

**Anna Domańska**

Lodz University of Technology

Faculty of Mechanical Engineering

Institute of Machine Tools and Production Engineering

Department of Management and Economic and Legal Sciences

## **SELECTED LEGAL ASPECTS OF MANAGEMENT CONTRACTS**

### **Abstract**

*Management contracts appeared as a form of an enterprise management when the era of market economy had dawned. The issues of management contracts are complex and multidimensional because they include economic, social, and legal aspects. The discussion below concerns selected legal aspects of management contracts which remain at the focus of the interest of private as well as public law. In order to determine the legal character of such contracts, the provisions of the Civil Code were analysed, in particular the freedom to contract, as well as the provisions of the Labour Code within the area of the employment relationship characteristics and taking judgements of the Supreme Court into account. Ultimately, the legal nature of a given management contract depends on the circumstances in a given case. The analysed selected provisions of detailed acts which the legislator regulated management contracts with indicate that these contracts are civil law contracts. From the standpoint of public law, in particular tax law, this decides about the manner of the settlement of income from such contracts with tax authorities. Natural persons providing services in person based on agreements concerning the management of an enterprise, management contracts, or similar agreements are or are not VAT payers depending on the legal relationship within which they provide these services.*

Management contracts are examples of non-regulated agreements with an established position in economic practice. The discourse on management contracts may be held from many points of view. The comments presented here refer to selected legal bases and conditions of management contracts. Firstly, the legal nature of such contracts is still not determined and depends on the circumstances in a given case. Secondly, some guidelines concerning the nature of management contracts may be sought in provisions of detailed acts with which the legislator regulated agreements concerning the management. Thirdly, it may

not be omitted that the assumed nature of the contract will influence the manner of the settlement of income from a management contract with tax authorities.

## I.

The principle of the freedom to contract (art. 353<sup>1</sup> of the Civil Code) indicates that parties may shape their legal relationship at their discretion as long as the contents or purpose thereof are not contrary to the properties (nature) of the relationship itself, the act, and the principles of social coexistence.

The freedom to determine the contents of a contractual relationship consists in the freedom to do so in contractual relationships in various types of regulated agreements as well in contractual relationships which are not included in the catalogue of regulated agreements and relationships combining elements of various regulated agreements.<sup>1</sup>

Non-regulated agreements are governed with general provisions of the civil law concerning agreements, relevant provisions of the general part of the law of obligations, and, if required, provisions on regulated agreements applied by analogy or directly, depending on the purpose of the analysed agreement and the similarity of such purpose with the purposes of regulated agreements.<sup>2</sup>

Parties may choose the type of the legal relationship which will be binding for them. This also includes the permanent performance of specified activities for remuneration, i.e. the legal relationship specified as work in the wide meaning of this expression. Work may be based on a civil law relationship (mandate contracts, management contracts) or employment relationship. The selection of the type of legal relationship has legal consequences not only for the contents thereof but also for many other areas (tax, law etc.).

The position that the principle of the freedom to contract is limited in the labour law for the benefit of the employee seems still valid. This results from the assumption that the employee is a weaker party to the employment relationship (in particular, in the economic and social aspect). Therefore, appropriate application, through art. 300 of the Labour Code, of the art. 353<sup>1</sup> of the Civil Code, which contains the provision for creating and shaping a theoretically unlimited number of obligation relationships between equal contractors to the employment relationship, should take into account this non-equality of real situations of the employer and the employee.

The principle of a privileged position of the employee was formulated *expressis verbis* in art. 18 (1) of the Labour Code, under which provisions of

---

<sup>1</sup> M. Safjan (in:), *Kodeks cywilny*. Tom I. Komentarz, ed. K. Pietrzykowski, Warsaw 2002, p. 664.

<sup>2</sup> W. Czachórski (ed.), A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania*. Zarys wykładu, Warsaw 2002, p. 133.

employment contracts and other acts based on which an employment relationship is formed may not be less beneficial for the employee than the provisions of the labour law. Therefore, it may be concluded that a contract may specify a more beneficial work relationship than the provisions of the labour law. Pursuant to art. 18 (2) of the Labour Code, the provisions of an employment contract which are less beneficial for the employee are invalid; they are replaced with applicable provisions of the labour law.

