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Introduction to Polish private international law: Specific part

Law applicable to natural persons

The specific part of the Polish Act on Private International Law of 2011 begins with two Chapters (2 and 3) dealing with entities between which the private-law relationships may arise. They are, first and foremost, natural persons, *viz.* human individuals as bearers of the rights and obligations. Section 11 PILA 2011 provides—

(1) A natural person's legal capacity and capacity to act is governed by the law of his or her nationality.

(2) If a natural person makes a juridical act within the scope of his or her business, it suffices that he or she has the capacity to act under the law of the state in which the business is operated.

(3) Paragraph 1 does not exclude the application of the law governing the juridical act, if it results from that law that there are specific requirements as to the capacity to make the juridical act in question.

Briefly speaking, the opening Section of Chapter 2 refers to the legal category of *capacity of persons* (here: natural ones). Therefore, the law designated by the commented legal rule shall apply to questions of the personal status of natural persons. In Polish, the law applicable to these issues is referred to in short as '*statut personalny*' (similarly, *das Personalstatut* is common in the German legal language). A comparable manner of speaking, however, does not suit the English legal nomenclature.

Besides, it is noteworthy that in Polish private international law—just as in many other PIL national systems—there is also another notion in use, namely that of the 'personal law' (*lex personalis*). It stands for the law designated with personal connecting factors, viz. first and

foremost nationality, and then domicile or habitual residence, of a natural person, irrespective of a kind of situations or relationships to which the person is a party. Thus, for instance, we may say that the *lex personalis* governs a person's capacity to marry (see Sec. 48 PILA 2011), just as it is the case as to the general legal capacity under Sec. 11 PILA 2011.

There are two broad categories recalled in the paragraph (1), namely: (i) the *legal capacity*, and (ii) the *capacity to act*. Both are used in order to denominate different aspects of a general legal attribute of natural persons. In the contemporary world, where the slavery is no longer legal, everyone, irrespective of his or her age and the state of mind, has a right to acquire and possess property. Here the capacity stands for the passive capacity, usually conceptualized in the civil-law jurisdictions (Polish: *zdolność prawna*=German/Austrian: *die Rechtsfähigkeit*, French: *la capacité de jouissance*, Spanish: *la capacidad jurídica*), whereas there is also the active capacity, i.e. the ability to enter into legal transactions in one's own name (Polish: *zdolność do czynności prawnych*=German/Austrian: *die Geschaftsfähigkeit*, French: *la capacité d'exercise*, Spanish: *la capacidad de obrar/la capacidad de ejercicio*).

At the first place, the law of a person's nationality (*lex patriae*) applies, which means that the person's political belonging to the state (citizenship) decides on the connection. It should be noted, however, that there are 'competitors' of this connecting factor belonging to a broader category of so-called personal connecting factors. For certain categories of persons, first and foremost refugees, stateless persons or persons whose nationality or content of their law of origin cannot be determined—the citizenship connecting factor is replaced by another, i.e. the connector of domicile (permanent and voluntary residence in a country), then habitual residence (center of life activity) and, for some residual cases, ordinary residence (sojourn in a country).

Example. Shamil G., formally a Russian national, lives in a Polish refugee center near Warsaw. He arrived to Poland in 2015, declaring at the border crossing that he had to flee Chechnya because of the persecution by President Ramzan Kadyrov's local regime. At the same time he applied for international protection.

Although Shamil G. might still retain a Russian passport and has never been deprived of nationality of the Russian Federation, his civil law status in Poland will no longer be subject

to Russian law, but because of his refugee status Polish law, as law at his place of habitual residence, takes the place pursuant to Sec. 3(2) PILA 2011—

(1) If the present Act provides for the applicability of the law of nationality and it is not possible to establish the nationality of a given person, or if he or she does not have the nationality of any state, or it is not possible to establish the content of the law of nationality, then the law of the state in which the given person is domiciled will be applied; if there is no domicile, the law of the state in which he or she has habitual residence will be applied.

