The key institutions regulated in book one (the General part) of the Polish Civil Code

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The purpose of this article is to provide a brief description of selected issues from the General part of the Polish Civil Code which regulates a number of general institutions applicable in all other areas of civil law, especially in property law, the law of obligations, inheritance law or family law, and also in other parts of widely understood private law including commercial law or intellectual property law. Firstly, the article presents the definition and a general overview of the subjects of civil law (individuals, legal persons, including the State Treasury, limited liability companies and joint stock companies, cooperatives, foundations, universities or local government units, and finally the so called "statutory" persons). Then, the author turns to the definition and general overview of the objects of civil law relationships (especially tangibles and intangibles, movables and immovables, things specified as to their identity and things specified as to their kind, and finally the enterprise being an organized complex of tangible and intangible assets). The last part of the article deals with the construction of representation in civil law transactions (including representation by a company's body, by a proxy and the construction of joint mixed representation), the main principles of representation, the legal consequences of improper representation, the particular forms of acts in law (such as the document form, the ordinary written form, the electronic form, the written form with a certified date, the written form with certified signatures, and the notarial deed) and different consequences of not complying therewith (*ad solemnitatem*, *ad eventum* and *ad probationem*).

Keywords: civil law, subjects of civil law, objects of civil law relationships, representation in civil law transactions, company's body, proxy, forms of acts in law.

Introduction

Book One of the Polish Civil Code regulates a number of general institutions applicable in all other parts of the civil law, especially in property law, inheritance law or family law, and also in other parts of widely understood private law, like commercial law or intellectual property law.

The main subject of this article is to provide a brief description of selected issues from the General part of the Polish Civil Code, including the definition and a general overview of the subjects of civil law, the definition and a general overview of the objects of civil law relationships, the construction of representation in civil law transactions and particular forms of acts in law.

1. The subjects of civil law

There are three categories of subjects in Polish civil law i. e.: individuals (natural persons), legal persons and organizational units without legal personality (so-called statutory persons or imperfect legal persons). For the functional reasons, Polish law distinguishes also a category of entrepreneurs and a category of consumers.

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1.1. Individuals (natural persons)

The legal status of a natural person belongs to every person from the moment of birth until the death (Art. 8 of the Polish Civil Code; hereinafter CC). Depending on the age the individuals may have, respectively: full capacity to perform acts in law, limited capacity to perform acts in law or no capacity to perform such acts.

As a rule, the full capacity to perform acts in law is granted to every individual who is at least 18 years of age (Art. 10 CC). Such a person may completely independently make decisions of which acts in law to perform. Minors between 13 and 18 years of age have limited capacity to perform acts in law, which means that the effectiveness of any act performed by them (mutual or unilateral acts) usually depends on the consent of their statutory representative (Art. 15–22 CC). Minors under 13 years of age do not have capacity to perform, acts in law at all. Their legal affairs are managed directly by their statutory representatives (usually parents), under the supervision of the court (Art. 12 and Art. 13 CC).

The scope of capacity to perform acts in law depends not only on the age but also on potential incapacitation that may be imposed by the court. Incapacitation may be partial or complete. The former means a limitation, and the latter total deprivation of the capacity to perform act in law. A decision on incapacitation may be taken by the court only in the event when as the result of a mental disease, mental deficiency or mental disorders of another kind, especially due to alcohol use disorder (AUD) or drug addiction, a given individual is unable to control his or her behavior (Art. 13 and 16 CC).

1.2. Legal persons

A legal person is every organizational unit to which legal personality is granted by law (Art. 33 CC). The provisions of the Polish Civil Code directly grant such legal personality only to the State Treasury, and in the case of other entities the legal personality is granted by specific legislative acts (like the Act on commercial companies, the Act on foundations etc.). Among legal persons, there are companies (limited liability companies and joint stock companies), cooperatives, foundations, universities or local government units (municipalities, districts and voivodeships).

The establishment, structure and dissolution of a legal person are regulated by the relevant provisions of law and also by the statute of the entity (Art. 35 CC). Legal persons act through their bodies in a manner provided for in the statute (Art. 38 CC). If a relevant body is not able to act for whatever reason, the Polish Civil Code provides for the use of the institution of a curator appointed by the court. The main task of such curator is to bring the bodies of the legal person in question to be properly appointed. Unless it happens the legal person is represented by the curator who is supervised by the court (Art. 42 and 42^1 CC).

1.3. Statutory persons (*Ułomne osoby prawne*)

The third category of civil law subjects was implemented to the Polish Civil Code in 2003. Earlier, the concept of "imperfect legal persons" was developed by the doctrine to justify the subjectivity (or the subject nature) in civil law of partnerships (that have no legal personality). By a "statutory person" one should understand a unit recognized as a subject in civil law but deprived of legal personality. This category covers, among others, all partnerships, i. e. the registered partnerships, professional partnerships, limited partnerships and limited joint-stock partnerships, as well as the companies in organization (i. e. in the time period between the establishment of a company and its entry to the register of entrepreneurs).

The substantial difference between legal persons and statutory persons concerns the liability for obligations of such an organizational unit. With regard to legal persons there is a general rule that they are solely liable for their obligations. In the case of statutory persons the liability for their obligations is imposed also on their members (e. g. shareholders). It is so called subsidiary liability, which is activated when the statutory person becomes insolvent (Art. 33^1 § 2 CC). Both general rules mentioned above could be replaced by exceptions provided in the specific provisions of law. For example, the shareholders of a limited liability company (which is a legal person) may be in some situations liable for obligations related to the company's activity[1]. On the other hand the liability of some partners in partnerships (which are "statutory" persons) may be limited (e. g. the liability of limited partners in a limited partnerships) or even totally excluded (e. g. the liability of stockholders in limited joint-stock partnerships).

An additional crucial difference between legal persons and "statutory" persons (or persons without legal personality) appears at the field of tax law. Legal persons are subject to corporate tax while statutory persons are generally exempted from it (except joint-stock partnership). Perhaps it is the reason why statutory persons are commonly perceived as an attractive form of conducting commercial activity in Poland.

1.4. Entrepreneurs

Pursuant to Art. 43^1 CC an entrepreneur is defined as an individual (a natural person), a legal person or a statutory person who runs on his or her own behalf a commercial or professional activity.

In the light of the presented definition any subject of the civil law whose activity cumulatively fulfills the criteria below belongs to this category of entrepreneurs. The business:

— is run in the name and on *behalf of the subject indicated*;

— may be qualified as *commercial or professional*.

The Polish Civil Code provides neither a definition of commercial nor of professional activity. Following the concept presented in the doctrine and the judicial decisions one may define commercial activity as operating or participating in economic relations in a manner characteristic for those who are professionally engaged in the provision of goods or services to the others. Professional activity, on the other hand, refers to all self-employed professionals like, advocates, legal advisors, notaries, doctors, accountants and the like[2].

In general, all entrepreneurs are registered in one of the following public registers: the register of entrepreneurs being a part of the National Court's Register and Central Evidence and Information on Commercial Activity (hereinafter CEIDG).

The *register of entrepreneurs* is kept by the court pursuant to the National Court's Register Act[3]. It covers almost all entrepreneurs, except for individuals, including, without limitation, the following: registered partnerships, limited partnerships, professional partnerships, limited joint-stock partnerships, limited liability companies, joint-stock companies, cooperatives and also foundations and associations, provided that the last two run not only statutory but also commercial activity.

Unlike the register of entrepreneurs, the CEIDG covers only individuals who run commercial or professional activity (so called "sole traders").

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[1] Art. 198 § 2 of the Polish Commercial Companies Code (hereinafter CCC).

[2] More on the definition of entrepreneur please see: *Grykiel J.* Pojęcia działalności gospodarczej i zawodowej w rozumieniu art. 431 k. c. // Studia Prawnicze. 2005. No. 4. P. 31–48.

[3] Act of 20.08.1997, unified text Journal of Laws 2019. Item 1500, as amended.

