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THE NOTION OF LITIGATION CAPACITY IN POLISH CIVIL PROCEEDINGS AGAINST THE BACKGROUND OF COMPARATIVE LAW

Abstract

The problems of this paper refer to comparative law considerations related to the notion of litigation capacity in civil proceedings in selected European legal systems so as to establish in an evaluative way the identities, differences and similarities, occurring between them. This research serves primarily to find new solutions aimed to improve Polish legal provisions with regard to litigation capacity. Thus, the legal definitions of the notion of litigation capacity formulated on the ground of German, Austrian, Swiss, Norwegian, Hungarian, Italian, Ukrainian, Czech, French and Polish systems of civil proceedings have been presented in the paper. Many attempts at defining the notion of litigation capacity in civil proceedings have been also undertaken in the legal theory of these states, which have been also presented in the necessary scope for the needs of this paper, the more so that there have occurred numerous divergences how this notion is to be understood. In this area, there is a particular need to resolve the issue whether litigation capacity shall be understood as a category of a type of feature or qualification or else as a subjective right.

Keywords

civil proceedings; the Code of Civil Procedure; litigation premise; litigation capacity (capacity to perform acts in civil proceedings); court capacity (capacity to be a party in civil proceedings); definitions

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INTRODUCTION

The admissibility of initiating and conducting civil proceedings depends on the existence or non-existence of procedural premises provided by the law. One of such premises, i.e. circumstances provided for by procedural law, whose existence or non-existence determines the admissibility of initiating and conducting civil proceedings in order to put into life the norms of substantive law, is the litigation capacity¹ of the parties and participants in the proceedings. It is one of the subjective, positive, and absolute procedural premises, whose unrestored absence results in the invalidity of civil proceedings under article 379 point 2 of the Code of Civil Procedure. The issue of litigation capacity is therefore one of the key issues for the theorists and practitioners of civil proceedings, and the very definition of the concept of litigation capacity is a starting point for further analysis of issues related thereto.

In this study, comparative law considerations with reference to litigation capacity in selected legal systems² are presented so as to assess the identical features, differences, and similarities³ occurring between them. The comparative law analysis of procedural problems sharpens

¹ This phrase should be understood as: capacity to perform acts in civil proceedings.

² M. Sawczuk author of *Zdolność procesowa w postępowaniu cywilnym* [Capacity to perform litigation acts in civil proceedings], Warszawa, 1963, p. 9-25 described the notion of capacity to perform litigation acts in civil proceedings of selected European legal systems as the first legal writer in Polish doctrine still on the ground of the provisions of the 1930/1932 Polish Code of Civil Procedure. In the most recent doctrine, pursuant to the provisions of the 1964 Polish Code of Civil Procedure, being currently in force, P. Rawczyński in his paper *Zdolność procesowa w sądowym postępowaniu rozpoznawczym w sprawach cywilnych* [Capacity to perform litigation acts in civil fact-finding court proceedings], Warszawa, 2018, p. 35-56 attempted to present these problems. Furthermore, this author included comparative law elements in a necessary scope into individual chapters of the monograph cited which allowed him to expose more distinctly the identities, differences and similarities of legal issues analysed in the individual chapters. This paper makes up an enriched version of considerations presented in P. Rawczyński's paper *supra* note 2, p. 35-56.

³ More thereon K. Lubiński, "Przedmiot komparatystyki prawa procesowego" [The object of civil proceedings comparative law], in P. Grzegorzcyk, K. Knoppek, M. Walasik (eds.), *Proces cywilny. Nauka-Kodyfikacja-Praktyka. Księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi* [Civil proceedings. Legal theory-Codification-Practice. Jubilee book dedicated to Professor Feliks Zedler], Warszawa, 2012, p. 1071.

inter alia one's view on one's own system of procedural law.⁴ This research serves also to seek new solutions intended to improve the national legal system relating to litigation capacity.

In this paper, legal definitions of litigation capacity are presented as expressed on the ground of selected European systems of civil proceedings. The doctrine has also attempted several times to define the notion of litigation capacity in civil proceedings, which need to be presented in a necessary scope in this paper, the more so that there have appeared divergencies as to the meaning of this notion. Above all, it needs resolving whether litigation capacity should be understood in terms of feature or qualification of a kind, or in terms of a subjective right.

That is why the analysis of the title issue requires the definition of litigation capacity to be presented on the ground of the provisions of civil proceedings in selected legal systems so as to be later able to focus the attention on doctrinal definitions of this notion.

I. THE NOTION OF LITIGATION CAPACITY

1. INTRODUCTION

Numerous attempts at defining the notion of litigation capacity in civil proceedings have been undertaken by the doctrine, the more so because material divergences in the understanding of this notion have appeared. It needs resolving in particular whether litigation capacity should be understood in terms of feature or qualification of a kind, or in terms of a subjective right. There exist also legal definitions of the notion of litigation capacity on the ground of several systems of European civil law proceedings. That is why the analysis of the title issue requires the definition of the capacity to litigate to be presented on the ground of the provisions of civil proceedings in selected legal systems so as to be later able to focus the attention on doctrinal definitions of this notion.

⁴ *Ibid.*, p. 1070.

2. DEFINITIONS OF THE NOTION OF LITIGATION CAPACITY

2.1. DEFINITIONS OF THE NOTION OF LITIGATION CAPACITY IN SELECTED EUROPEAN SYSTEMS OF CIVIL PROCEEDINGS

Pursuant to § 51 subpara. 1 of the German Code of Civil Procedure, litigation capacity (*Prozessfähigkeit*) is the capacity to take part in litigation.⁵ In turn, pursuant to § 52 of the German Code of Civil Procedure, everyone is capable of conducting litigation in the same scope as they are capable of incurring contractual obligations.⁶

In German doctrine, litigation capacity is defined as the capacity to conduct litigation in person or through a retained attorney *ad litem*/representative, and therefore as the capacity to undertake or to abandon (undertaking) litigation.⁷ Moreover, litigation capacity is understood as the capacity to exercise efficiently a party's rights and to take up litigation, either independently or through a retained attorney *ad litem*/representative,⁸ as well as the capacity to undertake and to accept efficiently litigation acts addressed thereto.⁹ In German legal theory, it is considered that litigation capacity answers the question of whether a party is capable of conducting litigation in person/personally (*in eigener Person*) or by (*selbst*) an attorney *ad litem*/representative retained thereby along with undertaking necessary litigation acts.¹⁰

⁵ The definition stipulated in § 51 of the German Code of Civil Procedure ("a party's capacity to stand before court") is a *verbatim* translation of the legal expression of *legitima persona standi in iudicio*. So L. Rosenberg, K. Schwab, P. Gottwald, *Zivilprozessrecht*, München, 2004, p. 262.

⁶ It is worth mentioning that pursuant to § 50 subpara. 1 of the German Code of Civil Procedure, whoever has legal capacity (court capacity), has the capacity to be a party in a litigation (capacity to be a litigant). Furthermore, it results from § 50 subpara. 2 of the German Code of Civil Procedure, that associations which have no legal capacity may sue and be sued. Thus in civil proceedings, these associations have the position of an association with legal capacity.

⁷ O. Jauernig, *Zivilprozessrecht*, München 2003, p. 65; L. Rosenberg, K. Schwab, P. Gottwald, *supra* note 5, p. 262.

⁸ F. Baur, W. Grunsky, *Zivilprozessrecht*, Berlin, 1994, p. 71.

⁹ P. Arens, W. Lüke, *Zivilprozessrecht*, München, 1994, p. 90.

¹⁰ Ch.G. Paulus, *Zivilprozessrecht. Erkenntnisverfahren, Zwangsvollstreckung und Europäisches Zivilprozessrecht*, Berlin, 2013, Nb 84.

The definitions stipulated in German legal theory differ without doubt from that provided for in § 51 subpara. 1 of the German CCP and unambiguously refer to the notion of litigation acts. Furthermore, although whoever independently undertakes obligations by concluding contracts¹¹ is capable of conducting litigation (*prozessfähig*), it is assumed that this capacity is an equivalent of the unlimited capacity to enter into legal transactions provided for in the civil substantive law¹² and is referred to as “litigation capacity to do legal acts” (*prozessuale Geschäftsfähigkeit*).¹³

In turn, pursuant to § 1 of the Austrian CCP, litigation capacity (*Prozessfähigkeit*) is the capacity to act independently before the court as a party so as to incur independently material obligations.

In Austrian legal theory, litigation capacity has been referred to as the capacity to undertake efficiently and accept as the addressee any litigation acts independently or through the intermediary of a retained attorney *ad litem*/representative.¹⁴ In this case, as well, this definition differs from the code stipulation of the notion of capacity to litigate. As it relates to the capacity to act, it is referred to as “litigation capacity to do acts” (*prozessuale Handlungsfähigkeit*).¹⁵

The notion “*Prozessfähigkeit*” is also applied by Swiss law and legal theory. In the light of article 67 subpara. 1 of the Swiss CCP, whoever is capable of acting, has litigation capacity.

However, litigation capacity in Swiss legal theory is the capacity to pursue one’s rights independently or through an independently retained attorney *ad litem*/representative.¹⁶ Litigation capacity is also defined as the capacity to undertake legally efficient (*rechtswirksam*) litigation acts¹⁷ and the entitlement to (*Befugnis*) legally efficient undertaking

¹¹ So O. Jauerning, *supra* note 7, p. 65.

¹² *Ibid.*, p. 65. Ch.G. Paulus claims also that capacity to perform litigation acts is linked with an unlimited capacity to legal acts provided for in civil substantive law (*idem*, *supra* note 10, Nb 84).

¹³ F. Baur, W. Grunsky, *supra* note 8, p. 71; L. Rosenberg, K. Schwab, P. Gottwald, *supra* note 5, p. 262.

¹⁴ W.H. Rechberger, D-A. Simotta, *Grundriss des österreichischen Zivilprozessrechts*, Wien, 2010, p. 159.

¹⁵ *Ibid.*, p. 159.

¹⁶ I. Meier, *Schweizerisches Zivilprozessrecht*, Zürich, 2010, p. 152.

¹⁷ T. Sutter-Somm, *Schweizerisches Zivilprozessrecht*, Bern, 2012, p. 52.

of litigation acts in person or through a retained attorney *ad litem*/representative.¹⁸ In addition, litigation capacity is an equivalent of the capacity to do acts-in-law provided for in the Swiss CC.¹⁹

In turn, pursuant to § 2-2 subpara. 1 of the Norwegian CCP,²⁰ litigation capacity (*Prosessdyktighet*) is the capacity to undertake independent acting in court litigation, initiating and being addressed in civil suits included.

