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Introduction to Polish private international law: General Part

Overriding mandatory provisions

Private international law pursues various goals. Some of them affect individuals, while other refer to general good (they affect public interests). The state protects its financial, defense, and social stability—its authorities strive at maintaining social order; another aim of modern states' policies consists in intensifying the protection of the weaker parties in private law relations (e.g. consumers, employees, pregnant women, etc.), assuming that they alone would not be able to effectively do so. Therefore, applying only the law designated as applicable to a given relationship by the conflict-of-law rules of private international law would not always properly ensure that all these objectives are met.

Example 1. A person residing in Poland takes out in Germany a loan in a foreign currency without the necessary individual permit, as required by the Polish exchange law as on the date of the obligation. Of course, it would be wrong to state that Polish foreign exchange regulations shall not apply because the court "was obliged to apply the German law system with all its effects".[1]

Example 2. A succession located in Poland comprises, inter alia, a farm, which is the property of a deceased person living abroad for years. According to the Polish law, agricultural land may be inherited by succession beneficiaries meeting specific requirements set out in provisions on the succession as to agricultural holding (Title X

[1] Judgment of the Court of Appeal (*Sąd Apelacyjny*) in Katowice of 12 October 2001, I ACa 383/01, OSA 2002/8/49.

Book IV of the Civil Code and Articles LV to LXIV of the Introductory Act to the Civil Code), regardless of the nationality of the deceased and the beneficiaries of the estate at the time of succession. Should the considerations of the state policy in the field of agriculture prevail the usual order of inheritance pursuant to the Italian Civil Code, if it differs in that regard from the Polish law?[2]

In both cases, the answer depends on the characterization of the Polish legal provisions which may undermine the application of the competent foreign law. In the example No. 1, it would be hard to imagine that the transaction consisting in the cross-border bank settlements between Poland and Germany does not involve the application of the exchange regulations (nowadays, of course, subject to the EU fundamental freedoms which have ironed out such restrictions). In the example No. 2, in turn, the foreign law applicable pursuant to Article 30 of the EU Successions Regulation No. 650/2012.[3]

At the first sight, the overriding mandatory provisions (French: *lois de police,* Polish: *przepisy wymuszające swoje zastosowanie*), occasionally referred to as the "necessarily" or "directly" applicable provisions (*lois d'application nécessaire/immediate*)[4], are an odd object in the conflict of laws. The name itself suggests that the provisions in question should apply irrespective of parties' will (*ius cogens*)[5], and moreover, that they somehow 'break through' to

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[2] Cf. resolution of the Supreme Court of 28 May 1969, III CZP 23/69, OSNCP 1970/1/3.

[3] *Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.*

[4] See i.a. B. Fuchs, *Statut kontraktowy a przepisy wymuszające swoje zastosowanie*, Kraków 2003; M. Mataczyński, *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym,* Kraków 2005.

[5] However, both these categories—i.e. *overriding* mandatory provisions and *common* mandatory provisions—should not be identified. As follows from from recital (37) to the Rome I, the former are a

a given private-law relationship, regulating certain aspects of it, no matter what other law is applicable to it. These provisions do not have to (even though it usually is the case) belong to the public law.[6]

The above features are uncontroversial. The real problem lies with the question, whether the overriding mandatory provisions refer only to the general interests (i.e. reasons of basic state policies in a narrower sense, called by German scholarly literature *die Eingriffsnormen*, i.e. intervening legal rules)[7] or the legally protected interests of weaker parties (in German legal language: *Parteischutzvorschriften*) as well.[8] The difference becomes clear if one compares, for example, Article 8(1) PILA 2011 and Article 9(1) of the Rome I Regulation—

Polish law: *The determination of a foreign applicable law does not prevent the application of the rules of Polish law, if it* ***clearly results from their content or purpose that they should be applied*** *to a given legal relationship* ***irrespective of the law otherwise applicable****.*

EU law: *Overriding mandatory provisions are provisions the respect for which is regarded as* ***crucial by a country for safeguarding its public interests****, such as its political, social or economic organisation, to such an extent that they are* ***applicable to any situation falling within their scope****,* ***irrespective of the law otherwise applicable*** *to the contract under this Regulation.*

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narrower concept than the latter; E. Traple, *Umowy o eksploatację utworów w prawie polskim*, Warszawa 2010, p. 205.

