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## LEGAL EFFECTS OF FULL LOSS OF CAPACITY FOR ACTS IN LAW BY A COMMERCIAL ATTORNEY

Business transactions are forcing their participants to deploy ever newer techniques and strategies. Legal institutions are evolving and transforming. New technologies are substantially enhancing commercial operations. However, traditional legal institutions do not seem to retire. One of them is the commercial power of attorney [Bielski 2006, 57]. It is a special power adopted for use in business transactions. One of its attributes, but not only, is limited the limited personal scope both on the side of the principal<sup>1</sup> and attorney. For according to Art. 109<sup>2</sup> § 2 of the Civil Code,<sup>2</sup> an attorney of the company can only be a natural person with full legal capacity. The purpose of this study is to discuss the legal consequences of the loss of full legal capacity by both the company's attorney and principal.

### 1. Power of attorney as a special type of commercial representation

At the outset, it would be justified to emphasise the importance of granting the power of attorney to the principal. By and large, any representation is based, in principle, on trust in another person<sup>3</sup>, in the case of the commercial power of attorney *sensu largo*, this trust has a special significance. The literature on the subject points out the wide scope of

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<sup>1</sup> It should be stressed, however, that it is very challenging to determine in practice who is actually authorised to grant the power of attorney; for more, see, for example: Wajda 2008, 38-40; Herbet 2013, 9-18; Wyrwiński 2005, 22-28.

<sup>2</sup> Act of 23 April 1964, the Civil Code, Journal of Laws of 2018, item 1025 as amended, [henceforth cited as: CC].

<sup>3</sup> An exception is some atypical uses of commercial representation to secure claims [Smyk 2010, 77-80].

attorney's powers in fact allows them to act as their principal's *alter ego* [Siemiątkowski 1999, 79]. It should be added that the power of attorney may not be limited with an effect to third parties (Art. 1091 § 2 CC), which, however, does not preclude the establishment of contractual restrictions creating attorney's liability before the principal. The scope of the power of attorney as such is very broad and covers court and out-of-court activities related to running a business. For example, the company's attorney is authorised to execute sales agreements, accept donations, sign checks and bills of exchange, grant and take out loans, or represent the business at court as well as before other state and local government bodies [Gniewek and Machnikowski 2014, 262]. Certainly, attorneys are also restricted in their actions [Bielecki 2007, 10-16], however, it is evident that this type of power can have a major impact on the proper operation and development of an enterprise. On the other hand, attorney's actions may also disturb the principal and put them into trouble. Admittedly, the literature on the subject demonstrates that the fact that the power of attorney cannot be granted to a legal person shows that it is rested on trust that can be put in a natural person only [Siemiątkowski 2002, 109; Moskwa 2001, 31; Radwański 2008, 541]. Still, there are more and more opinions in the doctrine that seem to advance the idea that legal persons be given the status of attorneys [Prutis 2001, 24-27; Grykiel 2008, 263-70], so this should not be ruled out *a priori*.

## **2. Power of attorney and legal capacity**

### **2.1. Introductory remarks**

The first question to consider is whether the granting of a commercial power of attorney to a person without legal capacity is possible. It seems not based on Art. 109<sup>2</sup> § 2 CC. This provision highlights the requirement to be met by a candidate for attorney. If violated, it will result in an act in law being invalid as inconsistent with statute (Art. 58 § 1 CC). However, the doctrine is right to point out that it is possible to convert such an act into a valid general power of attorney [Grykiel 2008, 275-76].

The above will translate into the existence of a commercial power of attorney when the attorney has lost their full capacity to act in law. The provision under Art. 109<sup>2</sup> § 2 CC does not indicate who can be granted

a power of attorney but provides the general rule of who is eligible to be qualified as an attorney. The provisions requires that the attorney complies with the requirement of full legal capacity at all times. Even a temporary loss of full legal capacity must result in the expiration of powers. Due to the *ipso iure* effects, it is not necessary for the principal to revoke the power of attorney. When adopting the option of revoking the power of attorney,<sup>4</sup> the attorney will not be encumbered with the obligation to resign from their function either. It is also worth noting that the removal of a commercial power of attorney from the National Court Register, as in the case of its entry, will only be declarative and not conclusive. However, according to Art. 109<sup>8</sup> § 1 CC, it is the entrepreneur's responsibility to report the expiration of the power of attorney.