In its judicature, the Supreme Court referred to the literature, where it is assumed that the essence of the management contract consists in the fact that a manager undertakes to run an enterprise of the other party at that party's account and risk and he runs this enterprise on his behalf or on behalf of another party. The characteristics of management contracts emphasize independence of the manager and the purpose of the contract, i.e. the transfer of the activities consisting in running an enterprise to the manager with granting him independence in running the enterprise. Another property of management contracts is the expectation that the manager contribute his own intangible assets, e.g. a new manner of managing the enterprise, his professional experience, commercial and organizational expertise, reputation, clients, established trade relationships, and his image. In this approach, management contracts are only civil law contracts.<sup>3</sup>

The Supreme Court dealt with the nature of management contracts many times. Assuming that the bases for establishing an employment relationship include the employment contract (art. 25 of the Labour Code), nomination (art. 68 of the Labour Code), selection (art. 73 of the Labour Code), appointment (art. 76 of the Labour Code), or cooperative employment contract (art. 77 of the Labour Code), it may be concluded that, since this list does not include management contracts, it means that management contracts are a type of civil law agreements, regulated (such as service agreements, mandate contracts or contracts to perform a specific task) or non-regulated ones. This does not exclude the possibility of managing a work establishment by an employee based upon an employment contract including the elements of an employment relationship specified in art. 22 of the Labour Code.<sup>4</sup>

By establishing an employment relationship, the employee undertakes to perform a specific work for the employer and under the employer's management, in the place and time specified by the employer, while the employer undertakes to employ the employee for a remuneration (art. 22 (1) of the Labour Code).

---

<sup>3</sup> Judgement of the Supreme Court of April 4, 2002 I PKN 776/00, OSN ZU IPUSiSP 2004, No. 6, item 94.

<sup>4</sup> Judgement of October 11, 2005 I PK 42/05, OSN ZU IPUSiSP 2005, No. 17-18, item 267.

Work on the conditions specified in this provision is based on the employment relationship, regardless from the name of the agreement concluded by the parties (art. 22 (1<sup>1</sup>) of the Labour Code).

What results from art. 22 (1<sup>1</sup>) of the Labour Code is the fact that a civil law agreement based upon which work is performed will be treated as an employment contract if the premises under art. 22 (1) of the Labour Code are met. On the other hand, an employment contract based upon which work is not performed upon the conditions specified in art. 22 (1) of the Labour Code will be treated as a different agreement.

If the contents of the legal relationship between the parties (judged not only by the contents of the contract but, most of all, the manner of performance thereof) are dominated by properties characteristic for the employment relationship specified in art. 22 (1) of the Labour Code (the performance of specific work for remuneration, for the employer and under the employer's management, in the time and place specified by the employer), this is work based on the employment relationship, regardless from the name of the contract concluded by the parties (art. 22 (11) of the Labour Code). On the other hand, if the contents of the employment relationship are not dominated by the properties characteristic from the employment relationship, it may not be assumed that the parties are bound with such a legal relationship.<sup>5</sup>

In the opinion of the Supreme Court, the contract under which work is performed may not be mixed and may not combine elements of an employment contract and a civil law contract.<sup>6</sup>

Repeatedly, the Supreme Court indicated that a lot of circumstances should be taken into account in order to assess whether a relationship is the employment relationship, including but not limited to the following:

1. the intention of the parties, including the intention expressed in the title of the agreement,<sup>7</sup>

---

<sup>5</sup> Judgement of November 25, 2004 I PK 42/04, OSN ZU IPUSiSP 2005, No. 14, item 209; cf. judgements of the Supreme Court of December 22, 1998, I PKN 517/98, OSNAPiUS 2000, No. 4, item 138; of January 12, 1999, I PKN 535/98, OSNAPiUS 2000, No. 5, item 175; of February 9, 1999, I PKN 562/98, OSNAPiUS 2000, No. 6, item 223; of April 7, 1999, I PKN 642/98, OSNAPiUS 2000, No. 11, item 417.

<sup>6</sup> Judgement of the Supreme Court of January 23, 2002, I PKN 786/00, OSNP 2004, No. 2, item 30.

<sup>7</sup> Cf. the judgement of March 4, 1999, I PKN 616/98, OSNAPiUS 2000, No. 8, item 312; the judgement of April 7, 1999, I PKN 642/98, OSNAPiUS 2000, No. 11, item 417; the judgement of December 9, 1999, I PKN 432/99, OSNAPiUS 2001, No. 9, item 310; the judgement of December 5, 2000, I PKN 127/00, OSNAPiUS 2002, No. 15, item 356.

2. the obligation to perform work in person; the prohibition to make the third party perform the work instead,<sup>8</sup>
3. the absolute principle of remuneration,<sup>9</sup>
4. the employee's obligation of due diligence rather than reaching the goal; the placing of the risk of operation on the employer,<sup>10</sup>
5. performance of cooperated team work,<sup>11</sup>
6. permanent performance of work,<sup>12</sup>
7. specific principles of operation of the employing entity,<sup>13</sup>
8. certain characteristics of the employment relationship, e.g. the payment of remuneration for overtime,<sup>14</sup>
9. the payment of the sickness benefit and the use of benefits from social insurance,<sup>15</sup>
10. the performance of work when summoned by the employer in order to replace absent employees,<sup>16</sup>
11. performance of subordinate work.<sup>17</sup>

The performance of subordinate work is a property which isolates the employment relationship out of other legal relationships. The Supreme Court specified the elements of the employment relationship which indicated that work is subordinate:

---

<sup>8</sup> Cf. the judgement of December 4, 1997 r., I PKN 394/97, OSNAPiUS 1998, No. 20, item 595; the judgement of December 2, 1998, I PKN 458/98, OSNAPiUS 2000, No. 3, item 94; the judgement of October 6, 1998, I PKN 389/98, OSNAPiUS 1999, No. 22, item 718; the judgement of October 28, 1998, I PKN 416/98, OSNAPiUS 1999, No. 24, item 775.