In Norwegian legal theory, litigation capacity is referred to as “litigation capacity to do acts” (*prosessuell handleevne*)²¹ and in many aspects, it corresponds to the notion of legal capacity to enter into legal transactions (*rettslig handleevne*) in the substantive civil law.²² At the same time, it has been indicated that litigation capacity means the capacity to undertake litigation acts and the capacity to act independently in a case.²³

As to § 49 subpara. 1 of the Hungarian CCP, it stipulates that litigation capacity (*a perbeli cselekvőképesség*) is the capacity to undertake litigation acts in person or through the intermediary of an attorney *ad litem*/representative. While defining the notion of litigation capacity, the legislator, used the word “in person” (*személyesen*), which in the framework of Polish civil proceedings is to be connected with postulatory capacity.

Pursuant to Hungarian legal theory, litigation capacity is the capacity to undertake litigation acts by one’s own acting (or through an attorney *ad litem*/representative).²⁴ Hungarian legal theory assumes also that

¹⁸ A. Staehelin, D. Staehelin, P. Grolimund, *Zivilprozessrecht*, Basel, 2013, p. 182.

¹⁹ *Ibid.*, p. 182.

²⁰ The 17.06.2005 act on mediation and proceedings in civil cases (Act on disputes).

²¹ T. Schei, A. Bårdsen, D. Nordén, C. Reusch, T. Øie, *Tvisteloven. Kommentarrutgave. Bind I*, Oslo, 2013, p. 65, 67, 81; J. Hov, *Rettergang i sivile saker*, Oslo, 2019, p. 78; I.L. Backer, *Norsk sivilprosess*, Oslo, 2020, p. 142; A. Robberstad, *Sivilprosess*, Oslo, 2021, p. 94; J.E. Skøghoy, *Toisteløsning*, Oslo, 2022, p. 262, 289.

²² J. Hov, *supra* note 21, p. 78. Compare also J.E. Skøghoy, *supra* note 21, p. 262, who directly recognizes that the differentiation between court capacity (*partsevne*), and capacity to perform litigation acts (*prosessuell handleevne*) can be compared to the differentiation between legal capacity (*rettsevne*), and capacity to do legal acts (*rettslig handleevne*) of law in personam.

²³ A. Robberstad, *supra* note 21, p. 94. Compare: T. Schei, A. Bårdsen, D. Nordén, C. Reusch, T. Øie, *supra* note 21, p. 81; J. Hov, *supra* note 21, p. 78; J.E. Skøghoy, *supra* note 21, p. 262, 289.

²⁴ S. Udvary, in A. Osztoivits (ed.), *Polgári eljárásjog I*, Budapest, 2013, p. 101.

litigation capacity expresses the capacity to undertake litigation acts directly or indirectly.²⁵

Litigation capacity in Italian law and doctrine is *capacità processuale*.²⁶ Pursuant to article 75 of the Italian CCP, whoever may independently dispose of the rights pursued in the litigation is capable of standing before court in a litigation. In turn, whoever may not freely dispose of the rights, must not litigate in court otherwise than through the intermediary of a representative, assisted or retained in accordance with the legal provisions which deal with their capacity.²⁷

Although *capacità processuale* means litigation capacity, a certain general consideration can be also noticed in article 75 of the Italian CCP to characterize court capacity²⁸ i.e. *capacità di stare in giudizio* (capacity to stand before court). Andrzej Jakubecki has directly recognized that litigation capacity has been made the exclusive object of the Italian CCP. However, the author has underlined that it results from article 75 of the Italian CCP that whoever may freely dispose of the rights pursued in a litigation, has the capacity to be a party in these proceedings.²⁹ Mieczysław Sawczuk has suggested also that neither in article 75 of the Italian CCP nor in the next ones of the code, is there any mention of court capacity. Furthermore, the author has claimed that *stare in giudizio* means “appearing before court”.³⁰ In turn, Italian-Polish dictionaries of

²⁵ M. Kengyel, in J. Németh, D. Kiss (eds.), *A polgári perrendtartás magyarázata*, Budapest, 2007, p. 383.

²⁶ M. Grelewicz-La Mela, B. Nuzzo, *Polsko-włoski słownik prawniczy* [Polish-Italian legal dictionary], Warszawa, 2003, p. 67; H. Kwiatkowska, *Słownik terminologii prawniczej. Włosko-polski. Polsko-włoski* [Dictionary of Law. Italian-Polish. Polish-Italian], Warszawa, 2011, p. 27.

²⁷ See more E. Zucconi Galli Fonseca, in F. Carpi, M. Taruffi (eds.), *Commentario breve al Codice di Procedura Civile*, Padova, 2011, p. 408 and the subsequent ones.

²⁸ This phrase should be understood as: capacity to be a party in civil proceedings.

²⁹ A. Jakubecki, “Zdolność sądowa według Kodeksu postępowania cywilnego i przepisów odrębnych (de lege lata i de lege ferenda)” [Court capacity according to the Code of Civil Procedure and separate provisions (de lege lata and de lege ferenda)], in K. Markiewicz, A. Torbus (eds.), *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego w Katowicach-Kocierzu (26–29 września 2013 r.)* [Fact-finding proceedings in the future Code of Civil Procedure. Papers of the All-Poland Congress of Chairs and Departments of Civil Proceedings in Katowice-Kocierz (26–29 September 2013)], Warszawa, 2014, p. 15.

³⁰ M. Sawczuk, *supra* note 2, p. 22.

law define court capacity as *capacità di essere parte*³¹ (capacity to be a litigation party) and the person capable of being a litigation party (having court capacity) – *capace di essere parte in giudizio*.³²

Pursuant to article 47 subpara. 1 of the Ukrainian CCP, litigation capacity (*громадянська процесуальна дееспособність*) is the capacity to exercise in person civil litigation rights and to fulfil one's own duties before the court. In article 47 of the Ukrainian CCP, persons who have litigation capacity have been defined in detail, which is unusual for a civil procedure law compared to other systems of civil procedure described. The legislator used the criterion of age when speaking of natural persons, and also referred to limited capacity to enter into civil transactions and to conclude marriage (marriage registration) in the case of a person who has not come of age.

There is no doubt about § 20 subpara. 1 of the Czech CCP either, pursuant to which litigation capacity (*procesní způsobilost*) means independent acting of a participant in the proceedings before court. In this case, whoever has the capacity to acquire by their own acting the rights and to take over the duties, can appear in court in person.

In the Czech doctrine, it is assumed that litigation capacity is the capacity to undertake litigation acts independently, or else the capacity to act in person before a court.³³ Litigation capacity has been defined also as the capacity to exercise the participant's rights and duties in the litigation either on their own or through an attorney *ad litem*/representative.³⁴ The scope of litigation capacity also refers to substantive provisions of civil law³⁵ similarly to the case of legal systems of the states mentioned earlier.

The French CCP will be distinguished amongst the other codifications mentioned, in the scope of interest to us, as it has no legal definition of the notion of litigation capacity, nor any certain constitutive ele-

³¹ H. Kwiatkowska, *supra* note 26, p. 27.

³² M. Grelewicz-La Mela, B. Nuzzo, *supra* note 26, p. 67.

³³ A. Winterová, *Civilní právo procesní*, Praha, 2011, p. 133. So also J. Stavinochová, P. Hlavsa, *Civilní proces a organizace soudnictví*, Brno, 2003, p. 225.

³⁴ A. Šíma, *Občanské právo procesní*, Praha, 2009, p. 16; R. Zahradníková, in R. Zahradníková (ed.), *Civilní právo procesní*, Plzeň, 2013, p. 92. Compare also J. Stavinochová, P. Hlavsa, *supra* note 33, p. 225.

³⁵ J. Stavinochová, P. Hlavsa, *supra* note 33, p. 225; A. Winterová, *supra* note 33, p. 133, 135; R. Zahradníková, in R. Zahradníková (ed.), *supra* note 34, p. 92.

ments, at least, to define this capacity. At the same time, the French CCP does not provide provisions which would indicate who has litigation capacity. Essentially, this means that it needs to rely on the provisions of substantive law, in particular those related to capacity to enter into legal transactions and transfer them correspondingly to the ground of civil proceedings. Neither does the French CCP contain provisions related to the court capacity in this area.

Only article 117 of the French CCP uses the notion of *capacité d'ester en justice* (capacity to sue in court) in the context of material irregularities that have an impact on the validity of an act (*la validité de l'acte*). Article 120 of the French CCP also makes reference to the notion of *capacité d'ester en justice*, stipulating that this capacity is analysed by the court *ex officio*.

In French-Polish dictionaries of law, the *capacité d'ester en justice* has been translated both as capacity to conduct proceedings and as court capacity.³⁶ In the French-English dictionary of law the notion of *capacité d'ester en justice* has been defined as the right to take part in court proceedings and the right to appear before court.³⁷

However, the definition of the notion of *la capacité d'ester en justice* in the French civil proceedings has been given by French jurists, although not all authors distinguish *la capacité d'ester en justice* as a separate litigation notion.³⁸

³⁶ J. Pieńkos, *Polsko-francuski słownik prawniczy* [Polish-French Dictionary of Law], Kraków, 2003, p. 251; M.T. Bem, M. Gebler, *Słownik terminologii prawniczej. Francusko-polski. Polsko-francuski* [Polish-French. French-Polish Dictionary of Law], Warszawa, 2011, p. 23, 311. *Capable d'ester en justice* means whoever has court capacity, has capacity to perform litigation acts. So A. Machowska, *Słownik terminologii prawniczej. Francusko-polski* [French-Polish Dictionary of Law], Warszawa, 2013, p. 133.

³⁷ F. Bridge, *The Council of Europe French-English Legal Dictionary*, Strasbourg, 1994, p. 114.

³⁸ The following authors have not dealt with the problems of *la capacité d'ester en justice*, as a separate process concept: H. Croze, C. Morel, *Procédure civile*, Paris, 1988, p. 129 and the subsequent ones; J.J. Barbieri, *La procédure civile*, Paris, 1995, p. 67 and the subsequent ones; H. Croze, *Le procès civil*, Paris, 1997, p. 22 and the subsequent ones; F. Bussy, "La notion de partie à l'instance en procédure civile", *Le Dalloz*, 2003, No 21, p. 1376 and the subsequent ones. Differently: G. Cornu, J. Foyer, *Procédure civile*, Paris, 1958, p. 381-382; P. Cuche, J. Vincent, *Précis de procédure civile*, Paris, 1963, p. 341-342; P. Catala, F. Terré, *Procédure civile et voies d'exécution*, Paris, 1976, p. 234; M. Bandrac, in S. Guinchard (ed.),

In the French doctrine, *la capacité d'ester en justice* is defined as acting before the court (*agir en justice*)³⁹ and pursuance of rights/submission of claims before the court (*l'exercice de l'action en justice*).⁴⁰ The notion of *la capacité d'ester en justice* is understood also as the capacity to undertake actions to pursue one's rights before the court or to defend one's rights.⁴¹ However, the pursuance of one's rights before court on one's own is the consequence of the capacity to enter into legal transactions (*capacité d'exercice*⁴²).⁴³ Thus, in French law, anyone may have the capacity to initiate proceedings, but this does not mean that everyone will be able to exercise such a right independently/in person (*la partie elle-même, seule*).⁴⁴

It seems that, *la capacité d'ester en justice* covers by its meaning both the capacity to appear as a party or another participant in civil litigation proceedings, and the capacity to undertake acts in civil litigation proceedings. Thus, within the notion of *la capacité d'ester en justice* neither capacity can be clearly distinguished.

