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CORPORATE DISPUTES IN A PARTNERSHIP – CAPACITY TO SUE AND BE SUED

This paper presents the procedure for depriving a partner in a personal partnership the right to represent and the right to conduct partnership business. The authors define the concept of conducting the partnership business and representing it, as well as their significance in strengthening their position as a partner. Then we point at two possibilities stipulated by the law, which allow depriving a partner of their right to represent the company and the right to conduct company business. The first one is a relevant provision in the company articles of association, whereas the other one is a valid judgment of a court justified by the existence of significant reasons. Furthermore, we characterize the nature of personal partnerships, especially the fact that such entities do not have the status of a legal person, but only legal capacity. Then we demonstrate the dispute going on in the contemporary debate related to establishing that is entitled to sue and which party is the claiming party in the suit. Finally, the last section of the article presents and compares legal norms concerning the deprivation of a partner of their right to conduct company business and compares legal norms concerning the above used in Polish and German legislature.

Keywords: the right to represent a company, the right to conduct company business, title to appear in court.

1. INTRODUCTION

According to Article 3 of the Commercial Companies Code (CCC), a commercial partnership is established to enable its partners to achieve their common goal. This especially is to take place by contributing their shares to the company and, if the articles of association specify it, by cooperating within the company in a determined way. A personal partnership emphasizes the personal element, namely its partners who have been authorized to conduct its business. When conducting the partnership business, partners should cooperate in order to achieve company goals. As the company enjoys the status of an entity in civil law relations, this generates theoretical and practical discrepancies as to how to interpret the mechanisms of its operations in external relations. The article 30 of the CCC provides a possibility of depriving a partner of the right to represent the company in two different ways: in the articles of association or on the basis of a valid court judgment³.

The aim of this article is to present the possibilities of depriving a partner of a personal commercial partnership of the right to represent and the right to conduct partnership business in Polish and German legislature as well as the views of the doctrine and judica-

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ture representatives and to point at the ways of determining the jurisdiction of the court and the title to appear before the court in such court trial.

2. THE RIGHT AND THE OBLIGATION TO CONDUCT THE BUSINESS AND THE RIGHT TO REPRESENT AS INSTRUMENTS/MECHANISMS OF MANAGING PERSONAL COMMERCIAL PARTNERSHIPS

The right to represent the partnership and the right and obligation to conduct partnership business constitute specific competencies, typical for a legal position of a partner in a personal partnership and expressing its active aspect. At the same time, the fact that they are granted directly to a partner differentiates the status of such partner from the status of a member of a corporate entity, in which conducting the business (managing) and the representation are granted to its organs. The law allows partners to create the activity and operations of a partnership both in internal relations (conducting the business) as well as in external relations (representing the company)⁴.

Affected by the legal structure of a capital company, the rights and obligations of personal partnership partners related to conducting the business and representing the company are also defined as “corporate” rights and obligations in the doctrine⁵.

The right of a partner to represent the partnership to third persons is statutory. Its content allows to classify it as the organizational right. Representing a partnership in business relations allows a partner to exert direct influence on its functioning and to organize the activity in external business relations as well as to achieve a goal for which it was established.

According to Article 29 § 1 CCC each partner has the right to represent the partnership. This right concerns all activities of a company in court and outside it⁶. Court activities entail all activities performed before all types of courts, including a court of conciliation (for example filing a suit, making unilateral declarations on behalf of a company). The out-of-court activities include concluding and terminating contracts, making declarations before state organs, such as Tax Chambers, Office of Competition and Consumer Protection, Financial Supervision Authority. Out-of-court activities entail all kinds of material law activities which turn out to be necessary in the course of the company operations and in which it may be a party.

In accordance with the provisions of the Commercial Companies Code representing a partnership means acting in external relations of a partnership as a legal entity, separate from partners, with its own, autonomous, legal sphere. A partner, while representing a partnership, acts on its behalf as an independent legal entity, bringing legal effects in

⁴ K. Kopaczyńska-Pieczniak, *Pozycja prawna wspólnika spółki jawnej*, nb. Chapter II, § 4, Lex 2013.

⁵ A. Szajkowski, *System Prawa Prywatnego*, t. 16: *Prawo spółek osobowych*, Warszawa 2008, p. 930.

⁶ Contrary to a civil partnership (Article 866 of Civil Code) the right of a partner in a general partnership to individual representation is not limited to the same scope as the right to conduct the business of the company. It is also much broader than in a civil partnership, as it covers all court and out-of-court activities. For safety reasons CCC dropped the requirement that the right to represent concern only activities related to running a trade company. A general partnership may also deal with services and production. In a civil partnership the right to represent practically covers only the activities of an ordinary board (“common activities of a company” Article 866 of Civil Code in connection with Article 865 § 2 of Civil Code; S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, A. Herbert, R. Gawalkiewicz, I. Mika, M. Tarska, *Kodeks spółek handlowych. Komentarz do art. 29 KSH*, nb. II/2, Wydawnictwo C.H. Beck, Warszawa 2012.

relations with third parties⁷. The representation of a commercial personal company by partners meets basic features mentioned in the doctrine as *differentia specifica* of an organ activity, that is partners are incorporated into an organizational structure of a partnership as a corporation, whereas the possession of the power of representation by at least one of them is necessary for a partnership to operate in legal system⁸.

The right and obligation to conduct the partnership business was defined in Article 39 of the CCC. As a rule, every partner has the right and obligation to conduct the partnership business. The right to conduct the partnership business results from the fact that in a general partnership there are no organs dealing with management and taking decisions, which is the consequence of the lack of corporate personality in a general partnership. The lawmakers divide partnership business into matters belonging to ordinary company activities and those going beyond that scope.

Conducting partnership business in case of a general partnership is a manifestation of cooperation in order to achieve the goal for which the partnership was established. The lawmakers shaped this scope of activities in a specific way. Making it both the right and responsibility of a partner. The right means that the law grants the possibility of partner's action, while the responsibility manifests the obligation of a partner to conduct the business.

The right and obligation to conduct the partnership business, due to its content, must be classified as organizational rights and obligations. Their essence is to ensure a partner has direct influence on partnership activities and accomplishment of a goal for which it was established. The essence of this right and obligation consists in guaranteeing personal bond between a partnership and its partners by ensuring they will personally conduct its business and involve in its operations. This proves that a partnership is not fully legally separated from partners, since they, as independent legal entities, not covered by the structure, create the partnership activity⁹.

The right and obligation to conduct partnership business are exercised independently by each partner only as far as ordinary activities of a partnership are concerned. Independent competence to execute this right is granted to a partner if at least one other partner does not object to dealing with a specific issue or issues by a partner.

⁷ Due to the fact that a general partnership operates under its own name, has its own assets and legal capacity, thus being an organization equipped with corporate personality, there are not sufficient jurisdictional premises for assuming that a partner representing a partnership does not act on behalf of the partnership, but on behalf of other partners and himself. This is claimed by: S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, A. Herbet, R. Gawalkiewicz, I. Mika, M. Tarska, *Kodeks spółek handlowych. Komentarz do art. 29 KSH, nb. 1/6*, Wydawnictwo C.H. Beck, Warszawa 2012.