<sup>9</sup> Cf. the judgement of December 5, 2000, I PKN 133/00, OSNAPiUS 2002, No. 14, item 326.

<sup>10</sup> Cf. the judgement of the Appeals Court in Rzeszów of December 21, 1993, III AUr 357/93, OSA 1994, No. 6, item 49.

<sup>11</sup> Cf. the judgement of November 5, 1998, I PKN 415/98, OSNAPiUS 1999, No. 24, item 780; the judgement of December 22, 1998 r., I PKN 517/98, OSNAPiUS 2000, No. 4, item 138.

<sup>12</sup> Cf. the judgement of December 14, 1999, I PKN 451/99, OSNAPiUS 2001, No. 10, item 337.

<sup>13</sup> Cf. the judgement of October 15, 1999, I PKN 307/99, OSNAPiUS 2001, No. 7, item 214.

<sup>14</sup> Cf. the judgement of December 4, 1998, I PKN 484/98, OSNAPiUS 2000, No. 2, item 62.

<sup>15</sup> Cf. the judgement of January 12, 1999, I PKN 535/98, OSNAPiUS 2000, No. 5, item 175; the judgement of February 14, 2001 r., I PKN 256/00, OSNAPiUS 2002, No. 23, item 564.

<sup>16</sup> Cf. the judgement of June 28, 2001, I PKN 498/00, OSNP 2003, No. 9, item 222.

<sup>17</sup> Cf. the judgement of March 20, 1965, III PU 28/64, OSNCP 1965, No. 9, item 157.

1. the specified time of work and place of performing the activities,<sup>18</sup>
2. the signing of the attendance register,<sup>19</sup>
3. the following by the employee of the work regulations and the superiors' instructions concerning the place, time, and manner of the performance of work; the obligation to observe the work standards,<sup>20</sup>
4. the obligation to follow the instructions of the superiors,<sup>21</sup>
5. the performance of shift work; permanent availability of the employee,<sup>22</sup>
6. the precise determination of the place and time for the completion of the assigned task and the performance of tasks under the supervision of a manager.<sup>23</sup>

However, these are the properties of an "ordinary" employment relationship. Doubtless, the specificity of the employment relationship of the person managing an establishment on behalf of the employer is different. However, this does not mean that this person may not be employed based on the employment relationship, what is confirmed with many provisions of the Labour Code, e.g.:

art. 128 (2) (2) – employees managing an employing establishment on behalf of the employer should be understood as employees managing the employing establishment in person and their deputies or employees being members of a collective body managing the employing establishment and chief accountants,

art. 131 (2) – the limitation of a week's working time (48h in the adopted settlement period) does not concern employees managing an employing establishment on behalf of the employer,

art. 149 (2) – working hours of employees managing an employing establishment on behalf of the employer are not registered,

art. 151<sup>4</sup> (1) – if necessary, employees managing an employing establishment on behalf of the employer perform work outside their normal working hours with no right to the remuneration and bonus for overtime,

art. 241<sup>26</sup> (2) – the labour agreement in an establishment may not specify the conditions of remuneration for employees managing the employment establishment on behalf of the employer and people managing the employment establishment upon the basis other than the employment relationship.

---

<sup>18</sup> The judgement of the Regional Labour and Social Insurance Court in Krakow of December 18, 1975, II U 2867/75, *Służba Pracownicza* 1976, No. 10, p. 28.

<sup>19</sup> The judgement of the Regional Labour and Social Insurance Court in Łódź of November 25, 1975, I P 848/75, *Służba Pracownicza* 1976, No. 4, p. 38.

<sup>20</sup> The judgment of February 27, 1979, II URN 19/79, *Nowe Prawo* 1981, No. 6, p. 82.

<sup>21</sup> The judgment of April 11, 1997, I PKN 89/97, *OSNAPiUS* 1998, No. 2, item 35.

<sup>22</sup> The judgment of September 11, 1997, II UKN 232/97, *OSNAPiUS* 1998, No. 13, item 407.

<sup>23</sup> The judgment of December 22, 1998, I PKN 517/98, *OSNAPiUS* 2000, No. 4, item 138.

