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PROTECTION OF THE INTERESTS OF CAPITAL COMPANIES IN SELECTED JUDGMENTS OF THE SUPREME COURT PERTAINING TO THE APPLICATION OF ARTICLE 210 (379) OF THE CODE OF COMMERCIAL COMPANIES

Dr. habil. Zbigniew Kuniewicz, University Professor
Faculty of Law and Administration, University of Szczecin, Poland
e-mail: zbigniew.kuniewicz@usz.edu.pl; https://orcid.org/0000-0003-0793-9937

Abstract. The paper aims to examine selected issues of representation of a company, which will be carried out on the basis of a special provision laid down in Article 210(1) (379(1)) of the Code of Commercial Companies. The objective of the provision is to protect the company's interests and the way to achieve this goal is through exclusion of the management board from representation in contracts and disputes between the company and a member of the management board. The paper seeks to examine the scope of application of Article 210(1) of the Code and to determine the legal nature and types of power of attorney that can be granted pursuant to the provision. The analysis is based on a rather complex factual case, and examines legal relationships in a limited partnership in which a limited liability company and a member of its management board are partners.

Keywords: company, representation of company in a contract with a member of the management board

INTRODUCTION

After thirty years of operations of commercial companies in free-market conditions in Poland and in the legal environment formed by regulations – first, the Commercial Code,[1] and since 2001, the Code of Commercial Companies[2] – a certain interpretation practice has been established with regard to the implementation of these regulations. An important issue addressed over this period by legal scholars and commentators and in judicial decisions involved proper representation of a company; in particular, representation carried out in a rather peculiar situation where contractual relations are established between the company and individuals who are members of the company's executive body, i.e. the company's management board.

The abovementioned situation comes under the hypothesis of Article 210(1) of the Code pertaining to a limited liability company[3] and Article 379(1) of the Code, pertaining to a joint-stock company. In view of identical axiological assu-

[1] Resolution of the President of the Republic of Poland of 27 June 1934, the Commercial Code, Journal of Laws No. 57, item 502 as amended [hereinafter: CC].
[2] Act of 15 September 2000, the Code of Commercial Companies, Journal of Laws of 2020, item 1526 as amended [hereinafter: the Code].
[3] Hereinafter: ltd. company.

mptions, the provisions were founded on and of the similarity of content, further discussion will focus on Article 210(1) of the Code. Conclusions drawn on that basis will apply also to Article 379(1) of the Code.

Pursuant to Article 210(1) of the Code, in a contract or a dispute between the company and a member of the management board, the company shall be represented by the supervisory board or an attorney appointed by the resolution of the shareholders' meeting. As both the legal writings [Strzępka and Zielińska 2015, 530; Popiołek 2015, 936; Szumański 2014, 504–505; Kuniewicz and Futrzyńska–Mielcarzewicz 2011, 113–17] and the judiciary[4] assert, the goal of the discussed provision is to protect the interests of the ltd. company, and indirectly, also its partners and creditors in the event of conflict of interests, which may emerge in a situation where a member of the management board concludes an agreement with "himself," and thus in a situation where the same persons are on both sides of the contract. A potential conflict of interests was solved by the legislator in favour of the company. In this case, the protection of the company's interests lies in eliminating the risk of members of the management board playing double roles: as representatives of the company's interests and as representatives of their own interests. It is worth noting that the regulations do not require the actual conflict of interest to take place; it suffices that there might be a potential conflict of individual interests of members of the board and the company's interests.

Ever since the provisions on the operations of companies became effective, one of the problematic issues and challenges has been to determine the effects of infringement of Article 210(1) of the Code, i.e. the prohibition to represent the company by members of the management board. It was commonly agreed that a contract concluded in violation of the provision was absolutely invalid, the normative basis for this sanction is provided in Article 39 or Article 58 of the Civil Code[5] [Kuniewicz 1996, 68–70; Naworski 2001, 411–12; Kidyba 2015, 996; Szumański 2013, 680; Weiss and Szumański 2014, 466; Gniewek 2017, 86; Gorczyński 2018, 254–57]. At present, this issue is no longer debatable thanks to the amendment to the Civil Code[6] adopted in 2018, whereby the provision of Article 39 was amended. The amended provision brings in the sanction of suspended in-