(2) Paragraph 1 applies mutatis mutandis with respect to a person who has been afforded protection in a state other than the state of his or her nationality, and whose links with the latter state have been permanently broken, as a result of a violation of human rights therein.

Sections 3(2) and 11(1) PILA 2011 give precedence to an international legal rule, namely, to Article 12 of the 1951 Geneva Refugee Convention[1], which stipulates that—

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

For the capacity of multinationals Polish law is applicable (if a person holds i.a. Polish nationality) or the law most closely related to a person (if only foreign nationalities coincide); see Sec. 2 PILA 2011.

If a person concerned changes his or her nationality (domicile, habitual residence), a problem may arise which law should govern the question of capacity as regards different rights and obligations acquired or juridical acts done by him or her over time.

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[1] Geneva Convention of 28 July 1951 Relating to the Status of Refugees, UNTS vol. 189, p. 137; Journal of Laws 1991 No. 119, item 515.

Example. A 17-year-old Scot acquired the Polish nationality shortly after entering into a contract with a Pole. Has he become a party to a valid agreement? Has he acquired rights and obligations arising therefrom?

The time factor in Sec. 11(1) PILA 2011 has not been determined by the lawgiver. Since, however, the capacity generally means an aptitude to hold titles, rights or obligations, the connecting factor should be taken as variable and not fixed. In spite of the fact that a 17-year-old person has full capacity under Scots law, he or she will not retain it because he or she changes nationality into Polish, where the age of majority is 18. Such a change, however, does not bring any prejudice to the acts already done. A legal system that takes the place of a previous one as governing the capacity, has no "retroactive effect." Therefore, no party to the contract will be in the position retrospectively to invoke Article 18(1) of the Polish Civil Code, which stipulates that the validity of a juridical act done by a minor without the consent of his or her legal representative shall depend of the representative's consent.

The scope of the notion of 'legal capacity' as the legal category of Sec. 11(1) PILA 2011 covers practically the whole legal entity of a human being, including the moment when he or she begins and ends legal existence. Therefore, the law designated by the commented rule refers to all legal presumptions, which are associated with the determination of, e.g. live birth, joint death, etc., as well as restrictions and cases of an artificial loss of capacity—except that in the latter case, if the loss of legal capacity occurs during the lifetime of a natural person (civil death), the exception of public policy may intervene.

Section 11(1) PILA 2011 does not cover some specific situations of natural persons being held accountable in law or acquiring property rights, e.g. (a) capacity to incur liability in tort/delict, subject to the law applicable to tort/delict (Article 15(a) Rome II Regulation); (b) capacity of an unborn child (*nasciturus*) to inherit, which is governed by the law applicable to successions (see Successions Regulation No. 650/2012).

As to Section 11(2) PILA 2011 (see *supra*), suffice it to say that it replaces the usual connecting factor insofar as business operations of a person concerned are at stake, and only to the extent of that person having no capacity to act according to his/her personal law. In these (rather rare) cases, the law governing the capacity to act shall be subject to the law at the place where the person's business activities are being carried out.

Pursuant to Sec. 11(3) PILA 2011, if the law governing a given juridical act sets out that a person should meet more severe conditions (e.g. that the person be of 'sound mind' or attain certain age, higher than the usual age of majority), the law designated by Sec. 11(1) gives way to such stricter requirements, even though they may completely be unknown or different under the normally applicable law.