The subordinate position of an employee managing an employing establishment on behalf of the employer is specific and may not be brought down to the characteristics listed above. Such an employee has no direct superiors who could supervise over his work and give him instructions; in general, he decides about the time and place of his work as well as about specific activities to be performed on his own. Therefore, a person managing an employing establishment on behalf of the employer may be employed based upon the employment relationship under which the performance of subordinate work is specific, different than in the “ordinary” employment relationship. In its judgement of September 7, 1999, the Supreme Court<sup>24</sup> decided that the subordination of an employee may consist in the determination, by the employer, of the time of work and tasks; however, the employee may decide freely, to a certain extent, about the manner of the performance of work, in particular when he does a creative job.<sup>25</sup>

What decides about the qualification of a legal relationship as an employment relationship is, most of all, the manner of performing work. The parties may make explicit declarations of intent concerning the shape of the new basis for employment. However, even without an explicit declaration of the parties’ intent in this area, a civil law relationship may become an employment relationship if the parties start to perform it in the manner which is characteristic of an employment relationship.<sup>26</sup>

When determining the type of work and the management of an employing establishment, the parties may form the contents of the employment relationship in such a way that this relationship includes some characteristic elements which would make it different from the “ordinary” or “pure” employment relationship but which would still fit the convention of the employment relationship defined in art. 22 of the Labour Code.<sup>27</sup>

As results directly from art. 241<sup>26</sup> (2) of the Labour Code, a person managing an employing establishment on behalf of the employer may be employed based upon the employment relationship or upon a different basis.

The need to meet the challenges of the economic life results in the liberalization and greater flexibility of employment forms. Therefore, in practice, various forms of employment are created; management contracts are one of them.

---

<sup>24</sup> The judgement of September 7, 1999, I PKN 277/99, OSNAPiUS 2001, No. 1, item 18.

<sup>25</sup> The judgement of April 4, 2002, I PKN 776/00, OSNP 2004, No. 6, item 94.

<sup>26</sup> The judgement of November 14, 1965, III PU 17/65, OSNCP 1966, No. 4, item 66.

<sup>27</sup> The judgement of October 11, 2005 I PK 42/05, OSN ZU IPUSiSP 2005, No. 17-18, item 267.

The qualification of a legal relationship as an employment contract or a civil law contract depends on the circumstances in a given case. Each form of employment of a manager, i.e. a civil law contract or an employment contract, has its advantages and drawbacks. The forming of a management contract as an employment contract provides a manager with guarantees of employment resulting from the labour law provisions; however, it is related with high costs of employment incurred by the employer, especially as the remuneration of a manager proportional to his personal potential and his scope of responsibilities may be very high. Civil law management contracts ensure great flexibility of employment and a possibility of the reduction of costs related to the employment of an employee. The fact that the legal relationship concerning the employment of a manager is subject to the freedom of contracting makes it possible to introduce many provisions to a contract, including but not limited to an unlimited working time of a manager, full responsibility for damage, and the exclusion of employee rights concerning minimum salary and annual leave. The employment based upon a civil law management contract is popular as a result of, in particular, high remuneration which often depends on work results, no subordination to a superior, and the possibility to fully use one's experience in management.

## II.

The notion of the “management contract” (in Polish “*kontrakt menedżerski*” or sometimes “*kontrakt kierowniczy*”) should, in general, be used for the basis of employment of people managing an employment establishment which is an economic entity, i.e. an enterprise, a company, or a cooperative, on behalf of the employer. It is a synonym of the agreement concerning management (“*umowa o zarządzanie*”).<sup>28</sup>

Under an agreement concerning management, a manager is authorized by the owners of an enterprise (company) to take any legal and factual acts concerning the managed enterprise (what does not exclude the introduction of some limitations as to the manager's independence, e.g. concerning the possibilities of selling real properties owned by the enterprise or its technologies, making transactions resulting in obligations exceeding a certain amount etc.).<sup>29</sup>

In several acts, the legislator used the notion of “agreement concerning management”. It concerns, in particular, the cases of managing public property, e.g. in the Act concerning state-owned enterprises, the Act concerning national

---

<sup>28</sup> The judgement of October 11, 2005 I PK 42/05, OSN ZU IPUSiSP 2005, No. 17-18, item 267.

<sup>29</sup> The judgement of the Supreme Court of April 4, 2002 I PKN 776/00, OSN ZU IPUSiSP 2004, No. 6, item 94.



investment funds, the Act concerning commercialization and privatization, and the Act concerning the management of agricultural real properties of the Treasury.

