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CLASSIFICATION OF CIVIL LAW CONTRACTS BETWEEN A LIMITED LIABILITY COMPANY AND MEMBERS OF THE MANAGEMENT BOARD¹

INTRODUCTION

Serving in the bodies of legal persons involves the occurrence of a legal relationship between the post holder and the legal person. This legal relationship is defined as an organizational relationship (also known as a corporate relationship) [HERBET 2015, 398] and it is commonly classified in the science as a civil law relationship [KRUCZALAK-JANKOWSKA 2000, 128]. Next to the organizational relationship another contractual bond often occurs linking the holder of the body with the legal person, defined as non-organizational.

With regard to a limited liability company, the statutory regulation directly refers in a number of places to a legal relationship other than an organizational bond, one that regulates rights and obligations of the parties. Establishing this legal relationship and its character has profound importance as it co-outlines the content of rights and obligations of a member of the management board. In turn, establishing the source and scope of obligations will involve the issue of his responsibility.

The aim of this paper is to examine whether a civil law contract (nominate or innominate) could most fully regulate mutual rights and obligations of members

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¹ Reflections in this paper were limited to a limited liability company yet the comments made are also adequate to a joint-stock company despite the differences occurring between these companies.

of the management board and the company, supplementing the organizational relationship.

REGULATION OF THE COMMERCIAL COMPANIES CODE

Analysing the legal status one needs to point out that regulations that directly address the existence of a non-organizational legal relationship include Articles 203 and 203(1) of the act of 15 September 2000 – The Commercial Companies Code². The former regulates the issue of dismissing a member of the management board and provides that it shall not deprive the member of the management board of rights under the employment relationship or another legal relationship applicable to his service as a member of the management board. A non-corporate relationship may therefore constitute a bond of an employment nature, or another, not specified by the legislator. It can also be noticed that the norms of Article 203 § 1 CCC confirm certain separateness of both relationships. Usually, establishing an organizational relationship by taking up a function in the company's bodies also results in establishing a non-organizational relationship which regulates rights and obligations of the parties³. Despite such an interrelationship, often even very close, these relationships reserve a certain degree of independence.

In turn, Article 203(1) CCC is a basis for defining by way of a resolution of shareholders rules for remunerating management board members⁴. This article outlines a certain regulation for one of the fundamental rights of a management board member, that is remuneration for actions carried out by him. In this scope it provides for shareholders' power to define general rules of remunerating management board members and granting them other benefits, in particular those of a pecuniary nature, as well as defining its limits. Specific remuneration and benefits are specified in the contract of employment or another contract executed

² Journal of Laws (Dz. U.) of 2019 item 505 as amended [hereinafter: CCC].

³ Naturally, a contrary situation cannot be excluded where a different legal relationship – non-organizational – occurs as first: for instance an employment relationship where an employee is promoted when becoming a member of the management of a company that is his employer.

⁴ The provision was added by virtue of Article 15(1) of the act of 9 June 2016 on principles of remunerating persons managing certain companies (Journal of Laws (Dz. U.) of 2016 item 1202) and prescribes that: A resolution of shareholders may establish rules for remunerating management board members, in particular the maximum remuneration, granting management board members additional benefits and the maximum amount of such benefits. Remuneration of management board members employed on the basis of a contract of employment or another contract shall be specified by a body or person appointed by a resolution of the general meeting to execute a contract with a management board member.

on behalf of the company by a body or person competent for appointing a management board member⁵.

The said legal regulations confirm that apart from an organizational relationship a limited liability company and a member of the management board of this company may be bound by yet another legal relationship. The act does not prejudge the obligation of establishing such a relationship, nor its nature, pointing out only that it may be a relationship falling under the branch of labour law, yet it does not exclude the possibility of applying institutions falling under other branches of the law, in particular civil law, which deserves a closer reflection taking into account the validity of the principle of the unity of civil law.

This is why it is necessary to attempt to identify this relationship on the basis of general regulations of contracts included primarily in the act of 23 April 1964 – The Civil Code⁶. Therefore, it becomes necessary to carry out a typological classification of basic rights and obligations of a management board member to a general framework of civil law contracts specified by statute, in order to identify a contract that best corresponds to the nature of this relationship. This in turn requires that the nature of actions taken by management board members be defined.