## **2.2. Establishment of attorney's interim advisor**

An interesting view has surfaced in the literature on the subject that, in the event of the appointment of an interim advisor for an attorney in the course of their incapacitation proceedings, the power of attorney is only suspended for the duration of the proceedings, and its future will only be decided in the final court's decision on incapacitation.<sup>5</sup> However, this approach courts some controversy. Of significance for the matter is the provision of Art. 549 § 1 of the Code of Civil Procedure<sup>6</sup> which reads that, "A person for whom an interim advisor has been appointed has limited capacity for acts in law, similarly to a partially legally incapacitated person." The appointment of an interim advisor has, therefore, a substantive legal effect as it limits legal capacity [Dolecki and Wiśniewski 2013, 133]. The natural outcome of this limitation is the expiration of powers. The concept of "suspension of power of attorney" is not justified in the binding law. Another issue is that such a suspension cannot be in any way reflected in the National Court Register. It seems that, in the discussed case, the power of attorney should be removed from the

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<sup>4</sup> Among many authors, such a possibility is advocated by, for example, Kidyba 2012, 649; Soltysiński, Szajkowski, Szumański, and Szwaja 2008, 390-91.

<sup>5</sup> See Radwański 2008, 560. The author is of the opinion that this view can be espoused.

<sup>6</sup> Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2018, item 1360 as amended.

register and then restored after the closing of the incapacitation proceedings or the cancelling of the decision to appoint an interim advisor. Such a course of action does not seem to differ much from the regular termination and renewal of the power of attorney. The fact that a commercial power of attorney is intended, in the first place, to ensure secure trading argues for the proposed solution. The instrument of a temporary suspension of power of attorney, meaning a temporary denial of attorney's powers while they should exhibit a greater stability, will certainly not serve the transparency of business transactions and the security of market activities.

### **2.3. The effects of attorney's incapacitation**

The subsequent limitation of capacity to act in law should be combined with the institution of incapacitation. Bear in mind, however, that its reasons can also be temporal. A disease underlying partial incapacitation can be cured. This requires a brief consideration of another question. The problem of impact of returning to full legal capacity on a previously and effectively granted power of attorney needs to be addressed.

As pointed out elsewhere, a commercial power of attorney expires upon the loss of full legal capacity. However, the two parties may want the former attorney to continue their representation. That an expired power of attorney has not been removed from the National Court Register can also be the case. So, can there be any "restoration" of powers given such a state of affairs? Unfortunately, this question must be answered in the negative. When an authorised representative loses his powers, the power of attorney expires completely and can no longer produce any legal effects. The consent for a former attorney to continue acting in their current role cannot be considered a restoration of powers either. The Civil Code provides that the power of attorney be granted in a written form *ad solemnite* (Art. 109<sup>2</sup> § 1 CC). The opposite is true of an "ordinary" power of attorney which, with some exceptions, can be granted in any form, including *per facta concludentia* [Radwański and Olejniczak 2013, 328]. In this case, the principal should once again grant the power in the form prescribed by the law. It seems, however, that in this state of affairs, the mere consent of the former principal can be viewed as an implied power of attorney for the

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former attorney;<sup>7</sup> however, such a consent will not be effective in respect of acts in law that require a special form (Art. 99 § 1 CC).

### **3. Acts by an attorney with expired powers**

Another question that deserves attention is the effects of acts by an attorney with expired powers. First, it should be noted that due to the fact that the commercial power of attorney is one of the forms of authorisation, it is governed by the provisions on “ordinary” power of attorney in matters not covered by the relevant laws [Piasecki 2003, 448; Ciszewski 2013, 235]. This will also apply to the standard under Art. 105 CC, according to which, if an attorney after the expiry of their authorisation, performs, on behalf of the principal, an act in law within the scope of their original powers, that act in law is valid unless the other party was aware of the expiry or could have easily acquired such knowledge. The above should also be linked to the registered nature of the power of attorney, which is one of its distinguishing attributes [Radwański 2008, 535]. According to Art. 14 of the Act on the National Court Register,<sup>8</sup> an entity obliged to submit an application for entry in the register may not rely – when dealing with third parties acting in good faith – on data that has not been entered in the register or has been removed from it. Moreover, Art. 17 para. 1 of the Act on the National Court Register provides for presumed accuracy of data entered in the register (the principle of register reliability) [Tarska 2009, 178]. In view of the above, the above provisions will apply until the removal of the expired power of attorney from the National Court Register, thus supporting the presumption of uninterrupted authorisation of the attorney. Some are right pointing out that Art. 14 of the said act is a factor that stimulates an entity obliged to make the required entry [Michnik 2013, 111], which, in this case, will be an entrepreneur granting a commercial power of attorney in accordance with Art. 109<sup>8</sup> § 1 CC. By extension, acts in law performed by a former attorney must be assessed against Art. 105

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<sup>7</sup> Judgement of the Court of Appeal in Kraków of 24 August 1995, file ref. I ACr 410/95, LEX no. 84124.

