manager constitutes a kind of security buffer in relation to declarations of intent made by the management board of a company with limited liability.

The choice of the character of procuration depends entirely on the will of the principal, which arises out of his/her declaration of intent disclosed in the register.⁵⁰ While dealing with the issue relating to procuration, it should be mentioned who, in relation to legal persons and so called legal persons without corporation status, has statutory entitlements to decide about establishing procuration. With respect to private companies, which are usually referred to as legal persons without corporation status, appointing of an authorised agent requires the approval of all partners entitled to manage the affairs of the company.⁵¹ In the case of associations of capital, the appointment of an authorised agent requires the consent of all board members.⁵² Entrepreneurs do not have complete freedom when choosing a person to be appointed as an authorised agent by them, since it must be a natural person with full legal capacity.⁵³ The foregoing limitation with respect to the requirement relating to the type of people appropriate to be authorised is also consistent with the provisions that prevent the transfer of procuration onto another person.⁵⁴ The introduction by the legislator of the interdiction of appointing a legal person an authorised agent was undoubtedly meant to safeguard the interests of the principal. There is no doubt that the interests of the principal might be threatened in cases where an authorized agent is a legal person. The risk would be even greater because of the changeability of persons responsible for the management of legal persons. Along with this, trust in the competence of the current management board would not be transferred

50 U Promińska in M Pyziak-Szafnicka (ed) 1003.

51 Art. 41 §1 of the Commercial Companies Code (CCC) applied appropriately to other private companies..

52 Art. 208 § 6 of the CCC in relation to a limited liability company, and Art. 371§4 CCC in relation to a joint stock company.

53 Art. 109 § 2 CC. An authorized agent may be appointed from a natural person with full legal capacity.

54 Art. 109 § 6 CC. The general power of attorney cannot be transferred. An authorized agent may appoint a attorney to perform a particular action or some kind of action.

onto consecutive new board members. For these reasons, it should be assumed that the restriction on the transferability of procuration is unquestionably justified, and that the restriction related to the legal form of an authorized agent is indispensable.

6. ATTORNEY IN COMPLEX STRUCTURE COMPANIES

With reference to entities with a complex structure, such as commercial companies where other companies are partners, both the power of attorney and procuration are inextricably linked with the entity sitting on the board. In practice, the situation when the parent company that is a partner of another partnership company has an authorised agent, and this very agent is also appointed an authorized agent for a subsidiary company, is a phenomenon that frequently occurs. This kind of action in relation to representation is not allowed by the applicable legal regulations,⁵⁵ and in view of the purpose,⁵⁶ it does not seem to be appropriate. What could be a feasible solution concerning the issue of procuration in all companies with a partner (or partners) who is a commercial company is dual authorisation. If an authorised agent were to perform their functions for both the parent company as well as for the subsidiary company, they should be registered as the authorized agent in both of the represented companies in the National Court Register. In the case of attorneys, the same guidelines should be applied by analogy, naturally with the exclusion of registration in the appropriate register.⁵⁷

A considerable question from the hitherto presented deliberations relating to clusters of partnership companies is the appropriate procedure on the side of the representing bodies.⁵⁸ In the case of attorneys or authorised agents, in a situation when they would be entitled to represent both partnership companies, there would be often a real risk of not precisely indicating the entity represented. As a consequence of this ambiguity, the contractor of the subsidiary company would not be able to know which of the companies is entering into the contract.⁵⁹ To prevent such a contingency, while signing the contract, together with the signature, the attorney or authorized agent should clearly indicate on whose behalf the declaration of intent is being submitted.⁶⁰ This view seems to be consistent with the line of case-law, stipulating that the person signing the declaration of intent, next to their signature should disclose the legal relationship on the basis of which they operate, i.e., on behalf of whom the declaration of intent is being made.⁶¹ The discussed

55 Art. 109 [8] § 1 CC. Granting procuration and its termination should be reported by an entrepreneur to the register of enterprises.

56 Individual companies may engage in activities of different type, and therefore the necessary competences of the authorized agents (*prokurenty*) may radically differ from each other.