Attention will be drawn to the fact that in German, Swiss, Hungarian, Ukrainian, and Czech civil proceedings, the legislators introduced separate provisions related to court capacity. Thus, in the procedural laws, they distinguished litigation capacity from court capacity, giving separate rules in the area cited. Although in this case, litigation capacity makes up a separate notion compared to court capacity, these notions are connected to one another.⁴⁵ Such a differentiation has not been pro-

Droit et pratique de la procédure civile, Paris, 2004, p. 23; G. Couchez, *Procédure civile*, Paris, 2004, p. 190.

³⁹ P. Cuche, J. Vincent, *supra* note 38, p. 341; P. Catala, F. Terré, *supra* note 38, p. 234.

⁴⁰ P. Catala, F. Terré, *supra* note 38, p. 234. The notion of *l'exercice de l'action* P. Kalina defines directly as the pursuance of rights/submission of claims. Idem, *Słownik francusko-polski i polsko-francuski. Część pierwsza. Francusko-polska* [French-Polish and Polish-French Dictionary. Part one. French-Polish], Warszawa, 1959, p. 284.

⁴¹ Translation based on a definition formed on the Internet website: <http://dictionnaire.sensagent.com> [last accessed 12.10.2016].

⁴² In French-Polish dictionaries of law, the notion of *la capacité d'exercice* is translated as the capacity to do legal acts. Confer: J. Pieńkos, *supra* note 36, p. 251; M.T. Bem, M. Gebler, *supra* note 36, p. 23; A. Machowska, *supra* note 36, p. 133.

⁴³ J. Bunge, *Zivilprozess und Zwangsvollstreckung in Frankreich und Italien*, Berlin, 2008, p. 40.

⁴⁴ G. Couchez, *supra* note 38, p. 190.

⁴⁵ In Latvian and Estonian civil proceedings, the legislators also distinguished in civil proceedings laws, the capacity to perform litigation acts from court capacity, pre-

vided for in the Austrian or the Italian CCP, although in the latter, a certain general definition to characterize court capacity can be found. The notion of court capacity has been functioning in the law of these states on the grounds of the civil proceedings doctrine. In turn, in French civil proceedings, the legislator has not introduced either provisions related to litigation capacity or those related to court capacity, covering both capacities by the notion of *la capacité d'ester en justice*.

2.2. THE NOTION OF LITIGATION CAPACITY IN THE POLISH SYSTEM OF CIVIL PROCEEDINGS

The notion of litigation capacity was already known on the grounds of the 1930/1932 CCP provisions. However, the legislator did not give a legal definition of this notion. The provisions of the 1930/1932 CCP stipulated only in article 63 § 1 of the original text that anyone had full or limited litigation capacity, corresponding to their capacity to incur liabilities pursuant to contracts.⁴⁶ A solution in this field was introduced,

senting separate rules in the area cited, of which legal definitions of both these notions (article 71 subpara. 1 of the Latvian CCP – court capacity, i.e. *Civilprocesaālā tiesībspēja* and article 72 subpara. 1 of the Latvian CCP – capacity to perform litigation acts, i.e. *Civilprocesaālā rīcībspēja*, and also § 201 subpara. 1 of the Estonian CCP – court capacity, i.e. *Tsiviilkohtumenetlusõigusvõime* and § 202 subpara. 1 of the Estonian CCP – capacity to perform litigation acts, i.e. *Tsiviilkohtumenetlustevõime*). In turn, in article 38 subpara. 1 of the Lithouanian CCP, the legislator gave the legal definition of capacity to perform litigation acts (*Civilinis procesinis veiksnumas*).

⁴⁶ After Poland regained independence, some of the most important tasks of the Codification Commission included the creation of a uniform system of civil proceedings for the whole country. At that time, forming the provisions of capacity to perform litigation acts, the legislator relied basically on the solutions adopted in the German and Austrian CCPs. From the 1930/1932 CCP, earlier in force, the legislator took over and transferred to the 1964 CCP in particular the solutions related to undertaking the litigation acts by a statutory representative (the 1930/1932 CCP used the wording may act in the litigation”) instead of a person not having capacity to perform litigation acts. In such a case, the statutory representative was obliged to prove their delegation by a document at the first litigation act (1930/1932 CCP used the notion of “statutory representative should prove their entitlement at the first litigation act”). Similarly to the 1930/1932 CCP which followed the pattern of the German and Austrian CCPs solutions, the 1964 CCP also provided for the provisions that at any stage of the case, the court should verify *ex officio* whether the parties have capacity to perform litigation acts and whether a statutory

following the pattern of the German⁴⁷ and the Hungarian⁴⁸ CCP. In accordance with § 52 of the 1877 German CCP, whoever was capable of undertaking commitments by entering contracts, was capable of conducting litigation. In turn, pursuant to § 71 of the 1911 Hungarian CCP, whoever was capable of contracting commitments on the litigation object, had the litigation capacity in the same scope.

Thus, on the grounds of the 1930/1932 CCP provisions, differently from the 1964 CCP, litigation capacity invoked the capacity to contract commitments. At that time, litigation capacity did not make up the litigation consequences of having general capacity to do acts in law,⁴⁹ but exclusively the capacity to undertake commitments by entering contracts.

In the 1964 CCP, currently in force, the legislator clearly separated court capacity (article 64 of the CCP) from litigation capacity (article 65 of the CCP), presenting separate regulations related to both capacities and attempting to define them.⁵⁰

representative is needed. In the case when the lacks can be made good, the court fixes a relevant deadline therefor. In both cases, the failure to supplement the lacks mentioned in the fixed deadline resulted in the proceedings being cancelled in the scope in which the lacks occurred. It needs adding that before the fixed deadline lapsed, the court could admit the party, having no capacity to perform litigation acts to do them temporarily.

⁴⁷ The German CCP of 1877 had been in force in a part of Polish territory before the 1930/1932 CCP came into force.

⁴⁸ The 1911 Hungarian CCP had been in force in the part of Poland within the borders of Spisz and Orawa up to 1922 when by a regulation of the Council of Ministers dated of 14.9.1922 (Journal of Laws No 90, item 833) the force of Austrian litigation law was extended to this area.

⁴⁹ Such a solution was adopted in the Austrian CCP of 1895 which had functioned on the lands of the former Austrian Partition up to the day when the Polish 1930/1932 CCP entered into force. Pursuant to § 1 of the Austrian CCP of 1895, anyone could act on their own before the court as a party (capacity to perform litigation acts), if they had the right to incur valid obligations on their own.

⁵⁰ The 1930/1932 Code of Civil Procedure did not contain a provision which would be the equivalent of article 64 of the Code of Civil Procedure, nor did it distinguish the notion and definition of court capacity (*zdolność sądowa*). The authors of the 1930/1932 CCP were of the opinion that its placing in the provisions of the litigation law was not necessary (*Polska Procedura Cywilna. Projekty referatów z uzasadnieniem. Tom I* [Polish Civil Procedure. Drafts of papers with justification. Volume I], Kraków, 1921, p. 54; *Polska Procedura Cywilna. Projekty referatów z uzasadnieniem. Tom I* [Polish Civil Procedure. Drafts of papers with justification. Volume I], Kraków, 1923, p. 54; *Polska Procedura Cywilna. Projekty referatów z uzasadnieniem. Tom I* [Polish Civil Procedure. Drafts of papers with justifi-

The provision of article 65 § 1 *in principio* of the CCP contains a short definition of litigation capacity, and defines capacity to undertake litigation acts as such. Thus, in the CCP provisions, the legislator set forth constitutive subjective and objective elements of litigation capacity, used by the doctrine to define this notion, in the case of natural persons, referring to full capacity to enter into legal transactions and limited capacity to enter into legal transactions. On the one hand, the legislator pointed out the subjects having litigation capacity in article 65 § 1 of the CCP, but on the other hand invoked the notion of litigation acts.⁵¹

On the ground of the CCP currently in force, it is indicated in the doctrine that litigation capacity is the capacity to undertake litigation acts whose purposes are the initiation, conducting, and termination of litigation and whose premises and results are dealt with in the procedural law.⁵² In addition, capacity to perform litigation acts has been defined as the right to act independently/in person in civil proceedings,⁵³ the entitlement to do litigation acts,⁵⁴ litigation capacity,⁵⁵ the capacity to do (in-

fication. Volume I], Warszawa, 1928, p. 52). Additionally neither the CCP bill of 1930/1932 nor the 1930/1932 CCP contained a definition of capacity to perform litigation acts.

⁵¹ K. Lubiński, *Stenogram wykładu z postępowania cywilnego na stacjonarnych studiach prawniczych na Uniwersytecie Mikołaja Kopernika w Toruniu w roku akademickim 2016/2017* [Stenographic record of lecture on civil proceedings at day studies of law at the Nicolaus Copernicus University in 2016/2017 academic year].

⁵² M. Lisiewski, in Z. Resich, W. Siedlecki (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom I* [The Code of Civil Procedure. Commentary. Volume I], Warszawa, 1975, p. 156.

⁵³ K. Korzan, "Zastępstwo strony przez kuratora w postępowaniu cywilnym" [Representation of a party by a court-appointed custodian in civil proceedings], *Nowe Prawo*, 1964, No 5, p. 507; idem, *Kurator w postępowaniu cywilnym* [Court-appointed custodian in civil proceedings], Warszawa, 1966, p. 30; J. Jodłowski, in J. Jodłowski, Z. Resich, *Postępowanie cywilne* [Civil proceedings], Warszawa, 1979, p. 220.

⁵⁴ S. Dalka, *Sądowe postępowanie cywilne. Założenia ogólne i proces cywilny* [Court civil proceedings. General assumptions and civil litigation], Gdańsk, 1984, p. 148; idem, *Podstawy postępowania cywilnego* [Bases of civil proceedings], Gdańsk, 1989, p. 68.