<sup>8</sup> Act of 20 August 1997 on the National Court Register, Journal of Laws of 2018, item 986 as amended [henceforth cited as: NCR].

CC if the requirement of third party's good faith is met [Grykiel 2007, 25-26].

#### **4. Expiration of the power of attorney and the nature of power's legal relationship**

Some room should also be given to the link between the expiry of a commercial power of attorney caused by the loss of attorney's full legal capacity and the so-called content of the legal relationship that underlies the granting of powers. The content of the legal relationship is a *causa* of the power of attorney, that is, the power is granted to make this legal relationship even more effective. This relationship explains and justifies the existence and often the scope of powers [Gudowski 2014, 730]. This is well demonstrated in the contract of employment that covers the management of an enterprise. In order for the new manager to decide the future of the enterprise, they are granted a power of attorney in the greatest scope possible. It can be said that while the content of the legal relationship creates an obligation towards a person, the power of attorney enables them to satisfy it [Wolter, Ignatowicz, and Stefaniuk 2001, 343]. However, a power of attorney may also exist without that legal relationship.<sup>9</sup> The above will affect the discussed problem because of the autonomy of the power of attorney and the content of the legal relationship. For the termination of the power of attorney due the loss of full legal capacity will not be automatically linked to the expiration of the said legal relationship. Quite the opposite, it will be necessary to examine what kind of legal relationship underlies the granted powers and then analyse the impact of losing full legal capacity on the existence of that relationship. For example, pursuant to Art. 22 § 3 of the Labour Code,<sup>10</sup> a person with limited legal capacity may, without the consent of their statutory representative, establish an employment relationship and perform acts in law relating to that relationship. So, if such a person can establish an employment relationship, they can remain a party to a previously concluded

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<sup>9</sup> It is worth noting, however, that in other legal systems different approaches can also be found [Fabian 1963, 44].

<sup>10</sup> Act of 26 June 1974, the Labour Code, Journal of Laws of 2018, item 917 as amended.

employment contract. The labour law doctrine shows that even legal incapacitation does not affect person's capacity under an employment relationship [Gersdorf, Rączka, and Raczkowski 2014, 165], although it should be noted that the opponents of granting fully incapacitated individuals the capacity to be employees prevail over the supporters of the same [Liszczyński 2012, 118]. The same is not true when a power of attorney is based on the contract of mandate. The contract of mandate will expire as a result of the mandatary's loss of the full capacity for acts in law. Should this be the case, both the powers and the contract will expire altogether.

### Conclusion

To conclude, the existence of a power of attorney is inseparable with the attorney's capacity to perform acts in law. In the existing legal setting, the loss of full legal capacity by an authorised attorney will result in the final termination of their commercial powers. This will also be true if an interim advisor has been appointed during the incapacitation procedure. This is to protect the principal and guarantee their reliable and effective representation.

*Translated by Konrad Szulga*

### REFERENCES

- Bielecki, Maciej. 2007. "Ograniczenia prokury." *Monitor Prawniczy* 1:10-16.
- Bielski, Piotr. 2006. "Sposób wykazania w postępowaniu sądowym posiadania statusu prokurenta – Glosa do wyroku Sądu Najwyższego z 20 października 2005 r., II CK 120/05." *Prawo Spółek* 5:57-59.
- Ciszewski, Jerzy, ed. 2013. *Kodeks cywilny. Komentarz*. Ed. 1. Warszawa: LexisNexis.
- Dolecki, Henryk, and Tadeusz Wiśniewski, ed. 2013. *Kodeks postępowania cywilnego. Tom III. Artykuły 506-729*. Wyd. 2. Warszawa: Wolters Kluwer Polska.
- Fabian, Jerzy. 1963. *Pełnomocnictwo*. Warszawa: Wydawnictwo Prawnicze.
- Gersdorf, Małgorzata, Krzysztof Rączka, and Michał Raczkowski. 2014. *Kodeks pracy. Komentarz*. Wyd. 3. Warszawa: LexisNexis.
- Gniewek, Edward, and Piotr Machnikowski, ed. *Kodeks cywilny. Komentarz*. Ed. 6. Warszawa: Wydawnictwo C.H. Beck.
- Grykiel, Jarosław. 2008. *Powstanie prokury*. Warszawa: Wydawnictwo C.H. Beck.