⁸ A. Herbet, *Spółka komandytowa według kodeksu spółek handlowych*, Lublin 2004, p. 156; K. Kopaczyńska-Pieczniak, *Pozycja prawna wspólnika spółki jawnej*, nb. Chapter II, § 1/3, Lex 2013 indicates that a partner representing a partnership acts as its statutory representative of specific nature. Above all, a partner is a member of a partnership organizational structure (an entity separate from a partnership, but included in it, "internal"), moreover certain essential modifications of his position are due to proper application of provisions on organs (Article 33 § 1 of the Civil Code). This leads to the origin, out of various cases of statutory representation, of its specific structure, assuming, by the virtue of the law, proper application of provisions on organs (especially Article 38 or Article 42 of the Civil Code), which must be seen as a specific type of statutory representation and should be defined as systemic (structural) statutory representation. At the same time, due to the lack of common provisions on statutory representation, it is justifiable to use here, by way of analogy, provisions on power of attorney (especially Article 108 of the Civil Code). Taking into consideration the content of Article 96 of the Civil Code, there are no legal foundations for constructing a third type of representation.

⁹ K. Kopaczyńska-Pieczniak, *Pozycja prawna wspólnika spółki jawnej*, nb. Chapter II, § 2/2, Lex 2013.

3. FREEDOM OF WILL OF PARTIES TO ARTICLES OF ASSOCIATION

One of the factors that may determine the legal status of a partner is the deprivation of the right to represent a partnership, which may be done in partnership articles of association or by means of a valid court judgment. Articles of association may stipulate that a partner is deprived of the right to represent the partnership or that he is authorized to represent it only jointly with another partner or a proxy. The exclusion of the right to represent the company by a partner is then done following his consent. The decision in this matter may be stipulated not only in the original articles of association, but also in an amendment to it.

The principles of excluding the partner from conducting the partnership business have been defined in Article 40 § 1 of CCC, which says that conducting the partnership business may be granted to one or a few partners either in articles of association or on the basis of a subsequent resolution of partners. Other partners are then excluded from conducting partnership business.

With reference to the nature of resolution passed by partners on granting company business to one or a few partners, the leading view in the doctrine is that such a resolution is an amendment to the articles of association. However, the differentiation made in Article 40 § 1 of CCC between articles of association and a subsequent resolution made by partners implies that although a resolution does constitute the change to articles of association understood as a legal relationship originating on its base, it is not treated as a change of articles of association in the mode of Article 9 of CCC. This is a specific type of a resolution made on the basis of an expressed authorization resulting directly from the legal act, whose subject is to define the rules of managing a partnership. Due to its content, which shapes the foundations of a partnership and the principles of its functioning it cannot be classified as belonging to conducting business, but to “ownership” matters. Partners make such a resolution as partners, not as those conducting the partnership business¹⁰.

Contractual modifications of a legal status of a partner as far as the right and obligation to conduct company business are concerned, may also consist in introducing a division of competencies between particular partners in articles of association, that is in granting directly particular scopes of matters, such as tax, accounting, personnel, to particular partners in articles of association. The articles of association may also stipulate that it will be possible to introduce such division in a subsequent resolution of partners.

4. STATUTORY POSSIBILITIES OF DEMANDING CORRECTION OF PROVISIONS GOVERNING CONDUCTING THE BUSINESS AND THE RIGHT TO REPRESENT A PERSONAL PARTNERSHIP IN THE COURT PROCEEDINGS – GENERAL ASSUMPTIONS AND FUNCTIONS

The right to demand that a partner be deprived of the right to conduct the business and release him from this obligation and the right to demand that a partner be deprived of the right to represent a partnership belong to a specific category of shaping rights, whose essence is manifested in the fact that the norm of material right gives rise to the right to make a claim for determining the legal relation or right, while its determination is shaped on the basis of a valid court judgment.

¹⁰ *Ibidem*.

The deprivation of the right to represent may take place at the moment of establishing a company, that is only in articles of association, which is reflected in the content of the application to enter the partnership into the register of companies. It may also take place while the partnership is operating, which can be done either via amendment to articles of association or on the basis of a valid court judgment. The right to represent the partnership by a partner is characterized by the fact that a partner may be deprived of this right as a result of a court judgment¹¹.

As we can see from Article 30 § 2 of CCC, a partner may be deprived of the right to represent the partnership only due to vital reasons by virtue of a valid court judgment. Vital reasons mentioned in this provision are an example of an expression calling for specification on the basis of a particular factual state in order to determine whether they exist. They relate to a particular partner or are evoked by a partnership relation. It seems that the doctrine views, especially the judgments of the Supreme Court made on the basis of other provisions of the CCC or previous Commercial Code, which take advantage of the concept of vital reasons, may be applied to specify vital reasons here. Therefore, a valid reason may be a chronic disease which prevents a person from performing a representation function¹². According to the judgment issued by the Court of Appeal in Kraków on 23rd January 2013¹³ both Article 30 § 2 and Article 47 of CCC mention vital reasons, though they do not define them. It is assumed, however, that these vital reasons are the violation of the obligation to be loyal to a partnership, participation in competitive activities and entities, unfair conduct or unreliable performance of duties by a partner, embezzlement, etc. The ban on competitive activity consists in forbidding any activities which might be considered detrimental to the interests of a partnership, but also those that are associated with competitive participation in the market. Vital reasons mentioned here must be considered in the context of relations prevailing in a given partnership.

5. THE PROCEDURE AND JURISDICTION OF THE COURT

According to Article 27 of the Civil Procedure Code¹⁴ the court action is brought before the first instance court in the district where the defendant has its residence. However, the court action related to belonging to a cooperative, partnership or association is brought only in the place of their residence (Article 40 of the CPC). In the suit for depriving a partner in a personal commercial partnership of the right to represent or the right to conduct the business of the partnership, the venue is determined by the registered seat of the partnership whose partner the defendant is.

The proceedings conducted in this scope will be a commercial case as understood in the act of 24th May 1989 on hearing commercial cases by courts. Commercial cases, ac-

¹¹ A legal effect of depriving a partner of the right to represent by means of a valid court judgment and excluding a partner from representing the partnership is the cessation (termination) of the statutory right to represent the partnership on their part. A partner loses the right to act on behalf of a partnership as its statutory representative. Both the judgment and the amendment to the articles of association evoke *ex nunc* effects and do not affect the validity or effectiveness of legal activities performed by a partner on behalf of a partnership before the judgment becomes valid or before the amendment becomes effective.

¹² A. Szajkowski, *System Prawa Prywatnego*, t. 16, *Prawo...*, pp 936–937.

¹³ Judgment of the Court of Appeal in Kraków from 23rd January 2013, case file number I ACA 1300/12, LEX nr 1344068.

¹⁴ The Act of 17th November 1964 Civil Procedure Code, *Journal of Laws* 2014, item 101.

cording to Article 2, are the cases concerning partnership relations¹⁵. The concept of partnership relations cases is tantamount to the concept of partnership relations cases defined in Article 2 section 2 of the act on hearing commercial cases by courts. The concept of partnership relations means both the legal relation between the partnership and its partners and the legal relation between partners connected with their partnership. The partnership relations cases are commercial cases heard by commercial courts. Before 03.05.2012 they were heard in a separate proceeding by commercial courts. Such cases include cases of depriving a partner in a general partnership of the right to conduct partnership business, cases of adjudging invalidity of a resolution passed by partners in a limited partnership or a resolution of a general meeting of shareholders which is in conflict with the law¹⁶.

It remains disputable how to acknowledge the non-material nature of the case, though such position should be supported. Therefore a relevant court to hear the case will be a regional court¹⁷, whose competences include, among others, non-material rights and material claims pursued jointly with them, apart from the cases related to establishing or denying paternity and for dissolution of adoption.

In jurisdiction, non-material cases (non-material rights cases) include cases concerning cooperative membership, especially cases concerning accepting and excluding from a cooperative or striking a person off the register of cooperative members, assuming that all legal relations related to cooperative law are derivatives from the basic cooperative membership relation, whose non-material nature is beyond any doubts¹⁸.