NATURE OF ACTIONS OF THE MANAGEMENT BOARD

Article 201 § 1 CCC, which defines in most general terms the tasks of the management board of a limited liability company, must be the basis for the identification process. This provision prescribes that the management board shall manage the affairs of the company and represent the company. This scope is specified further in Article 204 § 1 CCC providing that the right of a member of the management board to manage the affairs of the company and to represent it shall cover all court proceedings and out of court dealings of the company. Therefore, this scope is very broad⁷. Representing a company consists in expressing declarations of intent, that is involving the performance of legal acts [KIDYBA 2018; SZUMAŃSKI 2015, 532-

⁵ According to Article 210 § 1 CCC: in contracts between the company and a member of the management board and in disputes with him, the company shall be represented by the supervisory board or an attorney-in-fact, appointed under a resolution of the general meeting.

⁶ Hereinafter: CC.

⁷ In commentaries to the cited provisions it is pointed out that they are a basis for adopting a presumption of competences of the management board in all spheres of the company's operation [cf. in particular: [RODZYŃKIEWICZ 2018; KIDYBA 2018; PABIS 2019 I; KUPRYJAŃCZYK 2018].

33]. The second sphere of activity of the management board, not less important, is managing the company's affairs involving the performance of factual acts⁸.

This means that under the contract, services of a member of a management board as a party should involve the performance of a number of legal acts, but also factual acts. A civil law relationship which would regulate rights and obligations of a management board member and the company should therefore include the entire sphere actually specified directly by the norms of the Commercial Companies Code. Moreover, pursuant to regulation of Articles 203 § 1 and 203(1) CCC an executed agreement should regulate remuneration for performing such acts as well as allow the possibility of gratuitous performance.

It is worth reflecting in this angle on what the civil law relationship that would regulate the obligation of fulfilling so defined acts by a management board member for the limited liability company should be like.

NON-CORPORATE CIVIL LAW RELATIONSHIP

The scope of obligations presented above, which is to fall under this relationship, allows for classifying this relation as a type of service contract which is not regulated by other provisions⁹. Pursuant to Article 750 CC, the provisions on mandate apply accordingly to service contracts which are not regulated by other provisions.

However, the classification procedure is not so simple. The rules of interpreting the said provision developed in the science of civil law prescribe that the specific process of "negative classification" should be carried out first. Establishing that a given legal relationship can be regulated by the provisions of Article 750 CC occurs only when it does not fall under the regulation of another legal relationship¹⁰.

⁸ Some authors assume that this sphere includes both factual and legal acts [cf. SZUMAŃSKI 2015, 532; KUPRYJAŃCZYK 2018].

⁹ It needs to be emphasized that the civil law science adopts a classification of contracts on the basis of their certain general economic purpose. For example, one can distinguish a group of contracts concerning transfer of rights or handing over a thing for use. Under this differentiation there is also a group of service contracts which includes the following contracts: a specific work contract, construction works contract, mandate contract, agency contract, commission sales contract, carriage contract, forwarding contract, safekeeping contract, storage contract, bank account contract, listing after L. Ogiełło concerning service contracts in a broad angle [OGIEŁŁO 1979, 143]. In contrast to this group, legal relationships governed by Article 750 CC will be specified as "service contracts not regulated by other provisions" or "contracts under Article 750 CC" and in a similar way.

¹⁰ "This means that provisions of Article 750 CC should not be applied to specific service contracts and obligations that can be subsumed under provisions on the bank account contract, on

In this regard, among civil law agreements regulating performances involving carrying out factual or legal acts, the analysis should first and foremost include two basic contracts which constitute the types of service contracts of broadly regulated subject-matter. This involves a specific work contract as well as a mandate contract, which in practice are often applied in regulating such relationships [KRUCZALAK-JANKOWSKA 2000, 128 and 131]. The code's approaches to agency contracts, commission sales contracts or forwarding contracts allow for their quick elimination from the circle of reflections. The subject and the possible scope of regulation of these contracts does not correspond to the scope of actions of management board members.