1.5. Consumers

The category of consumers has been implemented to the Polish civil law to give more protection to those whom the legislator finds as a weaker party in civil law relationships, especially in relations towards entrepreneurs which are in advance qualified by law as a stronger party. The development of consumer law in Poland is also strongly influenced by EU regulations.

Pursuant to the definition provided in Art. 22^1 CC, the consumer is an individual who enters into a legal relationship with the entrepreneur, which is not directly related to commercial or professional activity of the individual. The analysis of this definition leads to the following conclusions.

Firstly, the status of a consumer may be granted *only to individuals*. Thus, legal persons and "statutory" persons have been intentionally left by the Polish legislator outside the definition of consumer.

Secondly, the classification of a given individual to the category of consumers is always made in relation to *particular acts in law* concluded by this individual with the entrepreneur.

Thirdly, the acts in law concluded by the consumer and the entrepreneur may not be *directly* related to the commercial or professional activity of given individual. The indirect character of such relationships does not exclude the classification of a given individual as a consumer. For example, if an individual purchases a flat from the entrepreneur to be used for the purposes of a commercial activity (e. g. as an office) run by such individual, such an individual shall not have the status of a consumer because of the direct relationship between the purchase and the commercial activity of this individual. Whereas when the same flat is purchased mainly for housing purposes, and only occasionally used also for some purposes related to commercial activity, then the relation between the purchase and the commercial activity of a given individual is only indirect, which does not exclude this person's status of consumer.

The status of a consumer grants a much wider protection in comparison to the general rules of civil law. The protection of consumers involves, among others, the following:

— possibility of eliminating so called *abusive clauses* from the contract, which are construed and implemented by the entrepreneur against good practice and with gross infringement of consumer rights — in such a case the contract remains in force but without the abusive clauses eliminated (Art. 385–385^3 CC);

— *extended liability* of the entrepreneur for the quality of goods (Art. 556^2, Art. 558 § 1 and Art. 560 § 2 CC);

— granting to the consumer some *additional rights* e. g. the right to withdraw from the contract within 14 days without specific reason if the contract is concluded outside the premises of the entrepreneur (Art. 27 of the Act on consumer rights[4]);

— *additional facilitation* granted to the consumer in the legal provisions on the termination of claims — i. e. the claims against the consumer are prescribed automatically, by virtue of law, without the need to raise prescription objection (Art. 117 § 2^1 CC).

2. Objects of civil law relationships

2.1. Definition and general overview of the objects of civil law relationships

By the object of civil law relationship one should understand any item to which the rights and obligations of the parties of such relationship are related. This is a category covering a number of different items, tangibles (like movables, immovables, liquids, gas-

[4] Act of 30.05.2014, unified text Journal of Laws 2020. Item 287, as amended.

es etc.) and intangibles (like receivables, shares, moral rights, electronic money etc.). Among all the items constituting the objects of civil law relationships a particular attention of the Polish legislator has been paid to things (movables and immovables) and to the enterprise, being an organized complex of tangible and intangible assets.

2.2. Movables and immovables

The Polish Civil Code defines a thing as every material item distinguished in the environment as having independent existence (Art. 45 CC). Within this category of subjects of civil law relationships a crucial meaning has been assigned to the distinction between movables and immovables (real estate). The immovables have been statutory defined while everything that does not belong to immovables has the status of a movable.

In the first place, a part of earth's surface, or a piece of land is an immovable, which means that it constitutes a separate property (Art. 46 § 1 CC). The crucial role in defining the real estate is played by the land and mortgage register. Pursuant to the majority concept presented by the case-law, several plots entered to one land and mortgage register constitute one immovable (i. e. one parcel/piece of land)[5].

The status of an immovable may be also attributed to a building or a part thereof, if a specific provision of law provides so. Otherwise a building or a part thereof is qualified as integral part of a land (Art. 48 CC). Among specific provisions of law that granting a status of immovable to a building or to a part of a building are: the regulation on perpetual usufruct (*użytkowanie wieczyste*), qualifying as a separate immovable each building raised by a perpetual usufructuary[6] or regulation on property of premises, qualifying as separate immovable each separated unit entered to a land and mortgage register[7].

Polish law, like many other systems of law, provides a specific regulation of immovables. Among a number of different provisions regulating the status of immovables one should pay attention at least to the following:

— a specific legal form — a deed (also known as a notarial act) — required for transactions (acts in law) related to the transfer of immovables (i. e. for a transfer itself or even for an obligation to make such transfer) — Art. 158 CC;
— no possibility of transferring real estate on condition or subject to a time limit (Art. 157 CC);
— certain limitation in acquiring immovables by foreigners[8];
— numerous and complex limitations in the transfer of agricultural immovables[9];
— specific regulation on the acquisition of real estate by usacaption (adverse possession) (Art. 172 and 173 CC);
— specific regulation allowing acquisition of real estate by someone acting in good faith and in trust to entries to the land and mortgage register (*rękojmia wiary publicznej ksiąg wieczystych*)[10].

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[5] *Rudnicki S.* Pojęcie nieruchomości gruntowej // Rejent. 1994. No. 1. P. 27–32; *Sokołowski T.* [Untitled] // Kodeks cywilny. Komentarz: in 3 vols. Vol. I: Art. 1–352 / ed. M. Gutowski. Warszawa: C. H. Beck, 2018. P. 430–431.

[6] Art. 235 CC.

[7] Act of 24.06.1994, unified text Journal of Laws 2020, Item 532, as amended.

[8] Act of 24.03.1920 on acquisition of immovables by foreigners, unified text Journal of Laws 2017. Item 2278.

[9] Act of 11.04.2003 r. on shaping the agricultural system, unified text Journal of Laws 2019. Item 2204.

[10] Art. 5–8 of the Act of 06.07.1982 on land and mortgage register and mortgage, unified text Journal of Laws 2019. Item 2204.

2.3. Things specified as to their identity and things specified as to their kind

Polish civil law also distinguishes *things specified as to their identity* and *things specified as to their kind.* Specified as to the identity is every specific, individualized thing. Specified as to the kind is every thing that has specific features. The qualification of a given thing as the one specified as to the identity or the one specified as to the kind *generally depends on the parties*. Usually the same thing (e. g. the car) may be classified either as specified as to the identity (e. g. the car identified by specific identity number) or as specified as to the kind (e. g. the car of given brand or model but without details identifying the particular item).

The distinction between things specified as to their identity and things specified as to their kind is crucial for the *mechanism of transfer the ownership*. Pursuant to Art. 155 CC, in relations to things specified as to their identity, the transfer of ownership takes place *solo consensu* at the moment of concluding the agreement obliging the parties to do such transfer (e. g. the sale, exchange or donation agreement), while for the transfer of ownership of things specified as to their kind the additional transfer of possession thereof is also required.

2.4. The enterprise

There are at least three reasons confirming that an enterprise is a very particular object of civil law relationships.

Firstly, because of its hybrid character — an enterprise constitutes an organized complex of *tangible* and *intangible* assets.

Secondly, an enterprise is available only to entrepreneurs, because it is strictly related to running a *commercial activity*.

Thirdly, the particular characteristic of an enterprise is a certain *level of organization* of its all parts, which gives a new quality to the whole structure.

One may point out at least two legal consequences which the Polish legislator wanted to achieve by the regulation of an enterprise in the civil code, i. e. implementation of a general rule that an enterprise may be transferred by a single act in law (*uno actu*) and the introduction of a special principle of liability of the acquirer (transferee) of the enterprise for the debts of the transferor related to the transferred enterprise.

Pursuant to Art. 55^2 CC, the act in law performed with regard to an enterprise covers all the parts of such enterprise, unless the parties agreed otherwise or unless some different rules are provided in specific regulations of law. One should remember, however, that following the majority concept presented in the doctrine, the transfer of an enterprise does not exclude the general rules applicable to the transfer of particular assets constituting thereof, including also any limitations applicable to such assets. The fact that such assets are transferred as parts of the whole enterprise does not mean that the transaction is any way easier to perform. The transfer of enterprise does not constitute a general succession — it is based on a concept of a set of *singular successions* in relation to each particular asset constituting the enterprise.