J.P. Naworski¹⁹ points out that the case of depriving a partner in a general partnership of the right to represent the partnership should be considered a non-material case, though the same author admits that the opposite view is possible. In literature²⁰ another view was also presented, which sees the case of depriving the partner of the right to represent the partnership as material one.

Assuming that the case of depriving a partner in a personal partnership of the right to represent/conduct the business of a partnership is of non-material nature, due to the fact that provisions of law do not stipulate a fixed fee for this kind of cases, it must be stated that in such a case a fee of PLN 30 must be paid (as defined in Article 14 of the act on court fees in civil matters²¹).

¹⁵ K. Kopaczyńska-Pieczniak, *Pozycja prawna wspólnika spółki jawnej*, nb. Chapter II, § 1/5, Lex 2013, indicates that the court judgment depriving the partner the right to represent the partnership has constitutive nature. Such case belongs to partnership relations cases, is a commercial case, and the relevant court to hear it is the commercial court. It must be considered a case for non-material rights, therefore a relevant court to hear it is the regional court (Article 17 point 1 of the CPC).

¹⁶ A. Góra-Błaszczkowska, *Kodeks postępowania cywilnego*, t. I: *Komentarz do art. 40 KPC*, nb. 7, Wydawnictwo C.H. Beck, Warszawa 2013.

¹⁷ A.J. Witosz, *Prowadzenie spraw i reprezentacja spółek osobowych*, Warszawa 2013, p. 347.

¹⁸ A. Góra-Błaszczkowska, *Kodeks postępowania cywilnego*, t. I: *Komentarz do art. 40 KPC*, nb. 3, Wydawnictwo C.H. Beck, Warszawa 2013.

¹⁹ R. Potrzeszcz, T. Siemiątkowski, *Kodeks spółek handlowych, Komentarz*, Warszawa 2001, p. 121.

²⁰ R. Pabis, *Przepisy ogólne. Spółka jawna, spółka partnerska*, t. I, Warszawa 2003, p. 286.

²¹ The act of 28th July 2005 on Court fees in civil cases, "Journal of Laws" 2014, 1025.

6. GENERAL ISSUES – THE ESSENCE OF A PERSONAL PARTNERSHIP

Personal partnerships do not possess corporate personality in Polish law. They only possess legal capacity, therefore they are subjects of rights and obligations. The above results from Article 8 of CCC, which states that a personal partnership may acquire rights on its own behalf, including the ownership of real estate and other material rights, contract obligations, sue and be sued. A personal partnership may then be treated as an organizational unit which is not a legal person, which is granted legal capacity on the basis of Article 33 of the Civil Code¹, while the statutory provision creating legal capacity of such partnership is Article 8 § 1 of CCC. Article 8 needs to be treated as a source of statutory capacity separate from capacity of partners creating it. The articles of association of a personal partnership (possibly with the entry to the register) creates a new, previously unknown, entity, which may acquire rights and contract obligations on its own²².

Legal capacity of personal partnerships is also emphasized by an expression used in Article 8 § 2 of CCC and then repeated in statutory definitions of particular types of personal partnerships, stating that a personal partnership conducts the business under its own company²³. Due to the fact that the provision of Article 8 of CCC was placed in the general part of the Commercial Companies Code concerning all kinds of personal partnerships, a commercial personal partnership obtains legal capacity not only in relations with third persons, but also in internal relations²⁴. The assumption of legal capacity of personal partnerships leads to a conclusion that the elements of legal capacity mentioned in the provision, that is acquiring rights and contracting obligations, suing and being sued, conducting the business under the joint company should be referred equally to all personal partnerships. Article 8 of CCC does not differentiate these elements depending on the type of a partnership²⁵.

The second attribute of being a carrier of rights except for the already mentioned legal capacity is the capacity to enter into legal transactions. A partnership also has a capacity to be a party in civil cases. The above capacities determine the fact that according to Article 8 of CCC a general partnership was shaped as an independent and separate from partners subject of rights and obligations, a party of legal relations in civil law and a party or participant of a civil procedure, especially a trial, an extra-judicial procedure or an enforcement procedure²⁶.

The granting of court and legal capacity to a personal partnership by CCC allows it to appear independently as an independent party in a court trial. A partnership may be a claimant or a defendant. There are no obstacles to file a suit and to defend itself as a party against the suit was filed. The possibility of appearing in a trial as a claimant or

²² D. Bucior, *Konstrukcja odpowiedzialności wspólników za zobowiązania handlowej spółki osobowej*, "Prawo Spółek" 2002, No 6, p. 12, the same is also stated by Z. Radwański, *Podmioty prawa cywilnego w świetle zmian kodeksu cywilnego przeprowadzonego ustawą z dnia 14 lutego 2003 r.*, "Przegląd Sądowy", No 7–8, p. 6.

²³ A. Herbet, *Odpowiedzialność wspólników za zobowiązania handlowych spółek osobowych – zagadnienia materialnoprawne*, Rejent 2003, p. 44.

²⁴ M. Tyrakowska, *Podmiotowość cywilnoprawna osób ustawowych na przykładzie spółki jawnej*, "Przegląd Prawa Handlowego" 2010, No. 5, p. 34.

²⁵ A. Kidyba, *Przepisy dodane jako normy kreujące nowe instytucje k.s.h.*, "Przegląd Prawa Handlowego" 2004, No 3, p. 14.

²⁶ K. Kopaczyńska-Pieczniak, *Ukształtowanie podmiotowości prawnej spółki jawnej [in:] Kodeks spółek handlowych po dziesięciu latach*, ed. by J. Frąckowiak, Wrocław 2013, p. 501.

defendant results from the fact that according to CCC provisions the partnership is the subject of trial rights and obligations, not its partners. Also when a suit is filed by the partnership, the claimant party refers to the personal partnership, not its partners.

It is commonly accepted nowadays that the trial of a personal partnership is not automatically a trial of its partner. A similar opinion has long been held by the doctrine and judicial decisions in Germany. Such view is consistent with the emphasized capacity of a general partnership and its court capacity. It is also directly derived from Article 31 § 2 of CCC, which clearly leaves it at the claimant's disposal to sue a partnership or one or more partners with it, or maybe restrict the suit to only partners. The provision determines clearly that there is no necessary joint participation in civil law proceedings between the sued partnership and its partners²⁷.

A commercial personal partnership should have a status of a party in a trial (participant of the proceedings in extra-judicial proceedings). Marking it as a claimant, defendant or participant should cover the company under which it operates. The consequence of accepting a partnership as a party should be an assumption that partners should be questioned in partnership matters as witnesses and they may report a secondary intervention²⁸.

As a result, the proceeding initiated by the partnership (under the company) or against it is a proceeding in which the partnership, not its partners, is the party. A third person suing the partnership may also sue its partners, though not necessarily all of them, as they are jointly and severally responsible for the obligations contracted by the partnership. However, there is only ordinary material joint participation, not the necessary joint participation or identity of parties²⁹.

7. THE DOCTRINE VIEWS ON TITLE TO APPEAR BEFORE COURT AND OWN POSITION IN THE CASE

An issue raising doubts in the doctrine is the issue of who has the title to file a suit for depriving of the right to represent and who should be the defending party in such a trial. The first view states that such demands should be put forward by the partnership, subject to proviso of prior resolution passed by all partners (save for the "excluded one")³⁰. An opposite position grants the title to file a suit to each partner (also to a limited partner), regardless of the method of representation adopted in the partnership³¹. Within it there are also different positions as to qualification of the possible participation in a dispute. Some authors assume that if the suit is filed by a few partners, there is a uniform, voluntary,

²⁷ G. Gorczyński, *Status spółki jawnej i jej wspólników w postępowaniu cywilnym*, „Przegląd Prawa Handlowego” 2010, No 1, p. 28 and next.