Another exception to the rule has been put in Sec. 12 of the Private International Law of Poland. It is commonly known as 'Lizardi's exception', which recalls a judgment of the French Court of Cassation of 1861[2] concerning a young 22-year-old Mexican who, after arriving with his family to France, had drawn several high-value debts. He would have been of age according to French law, which set out the threshold of 21 years. Still, when the creditors petitioned him for payment, he defended himself with an argument that underlying transactions are null and void, as in accordance with the then Mexican law he had no capacity to act before attaining 25 years of age. The defense was dismissed as ill-founded by the French supreme jurisdiction, since "a Frenchman cannot be held to know the laws of the various nations as to their provisions concerning in particular the minority, the majority and the extent of the engagements which can be taken by the foreigners within the framework of their civil capacity; [...] It suffices then, for the validity of the contract, that the Frenchman contracted without negligence and recklessness, and with good faith [*le Français ne peut être tenu de connaître les lois des diverses nations de leurs dispositions concernant notamment la minorité, la majorité et l'étendue des engagements qui peuvent être pris par les étrangers dans la mesure de leur capacité civile ; [...] il suffit alors, pour la validité du contrat, que le Français ait traité sans légèreté, sans imprudence et avec bonne foi*]."

Section 12 generally results in the same way: a foreigner who performs juridical acts outside his or her jurisdiction of origin cannot invoke his or her incapacity as the defense against the validity of legal transactions entered into with another person abroad. The precondition for this is a justified conviction ('good faith') of his or her partner that in accordance with the local law that person is capable of performing a valid juridical act. It should be stressed that ignorance of the fact of incapacity may not be caused by negligence,

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[2] Published: „Dalloz jurisprudence générale: Recueil périodique et critique" 1861/1, p. 193.

that is to say, a person entering into a juridical act with a foreigner should undertake all reasonable steps to get to know whether his or her partner is capable. Moreover, it is not the question of ignorance of facts as such (e.g. someone does not take care of the identity and age of another, does not check his or her passport, etc.) but rather of the foreign law. The assessment is made due to the particular circumstances of the case.

People with disabilities for various reasons (such as mental illness or addiction) may be subject to protective measures ordered by state authorities in their interest, so as to prevent them, first and foremost, from entering into transactions detrimental to their property. If such measures amount to the court intervention in the natural person's general capacity, incapacitation in a sense of Sec. 13 PILA 2011 takes place. It seems logical that the reasons and manner of incapacitation should depend first of all on the content of the law of the country whose national is the protected person. Nevertheless, in those cases where the incapacitation of a foreigner is decided by a court in Poland, in accordance with Sec. 13 (2) PILA 2011 it is Polish law and not the personal law that applies. Such a solution speeds up the course of proceedings and basically facilitates adjudication. Still, the impact of the ruled incapacitation on the scope of capacity to act must be assessed in accordance with the law indicated by Sec. 11 (1) PILA 2011.

In some cases, the end of personality in terms of a legal entity does not amount to a natural fact of death but the latter results from specific legal rules. Death may be declared by the court as regards a missing person (declaration of death *in absentia*), provided that the required period of time passed and there are other conditions fulfilled. Moreover, for situations where the fact of death is certain but the exact time has not been established in the form of a public record (death certificate), the court may replace such a lacking document with its declaratory judgment.

In any case, questions of death presumptions are based on law, which is different from country to country, and hence the designation of law applicable becomes necessary. A general solution given by the Polish private international law is in line with Sec. 11(1) PILA 2011; declaring death, as to its substantive conditions, shall be governed by the law of the country whose national the deceased was (Sec. 14(1) PILA 2011). However, if the Polish court is seized with the case, it will apply the Polish law (Sec. 14(2) PILA 2011).

Example. An Italian national living in Poland disappeared in March 2013 during his business trip to the Near East. He was last seen in the northern Israel, close to the Syrian border. His wife would like to take control over his property. Is she entitled to lodge the application for the declaration of death at the Polish court?

If the case is filed at the Polish court, the decision as to the presumed death of an Italian will not be subject to Italian law but it was left to the *lex fori.* Provided that Polish courts have jurisdiction over the matter (as it is the case, due to the last Polish domicile of the deceased, see Sec. 1106(1) of the Code of Civil Procedure), the Polish law decides, first and foremost, on the period of time and circumstances necessary to presume the decease.