Particular rules of liability of the acquirer of the enterprise are provided in Art. 55^4 CC. The acquirer of the enterprise together with the transferor has joint and several liability for the transferor's debts related to the transferred enterprise. The main aim of such regulation is to protect third parties, especially the transferor's creditors. Interests of the acquirer are protected by two limitations of his liability: the *pecuniary* and the *objective*. The pecuniary limitation means that the acquirer's liability is capped up to the value of the transferred enterprise while the essence of the objective limitation is to exclude all the transferor's debts that have not been known to the acquirer despite his due diligence.

3. The legal representation in civil law[11]

3.1. Definition and various types of civil law representation

The term "representation" means any kind of *direct substitution*, undertaken either *on someone's behalf* (the representation by duly authorized representative — applicable to all subjects of civil law) or *within a frame of corporate structure* (the representation by the relevant body — applicable only to legal persons or statutory persons[12]). In both cases the legal consequences of the representative's actions appear on the side of the subject represented (i. e. the principal or the entity whose company's body has acted).

Direct substitution must be distinguished from *indirect substitution*. Within direct substitution the substitute acts *on his own behalf* but *to the benefit of the principal*. Depending on the particular construction of indirect substitution, the legal consequences of actions undertaken by the indirect substitute may appear *directly in the legal sphere of the principal* — like in the case of an administrator (syndic) or firstly *in the legal sphere of the substitute* but with the *obligation to make settlement thereof with the principal* — like in the case of a trusteeship.

There are three basic types of representation, distinguished by taking into account the source of authorization, i. e.:

— representation by an authorized body;
— representation by proxy;
— mixed joint representation.

Representation by an authorized body is based on the fact that a specified person (usually a natural person), by functioning in an *organizational structure* of a subject which is an organizational unit (a legal person or a statutory person), and therefore as its *body*, has a competence to represent that organizational unit with the consequence that the activity of the body is treated as a "personal" action of that organizational unit (pursuant to the theory of bodies, commonly represented in the Polish doctrine, the action of the body is considered as the action of that subject). The Management Board of a limited liability company, a joint-stock company or a cooperative has a status of the authorized body. In the case of partnerships, the legal status of authorized partners to represent a partnership is not seen uniformly. In the view of some, partners have a status of an authorized body, while others say that they are statutory representatives, and there are still others who consider them as a *quasi body*, without specifying, which legal category they mean. It seems that the general reference to an appropriate use of regulations on legal persons contained in Art. 33^1 CC, allows to use the theory of bodies also in relation to statutory persons such as partnerships.

Representation by proxy consists in making a declaration of intent by the representative who acts *on behalf of* the represented. Depending on the source of authorization, there are two types of representation by proxy: a statutory representation and a power of attorney. *The authorization of a statutory representative* is based on statute (e. g. a parent or a guardian of minor, a curator), however the authorization of a power of attorney is a principal's declaration of intent which is contained in the text of the power of attorney.

Mixed joint representation is a specific type of representation which fits neither in a classic representation by a company's body nor in a representation by proxy. It incorporates both mentioned types of representation and is based on a cooperation between at

[11] More on this topic: *Pazdan M.* [Untitled] // System Prawa Prywatnego. Prawo cywilne — część ogólna. Vol. 2 / eds Z. Radwański, A. Olejniczak. Warszawa: C. H. Beck, 2019. P. 587–693.

[12] Pursuant to Art. 38 CC a legal person acts through its bodies. The same applies accordingly to "statutory persons" — Art. 33^1 CC.

least two people, in which at least one of them is a member of a company body and one of them is a proxy. An example of the joint mixed representation is a cooperation between a member of the board and a holder of a commercial proxy.

3.2. General rules of representation by an authorized body

3.2.1. The competent body

As a rule, an appropriate body to represent an organizational unit is its *management board*. This situation appears in a limited liability company (Art. 201 § 1 CCC); a joint-stock company (Art. 368 § 1 CCC); a cooperative (Art. 48 § 1 Cooperative Law Act).

As a rule, in partnerships partners are authorized to represent the partnership. A set of partners authorized to representation is specified in every partnership according to particular rules:

- registered partnership — *every partner* is authorized to representation (Art. 29 § 1 CCC);
- professional partnership — *every partner* is authorized to representation (Art. 96 § 1 CCC), however, if the deed of a professional partnership provides that the representation of the partnership is entrusted to the management board, then the competence to represent the professional partnership is owed to the management board (Art. 97 CCC);
- limited partnership — the company is represented by *general partners* (Art. 117 in connection with Art. 29 § 1 and Art. 103 CCC);
- limited joint-stock partnership — as in a limited partnership's case, the partnership is represented by each of the *general partners* (Art. 137 § 1 in connection with Art. 29 § 1 and Art. 126 § 1 point 1 CCC).

In the deed of partnership partners can modify statutory regulations of representation, indicating for example that only some of partners will have right to represent the partnership (Art. 30 § 1 CCC). Furthermore, a partner may be deprived of the right to represent the partnership only for important reasons, pursuant to a final and unappealable court ruling (Art. 30 § 2 CCC).

3.2.2. The composition of the authorized body

As a rule, the composition of the management board is subject to the statutory regulations (Art. 38 CC). Therefore, parties can determine in the articles of association or in the statute, how many people shall constitute that body. There are three different options:

- *the strict composition of the body* — is based on indicating a particular number of members of the body (e. g.: "the management board consists of three members");
- *the spread method clause* — is based on the indication of the minimum and the maximum number of members of the body (i. e.: 2–5);
- the composition of the body regulated by a *general clause* whereby the body has one or more members.

From the transaction party's point of view the most general clause appears to be the safest — at least one member of the management board is enough to constitute the company's body and the prospective increased number of the composition does not pose a risk of the incorrect composition of the management board. On the other hand, a strict composition of the company's body is the most risky one. In the event of a member's

death or resignation, or when a member is recalled, the management board will have an inappropriate composition and be called a "non-quorum board" until a new member is appointed in place of the recalled one.

From the point of view of the regulations on company's bodies, the non-quorum board cannot fulfill its function because it is improperly constituted. Applying this provisions without any exceptions would involve a serious risk for company's business partners as they do not have the possibility to verify easily the composition of the management board. It is because such information is not disclosed in the register of entrepreneurs. For these reasons, it is recognized that the non-quorum board may represent a company effectively if its composition is enough to represent it effectively pursuant to the binding law of the company's articles of association/statute.

If a company, a partnership, a cooperative or another organizational unit cannot be represented or run its affairs due to a lack of a relevant body or a default composition of its body, the court will constitute a curator (Art. 42 § 1 CC). The curator has the right of representation within the limits specified in the court certificate.

3.2.3. The scope of authorization

Within the frame of representation the scope of authorization includes all actions taken in court and out of court which are related to the business operations of a given legal or statutory person. A justification for that conclusion can be found in following provisions:

— Art. 29 § 2 CCC — in the case of all partnerships;
— Art. 204 § 1 CCC — in the case of a limited liability company;
— Art. 372 § 1 CCC — in the case of a joint-stock company.

The above-mentioned scope of authorization cannot be restricted with respect to third parties (Art. 29 § 3, Art. 204 § 2 and Art. 372 § 2 CCC). All presumptive limits will only have an internal effects which means that they will only involve a relation between the company and the member of the management board or the partner who is authorized to represent the company.