[4] Cf. judgment of the Supreme Court [hereinafter: SC] of 18 August 2005, ref. no. V CK 103/05, Lex no. 653638; judgment of the SC of 18 August 2005, ref. no. V CK 104/05, Lex no. 358805; judgment of the SC of 28 June 2007, ref. no. IV CSK 106/07, Lex no. 955036; resolution of the SC of 22 October 2009, ref. no. III CZP 63/09, OSNC 2010, no. 4, item 55; decision of the SC of 11 March 2010, ref. no. IV CSK 413/09, Lex no. 677902; judgment of the SC of 9 October 2010, ref. no. I CSK 679/09, Lex no. 622199; judgment of the SC of 15 June 2012, ref. no. II CSK 217/11, OSNC 2013, no. 2, item 27; decision of the SC of 14 November 2012, ref. no. I PK 212/12, Lex no. 1675355; judgment of the SC of 29 January 2014, ref. no. II PK 124/13, OSNP 2015, no. 4, item 52; resolution of 7 judges of the SC of 31 March 2016, ref. no. III CZP 89/15, OSNC 2016, no. 9, item 97; judgment of the SC of 3 February 2017, ref. no. II CSK 304/16, Lex no. 2284177.

[5] Act of 23 April 1964, the Civil Code, Journal of Laws of 2010, item 1740 as amended [hereinafter: the Civil Code].

[6] Act of 9 November 2018 on amendments to certain laws in order to implement simplifications for entrepreneurs in the tax and commercial laws, Journal of Laws of 2018, item 2244.

effectiveness of a contract concluded by a member of a body of a legal entity acting on its behalf without authorization. Thus, the solution adopted converges with the effects of the action of an attorney-in-fact who has no authorization or who exceeds the scope of the authorization (Articles 103–104 of the Civil Code) [Kuniewicz 2012, 154-164; Kubiak–Cyrul 2019, 93–94]. In fact, although the sanctions of absolute invalidity and suspended ineffectiveness differ in many ways, what is similar is that an act in law affected by either of them does not have intended legal effects [Radwański and Olejniczak 2015, 351–54].

1. THE MATERIAL SCOPE OF APPLICATION OF ARTICLE 210(1) OF THE CODE

Establishing legal effects of action taken by a member of the management board without the power of representation was not the only disputable issue with regard to Article 210 of the Code. A thorough analysis of judicial decisions, in particular the judgments of the Supreme Court, leads researchers to believe that the material scope of the provision in question still raises many controversies. It is not a secondary issue, since defining and establishing company representation is what decides about the effectiveness and, in consequence, the validity of the acts of representation. It should be noted that representation is inappropriate not only when, irrespective of the ban laid down in Article 210(1) of the Code, the company is represented by the management board, but also when as a result of erroneous interpretation of the discussed provision the management board is excluded from representation, even though it is authorized to act on behalf of the company with regard to a given matter [Kuniewicz 2020, 138].

To address the issue of the material scope of the application of Article 210(1) of the Code, i.e. to explain the meaning of the wording: "in a contract between the company and a member of the management board," it must be asserted that the premise underlying the provision refers to both the purely obligatory contracts and obligatory organizational contracts [Leśniak 2017, 58–60; Kuniewicz 2020, 103]. The latter contracts lead to the establishment of specific types of legal entities, such as partnerships or capital companies.

Recently, some issues arose in the judicial decisions with regard to the application of Article 210(1) of the Code in the context of specific connections between entities, namely, in the context of legal relationships in a limited partnership in which a limited liability company and a member of its management board are partners. To be more specific, in this case, an ltd. company is a general partner in a limited partnership, while a member or members of the company's management board act as limited partners in the limited partnership. In this case, the obligation to apply the rule of representation provided in Article 210(1) of the Code applies to not only the making of articles of a limited partnership but also to further legal transactions carried out between the ltd. company and a member of its management board, which arose in connection to the legal relationship, the source

of which are the articles of partnership. If, in particular, a member of the ltd. company's management board is, along with the company, a partner in a limited partnership, Article 210(1) of the Code applies to the ltd. company's statement of consent to amending the articles of partnership of a limited partnership (irrespective of the form in which amendment is made). Pertinent reasoning with regard to this issue was presented by the Supreme Court in the Resolution of 7 September 2018.[7] In this situation, a contractual relationship between an ltd. company and the member of its board is subject to modification, therefore, application of the special provision is obligatory (Article 210(1) of the Code), regulating representation of a company [Kuniewicz 2020, 101–109].