²⁸ Szerzej M. Litwińska-Werner, *Kodeks spółek handlowych. Komentarz do art. 8*, nb. 8, Wydawnictwo C.H. Beck, Warszawa 2007.

²⁹ J.A. Strzépka, *Kodeks spółek handlowych. Komentarz do art. 8*, nb. 6, Wydawnictwo C.H. Beck, Warszawa 2013.

³⁰ According to Z. Fenichel such a suit is filed by a partnership against its partner – Z. Fenichel [in:] T. Dziurzyński, Z. Fenichel, M. Honzatko, *Kodeks spółek handlowych*, Kraków 1936, p. 92, the same also by Z. Jara, *Kodeks spółek handlowych. Komentarz do art. 30*, nb. 26, Wydawnictwo C.H. Beck, Warszawa 2014.

³¹ J. Szczotka indicates that the suit can be filed jointly by all partners, J. Szczotka, *Spółka jawna*, Bydgoszcz–Lublin 2003, p. 80, a suit on the basis of Article 30 § 2 of CCC may be filed by any partner, who does not have to have the right to represent the partnership, since he does not act on behalf of the partnership, but on his own behalf. Similarly: J. Bieniak, M. Bieniak, G. Nita-Jagielski, K. Oplustil, R. Pabis, A. Rachwał, M. Spyra, G. Suliński, M. Tofel, R. Zawłocki, *Kodeks spółek handlowych. Komentarz do art. 30*, nb. 5, Wydawnictwo C.H. Beck, Warszawa 2014.

material joint participation among them. Others claim that joint participation of all partners in the trial is necessary; partners who do not appear of the claimant side must be sued together with a person to whom a suit refers. Another opinion has it that active title to appear before court is granted to all other partners jointly, which is to stem from the fact that it is an essential case where, as a rule, all partners decide unanimously³².

A. Szumański indicates that a suit for depriving one marked active partner of the right to represent the partnership may be lodged by other active partners and all limited partners. We should rule out the view that active title is granted to the partnership itself. The commercial court in the trial mode will issue a judgment depriving an active partner of the right to represent the partnership. This judgment is of constitutive nature³³.

Ł. Błaszczak further argues that all other partners have to participate in the pending proceeding, basing on a construct of necessary joint participation³⁴, which does seem to be a too restrictive solution³⁵. There is no doubt that they may enter the proceedings as outside interveners³⁶. In his opinion, based on Article 30 § 2 of CCC, an impractical, though safe solution for a general partnership would be to grant the possibility of lodging a suit only to other partners (jointly). This concept is supported by the fact that depriving a partner of the right to represent should be a well-thought decision, preventing its excessive use.

According to A. Herbet, a view granting active title in the trial for depriving of the right to represent the partnership does not seem convincing. It is not about questioning the separate legal capacity of a partnership, but about determining the subject of the proceedings, namely defining the content of the partnership relations. A partnership cannot by any means be treated as a party to this legal relation, it cannot be treated as sort of “abbreviation”, which actually means all (remaining) partners. Since the provisions of CCC do not impose an obligation of active group title, the right to file a suit for depriving of the right to represent is granted to every partner³⁷.

Granting the title to file a suit to each partner is justified, most of all, by the nature of a general partnership, in which joint cooperation of all partners is a principle. The partnership articles of association oblige each partner to perform activities aimed at ensuring such joint cooperation. The legal relation of a partnership covers an obligation of each partner to cooperate with others when performing one’s organizational competencies. Each partner is at the same time obliged and entitled to take up activities aimed at accomplishing the goal for which the partnership was established. Moreover, since each partner may demand dissolution of a partnership by the court for some vital reasons (Article 63 § 1 of CCC), reasoning *a maiori ad minus* it seems even more justified to grant them the right to demand that another partner be deprived of the right to represent the partnership³⁸.

³² A.J. Witosz, *Prowadzenie spraw...*, p. 302.

³³ A. Szajkowski, *System Prawa Prywatnego*, t. 16: *Prawo...*, p. 938.

³⁴ Ł. Błaszczak, *Współuczestnictwo procesowe na przykładzie osobowych spółek handlowych – istota, rodzaje i przypadki jego występowania*, “Prawo Spółek” 2004, No 10, p. 25.

³⁵ Tak również A. J. Witosz, *Prowadzenie spraw...*, pp. 347–348.

³⁶ A. Szajkowski, *System Prawa Prywatnego*, t. 16: *Prawo...*, p. 818.

³⁷ A. Herbet, *Spółka komandytowa...*, p. 158–159; J.A. Strzępka, *Kodeks spółek handlowych, Komentarz*, Warszawa 2013, p. 106 emphasizes that the suit for depriving a partner of the right to represent may be filed by each partner, other partners may join the trial as outside interveners.

³⁸ K. Kopaczyńska-Pieczniak, *Pozycja prawna wspólnika spółki jawnej*, nb. Chapter II, § 1/5, Lex 2013.

M. Rodzyńkiewicz³⁹ points out that active title is granted to all other partners independently as a party to the partnership articles of association. However, a judgment shaping law depriving a sued partner the right to represent should have an effect towards the partnership itself, which cannot be achieved if the partnership does not participate in the trial as a party, which results from Article 365 of the CPC (a valid judgment is binding for the parties but also for other persons only when it results from the act of law; Article 30 of CCC on the other hand, does not allow us to conclude that a judgment described in it has the so-called extended scope of binding, including a general partnership in which the sued partner participates). It is justified then for a general partnership to participate in a trial either as a claimant or at least on the claimant's side as outside intervener.

Summarizing, the suit based on Article 30 § 2 of CCC can be filed by each partner, a partner filing it does not have to have the right to represent the partnership since he does not act on behalf of it, but on his own behalf. Granting the title to file a suit to each partner is justified mostly by the nature of the general partnership, which is governed by the principle of cooperation of all partners. Since the provisions of CCC do not introduce the requirement of active group title, the right to file a suit for depriving the partner of the right to represent should be granted to each partner.

Passive title is granted to a partner whom the demand for deprivation of the right to represent concerns⁴⁰. Provisions of law in such a case do not require suing other partners, who do not appear on the claimant's side.

One can find an opposite view in the doctrine, namely that in such a situation it seems justified that all partners participate in the trial. We may obviously assume that they may enter the case as outside interveners. The dispute in this scope should be perceived as a dispute between them as parties to this relation. So, if some partners file a suit, it is justified to sue, apart from the partner whom one wishes to deprive of the right to represent the partnership, other partners who do not appear on the claimant's side⁴¹.

The above opinion raises some doubts. Taking into account, for example, the nature of a limited joint-stock partnership, in which the partnership would issue bearer's shares. In this situation it would be impossible to sue all other partners. As R. Lewandowski points out, in case of a limited joint-stock partnership the doctrine assumes that in disputes with active partners, all shareholders do not have passive title. The limited joint-stock partnership represented by the supervisory board organ participates in the suit for the benefit of the shareholders. Since neither autonomous provisions on limited joint-stock partnerships nor provisions on a general partnership (Article 126 § 1 point 1 of CCC) regulate the issue of active title of active partners, general provisions of the procedure law shall apply. Each active partner as a natural person has active title to lodge a claim on the basis of Articles

³⁹ M. Rodzyńkiewicz, *Kodeks spółek handlowych. Komentarz*, Warszawa 2012, p. 82.

⁴⁰ This is claimed, among others, by. A.J. Witosz, *Prowadzenie spraw...*, p. 303.