3.2.4. The form of representation

The manner of representation by an authorized body is usually specified in a deed of incorporation of a company or in the statutes of a legal entity. In the case of partnerships, partners may also determine in the deed of partnership the manner of representation. If neither the statutes nor a the deed of partnership contains regulations related to the manner of representation, the statutory regulations will be applicable and according to them:

— in partnerships there will be a one-person (single) representation which means that *every partner* authorized to represent the partnership, has a right to represent the partnership solely (Art. 29 § 1 CCC);
— in limited liability companies there will be a statutory model of representation — if the management board is composed of more than one person, *two members* of the management board shall act jointly or *one member* of the management board shall act together with a *holder of a commercial proxy* (Art. 205 CCC) — if the management board is composed of one member, then that one member will act solely[13];
— in joint-stock companies there will be a similar principle as in limited liability companies which means a requirement to act jointly by *two members* of the manage-

[13] Provision of the Supreme Court of 24.07.2013. III CNP 1/13. The jurisprudence of the Supreme Court, Civil Chamber. 2014. No. 4. Item 43.

ment board or by *one member of the management board jointly with the holder of a commercial proxy* (Art. 373 CCC);

— in cooperatives, there will be a cooperation of *two members* of the management board or of *one member* of the management board jointly with a proxy (Art. 54 § 1 of the Co-operative Law Act).

An obligation to act jointly by two or more people does not mean that they have to make a declaration of intent at the same time[14]. There is an option allowing signing a contract successively. The company's statement will take effect when the last declaration of intent which is required within the frame of a joint representation is made.

It is disputable whether it is possible to introduce *additional criteria* (i. e. quota) within a frame of a contractual (statutory) regulation of joint representation. In practice there are provisions according to which acts in law not in excess of the certain value may be made individually, whereas in the event of acts in law in excess of a certain (set) value, the joint representation is required. These provisions are treated as valid and effective against third parties[15]. However, that kind of representation is doubtful, particularly in view of the statutory prohibition of restriction with respect to third parties[16]. What is more, it is sometimes difficult in practice to determine the value of the acts in law because there are no precise guidelines whether the value of pecuniary or non-pecuniary benefits should be taken into consideration (e. g. in a contract of sale). The matter is even more complicated in the continuous contracts such as a lease or a tenancy because it is not known what the basis of the value of the contract should be (i. e. the rent for the whole or choosing period of the contract or another value). Due to that fact, in practice, similar restrictions should be taken with caution and in the event of any doubt, a joint representation in performing an act in law should be demanded.

3.2.5. Representation in labour law

Specified rules of representation are applied in labour law. Pursuant to Art. 3^1 of the Labour Code — if an employer is an organizational unit, any actions under labour law shall be taken by the person that manages this organizational unit or its body, or by any other assigned person. This solution is applied accordingly in the case of employers as individuals if they do not perform any act in law within the scope of labour law personally[17].

3.2.6. The conduct of the company's affairs and the representation

As a rule, the conduct of affairs and the representation are two different spheres of the activities of organizational units. The conduct of the company's affairs means making decisions *within the organizational structure* of a particular company, while the company's representation is limited to making declarations of intent with an effect *outside the company*, namely on third parties.

Traditionally, the validity of the act in law performed by the company's does not depend on making right decision in the sphere of conducting its affairs. For instance, the conclusion of an agreement by the member of the management board who is authorized to represent the company alone, which is outside the scope of ordinary conduct

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[14] Judgement of the Supreme Court of 26.08.2009. I CSK 32/09. The jurisprudence of the Supreme Court, Civil Chamber. 2010. No. 2. Item 56.

[15] Resolution of the Supreme Court of 30.05.2008. III CZP 43/08. The jurisprudence of the Supreme Court, Civil Chamber. 2009. No. 7–8. Item 93.

[16] More on this topic please see: *Grykiel J.* Skuteczność czynności prawnej dokonanej przez podmiot wpisany do rejestru przedsiębiorców a sposób reprezentacji ujawniony w tym rejestrze — Glosa do uchwały SN z dnia 30 maja 2008 r. (III CZP 43/08) // Monitor Prawniczy. 2009. No. 21. P. 1180–1184.

[17] Judgment of the Appeal Court in Szczecin of 15.05.2014. III AUa 936/13. LEX No. 1496085.

of the company's will be valid and effective despite a lack of approval which pursuant to Art. 208 § 3 CCC should be expressed in a prior resolution. This, however, does not exclude the possible liability of that member of the management board to the company for the arbitrary conclusion of an agreement without the prior "internal" resolution. By way of an exception from the above-mentioned provision, the legislator sometimes implements specific regulations in which the validity of acts in law of the company's representation is subject to an appropriate decision in terms of the conduct of the company's affairs. An example of such a special regulation that is of practical importance is Art. 17 CCC which provides that where under the law, an act in law to be performed by the company requires a resolution of the shareholders or the general meeting, or of the supervisory board, such an act performed without the required resolution shall be *null and void*. A relevant resolution may be passed before the company submits a statement or thereafter, however, no later than two months following the date of submission of the statement by the company.

The analysis of Art. 17 CCC leads to conclusion that the application of this provision requires the following *legal prerequisites* occurring at the same time**:**

- the act in law is performed by a limited liability company or a stock-joint company;
- *the resolution of the shareholders* or *the general meeting*, or of *the supervisory board* is required to perform this act in law (that provision does not apply to other company's bodies, including the management board);
- the requirement to obtain approval must result from the law, not only from the company articles of association or statute.

Art. 17 CCC is applicable to such acts in law as the disposal or lease/acquisition of the real estate by a limited liability company. Pursuant to Art. 228 point 4 CCC these acts in law require a shareholders' resolution, unless the company deed provides otherwise. Without that kind of resolution the disposal or the acquisition of immovables will be null and void, even though the company was duly represented and the third party acted in good faith.

3.2.7. Openness of the representation rules

The representation rules in the organizational unit should be publicly available to allow a third party know the rules on which that organizational unit can make a declaration of intent. In the case of commercial companies and cooperatives, the principle of openness consists in a duty of entering the relevant data in the register of entrepreneurs. It refers to information, such as:

- details of board members;
- the manner of representation;
- information about a deprivation of partner's right to represent the company (or the cooperative).

3.2.8. Good faith protection related to entries to the entrepreneurs register and CEIDG

However, entries in the register of entrepreneurs shall be presumed to be accurate, in this respect the legislator did not foresee any protecting instruments such as a guarantee of authenticity of the land and mortgage register. A specified object and scope of protection which is guaranteed in relation to an entry in register of entrepreneurs or CEIDG should be determined case by case[18].

[18] Further on this topic please see: *Grykiel J.* Ochronna funkcja rejestru przedsiębiorców na przykładzie wpisów dotyczących spółek handlowych // Przegląd Prawa Handlowego. 2012. No. 12. P. 43–52.

3.3. Legal possibility to act by proxy

The essential prerequisite for the proxy to perform a particular act in law is the absence of the requirement that the act must be performed personally. Most of acts in law in civil law do not need to be performed in person, so (interested) subjects may be represented by an appointed proxy.

In some cases, however, the possibility of acting by proxy is at least disputable. It refers to, among others, the possibility of representing a partnership by a proxy of one of the partners[19]. The Supreme Court, in the analysis of that legal issue on the basis of a limited partnership in which the general partner was a limited liability company, considered that solution acceptable. It concluded that, apart from the management board of a limited liability company (being a general partner), the general partner's proxy may also act effectively on behalf of the limited partnership[20].

There are also cases when the possibility of acting by proxy depends on the decision of interested parties. For instance, the regulations of a limited liability company (Art. 243 § 1 CCC) allow to *exempt* in the articles of association the right to participate in the shareholders' meeting and exercise voting rights by proxy. In the event of such an exemption being implemented, shareholders have to participate in the shareholders' meeting and exercise their voting rights on their own and the potential power of attorney will be invalid.

3.4. The proxy

As a rule, every subjects of civil law (including legal and statutory persons) can be a proxy. In the event of individuals there is a prerequisite of having at least a limited capacity to perform act in law (Art. 100 CC).