However, certain doubts arise with regard to admissibility of the application of Article 210(1) of the Code on the grounds of legal relationships of a limited partnership in which the ltd. company is an entity and a party to acts in law. Just as a reminder, the normative construct of a limited partnership is required to have at least two partners (a general partner and a limited partner) with a different legal status (Article 102 of the Code). Not to delve into details of these differences, the important issue for this analysis is the representative function in a limited partnership. Pursuant to Article 117 of the Code, a partnership shall be represented by general partners who, under the articles of partnership or a final and unappealable court ruling, have not been deprived of the right to represent the partnership. On the other hand, a limited partner, as a partner, is not authorized to represent the partnership; he may represent it only in the capacity of an attorney in fact (Article 118(1) of the Code). In a case where a limited liability company is a general partner, it shall perform the representative function in a partnership, and in fact, the function is performed by a managing-executive body of the ltd. company, i.e. its management board. However, if a member of the board is a limited partner in the partnership, naturally, some doubt arises as to the application or non-application of the principle of representation set out in Article 210(1) of the Code. The doubt refers specifically to the application of the provision with regard to constructs undertaken not by partners of the limited partnership, i.e. ltd. company and the board's member, but by the partnership and the person who is a member of the management board of the ltd. company which is a general partner in the partnership.

This issue was resolved by the judgment of the Supreme Court of 11 December 2015.[8] The facts of the case were complex, in particular with regard to personal changes which took place in the course of the operations of both companies, i.e. the ltd. company and the partnership company. These changes were elaborated on by the Supreme Court, so there is no need to examine them here. For the purposes of this paper, an important factual element involves the fact that a civil law agreement was concluded between the defendant–the partnership and the plaintiff–a member of the board of the limited company that is a general partner in

[7] Ref. no. III CZP 42/18. The Resolution and the justification memorandum were published in OSNC 2019, no. 6, item 64.

[8] Ref. no. III CSK 12/15, Legalis no. 1522514.

the partnership. The subject matter of the agreement was the plaintiff's obligation, for a consideration, to acquire a building permit, the beneficiary of which was the partnership.

In the factual case presented, the issue raising doubts is neither the legal nature of the agreement concluded, not the admissibility of the agreement itself. The subject matter of the court dispute was the validity of the agreement since it was entered into between a plaintiff who is a member of the management board of the ltd. company and a limited partnership represented by a general partner–the limited liability company, which in turn was represented by another member of the ltd. company's board.

The first and second instance courts asserted that Article 210(1) of the Code is applicable to the said case. This article excludes the authorization of the management board to represent the ltd. company and non-compliance with this article results in the nullity of the agreement concluded.

In the statement of reasons for this judgment it was indicated that, pursuant to Article 117 of the Code, general partners have the right to represent the partnership. Since in this case an ltd. company was the only general partner, then, pursuant to Article 210(1) of the Code, representation of the ltd. by the management board in a contract with a board member is precluded. Moreover, the statement of reasons also provided reference to the principle of unlimited liability applicable to limited partnerships (Article 102 of the Code). Pointing to the close connection between the liability of the partnership and the liability of its general partner, the court of first instance asserted that allowing the conclusion of contracts between members of the board of the general partner's company and the partnership, represented by a general partner, who in turn is represented by another member of the management board would completely annihilate the protective purpose of Article 210(1) of the Code. In such a situation, the partners of the limited company should appoint an attorney-in-law to conclude a contract with the board member, so as to prevent any abuse of authority by the latter. In consequence, nonadherence to the principles of representation of a limited liability company stipulated in Article 210(1) of the Code – in the opinion of the adjudicating courts – causes absolute nullity of the act in law performed on the basis of Article 58 of the Civil Code.

In the extensive cassation appeal, the plaintiff raised a claim for infringement of substantive law and procedural law. The Supreme Court ruled only on the substantive issue, justly deeming it essential to the case. The issue can be narrowed down to the assessment of whether Article 210(1) can be applied to a contract concluded by a partnership with a member of the management board of a limited company which is also a general partner in the partnership.