The Act of September 25, 1981 concerning state-owned enterprises<sup>30</sup> contains Chapter II titled Agreement concerning the management of an enterprise. The provisions indicate that the founding body may entrust a natural or legal person with the management of a state-owned enterprise (art. 45a (1)). The management may be entrusted to such a person on the initiative of the founding body, upon the consent of the employee council and the general meeting of the employees (delegates) of the enterprise or upon the consent of the general meeting of the employees (delegates) (art. 45a (2)). The management is entrusted based upon the agreement concluded for a specified period of time, at least three years, between the Treasury represented by the founding body and the manager (agreement concerning the management of an enterprise). The agreement concerning the management of an enterprise should specify, in particular, the following:

- 1) the obligations of the manager concerning the routine management, modifications and facilitations in the enterprise,
- 2) the principles of remuneration due to the manager, taking into account the provisions of the Act of March 3, 2000 concerning the remuneration of persons managing certain legal entities (*Dziennik Ustaw [the Polish Journal of Laws]*, No. 26, item 306 and of 2001, No. 85, item 924 and No. 154, item 1799),
- 3) the assessment criteria for management efficiency,
- 4) the responsibility for the entrusted enterprise.

If the manager is a legal person, the agreement should specify who will perform the management activities on its behalf. The manager, or the person acting on its behalf in the event described above, is authorized to make any declarations of intent on behalf of the managed enterprise. Upon the take-over of the obligations by the manager:

- 1) the employees' self-management bodies are dissolved by operation of law,
- 2) the founding body recalls the director of the enterprise,
- 3) the manager takes over the competences of the director and the employees' self-government, with the exception of the following:
  - a. the right of objection against decisions of the founding body,
  - b. accepting and approving of the financial statements,
  - c. dividing the profit made by the enterprise into funds and specifying the principles of using these funds (art. 45b).

In the state-owned enterprise where the manager has taken his responsibilities, the founding body nominates a supervisory board pursuant to

---

<sup>30</sup> Act of September 25, 1981 concerning state-owned enterprises, i.e. *Dziennik Ustaw* of 2002, No. 112, item 981.

art. 59 and entrusts it with a constant supervision over the activities of the enterprise.

The founding body may immediately terminate the agreement concerning the management of an enterprise if:

- 1) the manager has grossly violated law in relations to the management of the enterprise,
- 2) the state-owned enterprise has failed to perform its tax obligations to the Treasury for at least 3 subsequent months,
- 3) the manager has significantly violated the provisions of the agreement concerning the management of an enterprise,
- 4) the circumstance specified in art. 37a (1) (4) (art. 45c) have arisen.

The Act of October 19, 1991 concerning the management of agricultural real properties of the Treasury<sup>31</sup> (*Dziennik Ustaw* 1995.57.299) indicates that the administration of the property of the Treasury consists in the management of a specific part of the Resource on behalf of the Agency, based upon an agreement, for remuneration, and for a specific term. An administrator may be a legal or natural person. The agreement between the administrator and the Agency should be concluded in writing and specify, in particular, the following:

- 1) the assets to be managed,
- 2) the principles of the administrator's remuneration, including the administrator's right to collect fruits or to receive a share in profit,
- 3) the responsibilities of the administrator,
- 4) the assessment criteria for administration efficiency,
- 5) the scope of responsibility for the entrusted property,
- 6) the term of the agreement.

The Act of April 30, 1993 concerning national investment funds and the privatization thereof, which becomes invalid on January 1, 2013,<sup>32</sup> indicates that a fund may enter into an agreement on the management of its property with a management company. Such an agreement is concluded by a fund represented by the supervisory board. The agreements concerning the management may be concluded by funds with the Treasury being a sole shareholder thereof and only with the management companies selected within a tender procedure by the Selection Committee specified in art. 15 (3), (art. 21).

A contract between a fund and a management company may specify that the fund will grant a commercial proxy to the management company. If a commercial proxy is granted to the management company, the name of the company and names of people exercising the rights of proxy should be disclosed in the commercial register. The contract may not release the management

---

<sup>31</sup> Act of April 30, 1993 concerning national investment funds and the privatization thereof (*Dziennik Ustaw*, No. 44, item 202, as amended).

<sup>32</sup> *Dziennik Ustaw* of May 29, 2012, item 596.

company from its obligation to pay all costs and expenses incurred by the fund and due to the company, or incurred by the company or its representatives and consultants in relation to the performance of obligations by the company.

Legal acts performed by the third party with a person exercising the rights of a commercial proxy of a fund which is a legal person are valid even if the name of the commercial proxy or the name of the person acting as a commercial proxy is not disclosed in the commercial register upon the performance of the legal act. Acting without proxy or exceeding the scope of proxy by a person disclosed in the commercial register who exercises the rights on behalf of the commercial proxy of the fund which is a legal person does not affect the validity of legal acts performed by this person with the third party unless the third party acted in bad faith (art. 22). The obligations and rights of the management company are specified in the statute of the fund and in the contract between the fund and the management company. The statute of the fund and the contract between the fund and the management company may not exclude or limit the liability of the management company for damage caused to the fund as a result of intentional guilt or gross negligence (art. 23).