Some of the provisions exclude a possibility of acting as a proxy for certain persons. For instance, neither member of the management board nor an employee of a limited liability company can be a proxy of a shareholder on a shareholders' meeting (Art. 243 § 3 CCC). A similar rule is provided in a joint-stock company, except for a public company (Art. 412^2 § 1 and 2 CCC). A power of attorney granted to that persons to participate in a shareholders' meeting or to exercise voting rights will be **invalid**.

In specific cases the possibility of granting the power of attorney is very disputable. It refers to, among others, proxies given to *members of the management board* or *partners authorized to represent a partnership.* The Supreme Court has decided on that matter several times but, unfortunately, the rulings were not entirely consistent. It may be assumed that granting a power of attorney to these persons to perform a certain (specified) acts or granting a power of attorney determining the kind of acts in law that may be performed is relatively safe. Granting a commercial proxy or a general power of attorney howsoever can be defended pursuant to the binding legal provisions is still connected with a certain risk[21].

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[19] Please see: *Grykiel J.* Wykorzystywanie prokury do reprezentacji spółki komandytowej, której komplementariuszem jest osoba prawna nieposiadająca zarządu. Glosa do postanowienia SN z 16.06.2016, V CZ 26/16 // Monitor Prawniczy. 2017. No. 13. P. 716–722, together with judgments and literature quoted therein.

[20] Provision of the Supreme Court of 16.06.2016. V CZ 26/16. LEX No. 2075719. Similarly, provision of the Supreme Court of 29.06.2016. III CSK 17/16. The jurisprudence of the Supreme Court, Civil Chamber. 2017. No. 4. Item 46.

[21] Further on this topic please see: *Grykiel J.* Udzielenie prokury członkowi organu reprezentacji mocodawcy // Glosa. 2007. No. 5. P. 95–113; *Naworski J. P.* Reprezentacja spółki kapitałowej z udziałem pełnomocników — w tym będących członkami // Glosa 2007. No. 5. P. 5–55, together with judgments and literature quoted therein.

3.5. Types of power of attorney

3.5.1. The concept of the power of attorney

A power of attorney is an empowerment arising from a unilateral act in law performed by one person (the principal) on the basis of which the principal authorizes a chosen person (a proxy) to act on his or her behalf with all effects to the principal.

As a rule, the scope of the empowerment of the proxy is determined by the principal. In the text of the power of attorney restrictions or limitations of the authorization (power of attorney) may be identified and they may concern, for instance, the value of the act in law, the place and time of performing the act, or the person of the contractor. As long as the law does not provide exceptions, all such restrictions become *effective against third parties.* Therefore, if the text of the power of attorney shown by a contractor/business partner, for example, has been worded vaguely, it may be better to ask for another power of attorney with unambiguous wording from which it will be clear that the proxy has been explicitly authorized to perform specific acts in law on behalf of his principal (e. g. to conclude a settlement agreement in a particular case).

A distinction should be drawn between a *substantive* and *procedural* power of attorney. The first one is based on an authorization to perform so-called substantive acts in law and thus to conclude a contract or a notice of cancellation or withdrawal from a contract etc. The procedural power of attorney gives authorization to represent the principal in particular proceedings (civil, administrative, taxation etc.). As a rule, only the substantive power of attorney is regulated in the civil code. As for the procedural power of attorney, it is regulated in provisions referred to a particular type of proceedings, thus respectively in The Code of Civil Procedure, The Code of Administrative Procedure, The Code of Criminal Procedure etc. Only a commercial proxy combines features of both powers of attorney because it authorizes the proxy to take actions in court and out-of-court.

The Civil Code distinguishes four types of power of attorney:

— the general power of attorney;
— the power of attorney determining the kind of acts in law;
— the power of attorney for an individual act in law; and
— the commercial proxy (*prokura*).

3.5.2. The general power of attorney

A general power of attorney shall comprise the authorization for acts of *ordinary management.* The term ordinary management should be understood as acts in law within the scope of ordinary activities of particular subjects. Acts in law exceeding the scope of ordinary management are acts which due to their nature or value cannot be considered as belonging to ordinary or typical activities and which are generally performed in day-to-day operations of a particular subject.

Because of the general nature of the clause *ordinary management*, the scope of the authorization of the general proxy is *vague*. In consequence, in case of doubt, a power of attorney determining the kind of acts in law and a power of attorney for an individual act in law should be required.

A general power of attorney shall be granted in writing on pain of invalidity (Art. 99 § 2 CC). However, if the other special form is required for *the validity* of the act in law within the scope of the general power of attorney, then the general power of attorney shall be granted in the same form to provide/ensure that it also includes authorization to perform the act in law in question. Thus is known as *the derivative form* requirement.

3.5.3. The power of attorney determining the kind of an act in law

It shall comprise the authorization for performing certain types of acts in law which are referred to in a wording of the power of attorney. The certain types of acts in law should be understood as a specified type of acts in law (sale, exchange, lease) performed with regard to particular objects (movable things, land, rights etc.). There is no clear regulation how to specify the scope of this power of attorney. For practical reasons, the clearer and more precise the content of the power of attorney, the lesser is the risk that it will questioned. Acts in law referred to in the power of attorney may belong to the ordinary management or exceed that scope.

One or more powers of attorney determining the kind of acts in law may be included in one document of proxy.

The power of attorney determining the kind of acts in law does not require any specific form. When a specific form is required for the validity of an act in law, a power of attorney to perform such an act shall be granted in the same form. The *derivative form* requirement referred to Art. 99 § 1 CC applies to such situations. For example, a power of attorney authorizing a sale of property shall be executed in the form of a notarial deed on pain of invalidity (Art. 99 § 1 in connection with Art. 158 CC), while the power of attorney to enter into a preliminary contract of a sale of property does not need that kind of form because the regulations governing preliminary contracts (Art. 390 § 2 CC) provide for a special form only in order to achieve some additional legal results (*ad eventum*) and not on pain of invalidity (*ad solemnitatem*)[22].

3.5.4. The power of attorney for one (specific) act in law

It shall comprise the authorization for *one, particular* act in law indicated in the content of the power of attorney (e. g. for a sale of a particular property). It can be an act performed within the scope of ordinary management or it may exceed that scope**.**

One or more powers of attorney for a specific act in law can be included in one document of proxy.

As a rule, the choice of the type of power of attorney belongs to the principal. However, the legislator sometimes restricts the principal's right and points out a particular type of the power of attorney. For example, pursuant to Art. 109^3 CC authorizing a holder of commercial proxy to the sale of the property or enterprise, the principal must grant a power of attorney for an specific act in law. In such a case, a general power of attorney or a power of attorney determining the kind of acts in law will be ineffective as done in contradiction with an above-mentioned provision.

The commercial proxy is a special type of a power of attorney which is available only for entrepreneurs. More information can be found in point 3.6 hereunder.

3.6. The commercial proxy (*prokura*)

3.6.1. Definition of the commercial proxy

Pursuant to the definition in Art. 109^1 § 1 CC commercial proxy is a power of attorney granted by an entrepreneur who must be entered into the CEIDG, or in the register of entrepreneurs of the National Court Register, together with authorizations granted to perform actions in court and out-of-court which are connected with conducting the enterprise's affairs. The commercial proxy is the most extensive power of attorney which is known in Polish civil law.

[22] Please see sec. 4 of this article.

3.6.2. Main characteristics of the commercial proxy

A commercial proxy has many features which distinguish it from the classic civil law power of attorney, among them the most significant are:

— statutory defined scope of authorization (Art. 109^1 § 1 CC);
— very wide scope of authorization covering all actions performed in court and out-of-court related to conducting the enterprise;
— mixed nature — the commercial proxy combines features of a *substantive* and *procedural* power of attorney;
— unlimitable authorization — the scope of commercial proxy may not be limited effectively with regard to third parties (Art. 109^1 § 2 CC), therefore all potential restrictions will only have an internal character i. e. will be only effective in the principal and the holder of the commercial proxy relationship;
— a limited availability — the commercial proxy can be granted only by an entrepreneur who is subject to the obligation of being entered into the Central Registration and Information on Business, or in the Register of Entrepreneurs of the National Court Register (Art. 109^1 § 1 CC);
— openness — the fact of granting commercial proxy and its expiration shall be notified by the entrepreneur to the CEIDG or to the Register of Entrepreneurs of the National Court Register (Art. 109^8 CC).