Resolving the above dispute, the Supreme Court ascertained that there are no jurisdiction arguments to justify the application of Article 210(1) of the Code to a contract entered into by a member of the board of an ltd. company that is a general partner in a partnership. Although the statement of reasons is not very len-

gthy, it is based on precise and substantial premises. In the light of the argumentation, the crucial factor here is that every commercial company constitutes a specific type of company, regulated by the statute. Neither the Code of Commercial Companies (no need for comma here) nor the legal commentary based on the Code implies that provisions pertaining to one company type may be applied to a different company type. The only exception here are the regulations on registered partnerships, which pursuant to express provisions of the Code should be applied to commercial partnerships, including limited partnerships (Article 103(1) of the Code). To further the argumentation of the Supreme Court, it is worth adding that a limited partnership, just as any other commercial company has legal capacity (Article 8 of the Code), thus constitutes an organization unit referred to in Article 33^1 of the Civil Code. In accordance with Article 33(1) of the Civil Code, provisions on legal persons shall apply to organizational units which have no legal personality, but are granted legal capacity under the law. However, the provision invoked does not authorize the application of Article 210(1) of the Code to legal relationships in a limited partnership. The regulation of Article 33^1(1) of the Civil Code is part of the General Provisions of the Civil Code, hence reference it includes pertains to the application of general provisions on legal persons, and not specific provisions regulating given types of legal persons, e.g. a limited liability company [Kuniewicz and Kuniewicz 2014, 35].

Emphasizing the protective purpose – from the perspective of company's interests – of Article 210(1) of the Code, the Supreme Court rightly noted that this provision is supposed to prevent the occurrence of a situation in which the same person, or other members of the management board the person collaborates with, appears on both sides of a construct in which a limited liability company participates.

In the adjudicated case the essential issue, overlooked by the courts of lower instances, is that the disputed contract was concluded between a limited partnership and a natural person who was a member of the ltd. company's management board, and not between an ltd. company and a member of its management board. Therefore, if we assume, as it is commonly accepted, that Article 210(1) of the Code pertaining to an ltd. company is a special provision, the logical conclusion is that its application to legal relationships of a limited partnership is not admissible. It would be also against the ban on the widening of interpretation of special provisions. In consequence, it must be stated that a contract concluded by a partnership with a member of the ltd. company's management board, a general partner in the partnership, was not a contract concluded "with oneself." From a wider perspective that takes into account not only the limited partnership, but also other partnerships, admissibility of such contracts should be judged with reference to Article 108c of the Civil Code [ibid., 34–35]. Although the provision pertains to the power of attorney, it expresses the general principle of prohibition to perform acts in law "with oneself" if a conflict of interests arises.

2. POWER OF ATTORNEY GRANTED ON THE BASIS OF ARTICLE 210(1) OF THE CODE

The above arguments imply that Article 210(1) of the Code does not apply to contractual relationships between a limited partnership and a member of an ltd. company's board that is a general partner in the limited partnership. However, this provision should be applied to legal relationships established in the context of a limited partnership in which an ltd. company is a general partner, and a member of the company's board is a limited partner. Moreover, in such an arrangement of entities, a person who is simultaneously a limited partner in the partnership and a member of the ltd. company's board, pursuant to Article 210(1) of the Code, cannot be appointed as an attorney-in-fact by the shareholders' meeting since such a connection is against the nature of a limited partnership.

The above opinion was expressed by the Supreme Court in a resolution of 30 January 2019.[9] The main issue the Supreme Court was presented with by the Regional Court pertained to the type of the power of attorney that can be granted on the basis of Article 210(1) of the Code. Specifying the legal doubt, the Regional Court formulated a question whether limited power of attorney should be applied to representing a limited liability company, i.e. pertaining to the conclusion of a specific contract or to the representation of the company in a specific dispute, or should "specific" power of attorney be admissible, and if so, can the specific power of attorney be granted and effective for an indefinite period of time.[10]

It should be emphasized that the questions capture a more profound issue, which is the effect of certain systemic premises that were adopted in Poland and refer to the nature of a legal power of attorney granted pursuant to Article 210(1) of the Code. In essence, if the questions posed refer to the concepts of limited and specific power of attorney, then it means that the inquiring entity is referring to the power of attorney as regulated in the Civil Code. However, this issue is not indisputable, and on the wider plane, it can be brought down to the issue of the relation of the provisions of the Code of Commercial Companies to the provisions of the Civil Code and the distinction between commercial and civil law [Frąckowiak 2020, 13–23].