⁵⁵ W. Broniewicz, "Glosa do uchwały Sądu Najwyższego z 16.4.1991 r., III CZP 23/91" [Gloss to the resolution of the Supreme Court of 16.4.1991, III CZP 23/91], *Przeгляд Sądowy*, 1992, No 9, p. 100; M. Manowska, in M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz do art. 1–505³⁷. Tom 1* [The Code of Civil Procedure. Commentary to art. 1–505³⁷. Volume I], Warszawa, 2011, p. 150. Compare: W. Siedlecki, in W. Siedlecki, Z. Świeboda, *Postępowanie cywilne. Zarys wykładu* [Civil proceedings. Basic lecture], Warszawa, 2001, p. 118; Ł. Błaszczak, *Pozycja handlowej spółki osobowej w procesie cywilnym*

itiate) independently/in person litigation acts in civil proceedings,⁵⁶ the subject's qualification to initiate in person/on their own litigation acts⁵⁷ and the ability to do litigation acts independently/in person in a valid litigation or during other civil proceedings.⁵⁸

Getting to analysing the issue, it needs resolving whether litigation capacity is to be understood as an attribute,⁵⁹

[Position of a commercial civil partnership in civil litigation], Toruń, 2006, p. 131; idem, "Spółka osobowa prawa handlowego jako strona procesu cywilnego. Wybrane zagadnienia na tle procedury cywilnej" [A commercial civil partnership as a party in civil litigation], in J. Frąckowiak (ed.), *Kodeks spółek handlowych po pięciu latach* [The Companies' Code after the first five years], Wrocław, 2006, p. 276.

⁵⁶ B. Bładowski, "Głosa do postanowienia Sądu Najwyższego z 3.4.1981 r., IV CZ 38/81" [Gloss to the decision of the Supreme Court of 3.4.1981, IV CZ 38/81], *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych*, 1982, No 5–6, p. 164; J. Jodłowski, in J. Jodłowski, K. Piasecki (eds.), *Kodeks postępowania cywilnego z komentarzem. Postępowanie rozpoznawcze. Tom I* [The Code of Civil Procedure with commentary. Fact-finding proceedings. Volume I], Warszawa, 1989, p. 150; M. Uliasz, *Kodeks postępowania cywilnego. Komentarz* [The Code of Civil Procedure. Commentary] Warszawa, 2008, p. 99; M. Jędrzejewska, K. Weitz, in T. Ereciński (ed.), *Kodeks postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze. Komentarz. Tom I* [The Code of Civil Procedure. Part one. Fact-finding proceedings. Commentary. Volume I], Warszawa, 2009, p. 242; M. Sychowicz, in K. Piasecki (ed.), *Kodeks postępowania cywilnego. Tom I. Komentarz do artykułów 1–366* [The Code of Civil Procedure. Volume I. Commentary to articles 1– 366], Warszawa, 2010, p. 303; G. Bieniek, in K. Piasecki (ed.), *Kodeks postępowania cywilnego. Tom II. Komentarz do artykułów 367–505³⁷* [The Code of Civil Procedure. Volume II. Commentary to articles 367–505³⁷], Warszawa, 2010, p. 239; E. Rudkowska-Ząbczyk, in E. Marszałkowska-Krześ (ed.), *Kodeks postępowania cywilnego. Komentarz do artykułu 65* [The Code of Civil Procedure. Commentary to article 65], Legalis, 2012; M. Manowska, in M. Manowska (ed.), *Kodeks postępowania cywilnego. Komentarz* [The Code of Civil Procedure. Commentary], Warszawa, 2013, p. 145.

⁵⁷ A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz* [Bankruptcy and rehabilitation law. Commentary], Kraków, 2003, p. 395.

⁵⁸ P. Telenga, in A. Jakubecki (ed.), *Kodeks postępowania cywilnego. Komentarz* [The Code of Civil Procedure. Commentary], Warszawa, 2012, p. 100. Compare also an earlier edition of the commentary (2005, p. 117; 2008, p. 104; 2010, p. 94). The author used the expression: "Whoever has no capacity to perform litigation acts, may not perform litigation acts on their own in a valid litigation nor in other civil proceedings".

⁵⁹ M. Wach, *Status utomnych osób prawnych w polskim prawie cywilnym* [Status of organizations entities which are not legal persons to which legal capacity is granted by law in Polish civil law], Warszawa, 2008, p. 35–36; L. Ludwiczak, *Ubezważnowolnienie w polskim systemie prawnym* [Legal incapacitation in Polish legal system], Warszawa, 2012, p. 62; P. Cioch, in J. Studzińska, P. Cioch, *Postępowanie cywilne* [Civil proceedings], Warszawa, 2016, p. 123.

feature,⁶⁰ qualification⁶¹ of the party or any other litigant granted by

⁶⁰ F. Fierich, *Prawo procesowe cywilne. Rzecz o stronach i zastępcach. Część I* [Civil Procedure. On parties and representatives. Part I], Kraków, 1905, p. 19; L. Nadel, "Zdolność procesowa wedle k.p.c. (ciąg dalszy)" [Capacity to perform litigation acts pursuant to CCP (continued)], *Palestra*, 1934, No 10, p. 425; W. Broniewicz, "Zdolność sądowa w postępowaniu cywilnym" [Court capacity in civil proceedings], *Nowe Prawo*, 1966, No 5, p. 572; Z. Generowicz, "Zdolność arbitrażowa i zdolność procesowa w postępowaniu arbitrażowym" [Arbitration capacity and capacity to perform litigation acts in arbitration proceedings], *Palestra*, 1970, No 12, p. 32; M. Szewczyk, "Status procesowy wspólnoty mieszkaniowej" [Litigation status of a housing community], *Radca Prawny*, 1998, No 6, p. 43; A. Jakubecki, F. Zedler, *supra* note 57, p. 395; Ł. Błaszczak, "Handlowa spółka osobowa jako strona procesu cywilnego – analiza wybranych zagadnień procesowych" [Commercial civil partnership as a party in civil litigation – an analysis of selected litigation issues], *Prawo Spółek*, 2005, No 9, p. 43, 44; idem, "Spółka osobowa prawa handlowego jako strona procesu cywilnego. Wybrane zagadnienia na tle procedury cywilnej" [A commercial civil partnership as a party in civil litigation], in J. Frąckowiak (ed.), *Kodeks spółek handlowych po pięciu latach* [The Companies' Code after the first five years], Wrocław, 2006, p. 277; H. Pietrkowski, *Metodyka pracy sędziego w sprawach cywilnych* [Methods of judge's work in civil cases], Warszawa, 2009, p. 100; idem, *Czynności procesowe zawodowego pełnomocnika w sprawach cywilnych* [Litigation acts of a professional attorney ad litem in civil cases], Warszawa, 2013, p. 96; M. Sychowicz, in K. Piasecki (ed.), *supra* note 56, p. 303; L. Ludwiczak, *supra* note 59, p. 57; P. Grzegorzczak, in T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze. Tom I* [The Code of Civil Procedure. Commentary. Fact-finding proceedings. Volume I], Warszawa, 2012, p. 328, 345; P. Feliga, "Brak zdolności sądowej syndyka nieposiadającego licencji – glosa – V CSK 206/11" [Lack of court capacity of a receiver that has no licence – a gloss – V CSK 206/11], *Monitor Prawniczy*, 2013, No 19, p. 1059; R. Flejszar, in A. Góra-Błaszczkowska (ed.), *Kodeks postępowania cywilnego. Tom I. Komentarz do art. 1-729* [The Code of Civil Procedure. Volume I. Commentary to art. 1-729], Warszawa, 2013, p. 254-264; Ł. Błaszczak, "Wadliwość czynności procesowych stron i uczestników. Obecny model i propozycja zmian w przyszłym Kodeksie postępowania cywilnego" [Defectiveness of litigation acts of party and participants. The current model and suggestion for amendments to the future Code of Civil Procedure], in K. Markiewicz, A. Torbus (eds.), *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania Cywilnego w Katowicach-Kocierzu (26-29 września 2013 r.)* [Fact-finding proceedings in the future Code of Civil Procedure. Papers of the All-Poland Congress of Chairs and Departments of Civil Proceedings in Katowice-Kocierz (26-29 September 2013)], Warszawa, 2014, p. 204; Ł. Błaszczak, E. Marszałkowska-Krześ, "Przymioty procesowe stron i uczestników postępowania nieprocesowego niezbędne do dochodzenia ochrony prawnej na drodze sądowej. Wybrane zagadnienia" [Litigation attributes of the parties and participants in non-litigious proceedings necessary to pursue legal protection in court. Selected issues], *Studia Prawno-Ekonomiczne*, 2015, Volume XCV, p. 17, 24-25.

⁶¹ S. Gołąb, *Strona procesowa* [Litigation party], Kraków, 1939, p. 6; idem, "Strona procesowa" [Litigation party], *Czasopismo Prawnicze i Ekonomiczne*, 1939, p. 6; S. Włodyka,

force of law or as a legal competence,⁶² entitlement, or subjective right.⁶³

In the opinion of *Eugeniusz Waškowski*, litigation capacity consists in the right to do litigation acts independently/on one's own.⁶⁴ Similarly, *Wacław Miszewski* considers litigation capacity to be the right to do litigation acts in person or through an attorney *ad litem*/representative.⁶⁵ *Mieczysław Sawczuk* was of similar opinion, claiming that litigation capacity is a subjective right.⁶⁶ On the other hand, according to *Stawomir Dalka*, capacity to perform litigation acts is the entitlement to perform litigation acts.⁶⁷

Strony w procesie cywilnym (art. 55–97 i 194–198 k.p.c.) [Party in a civil litigation (art. 55–97 and 194–198 of the CCP], Katowice, 1966, p. 28, 38; idem, “Zdolność sądowa i procesowa w nowym ustawodawstwie cywilnym” [Court capacity and capacity to perform litigation acts in new civil legislation], *Przegląd Ustawodawstwa Gospodarczego*, 1966, No 5, p. 149; J. Krajewski, *Sytuacja prawna jednostki gospodarki uspołecznionej w procesie cywilnym* [Legal position of a State-owned entity in civil litigation], Toruń, 1969, p. 69; J. Mokry, *Odwrotność czynności procesowych w sądowym postępowaniu cywilnym* [Revocability of litigation acts in court civil proceedings], Warszawa, 1973, p. 59; M. Bosakirska, “Glosa do postanowienia Sądu Najwyższego z 3.10.1972 r., I CZ 55/72” [Gloss to the Supreme Court decision of 3.10.1972, I CZ 55/72], *Nowe Prawo*, 1974, No 11, p. 1568; K. Korzan, *Postępowanie nieprocesowe* [Non-litigious proceedings], Warszawa, 1997, p. 96; K. Markiewicz, *Postępowanie w sprawach depozytowych* [Proceedings in deposit cases], Warszawa, 2007, p. 217 and the subsequent ones; Ł. Błaszczak, “Wadliwość”, *supra* note 60, p. 204–205. Compare also the judgment of Szczecin Appellate Court of 2.4.2009, I ACA 53/09, Legalis.