3.6.3. Types of commercial proxy

There are some types of commercial proxy which are distinguished by two criteria i. e*. the scope of authorization* and *the manner of representation.*

Considering the scope of authorization the following are distinguished:

— the full commercial proxy (Art. 109^1 § 1 CC);
— the branch commercial proxy (Art. 109^5 CC).

The full commercial proxy comprises the authorization for actions taken in court and out-of-court which are related to conducting the affairs of the enterprise, subject to exclusions provided for in Art. 109^3 CC.

The branch commercial proxy is an acceptable restriction of the scope of authorization by the legislator. According to the definition contained in Art. 109^5 CC, the branch commercial proxy is based on limiting the scope of authorization to certain activities entered in the register of the enterprise's branch. The practical application of the branch commercial proxy is doubtful because of its legal construction has not been properly adjusted to the regulations on registering companies which do not provide a separate register for branches[23].

First of all, there is *no separate register for branches*. All branches of a particular entrepreneur are entered in one register.

Secondly, the data disclosed in the register makes it *impossible* to determine the scope of activities which are handled in a particular branch. Information of the business activity is one and joint for all branches and the head office. Besides, in one of the latest amendments of the National Court Register Act, there are only ten positions of the business activity which are entered in the register.

[23] Further on this topic please see: *Grykiel J.* Prokura oddziałowa w świetle regulacji art. 109^5 k. c. // Przegląd Prawa Handlowego. 2006. No. 10. P. 52–58; *Naworski J. P.*: 1) Prokura oddziałowa na tle prokury pełnej (cz. 1) // Prawo Spółek. 2008. No. 1. P. 28–40; 2) Prokura oddziałowa na tle prokury pełnej (cz. 2) // Ibid. No. 2. P. 2–11.

For the above reasons, the authorization of the branch commercial proxy cannot be effectively established. It must be emphasized that the legislator adopted the branch commercial proxy model which is distinguished from other branches on the basis of *the subject criterion* (type of activity), not territorial (branch territory). Meanwhile, in practice, most branches deal with the same cases but on different territories.

Taking all presented objections into account, it should be assumed that performing any acts in law with participation of a holder of the branch commercial proxy is risky.

Applying the manner of representation criterion, the following types of the commercial proxy can be distinguished:

— *sole commercial proxy* (independent) — which allows the holder of a commercial proxy to represent the principal solely without necessity to cooperate with anybody;
— *joint commercial proxy* — in which the holder of the commercial proxy must cooperate with another holder or other holders of commercial proxy;
— *improper joint commercial proxy* — in which the holder of the proxy must cooperate only with the member of the management board or the partner who is authorized to represent the partnership/company — within the frame of that commercial proxy it is impossible to cooperate with another holder of a commercial proxy;
— *extended joint commercial proxy* — in which there is possibility to act with another holder of a commercial proxy or a member of the management board or the partner who is authorized to represent the partnership/company.

The improper joint commercial proxy and the extended joint commercial proxy were implemented to the Civil Code by the amendment which entered into force on 1st January 2017 (Art. 109^4 § 1^1 CC). The wording of the new regulations and the manner of adjustment new types of the commercial proxy are an issue of considerable controversy[24].

In all types of the commercial proxy which require cooperation by at least two persons, it is essential to *adequately and precisely* indicate the persons who shall cooperate. Providing the general information that the commercial proxy is joint is not enough. Such general description unable to determine how many people shall cooperate to effectively represent the principal. In that case, in order to provide verification of the manner of representation, presentation of the document of commercial proxy should be required. That document should specify sufficiently with whom the holder of commercial proxy should cooperate.

3.6.4. The scope of authorization

The general scope of the authorization of the holder of a commercial proxy comprises the authorization for actions taken in court and out-of-court which are connected with conducting the enterprise (Art. 109^1 § 1 CC). The holder of the commercial proxy can represent the principal also in legal or administrative proceedings without the necessity of getting a separate authorization.

The general scope of authorization is limited. The limitations are specified in Art. 109^3 CC, pursuant to which an alienation of an enterprise, the performance of an in act in law by which an enterprise is given for a temporary use, as well as an alienation and encumbrance of the immovable property require *a power of attorney for individual acts.* This provision applies only to acts in law related to the enterprise within the meaning of Art. 55^1 CC. It seems that immovable property means also a share in co-ownership, perpetual usufruct

[24] Instead of many please see: *Grykiel J.* Prokura łączna po nowelizacji // Monitor Prawniczy. 2017. No. 4. P. 185–193; *Opalski A., Pabis R., Wiśniewski A. W.* Regulacja prokury łącznej mieszanej w kodeksie cywilnym // Przegląd Prawa Handlowego. 2017. No. 3. P. 15–23, together with judgments and literature quoted therein.

and a share in thereof. Whereas the term "alienation" is defined not only as making purely dispositive legal actions but also as making contracts with double legal effect (an obligatory and transferring effect). The legislator did not specify whether Art. 109^3 CC covers entirely the obligating acts in law. Similar concerns arise in the interpretation of the notion of "encumbrance" of the property. In so far as it does not raise concerns that the encumbrance is related to the limited proprietary rights, it is controversial whether it includes also obligatory acts in law such as the conclusion of a contract of lease of immovable property with a possibility of submitting a claim in the land and mortgage register. Just for safety reasons, in such situations it is better to require the representation by a company's body or presenting by a holder of a commercial proxy a separate power of attorney for performing individual acts in law as referred in Art. 109^3 CC.

The present regulation arising from Art. 109^3 CC discriminates without any reason the holder of a commercial proxy. While the power of attorney determining the kind of a specific acts in law (and in some cases also a general power of attorney) may be granted to every other person, and this power would also include the right to sell or encumber the immovable property, the same power of attorney cannot be granted to a commercial proxy who may only be given authorization in respect for a certain specific act in law. This potential granting the power of attorney determining kind of the acts in law would be invalid because of the contradiction with Art. 109^3 CC. Moreover, the legislator did not specify the consequences of granting the commercial proxy to a person who earlier had been given the power of attorney determining the kind of acts in law specified in Art. 109^3 CC. Thus it may be reasonably assumed that in such situation the power of attorney will expire as it is irreconcilable with an explicit wording of Art. 109^3 CC[25].

3.7. The mixed joint representation

3.7.1. The legal character

The legal character of the mixed joint representation is disputable. In the view of some, it should be treated in the same way as the representation by a company's body, while others take the position that every person cooperating with the authorized representative keeps his or her own status and the scope of authorization. The other view seems to be better justified but the first position prevails in the ruling of the case-law, which treats the mixed joint representation in the same way as the representation by a company's body.

3.7.2. Applicability of the construction

A possible applicability of mixed joint representation needs an appropriate legal ground. This construction is an exception from general representation rules which provide only pure organic representation and pure representation by a proxy.

In the case of partnerships, the legal basis to apply the mixed joint representation with a holder of a commercial proxy is Art. 30 § 1 CC. In companies that legal structure is provided directly in Art. 205 CCC (governing limited liability companies) and in Art. 373 CCC (governing joint-stock companies). On the other hand, the Cooperative Law allows mixed joint representation with participation of any proxy, including a holder of a commercial proxy (Art. 54 § 1 Cooperative Law Act).

[25] Further on this topic please see: *Grykiel J.* Ustawowe granice prokury — kilka uwag w kwestii wykładni art. 109^3 k. c. // Monitor Prawniczy. 2005. No. 23. P. 1179–1184, together with judgments and literature quoted therein.