Each modification of significant provisions of the contract between the fund and the management company, in particular each modification of conditions of remuneration due to the management company, requires the approval of the general meeting of shareholders of the fund. The fund may terminate the contract with the management company with no statement of reasons, with a period of notice no longer than 180 days. If the contract is terminated by the fund in circumstances for which the management company is not responsible, a possible contractual compensation provided for the management company on that account may not exceed a half of the yearly lump sum remuneration for management.

If the contract between the fund with the Treasury being a sole shareholder thereof and the management company provides for a yearly lump sum remuneration for management, yearly remuneration for financial results of the fund, or final remuneration for financial results of the fund, the following principles of remuneration due to the management company are applied:

- 1) the yearly lump sum remuneration for management is specified in the tender described in art. 21 (2),
- 2) the yearly remuneration for financial results of the fund, including the remuneration expressed as a percentage of shares of the fund, is specified as an amount which does not exceed the value of 1% of shares of the fund for each year of the provision of services by the management company, taking into account the amount obtained from the sales of shares and the value of due dividend,
- 3) the final remuneration for financial results of the fund, including the remuneration expressed as a percentage of shares of the fund, is specified in both cases as an amount which does not exceed the product of the value of

0.5% of the shares of the fund and the number of years during which the management company provided its services to the fund, taking into account the amount obtained from the sales of shares and the value of due dividend; such a remuneration may only be paid after the expiry of the contract with the management fund (art. 24).

The principles of remuneration due to the management company providing services to the fund where the Treasury ceased to be a sole shareholder must meet the condition that the part of the remuneration which depends on the financial results of the fund may not exceed the value of 2% of shares of the fund for each year of the provision of services by the management company, also in the event when it is expressed as a percentage of shares of the fund (art. 24).

The Act of August 30, 1996 concerning commercialization and privatization<sup>33</sup> determines that the management of a company may be entrusted to a natural person by way of a contract in companies formed as a result of commercialization. In such an event, a one-person management board is established in the company and a person entrusted with the management obligations becomes a member of the management board. The person who the management obligations are entrusted to is selected as a result of a competition conducted by the supervisory board. The decision to conduct the competition is made by the general meeting of shareholders. The contract specified above is concluded on behalf of the company by the supervisory board upon the consent of the general meeting of shareholders. It should include, in particular, the following:

- 1) the obligations of the person entrusted with the management obligations, including the scope of modifications and facilitations in an establishment of the company (reorganization of the company),
- 2) the remuneration due to the person entrusted with the management obligations, specified in the manner which considers the relationship of the remuneration with the financial results of the company and the extent to which the tasks which are a part of the obligations specified in item 1 are completed,
- 3) the term of the contract,
- 4) reasons for an early termination of the contract.

The contract has to be submitted to the court which keeps the relevant register.

The characteristic of “agreements concerning management” in the regulations defined above is the entrusting of the management of an enterprise within a narrower or wider scope. A manager may be a natural or legal person. Furthermore, the acts listed above regulate the management of a specific type of

---

<sup>33</sup> Act of August 30, 1996 concerning commercialization and privatization (i.e. *Dziennik Ustaw* of 2002, No. 171, item 1397, as amended).

an enterprise which is a part of the state property. This has an influence on the specific procedure of nominating managers, specific principles of remuneration due to them, and principles of liability.<sup>34</sup>

### III.

Natural persons providing services in person based on agreements concerning the management of an enterprise, management contracts, or similar agreements are or are not VAT payers depending on the legal relationship which forms the basis for the provision of such services.

Management services provided as a part of business activities are, as a rule, taxed based on art. 5 (1), art. 8 (1), and art. 15 (1-2) of VAT Act of March 11, 2004 (*Dziennik Ustaw*, No. 54, item 535) upon general principles. However, if activities specified in art. 13 (9) of the Personal Income Tax Act of July 6, 1991 (*Dziennik Ustaw* of 2000, No. 14, item 176, as amended), i.e. activities performed in person based on agreements concerning the management of an enterprise, management contracts etc., are performed by persons who, as a result of the activities, are bound to the party ordering such activities with legal relationship between the ordering party and the person performing the activities, these activities are excluded from VAT obligations concerning the conditions of the performance thereof, remuneration, and liability of the ordering party.

Management contract are not taxable with VAT if they specify the conditions of work and the remuneration due to the manager and if they state that the ordering party is liable for the manager's activities towards the third party. These elements of a legal relationship correspond to properties of employment relationship. This, in turn, results in the fact that the activities are not performed by the manager independently, on his own, and on his own responsibility; therefore, the activities are not taxable with VAT.