⁶² Ł. Błaszczak, “O kompetencji (prawnej) stron i metodzie dokonywania czynności procesowych w sądowym postępowaniu cywilnym” [On (legal) competence of the parties and on the method to do litigation acts in court civil proceedings], *Wrocławskie Studia Erazmiańskie*, 2014, No VIII, p. 77 and the subsequent ones.

⁶³ Confer bibliography cited in next four footnotes.

⁶⁴ E. Waškowski, “O projekcie kodeksu procedury cywilnej. Strony i ich zastępcy” [On the code of civil procedure bill. The parties and their representatives], *Palestra*, 1929, No 1, p. 10.

⁶⁵ W. Miszewski, *Proces cywilny w zarysie. Część pierwsza* [An outline of civil litigation. Part one], Warszawa–Łódź, 1946, p. 81.

⁶⁶ M. Sawczuk, “Zdolność procesowa organizacji nie posiadających osobowości prawnej” [Capacity to perform litigation acts of organizations without legal personality], *Annales Universitatis Mariae Curie-Skłodowska Sectio G*, 1960, Volumin IV, p. 149; idem, *Zdolność*, *supra* note 2, p. 102.

⁶⁷ S. Dalka, *Sądowe*, *supra* note 54, p. 148 and idem, *Podstawy*, *supra* note 54, p. 68. W. Bendetson also claims that capacity to perform litigation acts is an entitlement (idem, “Nowe unormowanie zastępstwa sądowego państwowych jednostek organizacyjnych” [New legal provisions related to court representation of State-owned organization enti-

In turn, the starting point for an analysis of the issue raised on the ground of the CCP currently in force will be the text of the definition of litigation capacity adopted by the legislator in article 65 § 1 *in principio* of the CCP. It needs underlining that this provision speaks about the “ability”, and not about “competence”, “entitlement” or “right” of the parties or other participants in the proceedings to undertake litigation acts.

A similar solution has been functioning also in § 51 subpara. 1 of the German CCP (*die Fähigkeit*), § 1 of the Austrian CCP (*fähig*), § 2-2 subpara. 1 of the Norwegian CCP (*evnen*), article 75 of the Italian CCP (*capacita*), article 47 subpara. 1 of the Ukrainian CCP (*здатність*), and § 20 subpara. 1 of the Czech CCP (*způsobilost*). In those provisions, the legislator used the wording “the ability”, “able” by which it has prejudged the principle that litigation capacity has not been considered as “competence”, “entitlement” or “right”. Thus, not only in Polish civil proceedings for the needs of this paper, the understanding of the notion of “ability/capacity” in the context of “litigation capacity” becomes of vital importance.

In the Polish language, the notion of “capacity/ability” means “potential fitness”, “ability to do something” or “capability/worthiness for something”.⁶⁸ The notion of “competence” is understood in Polish as “formal scope of entitlement to some action”, “scope of powers of an agency, authority” or else “scope of matters in the field of action of a given authority or its representative”.⁶⁹ The notion of “entitlement” means in Polish “the right to something granted to somebody”, “powers dele-

ties], *Przegląd Ustawodawstwa Gospodarczego*, 1958, No 8, p. 290). Furthermore, in the Swiss civil proceedings theory, a concept was expressed that capacity to perform litigation acts is an entitlement (*Befugnis*) to act in a legally efficient way in a litigation on one’s own or through a representative. Confer A. Staehelin, D. Staehelin, P. Grolimund, *supra* note 18, p. 182.

⁶⁸ M. Szymczak (ed.), *Słownik języka polskiego. Tom 3. R-Ż* [Dictionary of Polish language. Volume 3. R-Ż], Warszawa, 1981, p. 993; W. Doroszewski (ed.), *Słownik języka polskiego. Tom X. Wyg-Ż* [Dictionary of Polish language. Volume X. Wyg-Ż], Warszawa, 1997, p. 978; S. Dubisz (ed.), *Uniwersalny słownik języka polskiego. Tom V. W-Ż* [Universal dictionary of Polish language. Volume 5. W-Ż], Warszawa, 2003, p. 626; H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny. Tom 49* [Practical dictionary of Polish language. Volume 49], Poznań, 2004, p. 158.

⁶⁹ H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny. Tom 17* [Practical dictionary of Polish language. Volume 17], Poznań, 1998, p. 57; S. Dubisz (ed.), *Uniwersalny słownik języka polskiego. Tom 2. H-N* [Universal dictionary of Polish language.

gated to somebody”,⁷⁰ and the notion of “right” – “the entitlement vested in somebody in accordance with the provisions in force”, “what somebody may claim”, “just claim”, “privilege”.⁷¹ The notions of “competence”, “entitlement” and “right” are considered synonymous.⁷²

Thus, “litigation capacity” is the ability to undertake legal acts provided for by law which shall be defined as the legal qualification of a litigation party or another participant to undertake proceedings acts in civil proceedings. This capacity is not a legal competence, entitlement, or a subjective right.⁷³ Litigation capacity is subject to uniform evaluation in any, and not only in given, civil proceedings, and therefore, it does not depend upon the will of the parties or other participants in the proceedings, but upon procedural law which indicates who has such a qualification.⁷⁴ Therefore, nobody may grant themselves litigation capacity, or transfer it to somebody else or renounce it for the sake of somebody else. Furthermore, litigation capacity is vested in individual persons *in abstracto*. This means that both the provision of article 65 § 1 of Polish CCP, and the provisions of § 51 subpara. 1 of the German CCP, § 1 of the Austrian CCP, article 67 subpara. 1 of the Swiss CCP, § 2-2 subpara. 1 of the Norwegian CCP, § 49 subpara. 1 of the Hungarian CCP, article 75 of the Italian CCP, article 47 subpara. 1 of the Ukrainian CCP, and § 20 subpara. 1 of the Czech CCP must be evaluated in categories of a general and abstract norm, and not as an individual and concrete one,

Volume 2. H-N], Warszawa, 2003, p. 626; E. Polański (ed.), *Wielki słownik języka polskiego* [Great dictionary of Polish language], Kraków, 2008, p. 349.

⁷⁰ W. Doroszewski (ed.), *Słownik języka polskiego. Tom IX. T-Wyif* [Dictionary of Polish language. Volume IX. T-Wyif], Warszawa, 1997, p. 978.

⁷¹ W. Doroszewski (ed.), *Słownik języka polskiego. Tom VI. P-Prę* [Dictionary of Polish language. Volume VI. P-Prę], Warszawa, 1996, p. 1434; S. Dubisz (ed.), *Uniwersalny słownik języka polskiego. Tom 3. O-Q* [Universal dictionary of Polish language. Volume 3. O-Q], Warszawa, 2003, p. 857.

⁷² W. Cienkowski, *Praktyczny słownik wyrazów bliskoznacznych* [Practical dictionary of synonyms], Warszawa, 1993, p. 80, 195, 281.

⁷³ S. Gołąb, *Strona procesowa*, *supra* note 61, p. 6; idem, “Strona procesowa”, *supra* note 61, p. 6; Z. Generowicz, *supra* note 60, p. 32; M. Pazdan, in M. Safjan (ed.), *System prawa prywatnego. Prawo cywilne – część ogólna. Tom I* [Private law system. Civil law – general part. Volume I], Warszawa, 2012, p. 1035.

⁷⁴ Compare: S. Gołąb, *Strona procesowa*, *supra* note 61, p. 6; idem, “Strona procesowa”, *supra* note 61, p. 6.

or else a competence norm,⁷⁵ by force of which a subject is granted the competence (authorization) to do a conventional act of a given type with such an effect that by doing it, duties of other subjects⁷⁶ shall come into force or become updated.

The Polish legislator has placed the provisions related to litigation capacity in the first part, book one, title four of the CCP referred to as “the Parties”, however, it needs to be remembered that this capacity is to be vested, not only in the parties, but also in other participants in the proceedings who undertake litigation acts in person or on behalf of somebody else.⁷⁷ Furthermore litigation capacity refers to anyone who undertakes litigation acts in civil proceedings,⁷⁸ considered the exceptions in particular provisions.⁷⁹ Thus, litigation capacity shall be linked

⁷⁵ Contrary Ł. Błaszczak, who claims that article 65 § 1 CCP may be considered a competence norm which creates legal (litigation) competence to do certain conventional acts set forth (legally important from the point of view of civil litigation). Idem, “O kompetencji (prawnej)”, *supra* note 62, p. 95–96.

⁷⁶ Such a definition of competence norm was presented in the legal theory by Z. Ziemiński (idem, in S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa* [A short outline of the theory of law], Poznań, 2001, p. 35) and S. Wronkowska (idem, *Podstawowe pojęcia prawa i prawoznawstwa* [Fundamental concepts of law and jurisprudence], Poznań 2005, p. 19–20). Without finally deciding whether the notion of competence norm should be linked exclusively with the activity of State authorities, or else also with the authorization of natural persons to undertake given decisions or acts, M. Morawski has claimed that some authors consider as examples of competence norm provisions those which refer to drawing up a last will, to initiate a statement of claim, or to appeal against a court decision. Idem, *Wstęp do prawoznawstwa* [Introduction to jurisprudence], Toruń, 2012, p. 57.

⁷⁷ It is worthy of attention that some authors refer the capacity to perform litigation acts only to the parties (S. Gołąb, *Strona procesowa*, *supra* note 61, p. 5; idem, “Strona procesowa”, *supra* note 61, p. 5; W. Bendetson, *supra* note 67, p. 290; K. Korzan, “Zastępstwo”, *supra* note 53, p. 507; idem, *Kurator*, *supra* note 53, p. 30).

⁷⁸ W. Siedlecki, in W. Siedlecki, Z. Świeboda, *supra* note 55, p. 118; Ł. Błaszczak, in E. Marszałkowska-Krześ (ed.), *Postępowanie cywilne* [Civil proceedings], Warszawa, 2011, p. 113. Compare also E. Waśkowski, *Podręcznik procesu cywilnego* [Civil litigation manual], Wilno, 1932, p. 152; M. Sawczuk, *Zdolność procesowa w postępowaniu cywilnym*, *supra* note 2, p. 40; W. Siedlecki, *Zarys postępowania cywilnego* [Civil proceedings outline], Warszawa, 1966, p. 113; Z. Świeboda, *Czynności procesowe w sądowym postępowaniu cywilnym* [Litigation acts in court civil proceedings], Warszawa, 1990, p. 62.