⁴¹ The partnership and the partners are jointly and severally responsible for obligations contracted by the partnership. Even if during the court trial the partnership loses its legal being, the proceeding is not discontinued, since it is participated by people who had the status of partners in a personal partnership. Due to joint and several responsibility of the partnership and partners, the title to appear before court is granted both to the partnership and to the partners. This is not joint passive title. Each of these entities enjoys independent title to appear before court. Therefore the loss of a legal being does not necessitate discontinuation of the proceedings, since the trial may be continued with participation of persons who were partners in a personal partnership Ł. Błaszczak, *Handlowa spółka osobowa jako strona procesu cywilnego – analiza wybranych zagadnień procesowych*, "Prawo Spółek" 2005, No 9, item 41, Lex No. 49060/4.

64-65 of CPC on their own behalf. Due to the fact that in the analyzed dispute, there will usually be claims made by a few active partners, Article 72 § 1 point 1 of CPC on material joint participation shall apply, since this concerns the joint right of active partners to conduct the business of a partnership⁴².

There are also some doubts raised in the doctrine, concerning the effectiveness of the pronounced judgment which deprives the partner the right to represent the partnership to third persons (outside the partnership) and in relations between the partnership and all partners. The Commercial Companies Code, in case of personal partnerships does not contain a separate regulation, as it does with limited liability companies. According to Article 254 of CCC a valid judgment declaring a resolution invalid is valid in relations between the partnership and all partners as well as in relations between the partnership and members of partnership organs.

Following a general principle expressed in Article 366 of CPC, a valid judgment is *res judicata* only as far as the subject of the judgment was (following the subject of the dispute) and also only between the same parties. The provision of Article 254 of CCC introduces the effects of a valid judgment different from the general rule. This difference is also based on Article 365 § 1 of CPC which states that a valid judgment is binding not only to the parties and the court which issued it, but also to other courts and other state and public administration organs, and in cases stipulated by the act of law, also to other persons. A case stipulated in the act, when a judgment binds other persons than parties, is the regulation of Article 254 of CCC, which introduces an extended effectiveness of the judgment revoking or stating the invalidity of a resolution passed in a limited liability company.

The lack of the above regulation in case of personal partnerships should not determine the fact that a judgment depriving a partner the right to represent the partnership does not have an effect between the partnership and all partners and to third persons. As far as effectiveness towards third persons is concerned, it should be pointed out that the statutory authority of a partner in a general partnership cannot be limited towards third persons, which is defined in Article 29 § 3 of CCC. The Act allows though to limit the way the right to represent is executed (Article 30 § 1 of CCC). The provision of Article 29 § 3 of CCC concerns the object scope of representation, while Article 30 of CCC deals with subject issues, competencies granted to a partner and the way of executing them. The way of shaping the principles of representation may vary, though as long as the ban placed in Article 29 § 3 is violated, the effectiveness of adopted solutions will be limited to relations between partners⁴³. All kinds of limitations to the object scope of this competence will only have internal effect⁴⁴. The absolute rule of the ban on limiting the object scope of the right to represent and the possibilities of changes the subject scope by depriving some partners of this right are not interrelated institutions. Admittedly, Article 29 § 3 of CCC

⁴² R. Lewandowski, *Spory w spółce komandytowo-akcyjnej*, "Państwo i Prawo" 2006, No. 7, Lex No. 51749/1.

⁴³ According to A.J. Witosz, the provision of Article 29 § 1 of CCC defines the statutory model of the object scope (each partner has the right to represent), while Article 29 § 2 defines the statutory model of the object scope (the right to all court and out-of-court activities of a partnership), while Article 29 § 3 places a statutory ban on violating the model adopted for the object scope, Article 30 § 1 defines legally allowable method of limitation in form of a joint representation (allowable, since it is of subject nature, which was emphasized by defining this issue in a separate provision, thus separated from the object scope in Article 29 § 2 and 3 of CCC, A.J. Witosz, *Prowadzenie spraw...*, p. 129.

⁴⁴ *Ibidem*, p. 120.

determines the direction in which the following provision should be construed, but Article 30 § 1 of CCC defines the freedom to shape principles of representation, which affects third persons, and only in case of violating provisions of Article 29 § 3 of CCC – internal effect⁴⁵.

We cannot draw a conclusion that the provision of Article 29 § 3 of CCC concerning the ban on contractual limitation to the scope of representation also refers to Article 30 of CCC. A question would then rise, what to do in a situation when a partner is deprived of the right to represent on the basis of a valid court judgment. It is hard to assume that this court deprivation of the right to represent does not bring any effects towards third persons. It is equally hard to assume that the contractual deprivation of the right to represent is not effective towards third persons, while the court deprivation of this right brings such effects towards third persons⁴⁶.

It is hard to agree with the opinion of M. Rodzyński⁴⁷, who states that due to the express wording of Article 29 § 3 of CCC, we should assume that depriving a partner of the right to represent the partnership on the basis of a valid court judgment does not bring any effect to third persons. It is hard to accept the admissibility of a judgment which does not bring effects towards third persons. Other partners, when deciding to file a suit, would only be able to achieve a situation in which the deprivation would be effective in relations between partners and the defendant and the defendant and the partnership. De facto the partner would not be deprived of competencies, but would only be obliged to restrain from using them, since the right to represent itself, understood as the right to make statements of will on behalf of the partnership and directly affecting it, would still be in force⁴⁸.

In case of conducting the partnership business, the law, just as in the issue of the right to represent, does not determine who may file a suit for depriving a partner the right to conduct the partnership business. Doctrinal views are varied in this scope and an authorized entity might be each partner, all partners acting jointly, some partners or the partnership itself⁴⁹. Another concept was proposed by A. Kidyba, who claims that the suit for depriving a partner the right to conduct the partnership business may be filed by partners in the case when a resolution was adopted, expressing consent to such suit. If there is no resolution, according to this author, an independent suit against partners and partnership may be filed by a partner who was denied consent⁵⁰.

⁴⁵ *Ibidem*, p. 317. The limitation of the scope of representation may only be made in an agreement (for example division of competencies, forbidding to perform certain activities), however, such limitations have no effect on third persons, but this may make a partner liable to a partnership. A partner violating limitations resulting from an agreement may be held liable on the basis of Article 471 of the Civil Code. Each partner may perform activities independently (individual representation). The articles of association may offer another form of representing the partnership. The articles may also introduce the principle of joint representation, that is an obligation of cooperation imposed on two partners or cooperation of a partner and a proxy. The method of representation must be reported to the National Court Register.

⁴⁶ J.A. Strzępka, *Kodeks spółek handlowych. Komentarz do art. 29*, nb. III/2, Wydawnictwo C.H. Beck, Warszawa 2013.

⁴⁷ M. Rodzyński, *Kodeks spółek...*, p. 79.

⁴⁸ A.J. Witosz, *Prowadzenie spraw...*, p. 348.

⁴⁹ M. Litwińska-Werner, *Kodeks spółek handlowych. Komentarz do art. 47*, nb. 3, Wydawnictwo C.H. Beck, Warszawa 2007, the author indicates that it is not excluded that claimants – apart from the partnership, include other partners.

⁵⁰ A. Kidyba, *Komentarz do art. 47 KSH*, nb. 3, Wydawnictwo Wolters Kluwer 2009.