It could seem obvious that due to the subject-matter of a specific work contract it should not regulate the legal situation of a management board member and a limited liability company either. Yet, according to Article 627 CC by a specific work contract the person accepting the order commits to perform a specific work and the orderer commits to pay the remuneration. Therefore, the subject-matter of this contract involves achieving a certain result, and the specific work contract itself is sometimes defined as a "contract for a result of a service" [BRZOZOWSKI 2018 I; IDEM 2018 II, 413]. In the science this contract is defined by pointing out that: "[...] it is a service contract, a consensual, mutual contract, where one party – the person accepting the order – commits to achieve in the future an individually specified, autonomous, objectively possible and subjectively certain result of human labour of a material or non-material character, while the other party – the orderer – commits to pay adequate remuneration in cash or in kind" [WÓJCIK 1963 II, 125]¹¹. Therefore, it can be noticed that the result of the contract may have a material as well as a non-material character, which could, however, raise some doubts from the point of view of the discussed classification. However, in such a situation it is required that the non-material work should be possible to materialize in some way [ZAGROBELNY 2017, 1294], or – as pointed out above – that it should be autonomous. However, it is not possible that a management board member should take upon himself an obligation to perform a specified work in a non-material form, which were to be for example the company's specified sta-

mandate, on agency, on sales commission, on forwarding, on carriage, on safekeeping, on storage or extra-code provisions regulating service contracts [...]" [OGIEGŁO 2018]. It needs to be added that a similar outlook was also expressed as regards a specific work contract in a broad approach to Code of obligations by W. Ludwiczak [WÓJCIK 1963 I, 190; cf. also SZPUNAR 1976, 389; as regards the currently applicable Civil code, cf. OGIEGŁO 1985, 52].

¹¹ Even though this definition was formulated at the time of validity of the Code of obligations, it retains its up-to-date status today and for many authors it is a reference point when defining this contract.

tus¹² or carrying out certain acts¹³. Moreover, in light of the cited definition, the work is to be a result that is not only objectively achievable, but also subjectively certain, which is out of question in the discussed situation. Therefore, summing up, an obligation to achieve a certain result does not correspond to the nature of a performance involving carrying out of factual and legal acts.

It also needs to be added that a management board member may receive remuneration for performed actions but he can also act gratuitously. Meanwhile, a definitional element of a specific work contract involves the person accepting the order receiving remuneration.

The situation of mandate is more complex. In this case the law doctrine is divided and one can find both views that allow a mandate contract as a regulator of rights and obligation of a management board member and a company, and those that exclude the possibility of applying it [TOPOLEWSKI 2015, 341]¹⁴. One needs to set out with the principal issue in this case, that is the subject-matter of the contract. According to Article 734(1) CC by a mandate contract the mandatary commits to perform a specified legal act for the mandator. Even if this contract were to be allowed as a possible civil law relationship binding a management board member and a company, it can also be seen straight away that it cannot cover all issues involved in serving as a management board member¹⁵.

Therefore, one needs to ask a question whether indeed a limited liability company may execute a mandate contract with a management board member that would regulate the non-corporate civil law relationship between them, at the same time limiting the statutory regulation of the legal bond binding a management board member and a company solely to an obligation to perform legal acts. The answer must be given differentiating between the two situations that are admissible in light of the provisions on mandate, i.e. direct substitution and indirect substitution.

¹² For example, an obligation involving a fact that after a certain time a company should find itself in a specific condition, e.g. after a year or at the end of a term longer than a year.

¹³ Naturally, certain factual acts performed by a management board member could bring a material result, a result which is a work, but it certainly does not apply to all acts that fall under managing the company's affairs. Neither can one adopt an interpretation that a result of a specific work contract may include e.g. performing a legal act such as executing a contract, as in such a situation it is always dependent on the intent of the other party, thus such a result, even if objectively achievable, could not be subjectively certain. Moreover, accepting this view would mean that the notion of "a work" would grow exceedingly, not in compliance with the intent of the legislator who provided for other contracts for such acts [cf. TOPOLEWSKI 2015, 5-8].

¹⁴ The author points out that such a solution is accepted by inter alia K. Kopaczyńska-Pieczniak, though he himself comes to a conclusion that such a relationship "[...] does not fall under a typical mandate" [ibidem, 342].

¹⁵ However, as a partial regulation it would be of little effect.