Although the legislator provided a clear opinion on that in Article 2 of the Code and expressly adopted the principle of unity of civil law, still voices are heard opting for separation (autonomy) of commercial law. This trend was echoed in the judgment of the Supreme Court of 15 June 2012,[11] which settled the issue of

[9] Ref. no. III CZP 71/18, Legalis no. 1870561.

[10] In the Polish legal system there are 3 types of power of attorney: general power of attorney, limited power of attorney granting powers to perform a specific act, and "specific" power of attorney, defined as "power of attorney granting powers to perform legal acts of one category" [Kierzkowska and Miller 2000]. The two types – limited and specific power of attorney – are often erroneously translated as "special power of attorney" and confused.

[11] Ref. no. II CSK 217/11. Resolution and the justification memorandum were published in OSNC 2013, no. 2, item 27.

the type of a power of attorney granted on the basis of Article 210(1) of the Code. The judgment ruled that the provisions of the Civil Code pertaining to the power of attorney do not apply to the power of attorney granted pursuant to Article 210(1) of the Code. In the opinion of the Supreme Court, a power of attorney granted to enable representation of the company in contracts and disputes with a member of the company's board are governed by a separate regulation. This "specificity" of the power of attorney comes from the fact that the attorney-in-fact is vested with powers under a special procedure, namely, on the basis of a resolution of the shareholders' meeting. Therefore, considering that source of authorization – the Supreme Court argued – an attorney-in-fact appointed by a resolution is not an attorney-in-fact of the company *sensu stricto*, since the authorization granted to him is not the result of the statement of intent of a board member as a body authorized to represent the company, but rather of a special representative referred to as the "corporate representative" or an "organizational representative." Since the shareholders' meeting does not have an autonomous competence for "external" representation – the statement of reasons attached to the judgment of the Supreme Court of 2012 argues – powers are given to the attorney-in-fact on the basis of a special act of an "internal board." In consequence, in the view of the Supreme Court, an attorney-in-fact appointed by the shareholders' meeting, plays the role of a "substitute manager," executing precisely defined acts which remain within the competence of the management board as a body of the company.

The stance of the Supreme Court and the justification provided are indeed interesting and might spark a discussion about the place of commercial law in the legal system. However, the attempt to prove the hypothesis that the Code of Commercial Companies provides autonomous regulation of the power of attorney granted by shareholders' meeting was deemed to fail. In the light of the regulation in force, there is no justification for the postulate that an attorney-in-fact appointed pursuant to Article 210(1) of the Code is not an attorney-in-fact, but a substitute manager. The Supreme Court's introduction of a rather obscure concept of "substitute manager" was met with critique from legal scholars and commentators [Kuniewicz and Czepita 2013, 677–80; Naworski 2013, 51–62; Kidyba 2015, 1001].

The issue is also addressed extensively in the justification memorandum of the resolution of the Supreme Court of 30 January 2019. To explain and unify existing jurisprudence, the Supreme Court questioned the argumentation presented in the 2012 Supreme Court judgment about the autonomy of the legal construct of the power of attorney pursuant to Article 210(1) of the Code with regard to the power of attorney based on the Civil Code. First of all, the basic premise was questioned, which was the grounds for the 2012 ruling, namely that the granting of the power of attorney by the shareholders' meeting is an "internal" or "organizational" act and does on apply to all external relationships of the company.

Despite the fact that, indeed, the power of attorney based on Article 210(1) of the Code demonstrates certain attributes that modify the standard model of repre-

sentation of a limited liability company, these do not suffice to contest the power of attorney regulated by the General Provisions of the Civil Code. Special attributes of this power of attorney include: first, the fact that the attorney-in-fact is appointed by the shareholders' meeting, and not the management board as a body vested with the general competence to represent the company; second, the scope of the power granted to the attorney-in-fact is limited since it extends only to contracts and disputes between the company and the board members; third, since the shareholders' meeting is usually a collective body, then a resolution is a collective act of will to appoint an attorney-in-fact. However, it should be noted that none of the attributes listed are significant enough to substantiate the postulate that they may be treated as a legal construct, separate from the legal construct of the power of attorney under the Civil Code (Article 95 et seq. of the Civil Code).