⁷⁹ Special regulations provide for situations when the parties or participants have no capacity to perform litigation acts and at the same time undertake some litigation acts (i.e. article 70 § 2 of the CCP).

inter alia also with the outside interveners,⁸⁰ legal representatives, and attorneys *ad litem* of the parties and participants.⁸¹

The above principle has been functioning in the European systems of civil procedure described in this paper. Those who may undertake litigation acts, in particular attorneys *ad litem*,⁸² and not exclusively the parties and participants in the proceedings have litigation capacity.

It must also be assumed *lege non distinguente /in the case in which the law fails to distinguish/* that basically litigation capacity refers to the right to undertake any litigation acts provided for in civil proceedings. In particular must be listed: initiation of claims, initiation of non-litigious proceedings, appealing against judicial decisions, making statements of procedural character, and granting powers of attorney *ad litem* in civil proceedings.⁸³ However, the CCP provisions do not grant to a party or a participant litigation capacity, having excluded certain litigation acts,⁸⁴

⁸⁰ F. Fierich, *Interwencja uboczna w świetle teorii o stosunku procesowym* [Secondary intervention in the light of the theory on litigation relationship], Kraków, 1903, p. 11; M. Kornhauser, "Czy interwenient uboczny powinien mieć zdolność procesową?" [Shall a secondary intervener have capacity to perform litigation acts?], *Polski Proces Cywilny*, 1934, No 21-22, p. 689-690; S. Włodyka, *supra* note 61, p. 28, 38; Z. Świeboda, *supra* note 78, p. 88, 101; J. Bodio, "Zdolność sądowa a zdolność procesowa w postępowaniu cywilnym" [Court capacity and capacity to perform litigation acts in civil proceedings], in P. Ruczkowski (ed.), *Prawo wobec wyzwań współczesności* [The law against contemporary challenges], Kielce, 2011, p. 50; idem, "Zdolność sądowa a zdolność procesowa w postępowaniu cywilnym" [Court capacity and capacity to perform litigation acts in civil proceedings], *Rozprawy z Zakresu Nauk Prawnych*, 2012, No 3, p. 8.

⁸¹ Z. Świeboda, *supra* note 78, p. 63; K. Korzan, *Postępowanie*, *supra* note 61, p. 96; W. Siedlecki, in W. Siedlecki, Z. Świeboda, *supra* note 55, p. 118; K. Korzan, "Podmioty postępowania nieprocesowego (cz. II)" [Subjects of non-litigious proceedings (part II)], *Rejent*, 2005, No 3, p. 26; R. Flejszar, *Przedsiębiorca w postępowaniu cywilnym rozpoznawczym* [Entrepreneur in fact-finding civil proceedings], Warszawa, 2006, p. 97; J. Bodio, "Zdolność sądowa", Kielce, *supra* note 80, p. 50; idem, "Zdolność sądowa", *Rozprawy z Zakresu Nauk Prawnych*, *supra* note 80, p. 8; P. Grzegorzczak, in T. Ereciński (ed.), *supra* note 60, p. 344-345, 352; R. Flejszar, in A. Góra-Błaszczkowska (ed.), *supra* note 60, p. 264, 270.

⁸² Compare: W.H. Rechberger, D-A. Simotta, *supra* note 14, p. 159. Compare also primarily § 49 subpara. 1 of the Hungarian CCP.

⁸³ M. Lisiewski, in Z. Resich, W. Siedlecki (eds.), *supra* note 52, p. 156; J. Bodio, "Zdolność sądowa", Kielce, *supra* note 80, p. 50; idem, "Zdolność sądowa", *Rozprawy z Zakresu Nauk Prawnych*, *supra* note 80, p. 8 along with legal writings cited in both the papers. Contrary M. Sawczuk, *Zdolność procesowa w postępowaniu cywilnym*, *supra* note 2, p. 38.

⁸⁴ M. Lisiewski, in Z. Resich, W. Siedlecki (eds.), *supra* note 52, p. 156; M. Sychowicz, in K. Piasecki (ed.), *supra* note 56, p. 305.

although the legislator provided for some exceptions from this principle, as for instance in article 56 § 2 of the CCP. It is assumed only conventionally that the parties and other participants in the proceedings, who/which have litigation capacity in certain types of civil cases, have the so-called limited litigation capacity. However, in these cases, they may undertake any litigation acts.

Of the definitions of the notion of litigation capacity presented in this paper and articulated by legislators of individual European civil proceedings systems, apart from the Polish CCP, only the Hungarian CCP invokes directly litigation acts, stipulating in § 49 subpara. 1 that litigation capacity is the ability to undertake litigation acts in person or through the intermediary of an attorney *ad litem*/representative. On the other hand, when analysing the doctrine, its representatives in Germany,⁸⁵ Austria,⁸⁶ Switzerland,⁸⁷ Norway,⁸⁸ Hungary,⁸⁹ and the Czech Republic⁹⁰ join litigation capacity with undertaking litigation acts. Doctrinal definitions of the notion of litigation capacity presented in the legal papers of those states, similarly to Poland, invoke thus the notion of litigation acts.

In consequence, it will be claimed that litigation capacity is vested in the parties and other participants in civil proceedings so as to put into life their rights and to assure litigation defence in a civil procedure by undertaking litigation acts therein.

In an attempt to define the notion of litigation capacity, legal theorists use alternately the words “in person” and “independently”. However, it is justified to consider the notion “independently” as meaning in the Polish language “occurring without anybody else’s assistance, nor influence, made/done in person by somebody”.⁹¹ At the same time, the

⁸⁵ O. Jauernig, *supra* note 7, p. 65; L. Rosenberg, K. Schwab, P. Gottwald, *supra* note 5, p. 262; F. Baur, W. Grunsky, *supra* note 8, p. 71; P. Arens, W. Lüke, *supra* note 9, p. 90.

⁸⁶ W.H. Rechberger, D-A. Simotta, *supra* note 14, p. 159.

⁸⁷ T. Sutter-Somm, *supra* note 17, p. 52.

⁸⁸ T. Schei, A. Bårdsen, D. Nordén, C. Reusch, T. Øie, *supra* note 21, p. 81; A. Robberstad, *supra* note 21, p. 94; J.E. Skøghoy, *supra* note 21, p. 262, 289.

⁸⁹ S. Udvary, in A. Osztovits (ed.), *supra* note 24, p. 101.

⁹⁰ A. Winterová, *supra* note 33, p. 133; J. Stavinohová, P. Hlavsa, *supra* note 33, p. 225.

⁹¹ E. Sobol, *Słownik języka polskiego* [Dictionary of Polish language], Warszawa, 2005, p. 900; idem (ed.), *Wielki słownik języka polskiego* [Great dictionary of Polish language], Warszawa, 2006, p. 897.

notion “in person” is considered synonymous with “independently”.⁹² In such a situation, there is no need to use in the definition of the notion of litigation capacity the words “in person” or “independently”, the more so that the legislator does not introduce this requirement in the definition of this notion in article 65 § 1 of the CCP.⁹³ Thus, the notion of litigation capacity covers both the ability to undertake litigation acts independently (in person) and through the intermediary of an attorney *ad litem*/representative.

Although the definition of litigation capacity phrased by the legislator in article 65 § 1 *in principio* of the CCP does not use the words “independently” or “in person”, there are however, European civil proceedings systems whose legal definitions use these terms. The word “independently” has been used by the legislator in § 1 of the Austrian CCP (*selbständig*), § 2-2 subpara. 1 of the Norwegian CCP (*selv*), and article 20 subpara. 1 of the Czech CCP (*samostatně*), basically considering litigation capacity to be the capacity to act independently before a court. In turn, the words “in person” have been expressed in § 49 subpara. 1 of the Hungarian CCP, according to which litigation capacity is the capacity to undertake litigation acts in person (*személyesen*) or through the intermediary of an attorney *ad litem*/representative. Article 47 subpara. 1 of the Ukrainian CCP invokes also the notion “in person”, claiming that litigation capacity is the capacity to exercise civil litigation rights and to fulfil one’s duties before court in person (*особу*). When defining the notion of litigation capacity, both Hungarian and Ukrainian legislators use the phrase “in person”, which within Polish civil proceedings is to be referred to as the ability to act independently (postulatory capacity).

⁹² W. Cienkowski, *supra* note 72, p. 159 and A. Kubisa-Ślipko, *Słownik wyrazów bliskoznacznych* [Dictionary of synonyms], Wałbrzych, 2000, p. 101. Another synonym of “personally” is also the notion of “on one’s own”. So T. Mika, D. Pluskota, K. Świetlik, *Słownik synonimów. Nie tylko dla ucznia* [Dictionary of synonyms. Not only for school pupils], Poznań, 1997, p. 121; Z. Kurzowa (ed.), *Słownik synonimów polskich* [Dictionary of Polish synonyms], Warszawa, 2003, p. 246. In turn, the term of “on one’s own” is the synonym of the term of “independently”. T. Mika, D. Pluskota, K. Świetlik, *supra* note 92, p. 171; Z. Kurzowa (ed.), *supra* note 92, p. 356. Compare also A. Markowski (ed.), *Wielki słownik* [Great dictionary], p. 727, where the author has claimed that both expressions “I was able to watch it on my own”, and “I was able to watch it personally” are correct whereas “I was able to watch it personally on my own” is not.

⁹³ K. Lubiński, *supra* note 51.

Some legal theorists link the definition of litigation capacity with the attribute of efficient undertaking of litigation acts.⁹⁴ In my opinion, the concept that litigation capacity is not a premise of litigation acts, efficiency shall be shared, because even litigation acts afflicted by a defect in consequence of lack of litigation capacity of a party or another participant in the proceedings do exert their legal effect.⁹⁵ The resolution of the court authority has a decisive nature, and litigation acts exert their legal effects until they are deprived of their efficiency by another litigation act. Thus, a failure to render the litigation act inefficient has such an effect that the litigation act afflicted by a defect exerts a legal effect in the same manner as a correct one.

Although similarly to the Polish legislator, those in Germany, Austria, and Switzerland do not link the definition related to the notion of litigation capacity with an efficient undertaking of litigation acts, however, in German, Austrian, and Swiss legal theory, the position which refers to an efficient undertaking of litigation acts can be encountered. Litigation capacity in German⁹⁶ and Austrian⁹⁷ doctrine has been expressed as the capacity to undertake and be addressed efficiently (*rechtswirksam*) litigation acts, and in the Swiss doctrine as the capacity to undertake legally efficient (*rechtswirksam*) litigation acts⁹⁸ and the entitlement to legally efficient (*rechtswirksam*) acting in litigation on one's own or through the intermediary of an attorney *ad litem*/representa-

⁹⁴ M. Szewczyk, *supra* note 60, p. 46; K. Flaga-Gieruszyńska, in A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure. Comments], Warszawa, 2010, p. 807; J. Bodio, "Zdolność do czynności prawnych a zdolność procesowa - na wybranych przykładach w sprawach z zakresu prawa osobowego i rodzinnego" [Capacity to perform legal acts and capacity to perform litigation acts - selected cases of personal and family laws], *Studia Prawnicze*, 2011, No 2, p. 137. Compare: J. Jodłowski, in J. Jodłowski, Z. Resich, *supra* note 53, p. 220; H. Pietrkowski, *Metodyka*, *supra* note 60, p. 100; idem, *Czynności*, *supra* note 60, p. 97; L. Ludwiczak, *supra* note 59, p. 57; P. Grzegorzczak, in T. Ereciński (ed.), *supra* note 60, p. 344; P. Cioch, in J. Studzińska, P. Cioch, *supra* note 59, p. 127.