- Grykiel, Jarosław. 2013. "Skutki wpisu prokury do rejestru przedsiębiorców." *Studia Prawnicze* 4:19-42.
- Gudowski, Jacek, ed. 2014. *Kodeks cywilny. Komentarz. Część ogólna*. Ed. 1. Warszawa: LexisNexis.
- Herbet, Andrzej. 2013. "W kwestii dopuszczalności udzielenia prokury przez spółkę w organizacji." *Palestra* 3-4:9-19.
- Kidyba, Andrzej, ed. 2012. *Kodeks cywilny. Komentarz. Vol. 1: Część ogólna*. Ed. 2. Warszawa: Wolters Kluwer Polska.
- Liszczyńska, Teresa. 2012. *Prawo pracy*. Ed. 9. Warszawa: LexisNexis.
- Michnik, Agnieszka. 2013. *Ustawa o Krajowym Rejestrze Sądowym. Komentarz*. Warszawa: Wolters Kluwer Polska.
- Moskwa, Leopold. 2001. "Nowe przepisy o prokurze." *Rejent* 9:25-42.
- Piasecki, Kazimierz. 2003. *Kodeks cywilny. Księga pierwsza. Część ogólna. Komentarz*. Kraków: Wolters Kluwer Polska.
- Prutis, Michał. 2001. "Osoba prawna jako prokurent." *Prawo Spółek* 9:24-27.
- Radwański, Zbigniew, ed. 2008. *System Prawa Prywatnego*. Vol. 2: *Prawo cywilne – część ogólna*. Ed. 2. Warszawa: Wydawnictwo C.H. Beck.
- Radwański, Zbigniew, and Adam Olejniczak. 2013. *Prawo cywilne – część ogólna*. Ed. 12. Warszawa: Wydawnictwo C.H. Beck.
- Siemiątkowski, Tomasz. 1999. *Prokura w spółkach prawa handlowego*. Warszawa: Wydawnictwo Prawnicze.
- Siemiątkowski, Tomasz. 2002. "Instytucja prokury w projekcie Komisji Kodyfikacyjnej Prawa Cywilnego." *Przeгляд Sądowy* 5:100-15.
- Smyk, Marcin. 2010. *Pełnomocnictwo według kodeksu cywilnego*. Warszawa: Wolters Kluwer Polska.
- Sołtysiński, Stanisław, Andrzej Szajkowski, Andrzej Szumański, and Janusz Szwaja, ed. 2008. *Kodeks spółek handlowych*. Vol. 5: *Pozakodeksowe prawo handlowe. Komentarz*. Ed. 2. Warszawa: Wydawnictwo C.H. Beck.
- Tarska, Monika. 2009. *Ustawa o Krajowym Rejestrze Sądowym. Komentarz*. Warszawa: Wydawnictwo C.H. Beck.
- Wajda, Dominika. 2008. "Prokura – problemy praktyczne." *Przeгляд Prawa Handlowego* 6:37-42.
- Wolter, Aleksander, Jerzy Ignatowicz, and Krzysztof Stefaniuk. 2001. *Prawo cywilne. Zarys części ogólnej*. Ed. 2. Warszawa: Wolters Kluwer Polska.
- Wyrwiński, Michał. 2005. "Udzielenie prokury przez przedsiębiorcę będącego osobą fizyczną." *Monitor Prawniczy* 1:22-28.

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## Legal Effects of Full Loss of Capacity for Acts in Law by a Commercial Attorney

### Summary

This study aims to address the question of impact of the loss of full legal capacity by a natural person on their ability to act as a commercial attorney and the legal consequences of the same. In particular, the analysis covers the decision on incapacitation of a commercial attorney as well as the consequences of the appointment of an interim advisor in court proceedings. In addition, the author looks at the consequences of acts in law by an attorney whose authorisation has expired due to the loss of their full legal capacity as well as discussing the above against the background of the so-called content of the legal relationship which is regarded as a *causa* of granted powers of attorney.

**Key words:** power of attorney, commercial attorney, legal capacity, incapacitation

### Skutki prawne utraty przez prokurenta pełnej zdolności do czynności prawnych

#### Streszczenie

Celem niniejszego opracowania jest przedstawienie zagadnienia wpływu utraty przez osobę fizyczną pełnej zdolności do czynności prawnych na byt prokury oraz jurydycznych konsekwencji powyższego. W szczególności przeanalizowana zostanie sytuacja wydania postanowienia o ubezwłasnowolnieniu prokurenta, jak również konsekwencje procesowej decyzji o ustanowieniu doradcy tymczasowego. Ponadto artykuł porusza zagadnienie skutków dalszego działania prokurenta, którego umocowanie wygasło z uwagi na utratę pełnej zdolności do czynności prawnych, jak również odnosi powyższe do zagadnienia tzw. stosunku podstawowego będącego swoistą *causą* udzielonej prokury.

**Słowa kluczowe:** pełnomocnictwo, prokura, zdolność do czynności prawnych, ubezwłasnowolnienie

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