However, the parties to a contract are not always able to form the contents of the contract as they wish, by including the provisions specified in art. 15 (3) of the VAT Act. The literature indicates that the examples of income recognized exclusively as income on the business activities as understood in art. 10 (1) (3) of the Personal Income Tax Act may also include income from a share in a registered partnership [*spółka jawna*] providing management services for another entity.

Pursuant to art. 22 of the Act of September 15, 2000 "Code of Commercial Companies",<sup>35</sup> a registered partnership is a partnership which runs an enterprise with its own business name but is not any other commercial company. Each partner is held responsible for the partnership's obligations with all his estate

---

<sup>34</sup> Cf. J. Kruczałak-Jankowska, *Umowy menedżerskie*, Warsaw 2000.

<sup>35</sup> *Dziennik Ustaw* No. 94, item 1037, as amended.

with no limitations, jointly and severally with other partners and the partnership itself.

Income from a share in a registered partnership providing management services for another entity should be qualified as income from non-agricultural business activities as understood in art. 10 (1) (3) of the Personal Income Tax Act.<sup>36</sup> The source of income of partners in partnerships (including registered partnerships) is a non-agricultural business activity, in the light of the provisions of the Personal Income Tax Act.

Pursuant to art. 5a (6) of the PIT Act, non-agricultural business activities are understood as gainful manufacturing, constructing, trade, and service activities as well as activities consisting in prospecting for, identifying, and mining ores from deposits; these activities are performed using tangible and intangible assets, in one's own name, in an organized and constant manner and the income from such activities is not recognized as other income from the sources listed in art. 10 (1) (1, 2 and 4-9). Furthermore, pursuant to art. 5b (10) of the Personal Income Tax Act, activities are not recognized as non-agricultural business activities if all of the following conditions are met:

- 1) the ordering party is held responsible to the third party for the results of these activities and the performance thereof, with the exclusion of the responsibility for the commitment of unlawful acts,
- 2) the activities are performed under the management of the ordering party and in the place and time specified by the ordering party,
- 3) the person performing the activities is not exposed to the economic risk related to the performed activities.

Pursuant to art. 13 (9) of the PIT Act, income from activities performed in person is recognized as income from agreements concerning the management of an enterprise, management contracts and similar agreements, including income from agreements of this type concluded as a part of non-agricultural business activities performed by the taxpayer.

Pursuant to art. 13 (8) (a) of the Personal Income Tax Act of July 26, 1991, income from activities performed in person, specified in art. 10 (1) (2), is recognized as income from services performed based on a mandate contract or a contract to perform a specific task, obtained only from natural persons conducting business activities, legal persons and their organizational units, or organizational units with no legal personality, with the exception of income from agreements concluded as a part of non-agricultural business activities performed by the taxpayer or income specified in item 9 of the Personal Income Tax Act mentioned above, i.e. income from activities performed in person based on

---

<sup>36</sup> Personal Income Tax Act of July 26, 1991, i.e. *Dziennik Ustaw* of 2010, No. 51, item 307, as amended, quoted as the PIT Act.

agreements concerning the management of an enterprise, management contracts, and similar agreements.

In order to determine whether activities are performed in person (art. 10 (1) (2) of the Personal Income Tax Act specified above) or are recognized as non-agricultural business activities (art. 10 (1) (3) of the above Act), it is necessary to examine the properties of the business activities, in particular the registration of the taxpayer as a business entity (entrepreneur), actual performance of the activities for the purposes of earning, performing them professionally in one's own name and on one's own account, and whether the activities are organized and permanent. Activities performed in person do not have to meet these criteria, in particular the requirement of permanence and a specific degree of organization.

Pursuant to art. 8 (1) of the PIT Act, the income from a share in a partnership which is not a legal person, joint ownership, joint venture, joint possession, or joint use of things or material rights is specified for each taxpayer proportionally to his right to the share in profits (...). These principles are used, accordingly, to accounting for tax-deductible costs, non-tax-deductible costs, and losses (art. 8 (2) of the PIT Act).

In the light of the provisions specified above, the income from a registered partnership which provides management services should not be qualified as income from activities performed in person, as specified in art. 13 (9) of the PIT Act. In this case, a manager-partner does not provide management services in person because it is a registered partnership with the status of an entrepreneur that is a party to the agreement concerning management. As a part of the performance of the provisions of a contract concluded with the managed entity, the registered partnership delegates its partners, who take actual part in the management of the company. Therefore, a partner to the partnership does not have income from the activities performed in person (the provision of the management services) but from his share in profit of the registered partnership.

#### **IV.**

To sum up, it should be stated that the issues of management contracts are complex and multidimensional. They include civil law as well as public law aspects. The discussion presented above has been limited to selected legal considerations. This, however, does not mean that the institution of a management contract can be discussed only in this context. It is certainly related with many economic or social issues because management contracts are one of the forms of managing an enterprise which appeared together with the market economy.