The lack of other regulations could indicate that a suit may be filed by each partner. However, the doctrine points out that it would be difficult to marry with the principle governing the general partnership, stating that the most important decisions exceeding the usual scope of partnership activities require consent of all partners. As a result, the doctrine presents the opinion that a suit should be filed by all other partners⁵¹. If we assume that a suit may be filed by particular partners, the defendant should be not only the partner who is to be deprived of the right to conduct the partnership business, but also other partners⁵². According to M. Allerhand, partners who do not agree for filing a suit should also be covered with the suit. A contrary opinion states that depriving a partner of the right to conduct the partnership business is a decision exceeding the usual scope of partnership activities, as understood in Article 43 of CCC. It is necessary then to obtain consent of all partners, excluding the partner who is to be deprived of the right. M. Allerhand's view would lead to the possibility of filing a suit for depriving the right to conduct the partnership business of one or more partners by a partner who is in minority and who acts contrary to the opinion of the majority⁵³.

K. Kopaczyńska-Pieczniak⁵⁴ indicates that the dispute concerning the shaping of the partner status, whose essence is deprivation of a particular right, does not exist in the partner-partnership sphere, but in relation between partners as parties in company relation, obliged to cooperate in order to accomplish an intended goal. The law does not indicate who has the active title in this scope. Since the issue of defining a circle of persons authorized to conduct the business, as "ownership" competence, does not belong to its scope, the decision to make such a demand is not governed by the rules of conducting the business. It should be assumed that the suit may be filed by each partner, regardless of whether he has the right to conduct the business. He does not have to have the right to represent the partnership. A partner acts on his own behalf, though in fact, in the interest of a partnership, in order to ensure it is run efficiently.

The above view is also supported by A. J. Witosz⁵⁵, who points out that the structure in which an organizational unit files a suit against its member, demanding that he is deprived of the right to manage the claimant, does not seem proper. It also seems that the demand to deprive such a person of the right to conduct the partnership matters is not a sign of managing it. It is members of the organizational unit who determine which partner is to conduct the business of the partnership. It is the object, not the subject of the issues defined in Article 47 of CCC. The internal organizational structure of a partnership is an object of dispute between the partners.

In S. Włodyka's opinion, if we assume that the suit includes *implicite* a demand to shape the relations inside the company, as it in fact is a suit to change the articles of association, then a more adequate solution demands that all other participants should participate in it. This view could be supported by a statement that a partnership relation is based on special trust between partners and depriving one of them of the right to conduct the partnership business required joint action of all other partners. A different view, giving

⁵¹ S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych*, t. 1, Warszawa 2006, p. 439.

⁵² J. Szczotka, *Spółka...*, p. 106.

⁵³ S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, A. Herbet, R. Gawalkiewicz, I. Mika, M. Tarska, *Kodeks spółek handlowych. Komentarz do art. 47 KSH, nb. 4*, Wydawnictwo C.H. Beck, Warszawa 2012.

⁵⁴ K. Kopaczyńska-Pieczniak, *Pozycja prawna wspólnika spółki jawnej*, nb. Chapter II, § 2/6, Lex 2013.

⁵⁵ A.J. Witosz, *Prowadzenie spraw...*, p. 301.

each partner the right to file a suit would be justified in a thesis that a partnership relation is an obligatory relation within which the rights and obligations are granted to particular partners. Filing a suit by a partner is an execution of the corporate rights that may be executed individually. Of some significance here is also an argument that it might turn out to be impossible to require joint cooperation of all partners, if, for example, other partners sabotaged initiating the court proceedings or denied their consent for passing a resolution or filing a suit without any justified reason, while the partner intending to initiate the court proceeding acted for the benefit of the partnership. This concerns a situation when a partner conducting the partnership business acts to the detriment of the partnership or shows incompetence in accomplishing the partnership goals, while other partners, for example also those appointed to run the partnership business, do not react. In essence, there is a problem of *ratio* which is at the base of the possibility of filing a suit. Especially as there is no requirement for partners authorized to run the partnership business to file a suit. The Commercial Companies Code does not say anything about it, while the doctrine has been occupied with the issue of collective or individual suit, while the problem of possessing the right to conduct the partnership business by others has not been raised. Thus we cannot defend the thesis that the right to file a suit is granted to each partner because it is a means of exercising the individual right of every partner to conduct the partnership business or the right to represent the partnership. Undoubtedly, assuming that each partner may in this case act individually is a safer solution, taking into account the protection of the analyzed regulation. Finally, the partner has the right, of undoubtedly individual nature, to file a suit for dissolving the partnership for vital reasons⁵⁶.

Referring to the existing discrepancies, one should first of all argue that there is no content-based justification for differentiating the issue of title in case of a suit for depriving a partner of the right to represent the partnership and to conduct the partnership business⁵⁷. Both rights belong to the category of corporate (organizational) rights which are generally granted to each partner. A partner may be deprived of both of them on the basis of the provisions found in the articles of association. The suit for depriving a partner of any of these rights should be treated uniformly, especially as regulations of Article 30 § 2 and Article 47 of CCC are twin regulations⁵⁸.

The passive title is granted to a partner whom the demand for depriving of the right to conduct the partnership business concerns.

⁵⁶ S. Włodyka, *Prawo spółek handlowych*, t. 2: *System Prawa Handlowego*..., pp. 407–408.

⁵⁷ A. Herbet, *Spółka komandytowa*..., p. 187 indicates that in spite of small terminology differences, the suit for depriving a partner of the right to conduct the partnership business should be considered as a parallel means to the suit for depriving of the right to represent. Analogies are found in the issues of title to appear in court, procedure mode and nature of the concluding judgment.

⁵⁸ Z. Jara, *Kodeks spółek handlowych, Komentarz do art. 47*, nb. 18, Wydawnictwo C.H. Beck, Warszawa 2014, the author is of an opinion that since the judgment depriving a partner of the right to conduct the partnership business should bind all partners in a general partnership, it should be assumed that a title to appear in court in the proceedings aimed at depriving a partner of the right to conduct the partnership business is granted in case of a general partnership, but just as in the case of a suit for depriving a partner of the right to represent the partnership, we cannot agree with it.

8. THE LEGAL AND COMPARATIVE ASPECT

According to § 117 HGB⁵⁹ [Commercial Code from 10.5.1897, which contains regulations on a general partnership, that is Offene Handelsgesellschaft OHG (§ 105 - § 160), limited joint-stock partnership, that is Kommanditgesellschaft KG (§ 161 - § 177a) and the sleeping partnership, that is stille Gesellschaft (§§ 230 – 237)] the right to conduct the partnership business may be taken away from a given partner at the request of other partners by means of a court decision if there is a sufficient reason for this. Such reason is especially serious violation of an obligation or inability to conduct the partnership business properly.

Differently than in § 712 BGB for a civil partnership, § 117 for security reasons offers for a general partnership (OHG) a possibility of depriving of the right only via constitutive suit. When the judgment becomes valid, it has the shaping (constitutive) effect, and the partnership articles of association are changed for and against all partners, however, only inasmuch as the full or partial deprivation of the right to conduct the partnership business is concerned.

Filing a suit is not limited by any date. However, a significant delay in the court claim speaks against the existence of vital reasons. Taking away the right to conduct the partnership business is possible only when relations in a partnership cannot be settled in a less radical way. Taking away the right to conduct the partnership business is usually associated with radical changes in professional perspective (employment) of the managing partner. On the other hand, partnership interests must be taken into account so that the purpose of its existence could be continued without any disturbances (quoted doctrine).

A vital reason for filing a suit exists when the way of conducting the partnership business by a partner has disturbed in the long run the trust relations between partners, whereas other partners, having considered the whole problem and having taken into account the interests of all interested parties, do not find it purposeful for such a partner to perform management rights over the partnership..