The Civil Code adopts a rule that when performing an act for the mandator, the mandatary in principle acts on behalf and on the account of the mandator, and therefore as a direct substitute – an attorney-in-fact. What is more, Article 734(2) CC provides for presumption of the power of attorney prescribing that in the absence of a contract to the contrary, a mandate includes an authorization to perform acts on the mandator's behalf. This provision does not prejudice the provisions on the form of a power of attorney. Nevertheless, such a model form of a mandate cannot be combined with the theory of bodies of a legal person adopted in Poland, according to which a body is not an attorney-in-fact (or even more generally – a representative) of a legal person but an element of its structure. Actions and omissions of a member of a body of a legal person are treated as actions and omissions of this very person¹⁶. Therefore, it is structurally excluded that a company's management board member should act on behalf and on the account of the company simultaneously as a body and attorney-in-fact since its competence in this regard results from serving in the company's body which is its immanent part¹⁷. It would then lead to a commutation of competences to act, governed by separate rules and scope¹⁸.

As signalled earlier, indirect substitution is also admissible within mandate next to direct substitution, which is characterized as mandatary's action on his own behalf yet on the account of the mandator. Therefore, also in this case it is impossible for a mandate contract to regulate an obligation of a management board member to perform legal acts since a member of the management board would have to act at their performance in his own name, but only on the account of the company, having an obligation resulting from the provisions of the law to deliver everything that he acquired in his own name when performing the mandate¹⁹. It

¹⁶ “The above principle is confirmed by the general rule of Article 38 CC, according to which a legal person acts through its bodies in the manner prescribed by the law and its articles of association based on that law. This provision formulates a universally accepted theory of bodies, according to which an action of a body of a legal person is considered directly as the company's action. A body, in contrast to an attorney-in-fact of a legal person, does not act in its name as its actions are considered directly as the company's actions. This theory entails, i.a. the following implications: 1) the body expresses the intent of the company; 2) the body is part of the company's structure and cannot be as such a separate subject of rights and obligations (which does not exclude the body's members acting in legal relationships with the company as natural persons); 3) good or bad faith, fault or lack of fault or causing harm by the body is treated as the occurrence of these circumstances on the company's side” [PABIS 2019 II].

¹⁷ The authorization by the management board of one of the management board members to act as an attorney-in-fact is a different issue.

¹⁸ Cf. judgement of the Court of Appeal in Warsaw of 4 July 2014, VI ACa 1622/13, in which it was adopted that the power of attorney to perform all acts is inadmissible. \

¹⁹ Article 740 CC provides for it.

results from the theory of bodies that actions of a management board member are treated as actions of the legal person itself. In turn, actions of an indirect substitute would have to be treated as taken by a third person, and the other party of these actions would not even have to know that the indirect substitute is acting on the account of the company [ZIEMIANIN and KUNIEWICZ 2007, 110-11]²⁰. Therefore, this construction cannot be combined with acting as a body.

Assuming that the mandatary can only act as an attorney-in-fact or indirect substitute, the theory of a body of a legal person results in the fact that a mandate contract cannot regulate the legal situation of a management board member and a company. However, one needs to ponder whether yet another formula may exist within a mandate. In fact, in a mandate contract it is possible to exclude the power of attorney for the mandatary. In principle it is assumed that he then acts as an indirect substitute. However, in the case of a company and a management board member it seems possible to exclude the power of attorney from the mandate contract as impossible to reconcile with the theory of a body, but the appointed management board member could by this contract commit to perform legal acts since he will have competence to performing them as the post holder.

Further reflections in this matter go beyond the framework of this study yet they put the interesting problem of admissibility of such an interpretation of provisions of a mandate contract in the light of the principle of the unity of civil law. However, as pointed out earlier, adopting such a construction would still constitute a partial solution due to a broad nature of actions of a management board member. A mandate contract would then allow for performing legal acts both against a payment and free of charge.

SERVICE CONTRACT UNDER ARTICLE 750 CC BETWEEN A MEMBER OF THE MANAGEMENT BOARD AND A COMPANY

The above reflections lead to conclusion that a service contract not regulated by other provisions referred to in Article 750 CC is a relationship that would correspond to the characteristics and scope of activities performed by a management board member (in the form of legal and factual acts, at the same time with the possibility of specifying them rather generally) as well as to regulating remuneration and its components and conditions of its payment, or even lack thereof.