## Bibliography

1. Brzozowski A., Safjan M., Skowrońska-Bocian E., Czachórski W. (ed.): *Zobowiązania. Zarys wykładu*, Warsaw 2002.
2. Kruczałak-Jankowska J.: *Umowy menedżerskie*, Warsaw 2000.
3. Safjan M.: *Kodeks cywilny*. Tom I. Komentarz, ed. K. Pietrzykowski, Warsaw 2002.

## LIST OF JUDGEMENTS OF THE SUPREME COURT

The judgement of April 4, 2002 I PKN 776/00, OSN ZU IPUSiSP 2004, No. 6, item 94.  
The judgement of October 11, 2005 I PK 42/05, OSN ZU IPUSiSP 2005, No. 17-18, item 267.  
The judgement of November 25, 2004 I PK 42/04, OSN ZU IPUSiSP 2005, No. 14, item 209.  
The judgements of the Supreme Court of December 22, 1998, I PKN 517/98, OSNAPiUS 2000, No. 4, item 138.  
The judgement of January 12, 1999, I PKN 535/98, OSNAPiUS 2000, No. 5, item 175.  
The judgement of February 9, 1999, I PKN 562/98, OSNAPiUS 2000, No. 6, item 223.  
The judgement of April 7, 1999, I PKN 642/98, OSNAPiUS 2000, No. 11, item 417.  
The judgement of January 23, 2002, I PKN 786/00, OSNP 2004, No. 2, item 30.  
The judgement of March 4, 1999, I PKN 616/98, OSNAPiUS 2000, No. 8, item 312.  
The judgement of December 9, 1999, I PKN 432/99, OSNAPiUS 2001, No. 9, item 310.  
The judgement of December 5, 2000, I PKN 127/00, OSNAPiUS 2002, No. 15, item 356.  
The judgement of December 4, 1997, I PKN 394/97, OSNAPiUS 1998, No. 20, item 595.  
The judgement of December 2, 1998, I PKN 458/98, OSNAPiUS 2000, No. 3, item 94.  
The judgement of October 6, 1998, I PKN 389/98, OSNAPiUS 1999, No. 22, item 718.  
The judgement of October 28, 1998, I PKN 416/98, OSNAPiUS 1999, No. 24, item 775.  
The judgement of December 5, 2000, I PKN 133/00, OSNAPiUS 2002, No. 14, item 326.  
The judgement of the Appeals Court in Rzeszów of December 21, 1993, III AUr 357/93, OSA 1994, No. 6 item 49.  
The judgement of November 5, 1998, I PKN 415/98, OSNAPiUS 1999, No. 24, item 780.  
The judgement of December 22, 1998, I PKN 517/98, OSNAPiUS 2000, No. 4, item 138.  
The judgement of December 14, 1999, I PKN 451/99, OSNAPiUS 2001, No. 10, item 337.  
The judgement of October 15, 1999, I PKN 307/99, OSNAPiUS 2001, No. 7, item 214.  
The judgement of December 4, 1998, I PKN 484/98, OSNAPiUS 2000, No. 2, item 62.  
The judgement of January 12, 1999, I PKN 535/98, OSNAPiUS 2000, No. 5, item 175.  
The judgement of February 14, 2001, I PKN 256/00, OSNAPiUS 2002, No. 23, item 564.  
The judgement of June 28, 2001, I PKN 498/00, OSNP 2003, No. 9, item 222.  
The judgement of March 20, 1965, III PU 28/64, OSNCP 1965, No. 9, item 157.  
The judgement of the Regional Labour and Social Insurance Court in Krakow of December 18, 1975, II U 2867/75, Służba Pracownicza 1976, No. 10, p. 28.  
The judgement of the Regional Labour and Social Insurance Court in Łódź of November 25, 1975, I P 848/75, Służba Pracownicza 1976, No. 4, p. 38.



The judgement of February 27, 1979, II URN 19/79, Nowe Prawo 1981, No. 6, p. 82.  
The judgement of April 11, 1997, I PKN 89/97, OSNAPiUS 1998, No. 2, item 35.  
The judgement of September 11, 1997, II UKN 232/97, OSNAPiUS 1998, No. 13, -item 407.  
The judgement of December 22, 1998, I PKN 517/98, OSNAPiUS 2000, No. 4, item 138.  
The judgement of September 7, 1999, I PKN 277/99, OSNAPiUS 2001, No. 1, item 18.  
The judgement of April 4, 2002, I PKN 776/00, OSNP 2004, No. 6, item 94.  
The judgement of November 14, 1965, III PU 17/65, OSNCP 1966, No. 4, item 66.  
The judgement of October 11, 2005, I PK 42/05, OSN ZU IPUSiSP 2005, No. 17-18, item 267.  
The judgement of the Supreme Court of April 4, 2002, I PKN 776/00, OSN ZU IPUSiSP 2004, No. 6, item 94.