⁹⁵ So also W. Broniewicz, *Legitymacja procesowa* [Power to sue and to be sued], Łódź, 1963, p. 14.

⁹⁶ P. Arens, W. Lüke, *supra* note 9, p. 90.

⁹⁷ W.H. Rechberger, D-A. Simotta, *supra* note 14, p. 159.

⁹⁸ T. Sutter-Somm, *supra* note 17, p. 52.

tive.⁹⁹ In the cases presented, the theoretical definitions differ from the code's description related to the notion of litigation capacity.

In turn, litigation capacity in Polish civil proceedings is to be considered as encompassing the undertaking of litigation acts both before court and in proceedings before the court registrar (*referendarz sądowy; rechtspfleger*).¹⁰⁰ Although court registrars are not judges as understood by the provisions of the Constitution of the Republic of Poland and of the CCP, they have court competencies in the scope of acts entrusted to them in civil proceedings, unless the law stipulates otherwise.¹⁰¹

⁹⁹ A. Staehelin, D. Staehelin, P. Grolimund, *supra* note 18, p. 182.

¹⁰⁰ Capacity to perform litigation acts includes also undertaking litigation acts in the proceedings before an enforcement officer. (compare: A. Józefowicz, "Czynności procesowe organu egzekucyjnego przed wszczęciem egzekucji" [Litigation acts of the enforcement body before enforcement proceedings are initiated], *Nowe Prawo*, 1963, No 10, p. 1100 and the subsequent ones; W. Broniewicz, "Postępowanie egzekucyjne i egzekucja w sprawach cywilnych" [Enforcement proceedings and enforcement in civil cases], *Państwo i Prawo*, 1988, No 8, p. 41 and the subsequent ones) and before court of conciliation/arbitration (compare: Z. Generowicz, *supra* note 60, p. 31–33).

¹⁰¹ More on the legal status and competences of a court registrar (*referendarz sądowy; rechtspfleger*) in: A. Maziarz-Charuza, *Skarga na orzeczenie referendarza sądowego w postępowaniu wieczystoksięgowym* [Complaint against court registrar's decision in land and mortgage proceedings], Warszawa, 2006, p. 52 and the subsequent ones; M. Rojewski, in W. Maciejko, M. Rojewski, P. Zaborniak, *Zarys metodyki pracy referendarza sądowego* [Outline of court registrar's work methods], Warszawa, 2009, p. 18 and the subsequent ones; P. Rawczyński, "Status publicznoprawny referendarza sądowego oraz jego funkcje w sądowym postępowaniu cywilnym" [Public law status of a court registrar and their functions in court civil proceedings], *Przegląd Prawa Egzekucyjnego*, 2009, No 10, p. 47 and the subsequent ones; P. Rawczyński, "Referendarz sądowy jako organ uprawniony do wystąpienia z pytaniem prejudycjalnym w trybie art. 276 Traktatu o funkcjonowaniu Unii Europejskiej" [Court registrar as a body authorized to ask a pre-judicial question pursuant to art. 276 of the Treaty on the Functioning of the European Union], *Przegląd Prawa Egzekucyjnego*, 2011, No 1, p. 79 and the subsequent ones; P. Rawczyński, "Pozycja ustrojowa referendarza sądowego w Polsce" [Systematic powers of a court registrar in Poland], *Przegląd Prawa Egzekucyjnego*, 2011, No 3, p. 85 and the subsequent ones; P. Rawczyński, "Referendarz sądowy w postępowaniu egzekucyjnym w sprawach cywilnych" [Court registrar in civil law enforcement proceedings], in K. Lubiński (ed.), *W poszukiwaniu prawa dobrego i sprawiedliwego. Księga Pamiątkowa ku czci Jana Tredera* [Searching for the good and just law. Memory book dedicated to Jan Treder], Warszawa, 2013, p. 216 and the subsequent ones; A.M. Arkuszewska, *Referendarz sądowy w postępowaniu cywilnym* [Court registrar in civil proceedings], Warszawa, 2011, p. 7–98 and 153–216; M. Rojewski, in M. Rojewski, R. Pawlik, J. Widło, I. Skonieczna-Masłowska, *Metodyka pracy referendarza sądowego w wydziałach cywilnych, gospodarczych, ksiąg wieczystych*

There is no doubt that in the German, Austrian, Swiss, Norwegian, Hungarian, Italian, Ukrainian, and Czech CCPs, the provisions on litigation capacity are applied not only in the procedure before court, but also before other process authorities, where the provisions of civil procedural law are applied.

With the above comments taken into account, it will be shortly emphasized that litigation capacity is a legal qualification of the parties or other participants in the proceedings to undertake litigation acts in civil proceedings.

The CCP provisions on litigation capacity refer directly to full and limited capacity of natural persons to perform civil acts. Natural persons with full capacity to conduct proceedings, legal persons, and organization entities referred to in article 64 § 1¹ of the CCP have full litigation capacity (litigation capacity to act) pursuant to article 65 § 1 of the CCP. Furthermore, pursuant to article 65 § 2 of the CCP, a natural person whose capacity to perform legal acts has been limited, has capacity to conduct proceedings in cases arising from the legal acts which they may do in person/independently. There is a principle (although with excep-

stych, rejestru zastawów i prowadzącym e-sąd [Work methods of court registrar in civil, commercial, land, and mortgage registers, pledges registers divisions and running e-sąd (e-court)], Warszawa, 2012, p. 20 and the subsequent ones; K. Lubiński, P. Rawczyński, "Geneza i rozwój instytucji referendarza sądowego w Polsce" [Genesis and development of court registrar's institution in Poland], in A. Gaca (ed.), *Pro memoria. Księga dla uczczenia pamięci Profesor Krystyny Kamińskiej* [In memory. Book to honour the memory of Professor Krystyna Kamińska], Toruń, 2013, p. 299 and the subsequent ones; K. Lubiński, P. Rawczyński, "Referendarz sądowy w polskim postępowaniu cywilnym na tle prawnoporównawczym" [Court registrar in Polish civil proceedings against the background of comparative law], in T. Ereciński, J. Gudowski, M. Pazdan, M. Tomalak (eds.), *Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu* [The law derives its name from justice. A jubilee book dedicated to Professor Tadeusz Wiśniewski], Warszawa, 2017, p. 284 and the subsequent ones; K. Lubiński, P. Rawczyński, "Status prawny i zadania referendarza sądowego w postępowaniu cywilnym w orzecznictwie Trybunału Konstytucyjnego" [Legal status and tasks of a court registrar in the jurisdiction of the Constitutional Tribunal], in A. Barańska, S. Cieślak (eds.), *Ars in vita. Ars in iure. Księga Jubileuszowa dedykowana Profesorowi Januszowi Jankowskiemu* [Art in life. Art in law. A jubilee book dedicated to Professor Janusz Jankowski], Warszawa, 2018, p. 93 and the subsequent ones; M. Sztorc, *Status prawny referendarza sądowego w Rzeczypospolitej Polskiej* [Legal status of a court registrar in the Republic of Poland], Warszawa, 2016, p. 103 and the subsequent ones.

tions) that natural persons' loss or limitation of litigation capacity exerts an impact on their capacity to conduct proceedings.

Thus, on the basis of the Polish CCP, litigation capacity makes reference to the capacity to legal acts.¹⁰² Such a solution has also been functioning in Hungarian law where article 49 subpara. 1 of the Hungarian CCP refers to full and limited capacity to perform legal acts (*teljes cselekvőképesség; korlátozott cselekvőképesség*). In turn, § 1 of the Austrian CCP stipulates that whoever may incur independently valid obligations, may act independently before court as a litigant (litigation capacity).¹⁰³ However, it is claimed in the legal theory that litigation capacity is linked with the ability to do acts in law (*Handlungsfähigkeit*) and with the legal capacity (*Geschäftsfähigkeit*).¹⁰⁴ In German law, the scope of litigation capacity is dealt with in § 52 of the German CCP, which refers to the capacity to incur contractual obligations,¹⁰⁵ and by the same, to the provisions on the capacity to perform legal acts (*Geschäftsfähigkeit*).¹⁰⁶ Thus basically, a person capable of legal acts (*geschäftsfähig*) has litiga-

¹⁰² However, it needs emphasizing that this reference relates to the capacity of natural persons to do legal acts. Confer: J. Krajewski, K. Piasecki, *Kodeks postępowania cywilnego. Tekst – orzecznictwo – piśmiennictwo* [Code of Civil Procedure. Text – jurisdiction – theoretical papers], Warszawa, 1968, p. 74; K. Korzan, *Postępowanie*, *supra* note 61, p. 97; idem, “Podmioty”, *supra* note 81, p. 28; Ł. Blaszcak, in E. Marszałkowska-Krześ (ed.), *Postępowanie*, *supra* note 78, p. 113. Compare also J. Krajewski, “Zdolność procesowa małoletniej matki w procesie o ustalenie ojcostwa” [Capacity to perform litigation acts of a minor mother in the proceedings to establish paternity], *Nowe Prawo*, 1957, No 12, p. 122; K. Lubiński, *Postępowanie o ubezwłasnowolnienie* [Legal incapacitation proceedings], Warszawa, 1979, p. 47; K. Piasecki, *Postępowanie sporne rozpoznawcze w sprawach cywilnych* [Litigation fact-finding proceedings in civil cases], Warszawa, 2010, p. 184; L. Ludwiczak, *supra* note 59, p. 57; orzeczenie Sądu Najwyższego z 17.10.1957 r. [Supreme Court judgement of 17.10.1957], 3 CR 450/57, *Państwo i Prawo*, 1959, No 1, p. 110.

¹⁰³ *Eine Person ist insoweit fähig, selbständig vor Gericht als Partei zu handeln (Processfähigkeit), als sie selbständig gültige Verpflichtungen eingehen kann.*

¹⁰⁴ W.H. Rechberger, D-A. Simotta, *supra* note 14, p. 159–161.