3.7.3. The scope of authorization

In the case of mixed joint representation, the scope of authorization is a matter of dispute. In the existing case-law developed on the basis of rulings in matters involving companies, there is a prevailing view that the authorization of cooperating persons within a frame of mixed joint representation is adequate to the authorization of the organic representation, so it comprises all actions taken in court and out-of-court[26]. On this basis, the holder of commercial proxy who acts jointly with a member of the management board is not subject to limitations referred to in Art. 109^3 CC. Thus, the holder of a commercial proxy is able to dispose of the immovable property of the company without the necessity of procuring a specific power of attorney for an individual act in law.

The view that the holder of the commercial proxy together with a member of the management board or a partner who is authorized to represent a partnership maintains the scope of authorization set in the provisions of the commercial proxy seems more reasonable. None of the provisions provides directly that this scope will extend only by the fact of cooperation with a member of management board.

Taking into consideration these discrepancies, in the event of acts in law provided in Art. 109^3 CC it is safer to require representation by a company's body (signing an agreement only by members of management board) or require from the commercial proxy a power of attorney for an individual act in law.

3.8. A general ban on "self-contracting"

3.8.1. Origins of the ban

A general ban on "self-contracting" is provided only in provisions of the power of attorney. Pursuant to Art. 108 CC, the proxy may not be the other party to an act in law which he carries out on behalf of his principal, unless something else may arise from the content of the power of attorney or where, given the content of the act in law, the possibility of violating the interests of the principal is excluded. This provision shall apply accordingly where the proxy represents both parties.

In the case of representation by a company's body, there is no general provision which would by an equivalent of Art. 108 CC. However, there are particular regulations related to the same issue. The example is Art. 210 CCC, pursuant to which in a contract between the company and a member of the management board, as well as in a dispute with a member of the management board, the company shall be represented by the supervisory board or an attorney appointed by a resolution of the shareholders' meeting. Equivalent of that provision is Art. 379 CCC appliable to a joint-stock company. The term contract, which is used in both provisions, should be understood as a *contractual relation* between the company and the member of the management board and not only legal action which creates that relation. As a consequence, a regulation which is provided in that provisions is applied not only to conclude a contract between the company and member of management board, but also to all legal actions between parties of that contractual relations and hence declaration of intent of contract withdrawal or termination.

In all cases where the legislator did not introduce a particular regulation which regards the general ban on "self-contracting", according to a view in the legal doctrine, there is a possibility of an analogous application of Art. 108 CC which among others, applies to possible acts in law performed between a partnership and one of its partners authorized to representation.

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[26] In this direction, among others, resolution of 7 judges of the Supreme Court of 30.01.2015. III CZP 34/14. The jurisprudence of the Supreme Court, Civil Chamber. 2015. No. 7–8. Item 80.

3.8.2. Legal justification of the prohibition

The general ban on "self-contracting" is justified by an exclusion of the situation in which the representative acts in conditions of *conflicts of interest.* These conflicts of interest are based on performing acts in law by the representative who acts not only on behalf of the represented entity but also in his or her own name or on behalf of third party whom he or she would also represent.

3.8.3. Legal consequences of the infringement of the prohibition

A general ban on "self-contracting" is an example of the limitation of the scope of authorization of the representative. Breaching that ban, the representative would act *beyond the scope of authorization*. The consequences of its ban should be assessed in this perspective.

In the event of the proxy, a breach of the ban from Art. 108 CC should be subject to sanctions provided for in Art. 103 and 104 CC, whereas in case of the company's body the appropriate sanction is provided in Art. 39 CC or, possibly, in special provisions which envisage other consequences.

More on the consequences of acting without authorization can be found in Point 3.9

3.9. The consequences of defective representation

3.9.1. The false proxy

The term false or alleged proxy should be understood as a person who acts on behalf of other party and has no authorization to do that or exceeds the scope of the power of attorney granted. The consequences of this are governed by Articles 103-105 CC. The legislator varied that consequences depending on the fact whether the act in law performed by that false proxy was of a contractual nature or was an act in law of a unilateral character. Besides, a special regulation is provided for the event when the proxy performs a particular act in law after an expiry of the power of attorney granted to him or her.

3.9.2. Contracts

Contracts concluded by the false proxy are subject to *suspended ineffectiveness*. It means that the validity of the contracts depends on its confirmation by the person on whose behalf the contract was concluded. That confirmation needs the same form which is required for the validity of a confirmed contract (Art. 63 in connection with Art. 103 CC). The other party may set an appropriate time limit to confirm the contract to bind for the person on whose behalf a contract was concluded. When the set time limit elapses to no avail, the contract is considered to be unconfirmed which results in an *absolute invalidity* (Art. 103 § 2 CC). It shall not however prejudice the possible liability of the false proxy, albeit limited to a negative contractual interest (Art. 103 § 3 CC).

3.9.3. Unilateral acts in law

A unilateral act in law (termination, withdrawal etc.) made by the false proxy are as a rule *absolutely invalid* without any possibility of its later confirmation (Art. 104 CC). However, the confirmation will be possible when the person to whom the declaration was made by a false proxy, agreed on acting without authorization. Then, the principles of Art. 103 CC shall apply.

3.9.4. Acting upon expiry of authorization

Art. 105 CC contains a significant regulation intended to protect third party interests who are in good faith. Pursuant to that provision, if a proxy performs an act in law on behalf of his or her principal within the scope of the original authorization following the expiration of the authorization (e. g. after the termination of the power of attorney), the act in law shall be valid, unless the other party knew of the expiration of the authorization or might have learned of it with ease. This provision is an exception to the rule that after the expiry of the authorization, the proxy may not perform acts in law with legal consequences to the principal. If the proxy presents a power of attorney and neither from its content nor from the circumstances follows that the authorization to represent the principal expired, then relying on the veracity of a presented power of attorney, it may be assumed that the act in law will not have been effectively questioned.

3.9.5. A false company's body

Consequences of acting by the false company's body are provided in Art. 39 CC which until recently had provoked a dispute whether a contract entered into with such a false body can be confirmed (in the similar manner as in the case of a false proxy) or whether such a contract shall be considered as absolutely invalid from the very beginning[27].

On 1st of March 2019 the amendment to Art. 39 CC came into force, which provides for the same consequences for an act in law performed by a false body as are currently applicable to a false proxy. Pursuant to the amended Art. 39 CC, contracts concluded in these circumstances *require a confirmation*, however unilateral acts in law are in general *invalid*, unless the person to whom the declaration of intent on behalf of a legal person was made, agreed to an act in law being performed without authorization — then, such an act in law may be confirmed.

Provisions on legal persons do not have an equivalent of Art. 105 CC that would provide a protection of a contractor in good faith. As a result, a potential application of that provision would be possible only by careful analogy. However, this issue is disputable.

4. The form of acts in law[28]

4.1. The freedom of form principle

Polish law grants a *freedom of form* of acts in law, which means that unless a specific provision of law provides otherwise one could express his intent in any manner that reveals such intent sufficiently (Art. 60 CC). As an exception from this general rule, some specific provisions provide for a requirement to express one's intent in a particular form. Usually the particular form is applied to acts in law of a particular kind (like a transfer of real estate — Art. 158 CC) or to acts in law between particular subjects (like a declaration of intent addressed to a limited liability company by its sole shareholder — Art. 173 CCC).

4.2. Types of particular forms

The document form has been regulated in the civil code in 2016. By implementing this new specific form the Polish legislator tried to make legal relationships less formal

[27] Please see, among others: *Grykiel J.* Skutki wadliwej reprezentacji w ramach organu osoby prawnej — Glosa do uchwały SN (7) z dnia 14 września 2007 r. (III CZP 31/07) // Prawo Spółek. 2008. No. 11. P. 46–54, together with judgments and literature quoted therein.