²⁰ The authors point out that in light of the theory of bodies, in order to attribute the action of a natural person to a legal person, it should be known that the given natural person acts as a body.

The doctrine's leading view assumes that under contracts specified in Article 750 CC it is possible to both regulate performances involving carrying out factual acts as well as an array of legal and factual acts [cf. in particular: MOREK and RACZKOWSKI 2019; OGIEGŁO 2018]. Such a scope corresponds to acts carried out by a management board member as part of representation of the company and when managing its affairs. In contrast to contracts referred to earlier, it would then be possible to include in one contract a whole range of duties of a management board member specified by commercial law, creating a contractual obligation to serve as a member of the management board [KRUCZALAK-JANKOWSKA 2000, 132]²¹.

Provisions on mandate apply accordingly to service contracts specified in Article 750 CC. The legislator noticed the usefulness of such regulation also of a certain aspect of a corporate bond. In accordance with Article 202(5) CCC the provisions on termination of the contract of mandate by the mandatary shall apply accordingly to the resignation of a member of the management board. In both cases the technique of relevant application of provisions of mandate was applied, which confirms the possibility of them providing a coherent regulation of both an organizational and non-organizational bond. In particular it may express itself by the fact that giving notice on serving as a member of a company's management board will mean an act ending both relationships as closely related. Naturally, a contrary situation may occur and only one of them may be terminated²². Solving this issue will depend on specific facts.

Due to appropriate application of the regulation concerning mandate to service contracts not regulated by other provisions, it is possible as part of this relationship to regulate remuneration of management board members as well as to establish that a management board member will not receive remuneration²³. Performing acts free of charge should be specified in the contract or result from circumstances.

²¹ The author claims that rights and obligations in terms of management are laid down in the norms of laws, articles of associations and general terms and conditions, whereas a civil law contract entails an obligation to serve a post.

²² It is confirmed to a certain degree by Article 203 § 1 CCC, which in the case of dismissing a management board member assumes that this event does not deprive him of claims under an employment relationship or another legal relationship concerning serving as a management board member. "In particular, dismissing a management board member resulting in termination of an organizational relationship between him and the company does not cause, as a rule, termination of a parallel relationship resulting from establishing an employment relationship or another contract of a civil law nature, unless otherwise stated in the content of this contract [...]" [PABIS 2019 III]. This is why the situation may look similar in the case of resignation from serving in the management board, which ends an organizational bond, but can uphold the non-corporate relation of a natural person who will provide other services for the company.

²³ Such a solution is possible by appropriate application of Article 735 CC.

Otherwise the rule of payment needs to be assumed, which in view of a lack of an applicable tariff will result in the fact that a management board member will be entitled to remuneration adequate to the work performed.

The issue of remuneration of a management board member is significant which is confirmed by the circumstance that both previously cited provisions of CCC concerning the non-organizational relationship addressed, among others, this issue. Therefore, a resolution of shareholders may specify principles of remuneration of management board members, yet specific arrangements, within limits outlined in the resolution, should be done in the contract. However, should shareholders not pass an appropriate resolution, there are no obstacles for relevant regulations to be placed indeed in the provisions of a service contract executed between a company and a management board member. The degree of detail of this regulation would depend on the will of the parties. It could both specify basic remuneration as well as its other additional elements and conditions for payment.

An analysis of positions of the doctrine and judicial decisions allows for a conclusion that in the scope of reference included in Article 750 CC most provisions concerning mandate could be directly applied also to a service contract which is not regulated by other provisions [cf. for example: MACHNIKOWSKI 2017, 1455-456]. Whereas the property of the relationship could cause that certain provisions concerning mandate would have to be modified so as to accommodate the specificity of relations between a management board member and a company, while others could not be applied at all. It is also important that a dispositive nature of most of these provisions opens the possibility of adapting a service contract under Article 750 CC to the needs of a specific situation.

In view of the above, the statutory regulation of a mandate contract, applied adequately to service contracts not regulated by other provisions, makes it possible to decide on the most important issues concerning the relationship of a management board member and a company, not closing a further road of a detailed regulation of parties.