Nonetheless, the attributes of the legal construct of the power of attorney allow an answer to the question of what type of power of attorney can be used on the basis of Article 210(1) of the Code. Considering the attribute referring to the scope of the authorization, it should be ascertained that an attorney-in-fact appointed by the shareholders' meeting cannot be a general attorney-in-fact, since the authority given to the attorney-in-fact embraces solely ordinary acts of management. However, the question that remains open is about the type of power, i.e. is the limited power of attorney admissible, or rather, it is the specific power of attorney that should solely be applied (granting powers to perform acts in the law of one category). In terms of the functional criterion, the option to appoint a limited attorney-in-fact seems sensible. Since the legislator does not limit the power of attorney only to a single act, there are no grounds to conclude that the only authority that can be granted is the limited power of attorney. It must be said that the specific power of attorney for an indefinite period does not weaken the protection of the company's interests, and the protective function is the essence of Article 210(1) of the Code. Moreover, it is the partners themselves who decide about the scope of authority given to the attorney-in-fact and the period of time the authority can be exercised.

The nature of the power of attorney is that it is a legal relationship built on trust, and in the event the trust is lost, the shareholders can at any time revoke the power of attorney or change its scope. As it was aptly noted by the Supreme Court in the justification of the 2019 resolution, the decision on the scope of the authority granted to the member of the board to act on behalf of the company is taken by the company itself, after taking into consideration of potential benefits and risks connected to the role of an attorney-in-fact, as well as of the interests of the company and partners. If partners have appointed a limited attorney-in-fact and have not set any time limits, then it is simply an indefinite power of attorney. In addition, the admissibility of such a solution is supported by the functional aspect of running a company. This means that in companies with a relatively large number of shareholders, calling a shareholders' meeting to appoint an attorney-in-fact to perform just one single act is difficult and costly. It should also be under-

lined that a limited power of attorney may be limited not only by specifying the types of contracts under the power of attorney but also by defining, for example, maximum contract price or other premises that determine the scope within which the power of attorney operates.

CONCLUSIONS

Based on the arguments presented in this paper, a number of conclusions can be drawn about the application of Article 210(1) of the Code to a specific relationship between entities, i.e., a case in which a limited liability company and members of its management board are partners in a limited partnership.

Prohibition of representation of the ltd. company by the management board in contracts and disputes with a member of the board, arising from Article 210(1) of the Code, means that at the making of articles of partnership of a limited partnership between the entities listed above, the ltd. company cannot be represented by a member of its management board. What is more, the manner of representation of the ltd. company by an attorney-in-fact appointed by a resolution of the shareholders' meeting or a supervisory board, as set out in Article 210(1) of the Code, applies also to the limited liability company giving consent to any changes to the articles of partnership of a limited partnership.

However, Article 210(1) of the Code does not apply to contractual relationships formed by the partnership, in which the ltd. company acts as a legal entity, i.e. a party to the contract, whilst the other party to the contract is a partner in the partnership who is also a member of the ltd. company board, and represents the partnership as a general partner. This conclusion is justified by the fact that the discussed provision is a special provision, and since the above case does not pertain to a contractual relationship between an ltd. company and a member of its management board, an extensive interpretation of the provision is inadmissible.

The final conclusion is about the legal nature and the type of power of attorney referred to in Article 210(1) of the Code. In accordance with the principle of unity of civil law, the adoption of which result from the normative premise of Article 2 of the Code, it can be asserted that the power of attorney under Article 210(1) of the Code belongs to the conceptual category of civil law representation (Article 95 et seq. of the Civil Code). However, given the scope of the authority given to the attorney-in-fact, general power of attorney cannot be granted by the shareholders' meeting. Yet, pursuant to Article 210(1) of the Code, it is possible to appoint a limited attorney-in-fact to perform a given act in law and a specific attorney-in-fact to perform a certain category of acts; specific power of attorney can be granted for an indefinite period.

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