[28] More on this topic: *Czepita S., Drozd E., Kuniewicz Z., Radwański Z., Słotwiński S.* [Untitled] // System Prawa Prywatnego: in 20 vols. Vol. 2. Prawo cywilne — część ogólna / eds Z. Radwański, A. Olejniczak. Warszawa: C. H. Beck, 2019. P. 169–244.

and also to adapt the civil law to new requirements of electronic trade. Pursuant to Art. 77^2 CC, in order to comply with the document form of an act in law, it shall suffice that the declaration of intent be reflected in the document, in a manner enabling identification of the person making such a declaration. The new definition of a document in this context provides that it is any carrier of information enabling the perusal of its contents (Art. 77^3 CC). The requirements of such a widely defined document form are fulfilled not only when the declaration of intent is traditionally in writing and signed but also when it takes a shape of an SMS, e-mail or even a video recording.

The document form has not as yet been very often applied in practice, especially it has not replaced the traditional written form. The coming future will show, whether the goals which the Polish legislator tried to achieve by regulating this particular form in the civil code, will be effectively achieved[29].

The ordinary written form is one of the oldest used in civil law. It requires signing a document comprising the content of a declaration of intent. To conclude a contract it shall suffice to exchange the documents that comprise the content of the declaration of intent, signed by the respective parties (Art. 78 CC).

The electronic form is as a rule equal to the ordinary written form (Art. 78^1 § 2 CC). To comply with the electronic form requirement one shall make a declaration of intent by electronic means and provide it with a qualified electronic signature. The term "electronic form" has a much narrower meaning than the term "by electronic means." An ordinary e-mail is one of electronic means but to qualify as having an electronic form, it must bear a signature.

The written form with certified date is regulated in Art. 81 CC. Its main aim is to prevent the parties from antedating the act in law. It requires the declaration of intent be made in writing and have its date certified by a notary who will certify the date when the signatures of the parties have been put, or when the document upon the parties signing has been put in his or her presence. An act in law will also have a certified date in the following cases: (i) when its performance has been evidenced in any official document — from the date of this document; (ii) where in a document comprising an act in law, a reference is made by a state organ, local government organ or by a notary — from the date of the reference or (iii) where a document in an electronic form is provided with a qualified electronic time marking — from the date of the qualified electronic time marking provision (Art. 81 § 2 CC).

The written form with certified signatures consists in certifying not only the date when a declaration of intent has been made but also the identity of the parties thereto. Usually the certification is made by a notary who certifies the authenticity of signatures either put by the parties in his or her presence or put on the document presented to the notary earlier and acknowledged by the parties to be their own. This form is required, among others, to the transfer of shares in a limited liability company (Art. 180 § 1 CCC).

The notarial deed is the most solemn specific form in civil law, restricted only to acts in law of particular importance, like a transfer of real estate, the formation of companies or foundations etc. The notary certifies here not only the date and identity of the parties but is also responsible for the content of the declaration of intent, in order to ensure that it complies with the law. When the content of the notarial deed is agreed by the parties it is read aloud in their presence by the notary and thereafter signed by the parties as well as the notary. The original of the notarial deed remains at the notary's office and the parties receive the copies thereof which have the same power as the original document.

[29] Critical comments on the new document form: *Grykiel J.* Kilka uwag o nowej definicji dokumentu i formie dokumentowej // Monitor Prawniczy. 2016. No. 5. P. 236–242.

4.3. Legal consequences of non-compliance with a particular form

Polish law provides three kinds of sanctions in the event when the required specific form has not been complied with. They are *ad solemnitatem*, *ad eventum* and *ad probationem*.

The form *ad solemnitatem* means that non-compliance therewith results in invalidity of the entire act in law.

The form *ad eventum* means that when the required form is not complied with, the act in law remains valid but the parties will not achieve certain additional legal effects for the achievement of which this specific form has been reserved (e. g. the act in law will not be effective with regard third parties or the party to particular contract will not be able to enter his or her claims arising from that contract to the land and mortgage register).

The form *ad probationem* means that if this form is not complied with, the act in law remains in force, but in the event of a dispute concerning the performance or content thereof, the testimony from witnesses or the parties to the act in question is generally not admissible (Art. 74 CC).

Unless specific provisions of law provide otherwise the ordinary written form, the electronic form and the document form are the forms *ad probationem*, and the other specific forms are usually the forms *ad solemnitatem* (Art. 73 and 74 CC).

Conclusions

The General part of the civil code is not particularly often subject to legislative changes. However, the analysis of the amendments that have been made within the recent years allows to note several general tendencies and directions of change.

Firstly, there have been amendments aimed at answering the needs of the changing environment and meeting the expectations of the development of the informatization of trade (a new document form or electronic form being equivalent of a traditional written form).

Secondly, one may notice a clear tendency to develop regulation on commercial proxy, by extending its use and made it available also to individual entrepreneurs and by providing new types of such proxy such as improper joint commercial proxy or extended joint commercial proxy.

Thirdly, to make the civil law relationships more flexible, the consequences of improper representation by a company's body have been harmonized with the consequences of improper representation by proxy. In consequence, in both cases the act of law can be confirmed *ex post* by a party which has been misrepresented while before the amendments to the existing laws the act in law undertaken by an unauthorized company's body was always null and void (i. e. without the possibility of repairing it by subsequent confirmation of the act).

Fourthly, even in the General part of the civil code one may note a growing protection of consumers. An example of this tendency is one of the recent amendments to the provisions on the prescription of claims. Pursuant to the new regulation a claim against a consumer is prescribed by virtue of law upon a lapse of time, and there is no need to raise a specific objection.

The COVID-19 pandemic has brought about new challenges to legal transactions, including a growing need to extend the use of long-distance communication means especially in the fields where a specific form of an act in law is required. Current discussions in the doctrine are focused, among others, on a possible amended form of the notarial deed. The experts analyze how to implement a direct long-distance communication (like videoconference) at least in respect of certain acts in law where notary's assistance is required

by law. The nearest future will show if and to what extent the Polish legislator will be able to meet the expectations of modern trade.

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Ключевые институты первой книги (Общая часть) польского Гражданского кодекса

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В статье кратко излагаются отдельные вопросы, касающиеся Общей части Гражданского кодекса Польши, которая регулирует многие институты общего характера, применимые во всех других отраслях гражданского права, особенно в вещном, обязательственном,

наследственном, семейном и в других отраслях широко понимаемого частного права, таких как коммерческое право или право интеллектуальной собственности. В начале статьи представлены определение и общий обзор субъектов гражданского права, среди которых выделяются физические лица, юридические лица (включая государственную казну, общества с ограниченной ответственностью, акционерные общества, кооперативы, фонды, университеты, различные виды муниципальных образований), а также так называемые организационные единицы, не имеющие статуса юридического лица, включающие в себя различные виды товариществ (партнерств), и иные юридические лица до момента их внесения в реестр юридических лиц. Этот раздел завершается рассмотрением специфических категорий «индивидуальный предприниматель» и «потребитель». Далее даны определение и общий обзор объектов гражданско-правовых отношений (в их числе телесные и бестелесные вещи, движимое имущество и недвижимость, индивидуально определенные вещи и вещи, определенные их родовыми признаками, предприятия как имущественные комплексы, состоящие из телесных и бестелесных вещей). В завершение анализируются структуры представительства в гражданском праве (включая представительство органом, представительство уполномоченным лицом и так называемое совместное смешанное представительство), основные принципы, связанные с представительством в гражданском праве, правовые последствия ненадлежащего представительства, а также конкретные формы юридических действий (включая документальную форму, обычную письменную форму, электронную форму, письменную форму с точной датой, письменную форму с нотариально заверенными подписями и форму нотариального акта) и различные последствия, связанные с несоблюдением требуемой специальной формы (ad solemnitatem, ad eventum и ad probationem).

Ключевые слова: гражданское право, субъекты гражданского права, объекты гражданско-правовых отношений, представительство в гражданском праве, орган, уполномоченное лицо, формы юридических действий.

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