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Introduction to Polish private international law: General Part

Change of connecting factors. Time factor in the conflict of laws

It is natural that the factual circumstances underlying the connecting factor in the conflict-of-law rule may change over time; this is only excluded if the temporal aspect of such a legal rule has deliberately been composed so as to indicate a specific moment in time valid for the choice of law by the court, e.g. the testator's death (Article 21 of the EU Regulation No. 650/2012) or the issuing of a security (Sec. 31 PILA 2011).

Example. Marital property relations are governed by the common national law of the parties at the time the contract is concluded, unless the spouses have chosen the applicable law (Articles 51 and 52 of PILA 2011). In one of the cases before the Supreme Court, the spouses concluded a marriage contract and then changed their citizenship from Polish to German. A few years later, her husband's creditor enforced his outstanding debts. The wife's cassation appeal, alleging that the courts had violated German rules on matrimonial property, was dismissed. The Supreme Court emphasized that the matrimonial property was still subject to Polish law at the time the contract was concluded, and therefore there was no reason for the competence of German law.[1]

If there is no fixed time for the connection, changes that arise for various reasons depending, or not, from the parties' will, as for instance—

- change of nationality of a person whose capacity to enter into a contract is to be assessed (Sec. 11(1) PILA 2011);

[1] S.C. judgment of 15 May 2008, I CSK 541/07, OSNC 2009, issue 9, item 125.

· moving spouses' common habitual residence from one country to the other in a case of their marriage property (Sec. 51(2) PILA 2011);

· transfer of international responsibility in respect to territory, resulting in change of the location of an immovable owned by a person interested in the protection of her property rights (Sec. 41(1) PILA 2011);

· choosing a new law applicable to a contract, instead of an old law proper as per statutory connecting factor or parties' previous choice (Article 3(1) Rome I Regulation).

Of course, the above mentioned circumstances have not been listed exhaustively.

If such a change takes place, the court has to consider its consequences for the parties' interests. Some principles are important as regards the question of the law applicable. First of all, the court should not apply a newly competent law to the factual situation which has already been "closed", viz. they have already influenced the legal status of an interested person. Such a prohibition has sometimes been referred to as the "vested rights doctrine". So-called "open" factual situations, in turn, should be governed by the law currently designated as applicable, even though they emerged before the change. 'Continuous' situations (e.g. effects of a marriage), which cannot be reduced to a simple fact or a group of facts but last for years. A change as to the connecting factor probably will cause a change in the applicable law but any retrospective influence should be managed so that the interested parties were prevented from any prejudice.[2]

Example 1. A natural person who is a refugee changes his residence from one country (X) to another (Y). In the country X, he has concluded a contract, the validity of which—due to the lack of required capacity pursuant to law of the country Y—is being questioned before the Polish court. What law should the court apply?

Example 2. The owner of a movable, purchased *bona fide* from an unauthorized person, has held it for about 2 years on Polish territory and for a further 2 years in Switzerland, where he temporarily left to work. What law will decide on the acquisition of

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[2] M. Pazdan, [in:] M. Pazdan (ed.), *System Prawa Prywatnego*, vol. 20a, 1st ed., Warszawa: C.H. Beck 2014, p. 406 *et seq.*

title, given that Polish law provides for the requirement of continuous possession for a period of three years (Article 174 of the Polish Civil Code), while the Swiss law imposes the five-year period (Article 728 of the Swiss Civil Code)? If the claim is brought against him before the expiry of the five-year period, could the holder defend himself with the allegation that he has acquired the property under formerly applicable Polish law?

Both cases can be qualified as so-called mobile conflicts (French: *les conflits mobiles*), i.e. as situations where the conflict between two laws applicable after one another results from the activity of the parties themselves, consisting in changing their place of residence (example 1) or transferring things to another territory (example 2).

Answers. Example 1. The change will not raise major doubts. Admittedly, pursuant to Sections 11(1) and 3 PILA 2011, the refugee's personal capacity is subject to change. It is obvious, however, that a specific juridical act this is governed by the law indicated as relevant at the time of its conclusion. Subsequent changes in the place of residence (as well as changes of nationality, here immaterial) are devoid of legal significance. It can be said that the change of place of residence does not have retroactive effect, or putting it otherwise: the newly competent law does not interfere with the "closed" facts under the previous applicable law.[3]

Example 2. The change as to the law applicable took place before acquiring the title, which was the result of a time-extended factual situation (prescription of title in movable property). The possession of a movable thing shall be subject to the laws of the place where the property is located (Sec. 41(1) and 45 PILA 2011), and the title acquisition is governed by the law of the country where the property was situated at the time of an event giving rise to the acquisition (Sec. 41(2)). What does this mean in the context of an acquisitive prescription? Some conclusions can be derived from the case law of the Supreme Court: namely, the period required should be governed by the law of the last country of the location of movable property (here: Switzerland), still the period that elapsed under the rule of law previously applicable (here: Polish law) shall be taken into account. Such a way of counting the period is

[3] M. Sośniak, *Zmiana statutu w prawie międzynarodowym prywatnym,* 18 Ruch Prawniczy Ekonomiczny i Socjologiczny" [1964.1], p. 40–41

not possible, however, in the event of property stolen or otherwise lost by an owner.[4] The effect of such a solution is acquiring the title, so that rights of an acquirer can no longer be questioned in the event of the property being moved to the territory of a state which imposes different, i.e. stricter, requirements in this respect.[5]

To be sure, the change of connecting factor does not exhaust the possible influence of time to resolve conflict of law issues. In a broader aspect, changes in the relationship between a relationship and its applicable law may also be the result of introducing new legislation, as well as the result of political changes resulting in a change in private international law in force at the court seat. In the history of Poland, there were many such instances. Recently, changes in the legal status have been caused by the introduction of new provisions of European law (e.g. the Rome II Regulation[6], significantly modifying conflict-of-law rules on torts), as well as the adoption of the new Act of 2011 led e.g. to the emergence of a completely new institution in our law, which was the parties' choice of law for matrimonial property relations.

Newly introduced legal provisions may explicitly provide for intertemporal law; an example of this is art. 31 Rome II Regulation, indicating 11 January 2009 as the cut-off date for the application of the ordinance's norms to events that caused damage from that date. Therefore, the Regulation has no retroactive effect. In the case of the Polish Act, which does not contain such an explicit decision, the case law of the Supreme Court requires that the intertemporal provisions contained in the Act introducing the Polish Civil Code be applied accordingly.[7]

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[4] S.C. Resolution of 30 March 1992, III CZP 17/92, OSNC 1992, issue 11, item 186.

[5] See S.C. Judgment of 22 March 2002, I CKN 1137/99, OSNC 2003, issue 4, item 51.

[6] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

[7] See S.C. Decision of 14 February 2013, II CSK 294/12, OSNC-ZD 2013, issue D, item 75.