The doctrine emphasizes, however, that within considering the essence of the suit, the principle of proportionality should be observed. If a solution can be reached with less radical means, proposals of such solutions are made and implemented first of all. As examples one could quote: change of a single-person management of partnership business into a multi-person management, and limiting the right to conduct the partnership business in material, time and place aspects. It is also possible to deprive partially of the right to conduct the business, but also if a proper motion is included in the suit. Less painful means may be adjudged by the court only on motions included in the suit.

Partners who file the suit for taking away the right to conduct the partnership business from another partner are responsible for justifying their claim and providing evidence to prove the existence of reasons for accepting a vital reason. According to Article 117, deprivation of the right to conduct the partnership business is done via a constitutive judgment at the motion of other partners. The judgment changes the articles of association, therefore the decision must be taken by all other partners, both those managing the partnership and those excluded from the representation. An exception is made for public partnerships. In order to protect an investor, it is necessary to pass a resolution by an ordinary majority of votes to file a claim.

⁵⁹ Deutsches Handelsgesetzbuch 10.5.1897; <http://dejure.org/gesetze/HGB>.

The suit for taking away the right to conduct the partnership business may take place in one proceeding against a few partners conducting the partnership business. One reason for such accumulation of claims is to allow all other partners to file a suit. This possibility is not limited only to a case in which the same vital reason is given against a few partners conducting the partnership business. The reasons for which partners are deprived of their rights do not have to be identical or have any objective connection. However, if in case of even one partner managing the company business, one important reason does not apply, the suit will be dismissed, since there would formally be no consent of all partners on the claimant side. According to the doctrine, a partner who does wish to actively participate in the proceedings, has an option to express a binding consent for the participation of partners in it. They, then file a suit within the power of attorney granted to them.

The loyalty obligation resulting from the nature of the partnership allowed the judicial practice and theory to derive an obligation to cooperate within a suit for depriving of the rights, if this is beneficial for the partnership. A partner who restrains from that may be sued for expressing his consent, and the cooperation of other partners is not needed for that. The judgment reflecting the suit for expressing the consent replaces, according to § 894 ZPO (German Civil Procedure Code), the obligation to cooperate within the suit for depriving of the rights. Due to proceeding economy, the judicial practice and theory allow combining the suit for expressing consent and the suit for depriving of the rights.

The Commercial Code does not offer any specific provisions concerning court jurisdiction in case of a suit for depriving of the right to conduct the partnership business. The jurisdiction of the court is determined on the basis of general provisions (§ 12, 22 ZPO).

Other partners are authorized to file a suit only jointly. The right of a partner to conduct the partnership business may only be determined uniformly in relation to a suing partner. Therefore the necessary joint participation in law proceedings originates between them (§ 62 section 1 alt. 1 ZPO). If one partner does not participate in the proceeding, the suit has to be dismissed due to lack of active title of other members.

The German Commercial Code also offers a possibility of temporary protection of rights. Temporary protection of rights is expressed, unless there are specific provisions in HGB, in § 935 and next of ZPO. The right to conduct the partnership business may be taken away at the motion of all other partners by means of a temporary regulation (regulated in - § 940 ZPO) fully or partly. Within the judgment issued in summary proceedings, the court may determine all necessary demands. It is also possible to commission the business of the partnership to a third person, if the only partner managing the partnership was sued. Also the partner managing the partnership, who is at risk of losing the right, may defend himself with a motion for issuing a temporary regulation.

The valid judgment issued against the defendant and accepting the claim for depriving them of the rights, leads to the fact that such a person is fully or partially deprived of the right to conduct the partnership business. From the moment the judgment becomes effective such a partner has a status of a partner excluded from conducting the partnership business, and he does not have the right to make his objection according to § 115 sect. 1.

The judgment taking away the rights is limited to taking away the right to conduct the partnership business and concerns directly exclusively the sued partner. An automatic change of the future method of conducting business by the partnership does not take place via court judgment. Due to limited shaping effects, the rights to conduct the partnership business by other partners remain unchanged. If the sued partner was the only person

managing the business of the partnership, if the articles of association stipulated the possibility of two managing partners, some restructuring will be necessary.

The suit for taking away the right and the suit for expressing consent for restructuring may be combined if the sued partner does not want to participate in the restructuring. However, the court cannot order restructuring, since this would mean interference into the foundations of the partnership operations and it would infringe upon the autonomy of partners' will. If there is no agreement of the partners on restructuring, the final option is to exclude the partner who does not agree for restructuring in a partnership (§ 140) or to dissolve the partnership (§ 133).

§ 117 HGB is relatively valid. By regulations in the articles of association, we can simplify or hinder the issues related to taking away the right to conduct the partnership business. These regulations may concern both the reasons for such deprivation or the court proceeding in this respect.

The facilitations in the articles of association may mean that instead of the suit for taking away the right it will be possible for partners to pass a resolution, with the mentioned partner being excluded from voting on such solution. If there is a valid reason, other partners are obliged to express their consent for depriving a partner of the rights. When the resolution becomes effective, the right to conduct the partnership business is terminated. A partner who was deprived of the management has the right to demand court control by means of a suit for determining the existence (non-existence) of a legal relation (right). This possibility cannot be taken away from such a partner. Also other partners may file a suit for determining the existence/non-existence of the right in order to check the effectiveness of the resolution they passed. In the articles of association partners may also hinder the deprivation of the right to conduct the partnership business, for example by limiting (narrowing down) the possible reasons leading to such deprivation. The prevailing opinion rejects the possibility of total exclusion of the right to deprive someone of the right to manage the business of the partnership in its articles of association for vital reasons. For the proceedings concerning the deprivation of the right the articles of association may stipulate some obstacles in form of additional resolutions of partners or in form of preliminary examination (check) conducted by a relevant team (board) or an arbitrator.

The doctrine also assumes that a partner conducting the partnership business may resign from managing the partnership if other partners express their consent for this or if such possibility is stipulated in the articles of association. Moreover, a partner conducting the partnership business has an option of termination using § 105 section 3 of HGB in connection with § 712 section 2 of BGB, but only if there is a serious reason.

9. CONCLUSIONS

Due to the lack of precise legal regulations on the proceedings leading to depriving a partner of the right to represent and conduct the partnership business, the dispute concerning who is entitled to file a suit and who should be considered the defending party is still far from being solved. Two opposing views presented in this paper give this right to the partnership and to particular partners. Differences of opinions on active and passive title to appear in court in cases concerning the deprivation of a partner of their right to represent and conduct the partnership business demonstrate that this is undoubtedly a hot issue for practitioners and theorists of law. It is the lack of clear legal norms in legislature that accounts for the appearance of such diverse positions on this issue. In this problematic

case the authors referred to the German example, on the basis of which they presented the way it is regulated in German legislature. German regulations may constitute some indications to Polish lawmakers and doctrine, as they emphasize that during the proceedings for depriving a partner of his right to conduct the partnership business, the principle of proportionality should be observed, that is we should use the least radical means in order to solve the problem.