¹⁰⁵ *Eine Person ist insoweit prozessfähig, als sie sich durch Verträge verpflichten kann.*

¹⁰⁶ So L. Rosenberg, K. Schwab, *supra* note 5, p. 206; P. Arens, W. Lüke, *supra* note 9, p. 90; O. Jauerning, *supra* note 7, p. 65; L. Rosenberg, K. Schwab, P. Gottwald, *supra* note 5, p. 262. In the German theory, there are both the term of *Geschäftsfähigkeit*, and *Handlungsfähigkeit*. This differentiation (along with the definitions) was presented in Polish theory by M. Pazdan, *Zdolność do czynności prawnych osób fizycznych w polskim prawie prywatnym międzynarodowym* [Capacity to perform legal acts of natural persons in Polish private international law], Kraków, 1967, p. 106–107; idem, in M. Safjan (ed.), *supra* note 73, p. 1087.

tion capacity and a person incapable of litigation is therefore incapable of legal acts (*geschäftsunfähig*).¹⁰⁷ Both in Austrian and German civil procedure theory, litigation capacity refers to substantive law and is described as the notions of “litigation capacity to act” (*prozessuale Handlungsfähigkeit*)¹⁰⁸ and “litigation capacity to perform legal acts” (*prozessuale Geschäftsfähigkeit*).¹⁰⁹ A similar solution was adopted in Norwegian civil procedure theory in which the notion of litigation capacity was set forth as “litigation capacity to act” (*prosessuell handleevne*)¹¹⁰ and it was indicated that in many aspects, it corresponds to the notion of “capacity to perform legal acts” (*rettslig handleevne*) in substantive civil law.¹¹¹ In turn, within litigation capacity, the Swiss CCP makes a direct reference to the capacity to act (*handlungsfähig*), which is a statutory wording. Article 67 subpara. 1 of the Swiss CCP stipulates unanimously that whoever is capable of acting,¹¹² has litigation capacity. At the same time, it is assumed that litigation capacity is the litigation equivalent (*Abbild, Ebenbild*) of the substantive law capacity to act.¹¹³ The solution adopted in Czech law is worthy of attention, too. Pursuant to § 20 subpara. 1 of the Czech CCP, whoever has the capacity to acquire rights and incur liabilities by their own acting, has litigation capacity in the same scope.¹¹⁴ Although this provision does not use *expressis verbis* the notion of capacity to perform legal acts, the legal theory refers in this is-

¹⁰⁷ Ibid.

¹⁰⁸ W.H. Rechberger, D-A. Simotta, *supra* note 14, p. 159; G. Kodek, in G. Kodek, P. Mayr, *Zivilprozessrecht*, Wien, 2013, p. 149.

¹⁰⁹ L. Rosenberg, K. Schwab, *supra* note 5, p. 206; F. Baur, W. Grunsky, *supra* note 8, p. 71; P. Hartmann, in A. Baumbach, W. Lauterbach, J. Albers, P. Hartmann, *Zivilprozessordnung*, München, 2003, p. 182, 185; L. Rosenberg, K. Schwab, P. Gottwald, *supra* note 5, p. 262; J. Adolphsen, *Zivilprozessrecht*, Baden-Baden, 2006, p. 85.

¹¹⁰ J. Hov, *supra* note 21, p. 78; A. Robberstad, *supra* note 21, p. 94.

¹¹¹ J. Hov, *supra* note 21, p. 78. Compare also J.E. Skøghoy, *supra* note 21, p. 262, who claims straightforwardly that the differentiation between court capacity (*partsevne*), and capacity to perform litigation acts (*prosessuell handleevne*) can be compared to the differentiation between legal capacity (*rettsevne*), and capacity to do legal acts (*rettslig handleevne*) in personal law.

¹¹² *Prozessfähig ist, wer handlungsfähig ist.*

¹¹³ T. Sutter-Somm, *supra* note 17, p. 52; A. Staehelin, D. Staehelin, P. Grolimund, *supra* note 18, p. 182.

¹¹⁴ *Každý může před soudem jako účastník samostatně jednat (procesní způsobilost) v Volume rozsahu, v jakém má způsobilost vlastními úkony nabývat práv a brát na sebe povinnosti.*

sue to the substantive law, i.e. *způsobilost k právním úkonům*.¹¹⁵ In Czech civil law, to describe the capacity to acquire rights and incur liabilities by one's own acting, the notion "*způsobilost k právním úkonům*" has been used, equivalent to the Polish notion "capacity to perform legal acts".¹¹⁶

Contrary to the solutions invoked, in consequence of the circumstance that in the scope of litigation capacity, the provisions of the French CCP do not refer *expressis verbis* to the provisions of substantive law, legal theorists have drawn attention to this issue. In such a case, they do not distinguish court capacity from litigation capacity (capacity to conduct proceedings). Within *la capacité d'ester en justice* (the capacity to sue in court) they refer to the provisions of substantive law related to legal capacity (*capacité de jouissance*) and capacity to do acts in law/capacity to perform legal acts (*capacité d'exercice*).¹¹⁷ Basically, these theorists have claimed that in the field of the right to act before court (*droit d'agir*), legal capacity, and capacity to do acts in law (capacity to perform legal acts) can be distinguished¹¹⁹ and that the lack of litigation capacity makes up a consequence of the lack of substantive capacity.¹²⁰

CONCLUSIONS

On the basis of comparative law findings and the provisions adopted by the legislator in Polish law, four essential statutory solutions should

¹¹⁵ J. Stavinohová, P. Hlavsa, *supra* note 33, p. 225; A. Winterová, *supra* note 33, p. 133, 135; R. Zahradníková, in R. Zahradníková (ed.), *supra* note 34, p. 92.

¹¹⁶ So M. Pazdan, *Zdolność*, *supra* note 106, p. 107; *idem*, in M. Safjan (ed.), *supra* note 73, p. 1088.

¹¹⁷ In French-Polish dictionaries of law *capacité de jouissance* is defined as legal capacity and *capacité d'exercice* as capacity to do legal acts (confer: J. Pieńkos, *supra* note 36, p. 251; M.T. Bem, M. Gebler, *supra* note 36, p. 23; A. Machowska, *supra* note 36, p. 133).

¹¹⁸ Confer for example P. Cuche, J. Vincent, *supra* note 38, p. 342; M. Bandrac, in S. Guinchard (ed.), *supra* note 38, p. 23 and the subsequent ones.

¹¹⁹ M. Bandrac, in S. Guinchard (ed.), *supra* note 38, p. 23.

¹²⁰ G. Cornu, J. Foyer, *supra* note 38, p. 381. The authors cite legal capacity which is the right to take advantage of legal protection (to be a party to a court proceedings), and capacity to do legal acts which is the capacity to pursue before court one's rights and interest (to appear as an active party in court proceedings) and full capacity to do legal acts which is the capacity to pursue on one's own before court one's rights and interest. *Ibid.*, p. 381.

be distinguished. The first of them consists in the introduction into the Code of Civil Procedure of the notion of litigation capacity (along with a definition thereof) with the simultaneous failure to deal with court capacity (Austria, Italy¹²¹). The second solution amounts to the regulation in the Code of Civil Procedure of litigation capacity by defining it and directly referring to substantive law provisions of capacity to act (Switzerland), capacity to perform legal acts (Poland, Czech Republic, Hungary), capacity to incur valid liabilities (Austria), or capacity to undertake obligations by contracts (Germany). We deal with the third solution in the case of the Code of Civil Procedure which sets forth litigation capacity by defining it and indicating the age criterion and also by invoking limited capacity to civil law acts and to conclude marriage (registration of marriage) by natural persons who have not become of age (Ukraine). The fourth solution consists in the failure to place in the Code of Civil Procedure, some exceptions excluded, the provisions which relate to litigation capacity and court capacity (France).¹²²

In turn, in the legal theory of selected European states i.e. Germany, Austria, Switzerland, and the Czech Republic, litigation capacity is the capacity to conduct proceedings independently or with the help of a representative retained, or else the capacity to undertake efficiently litigation acts. Legal theorists in Hungary also refer to the notion of litigation acts to set forth litigation capacity. Thus, definitions of litigation capacity in the theoretical papers of these states, similarly as in Poland, invoke the notion of litigation acts. On the other hand, in the French theory, *la capacité d'ester en justice* covers by its meaning both the capacity to appear as a party or another participant in civil proceedings and the capacity to undertake litigation acts in civil proceedings.

In Polish civil proceedings, the legislator has included in article 65 § 1 *in principio* of the CCP, a short definition of litigation capacity, setting it forth as the capacity to perform proceedings acts. At the same time, it indicated the subjects which have litigation capacity, in the case of natural persons, referring to full capacity to perform legal acts and limited capacity to perform legal acts. Thus, the legislator has set forth certain

¹²¹ It is only in article 75 of Italian CCP that a certain general formulae of court capacity can be found (*capacità di stare in giudizio*, i.e. capacity to appear before court).

¹²² Compare: A. Jakubecki, *supra* note 29, p. 17.

constitutive subjective and objective elements of litigation capacity, that are used by the doctrine to define this notion.

Finally, it will be assumed that litigation capacity is a legal qualification of the parties or other participants to civil proceedings to undertake litigation acts in civil proceedings. It does not make up legal competency, entitlement, or subjective right.

In turn, the provisions maintained in the Polish CCP, consisting in distinguishing litigation capacity from court capacity deserve to be approved of. Such a solution is also justified in the light of what is established by the legal theory *inter alia* and the concepts, which have been worked out on the grounds of the 1930/1932 CCP provisions. Additionally certain constitutive subjective and objective elements of the notion of litigation capacity being stipulated by the legislator have made it possible to limit attempts at its defective interpretation.

Moreover, the lack in the CCP of provisions related to litigation capacity is unknown to Polish legal tradition and thinking and is significantly different from European standards, prevailing contemporaneously in this field. Such a solution must not be accepted in Polish litigation law.¹²³ Similarly, it could be difficult to achieve a more detailed definition, than that current in article 65 § 1 of the CCP, of those who have litigation capacity along with their enumerative listing. Therefore the indication of all subjects who are vested with litigation capacity in the provisions of the CCP, those not subject to civil law included, is useless and would create unnecessarily detailed data.

Apart from giving the definition of litigation capacity, the legislator has indicated in article 65 of the CCP, that litigation capacity is vested in natural persons, legal persons, and organization entities which are not legal persons to which legal capacity is granted by law and referred directly to natural persons' full capacity to conduct legal acts and limited capacity to conduct legal acts. This solution makes up a *sui generis* compromise between the lack of provisions related to litigation capacity and presenting an excessively detailed catalogue of subjects that undertake litigation acts on their own or on behalf of somebody else.

¹²³ Ibid., p. 18.