57 Power of Attorney is not liable to be entered in the appropriate register.

58 It applies to both attorneys and authorised agents (in the Polish law - *prokurenty*).

59 Z Radwański in Z Radwański (ed), 2008, 296.

60 Judgment of the Court of Appeal in Poznań I ACa 235/08 [2008] LEX 466417.

61 Judgment of the Court of Appeal in Warsaw VI ACa 143/03 [2004] LEX <<https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/vi-aca-143-03-wyrok-sadu-apelacyjnego-w-warszawie-520250452>> accessed 31 Jan 2019.

annotation, which precisely points to the person of the principal, is particularly important for the person who is the attorney or authorised agent. It is of such importance to representation because it is based on the liability aspect, since in the absence of the indication of on whose behalf the declaration of intent is made, it is assumed that the person making it acts on their own behalf,⁶² just as is the case when acting without authorization.⁶³ The situation when the action is carried out without authorization often occurs in the cases of signing promissory notes by attorneys who do not have relevant competence for that.⁶⁴

CONCLUSION

In conclusion, the activity of attorneys and authorised agents must be inextricably linked to indicating the person of the principal, which may be taken as a rule. To put it more precisely, while acting as an attorney, one should be obliged to reveal the person of the principal on every occasion, both during the negotiations, and in particular, when making the final declaration of intent. Finally, it is worth noting that the representation granted by entrepreneurs plays an important role in the economy, and making use of it or executing *lege artis* constitutes one of the pillars of safe and fair economic relations.

BIBLIOGRAPHY

LITERATURE

- Dmowski S, Rudnicki S, *Komentarz do kodeksu cywilnego. Księga 1. Cześć ogólna* [Commentary on the Civil Code. 1st Volumin. General part] (LexisNexis 2007).
- Dziurzyński T, Fenichel Z, Honzatko M, *Kodeks handlowy. Komentarz*, vol. 1, [Commentary on the Commercial Code] (Księgarnia Powszechna 1936).
- Fabian J, *Pełnomocnictwo* [Power of attorney] (PWN 1963).
- Kappes A. (ed), *Prawo spółek* (Zakamycze 1997).
- Klein A, ‘Charakter prawny organów osoby prawnej’ [Legal nature of the organs of a legal person] in J Błęszyński, J Rajski (eds) *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego* [Publications about civil law. Book in honor of Witold Czachórski] (PWN 1985).
- Longchamps de Barrier R, *Studia nad istotą osoby prawniczej* [Studies on the essence of a legal person] (Drukarnia Jakubowskiego i Sp. 1911).
- Machalski S, ‘Stanowisko prokurenta według k.p.c. z uwzględnieniem prawa upadłościowego’ [Commercial proxy’s position under the Code of Civil Procedure including bankruptcy law] (1936) PPH 2.
- Muller-Freienfels W, *Die Vertretung beim Rechtsgesellschaft* [Representation in the legal society] (Mohr 1955).

62 Judgment of PSC II C 354/35 [1935] (1935) OSN 11, item 453.

63 Judgment of PSC V CSK 48/08 [2008] LEX 424395; judgment of PSC IC 458/37 [1938] (1939) OSN 1, item 33.

64 Judgment of PSC II CKN 60/98 [1998] (1999) OSNC 1999 7-8, item 126.

- Pazdan M, 'Dobra i zła wiara osoby prawnej' [Good and bad faith of a legal person] in A Szpunar et al. (eds.) *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesora Biruty Lewaszkiwicz-Petrakowskiej* [Studies on private law. Book in honor of Professor Biruta Lewaszkiwicz-Petrakowska] (WUŁ 1997) 195.
- Pyziak-Szafnicka M (ed), *Kodeks cywilny. Komentarz, Część ogólna* [Civil Code. Commentary General part] (Wolters Kluwer Polska 2009).
- Radwański Z (ed), *Prawo cywilne – część ogólna* [Civil law - general part 2] (C.H. Beck 2008).
- Rakower A, 'Objaśnienie prawa wekslowego' [Explanation of the bill of exchange law] (1939) MPHiW 4.
- Sołtyński S, *Kodeks handlowy. Komentarz* [Commercial Code. Commentary] vol. 1 (C.H. Beck 1997).
- Szpunar A, *Komentarz do prawa wekslowego i prawa czekowego* [Commentary on the bill of exchange law and check law] (Wydawnictwo Prawnicze 1994).
- Wolter A, *Prawo Cywilne. Zarys części ogólnej* [Civil law. Outline of the general part] (PWN 1986).

