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Introduction to Polish private international law: Specific part

Moral persons in private international law

The issue of moral persons in private international law still remains—in spite of the globalization—rather the domain of domestic rather than international or supranational regulation, although European law has a significant impact here, especially the case-law of the Court of Justice of the EU.

When it comes to the connecting factors (applicable law) for moral persons, European countries are divided into three camps: (a) legal systems adhering to the so-called central office (*Sitztheorie*, *siège reel/social, teoria siedziby rzeczywistej*); (b) systems based on the incorporation (creation; *Gründungstheorie, teoria inkorporacji/utworzenia*) of a legal entity; (c) "hybrid" systems that combine solutions specific to both previously mentioned.

The first of the first two opposing concepts—i.e. the 'principal office' doctrine—has been worked out primarily in the French and German private international laws. It is argued that the law applicable to a legal person—and in particular a commercial company—should be at the place where the moral person's management (actually) is located and where decisions usually are taken to deal with its affairs.[1] Such a solution is believed by some authors to discourage the interested founders or shareholders from creating fictitious foreign companies (the so-called *'letter-box' companies*). Nonetheless, the theory seems to be two-bladed sword: when the management is carried out in a country other than that of its actual

[1] In France, see Cass. 30.03.1971, N° 67-13873, Bull.civ. 1 N. 111, p. 90; in Germany, see e.g. Reichsgericht 03.06.1927, Rep. II. 346/26, RGZ 117, 215 (*Eskimo Pie*).

central office, the moral person in question risks of losing its legal personality, since the law formally governing its organization and functioning does not coincide with its 'real legal life.' The result might be detrimental to everybody, including the creditors and public authorities.

Example. The consequences of the aforementioned doctrine may be illustrated with the famous ECJ judgment in C-208/00 *Überseering*[2]: after being set up in the Netherland, the limited liability company Überseering BV (*besloten vennootschaap*—limited liability company) 'emigrated' to Germany, where all its shareholders and directors were resident. As a consequence, the lawsuit against the company's contractor was dismissed by the German courts, since it was denied any recognition. Under the real seat doctrine, the courts believed that the location of the company's principal office in Germany presupposed the application of the German law, instead of the Dutch corporate laws, to the applicant company. The European Court of Justice did not quite share this view: since the Dutch law was the law of another Member State, according to which the company was established in law, German courts were prevented from denying the legal capacity and, consequently, the capacity to commence legal proceedings.

The competing doctrine of incorporation designates the law according to which the moral person was set up as applicable to the whole legal life of it, irrespective of the circumstance of the structure of ownership, the place of management or business, and the like. Theoretically such a solution looks friendly for companies operating in a cross-border commerce, refraining from putting obstacles to the capital flows and transferring the registered office from one country to another while securing the continuity of legal personality. In this context, the variety of the latter concept is the registered office doctrine. It may be seen as a kind of compromise between two theories, but in fact, conflict-of-law legislation based on the incorporation often requires at least a nominal maintenance of the registered office of that entity on its territory.

Formally speaking, Polish conflict of law might be seen as adhering to the first of the above mentioned groups, since Sec. 17(1) PILA 2011 expressly refers to the law of the country

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[2] ECJ judgment of 5 November 2002, C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, ECLI:EU:C:2002:632.

in which the moral person has its central office ("*siedziba*"). However, it is problematic how this concept should exactly be understood. In the legislative motives of the Draft Bill on Private International Law the question has been left without the comment.[3] The case law of the Supreme Court does not give a definitive answer.[4] In the literature, however, there is a growing support of the 'registered office' connecting factor.

Irrespective of what has been discussed, the Polish law does not base itself on a clear-cut conflict-of-law concept. The structure of the connecting factors of Sec. 17 PILA 2011 takes into account differences between states and tries to reconcile them thanks to the *renvoi*—

(1) A moral person is governed by the law of the state, in which it has its seat.

(2) However, if the law determined under paragraph 1 refers to the law of the state according to which the legal person has been incorporated, that law applies.

As the result, the decision as to the law applicable has been left to the law of the state in which the moral person has its office.

Example. A foundation of the law of the US State of New York, registered in that state, with its branch in Poland established its registered seat in Switzerland. When deciding on the foundation's capacity to bring a lawsuit, the Polish court first applies the Swiss law (since the branch is not a separate entity). However, Article 154 (1) of the Swiss Federal Act on Private International Law stipulates that the 'companies' (i.e. organizations, irrespective of their legal nature) are governed by the law of the state according to whose laws they have been set up, provided that the local regulations on the publication and registration, if there are any, have been fulfilled. Finally, the NY law shall apply.

Section 17(3) PILA 2011 lists some of the matters governed by the law applicable to legal persons—

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[3] See the *Draft Bill on Private International Law*, Sejm Doc. of the 5th term, No. 1277, p. 14-15.

[4] Cf. S.C. orders: of 12 March 2015, case No. I CSK 452/14 (the 'real seat' doctrine applied); of 22 October 2015, case No. IV CSK 664/14 (an implicit reference to the 'registered office' of the company as the connecting factor).

- the formation, merger, division, transformation and dissolution of a legal person;
- the nature of a legal person;
- the name and business name;
- the capacity of a legal person;
- the competences and rules of functioning, as well as appointment and
- dismissal of the members of the corporate bodies;
- representation;
- the acquisition and loss of the status of a shareholder or a membership and the rights and obligations pertaining thereto;
- the liability of the shareholders or members for the obligations of the legal person;
- the consequences of a breach of law, the act of incorporation or the articles of association by the representative of the legal person.

The above list is not exhaustive.

Section 18 PILA 2011 is an equivalent of Sections 11(2) and 12 of the Act, as it sets out, respectively, the law governing the capacity to conclude business transactions and the possibility of rising the defense of non-capacity based on the law applicable to the the moral person. It does not seem to deserve a longer comment.

In turn, Section 19(1) PILA 2011 is a troublesome provision. It is composed of three distinct parts, each devoted to different questions of the international transfer of the seat. The first of them refers to the change of the law applicable to the company (moral person) moving from one country to another. It is rather obvious in the light of Sec. 17(1) PILA 2011 that *upon the transfer of the seat to another state, a legal person is governed by the law of that state*. The second sentence of Sec. 19(1), however, highlights that *the legal personality acquired under the law of the state of the hitherto seat is preserved if the laws of each interested states so provides*. However, the relationship between these two legal systems of the states of emigration and immigration is not quite certain: it may be either a consecutive or a cumulative application of both laws; from the two options, the last one seems much more probable. Last but not least, *the seat transfer within the European Economic Area does not result in the loss of*

legal personality. This provision should be perceived as the substantive law proviso, preventing from the result incompatible with the EU law principle set out in C-208/00 *Überseering*.

The case law of the Court of Justice of the EU proves that formalities of the Member States' law should not discourage companies from moving out from the state of their hitherto abide (the MS of 'emigration') and establishing itself in a new state (the MS of 'immigration').[5] Companies within the Single Market are free to decide where to 'settle'; practically, they have a free choice as to the governing law, either.

Polish law does not contain precise conflict-of-law rules on the cross-border mergers and divisions of companies. The only provision referring to the issue, Sec. 19(2) PILA 2011, provides that a merger of legal persons having their seats in different states is completed if the requirements provided for in these states are satisfied. Again, it seems that the legal systems of the states concerned should not apply consecutively but rather cumulatively.

[5] ECJ judgment of 12 July 2012, C-378/10, *VALE Építési kft.,* ECLI:EU:C:2012:440.