REFERENCES

- [1] Bieniak J., Bieniak M., Nita-Jagielski G., Oplustil K., Pabis R., Rachwał A., Spyra M., Suliński G., Tofel M., Zawłocki R., *Kodeks spółek handlowych. Komentarz do art. 30*, Wydawnictwo C. H. Beck, Warszawa 2014..
- [2] Błaszczak Ł., *Handlowa spółka osobowa jako strona procesu cywilnego – analiza wybranych zagadnień procesowych*, „Prawo Spółek” 2005, (9).
- [3] Błaszczak Ł., *Współuczestnictwo procesowe na przykładzie osobowych spółek handlowych – istota, rodzaje i przypadki jego występowania*, „Prawo Spółek” 2004 (10): 25.
- [4] Bucior D., *Konstrukcja odpowiedzialności wspólników za zobowiązania handlowej spółki osobowej*, „Prawo Spółek” 2002 (6): 12.
- [5] Deutsches Handelsgesetzbuch 10.05.1897. Accessed: <http://dejure.org/gesetze/HGB>.
- [6] Gorczyński G., *Status spółki jawnej i jej wspólników w postępowaniu cywilnym*, „Przegląd Prawa Handlowego” 2010 (1):28.
- [7] Góra-Błaszczkowska A., *Kodeks postępowania cywilnego. Komentarz do art. 40 KPC*, t. I, Wydawnictwo C.H. Beck, Warszawa 2013.
- [8] Fenichel Z., *Kodeks spółek handlowych*. Kraków 1936.
- [9] Herbet A., *Odpowiedzialność wspólników za zobowiązania handlowych spółek osobowych – zagadnienia materialnoprawne*, „Rejent” 2003 (6): 44.
- [10] Herbet A., *Spółka komandytowa według kodeksu spółek handlowych*, Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, Lublin 2004.
- [11] Jara Z., *Kodeks spółek handlowych. Komentarz do art. 30*, Wydawnictwo C.H. Beck, Warszawa 2014.
- [12] Jara Z., *Kodeks spółek handlowych. Komentarz do art. 47*, Wydawnictwo C.H. Beck, Warszawa 2014.
- [13] Kidyba A., *Przepisy dodane jako normy kreujące nowe instytucje k.s.h.*, „Przegląd Prawa Handlowego” 2004 (3): 14.
- [14] Kidyba A., *Komentarz do art. 47 KSH*, Wydawnictwo Wolters Kluwer, 2009.
- [15] Kopaczyńska-Pieczniak K., Chapter II., *Pozycja prawna wspólnika spółki jawnej*. Wydawnictwo Wolters Kluwer 2013.
- [16] Kopaczyńska-Pieczniak K., *Ukształtowanie podmiotowości prawnej spółki jawnej in: Kodeks spółek handlowych po dziesięciu latach*, 501. Wrocław 2013.
- [17] Lewandowski R., *Spory w spółce komandytowo-akcyjnej*, „Państwo i Prawo” 2006 (7).
- [18] Litwińska-Werner M., *Kodeks spółek handlowych. Komentarz do art. 8*, Wydawnictwo C.H. Beck, Warszawa 2007.
- [19] Litwińska-Werner M., *Kodeks spółek handlowych. Komentarz do art. 47*, Wydawnictwo C.H. Beck, Warszawa 2007.
- [20] Pabis R., *Przepisy ogólne. Spółka jawna, spółka partnerska*, t. I, Wydawnictwo C.H. Beck, Warszawa 2003.
- [21] Połowiak- Baran K., *Nieograniczone i nieograniczalne prawo reprezentacji wspólnika w spółce jawnej*, „Zeszyty Naukowe Prawa Gospodarczego i Handlowego” 2011, (1): 5.
- [22] Potrzeszcz R., Siemiątkowski T., *Kodeks spółek handlowych. Komentarz*, Wydawnictwo Lexis Nexis, Warszawa 2001.
- [23] Radwański Z., *Podmioty prawa cywilnego w świetle zmian kodeksu cywilnego przeprowadzonego ustawą z dnia 14 lutego 2003 r.*, „Przegląd Sądowy” 2003 (7–8): 6.

- [24] Rodzyński M., *Kodeks spółek handlowych. Komentarz*, Warszawa 2012.
- [25] Sołtyński S., Szajkowski A., Szumański A., Szwaja J., Herbet A., Gawłkiewicz R., Mika I., Tarska M., *Kodeks spółek handlowych. Komentarz do art. 29 KSH*, Wydawnictwo C.H. Beck, Warszawa 2012.
- [26] Sołtyński S., Szajkowski A., Szumański A., Szwaja J., Herbet A., Gawłkiewicz R., Mika I., Monika Tarska M., *Kodeks spółek handlowych. Komentarz do art. 47 KSH*, Wydawnictwo C.H. Beck, Warszawa 2012.
- [27] Sołtyński S., Szajkowski A., Szumański A., Szwaja J., *Kodeks spółek handlowych*, t. I, Wydawnictwo C.H. Beck, Warszawa 2006.
- [28] Strzępka J., *Kodeks spółek handlowych. Komentarz do art. 8*, Wydawnictwo C.H. Beck, Warszawa 2013.
- [29] Strzępka J., *Kodeks spółek handlowych. Komentarz do art. 29*, Wydawnictwo C.H. Beck, Warszawa 2013.
- [30] Szajkowski A., *System Prawa Prywatnego [w:] Prawo spółek osobowych*, t. 16, Wydawnictwo C.H. Beck, Warszawa 2008.
- [31] Szczotka J., *Spółka jawna*, Wydawnictwo Branta, Bydgoszcz–Lublin 2003.
- [32] Tyrakowska M., Podmiotowość cywilnoprawna osób ustawowych na przykładzie spółki jawnej, „Przegląd Prawa Handlowego” 2010 (5): 34.
- [33] Witosz A.J., *Prowadzenie spraw i reprezentacja spółek osobowych*, Wydawnictwo Lexis Nexis, Warszawa 2013.
- [34] Włodyka S. *Prawo spółek handlowych. System Prawa Handlowego*, t. 2, Wydawnictwo C.H. Beck, Warszawa 2007.
- [35] Judgment of the Court of Appeal in Kraków from 23 January 2013, case file number I ACA 1300/12, LEX nr 1344068.
- [36] The Act of 23rd April 1964 Civil Code, Journal of Laws 2014, item 121.
- [37] The Act of 17 November 1964 Civil Procedure Code, Journal of Laws 2014, item 101.
- [38] The Act of 15 September 2000 Commercial Companies Code, Journal of Laws 2013, item 1030.
- [39] Zivilprozessordnung 12.09.1950. Accessed: <https://www.gesetze-im-internet.de/bundesrecht/zpo/gesamt.pdf>.

SPORY KORPORACYJNE W SPÓŁCE OSOBOWEJ – LEGITYMACJA PROCESOWA

W opracowaniu przedstawiono procedurę pozbawienia wspólnika handlowej spółki osobowej prawa do reprezentowania i prawa do prowadzenia spraw spółki. Scharakteryzowano pojęcia prowadzenia spraw spółki i reprezentowania spółki oraz ich kształtujące i wzmacniające znaczenie dla pozycji wspólnika. Następnie wskazano na dwie możliwości przewidziane przez prawo, które pozwalają na pozbawienie wspólnika prawa do reprezentowania spółki oraz prawa do prowadzenia spraw spółki. Pierwszą z nich jest odpowiedni zapis w umowie spółki a drugą prawomocny wyrok sądu uzasadniony istnieniem ważnych powodów. W dalszej kolejności dokonano charakterystyki istoty spółek osobowych. Podkreślone zostało, że podmioty te nie posiadają osobowości prawnej a jedynie zdolność prawną. Kolejno wskazano na obecny w doktrynie spór o to, kto ma legitymację do występowania z powództwem oraz o to, kto jest stroną pozwaną w procesie. W ostatniej części artykułu skupiono się na przedstawieniu i porównaniu norm prawnych dotyczących pozbawienia wspólnika prawa do prowadzenia spraw spółki obowiązujących w niemieckim prawodawstwie z polskimi normami prawnymi.

Słowa kluczowe: prawo reprezentowania spółki, prawo prowadzenia spraw spółki, legitymacja procesowa.

DOI: 10.7862/rz.2016.mmr.27

Tekst złożono w redakcji: maj 2016

Przyjęto do druku: lipiec 2016