LEGAL ACTS

- Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań [Ordinance of the President of the Republic of Poland of 27 October 1933. – Code of obligations] [1933] JoL No. 82, 598.
- Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 czerwca 1934 r. Kodeks handlowy [Ordinance of the President of the Republic of Poland of 27 June 1934 – Commercial Code] [1934] JoL 57, item 502
- Ustawa z dnia 28 kwietnia 1936 r. – Prawo wekslowe [Act of 28 April 1936 – Bills of Exchange Law] [1936] JoL 37, 282.
- Ustawa z 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 Civil Code] [1964] JoL No. 16, item 93
- Ustawa z dnia 20 sierpnia 1997 r. o Krajowym Rejestrze Sądowym [Act of 20 August 1997 on the National Court Register] [1997] JoL 121, 769.
- Ustawa z dnia 15 września 2000 r. Kodeks spółek handlowych [Act of 15 September 2000 – Commercial Companies Code] [2000] JoL 94, 1037.
- Ustawa z dnia 14 lutego 2003 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw [Act of 14 February 2003 on the amendment to the Act – the Civil Code and some other acts] [2003] JoL 49, 408.
- Ustawa z dnia 2 lipca 2004 r. o swobodzie działalności gospodarczej [Act of 2 July 2004 on freedom of economic activity] [2004] JoL 173, 1807.

ONLINE SOURCES

- Ministerstwo Sprawiedliwości, Krajowy Rejstr Sądowy [the National Court Register], <<https://ems.ms.gov.pl/krs/wyszukiwanie>> accessed 31 Jan 2019.

COIG, Spis polskich firm [List of Polish companies], <http://www.coig.com.pl/spis-polskich-firm_katalog_polskich_firm.php> accessed 31 Jan 2019.

JUDGEMENTS

Judgment of PSC II C 354/35 [1935] (1935) OSN 11, item 453.

Judgment of PSC IC 458/37 [1938] (1939) OSN 1, item 33.

Judgment of PSC IV CR 368/76 [1976] (1977) OSNC 9, item 167.

Judgment of PSC III CZP 8/90 [1990] (1990) OSN 10-11, item 124.

Judgment of the Court of Appeal in Katowice I ACr 323/92 [1992] (1993) OSA 7, item 47.

Judgment of PSC II CKN 362/97 [1997] (1998) OSNC 2, item 33.

Judgment of PSC II CKN 866/97 [1998] (1999) OSNC 3, item 66.

Judgment of PSC II CKN 60/98 [1998] (1999) OSNC 1999 7-8, item 126.

Judgment of PSC I CKN 323/99 [2001] (2002) OSNC 7-8, item 94.

Resolution of PSC III CZP 8/02 [2002] (2002) OSNC 2002 11, item 133.

Judgment of the Court of Appeal in Warsaw VI ACa 143/03 [2004] LEX <<https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/vi-aca-143-03-wyrok-sadu-apelacyjnego-w-warszawie-520250452>> accessed 31 Jan 2019.

Judgment of PSC III CZP 68/06 [2006] (2007) ONSC 6, item 82.

Judgment of PSC I CSK 406/06 [2007] LEX 274237.

Judgment of PSC V CSK 48/08 [2008] LEX 424395.

Judgment of the Court of Appeal in Poznań I ACa 235/08 [2008] LEX 466417.

Resolution of PSC III CZP 34/14 [2015] (2015) OSNC 7-8, item 80.