

NEWSLETTER

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What to pay attention when concluding contracts with a member of a management board of a limited liability company?

Due to a recent judgment of the Court of Appeal in Warsaw, which stated **that the conclusion by the limited liability company contract with a member of the management board with breach of representation of the company in such situations, invalidates the contract without the possibility of subsequent confirmation of its conclusion by persons authorized to represent company** (judgment of the Court of Appeal in Warsaw on the 2nd of September 2015, file no VI ACa 2015), we would like to draw your attention to the very important issues related to the conclusion of such agreements.

I. Art. 210 § 1 of the Commercial Companies Code

Firstly, we point out that the issue of representation of limited liability company both when concluding contracts with board members as well as in a dispute with them is governed by Art. 210 § 1 of the Commercial Companies Code (hereinafter 'CCC'). That provision provides that in the above mentioned cases a company is represented by the supervisory board or an attorney appointed by a resolution of the general meeting of shareholders. This solution is designed to protect both the company and the shareholders against adverse decisions of the board or liquidators. This provision shall not apply in the case of single-member company, in which the partner is also the only member of the management board - in such cases, legal action between the partner and the company represented by him requires the form of a notarial deed.

It should be noted that Art. 210 § 1 CCC only applies to members of the management board in the course of their duties in the board of the company - thus, upon expiry of the mandate of the member of the management board shall cease to apply special rules of representation of the company.

The abovementioned principles of representation are valid **for all contracts concluded with members of the management board**, ie. whether related to such office (eg. managerial contract) and those that do not connect directly with the function performed (eg. lease contract). The rules stated in Art. 210 CCC **also apply in the case of legal actions that lead to changes or termination of contractual relationship between member of the management board with the company**.

The exception to the application of the above principles of representation is to conclude contracts that are in the ordinary course of business of the company's enterprise (eg. making shopping by a member of the management board in a store operated by the company). Moreover, these rules do not apply in the case of a declaration of intent of member of the management board to resign from his position - a board member can effectively make such a statement to another member of the management board (in accordance with the rules of representation of the company set out in the articles of association).

II. The supervisory board or representative?

As previously indicated, in the situations specified in the art. 201 CCC the company is represented by the supervisory board or an attorney appointed by a resolution of the general meeting of shareholders. In the doctrine and case law, it is assumed that in connection with the above provision functor inseparable alternative 'or', **the company may be represented either by the supervisory board as well as the representative** (unless the entity entitled to representation in such situations was clearly indicated in the articles of association).

With regard to the representation of the **company by the supervisory board** two possibilities should be pointed out:

1) the supervisory board may make a statement for the company, acting as a full court (requires a declaration by all members of the supervisory board),

2) the supervisory board adopts a resolution in which it expressed its consent to conclude a contract with a member of the board while authorizing one / some of the members of the supervisory board to sign a contract with a member of the board.

When it comes to representation of the company by **an attorney** it should be noted that the exclusive competence to appoint a representative in the situations provided for in art. 210 CCC has been awarded the shareholders' meeting. In the doctrine and case law indicated that a resolution on the election of a representative obligatorily should be made at a meeting in a secret ballot - it is impossible the establishment of a representative in writing mode (circulating) vote.

To act as a representative may be appointed both a partner and a person outside the group of shareholders. In addition, it is assumed that power of attorney may be granted for one of the members of the supervisory board. What's more, it is acceptable to the appointment of more than one representative.

Nevertheless, it should be noted that it is impossible to appoint member of the management board as a representative in such situations, due to the fact that such a solution would circumvent the disposal of art. 210 CCC.

When analyzing the issue of appointment of representative to represent the company a practical question appears - is it allowed to grant a generic power of attorney which includes the possibility for the representative to conclude all contracts with members of the management board (or) is it only allowed to grant a special power of attorney (including the right to enter into a specifically indicated contract)? It is hard to find in the doctrine one consistent position on this matter - the representatives of the doctrine stay in favor of both the admissibility of the generic power of attorney as well as indicate the exclusive possibility of an individual authorization. Given the above, in the opinion of our law firm, **the more desirable, with precaution, is a special power of attorney to be considered.**

III. The consequences of infringing Art. 210 § 1 CCC

With regard to the consequences of infringement of Art. 210 § 1 CCC, which is considered as the mandatory provision, it should be noted that the conclusion of a contract with a member of the management board with breaches of representation as provided in Art. 210 § 1 CCC or exceeding the scope of the authorization granted **invalidate the contract.**

In addition, it is worth noting that in accordance with the previously cited judgment of the Court of Appeal in Warsaw, **it is unacceptable 'healing' contract concluded in violation of Art. 210 § 1 CCC through its subsequent approval by representative.**

Considering the undoubtedly negative consequences of concluding a contract with a member of the management board with breach of the requirements specified in Art. 210 § 1 CCC when concluding contracts of this type, we want to point to the need for special care and attention on the issues discussed.