Summing up this part of reflections one needs to point out that the nature of acts performed by members of the management board acting as a managing body of a legal person correspond typologically to a statutory model of a service contract not regulated by other provisions. The lack of personal limitations of such a contract results in the fact that it can be executed both with a trader as well as a natural person who does not carrying out an economic activity. Secondly, adequate application of provisions on mandate on the basis of Article 750 CC would provide a normative basis to decide on typical matters which might require a solution in the relationship between a management board member and a company, as, in particular, in the case of the above-mentioned remuneration, giving notice

on this relationship, impact of the death of a management board member on this relationship, receiving advance payments from the company or other entities necessary to carry out specific acts for it, providing information or finally settlement in the event of early termination of the contract. At the same time, regulations on the activity of a management board member as an attorney-in-fact could not be applied, neither those concerning the death of the party ordering services (giving a mandate). In turn, provisions that regulate issuing instructions by the mandator will require modification by adapting to rules laid down in Article 207 CCC²⁴, in particular in terms of the subject and mode of formulating these instructions.

One cannot also omit the circumstance that the organizational relationship of a management board member and a company is to a significant degree characterized by trust. It is also a frequently emphasized element of a mandate contract and as a result of appropriate application of this regulation to service contracts under Article 750 CC it can also be a feature of said contracts. The occurrence of this mark in the case of both bonds points out that they can be particularly coherent.

In the context of the above it is also worth referring to a historic argument. In the interwar period, based on the provisions of the Code of obligations²⁵ and the Commercial code²⁶, it was assumed that if a management board member was bound to the company by a contract, where it could not be a contract of employment, then legal relationships outlined by this contract would be subject to legal regulation of a mandate contract [KRUCZALAK-JANKOWSKA 2000, 131]. Such a solution was possible due to the broadly defined subject-matter of a mandate approached as “performing a specific act”²⁷. It is legitimate here to state that with the applicable limitation of a mandate contract concerning the performance of legal acts, contracts specified in Article 750 CC currently regulate a large scope of relationships that was once subject to regulation of a mandate contract. This in turn additionally substantiates a statement that service contracts not regulated by other provisions are a good normative basis for regulating a non-corporate bond between a member of the management board and a limited liability company, with a long tradition already.

²⁴ The provision prescribes that in relation to the company, the members of the management board shall be subject to the limitations stipulated in Division I of Title III CCC, in the company’s articles of association and, unless the articles of association provide otherwise, in resolutions of the shareholders.

²⁵ Decree of the President of the Republic of Poland of 27 October 1933 – Code of obligations (Journal of Laws (Dz. U.) of 1933, No. 82 item 598).

²⁶ Decree of the President of the Republic of Poland of 27 June 1934 Commercial code (Journal of Laws (Dz. U.) of 1934, No. 57 item 502).

²⁷ Cf. Article 498(1) Code of obligations.

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Summary

The article attempts to qualify a legal relationship between a management board member and a limited liability company in the light of commercial law and contract law, and to seek the best statutory regulation for it. According to the author, regulation of art. 750 of the Civil Code, due to its wide and flexible scope, may constitute an appropriate normative regulatory model, corresponding to the characteristics of the bond connecting a member of the management board with a limited liability company.

Key words: mandate; services contract; management board member; limited liability company

KWALIFIKACJA CYWILNOPRAWNYCH UMÓW
POMIĘDZY SPÓŁKĄ Z OGRANICZONĄ ODPOWIEDZIALNOŚCIĄ
A CZŁONKAMI ZARZĄDU

Streszczenie

W niniejszym artykule podjęta została próba zakwalifikowania stosunku prawnego łączącego członka zarządu ze spółką z ograniczoną odpowiedzialnością w świetle regulacji prawa handlowego oraz prawa umów oraz poszukiwanie dla niej najlepszego ustawowego uregulowania. Zdaniem autora regulacja art. 750 Kodeksu cywilnego ze względu na swój szeroki i elastyczny zakres, może stanowić właściwy normatywny wzorzec regulacji, odpowiadający charakterystyce więzi łączącej członka zarządu ze spółką z ograniczoną odpowiedzialnością.

Słowa kluczowe: zlecenie; umowa o świadczenie usług; członek zarządu; spółka z ograniczoną odpowiedzialnością