[6] M.A. Zachariasiewicz, *O potrzebie wskazania w nowej ustawie o prawie prywatnym międzynarodowym podstawy stosowania przepisów wymuszających swoje zastosowanie,* 7 Problemy Prawa Prywatnego Międzynarodowego" [2010], p. 12.

[7] This definition has been supported by the Polish Supreme Court in the judgment of 19 December 2003, III CK 80/02, OSNC 2005/1/17.

[8] The difference between these categories has thoroughly been discussed by M. Lijowska, *Instrumenty kolizyjnoprawnej ochrony konsumenta a przepisy koniecznego stosowania,* 15 Kwartalnik Prawa Prywatnego [2006.2], p. 423 *et seq*.; in the foreign literature, see i.a. J.J. Kuipers, S. Migliorini, *Qu'est-ce que sont les lois de police? Une querelle franco-allemande apres la communautarisation de la Convention de Rome*, 19 European Review of Private Law [2011.2], p. 187 et seq.

It clearly results from the comparison of the texts of both legal instruments that the Polish lawgiver, following Article 7(1) of the 1980 Rome Convention on the law applicable to contractual obligations, defined the nature of overriding mandatory provisions in a broader way. The scope of Sec. 8(1) PILA 2011 includes both provisions protecting the interests of the state and of weaker parties, while, literally taken, Article 9(1) of the Rome I does not follow this path. This difference of views in two legal instruments, in spite of their unequal position in the legal system, should be assessed as unfortunate, since it is adjudicative bodies in the Member States, not the European Union, that decide to give individual provisions an overriding mandatory character. Therefore, the key will be in what direction the Court of Justice will interpret Art. 9(1) of the Rome I.[9]

There are different concepts as to the legal prerequisites for applying the overriding mandatory provisions. The first theory, quite popular in Germany, calls for the so-called 'special connecting factor' (German: *Sonderanknüpfung*), tacitly included in a given law provision; otherwise speaking, overriding mandatory provisions come into play due to an implicit unilateral conflict rule contained in their content, which for their scope of regulations requires the application of the law of a given country (e.g. 'for matters concerning foreign exchange by Polish residents, Polish foreign exchange law applies', etc.).[10] The second, competitive theory relies on the assumption that the nature and purpose of the provision would suffice; it is the very will of the legislator, not the conflict of laws, that forces their application.[11] It is hard to say which of these two is more frequent in the Polish legal theory and practice; quantitatively, however, the latter theory seems to be the minority opinion.

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[9] Critically on the Rome I Regulation, cf. M. A. Zachariasiewicz, *O potrzebie...,* p. 19 *et seq*.

[10] Supported in the Polish legal literature i.a. by A. Mączyński, *Nowelizacja przepisów szczególnych o dziedziczeniu gospodarstw rolnych a prawo prywatne międzynarodowe,* 19 Krakowskie Studia Prawnicze [1986], p. 119–120; B. Fuchs, *Statut...,* s. 72; M. Tomaszewski, *Przepisy szczególne o dziedziczeniu gospodarstw rolnych a prawo prywatne międzynarodowe,* Państwo i Prawo [1970.12], p. 925; M. Lijowska, *Instrumenty...,* p. 427.

[11] Supported by M. Mataczyński, *Przepisy...,* p. 115–116; M. A. Zachariasiewicz, *O potrzebie...,* p. 42–43.

The provisions forcing its application, which is obliged to apply by a Polish court, most often belong to the *lex fori* (i.e. Polish law). To varying degrees, however, the applicable law allows consideration of similar provisions established by lawgivers of other countries.

Example. A Polish defense industry company concludes a contract with a Jordanian contractor for the sale of tanks. Production components come from the USA. The contract signed in Warsaw is subject to Polish law. The Jordanian side orders the opening of a letter of credit and the Polish seller proceeds to fulfill the obligation. The first batch of tanks is delivered to the buyer, after which it turns out that - according to intelligence - the weapons go to the Syrian government army (Syria was classified as a state supporting terrorism under US export laws before the outbreak of civil war). Citing the US regulations governing arms exports, the Polish company withdraws from the contract and is then sued for payment of contractual penalties (lump sum damages). Does this standpoint deserve the legal protection?

The solution to the above case would be different in terms of European and national law provisions (regardless of the Rome I being appropriate to be addressed in the concrete factual situation). It should first of all be noted that the relationship with the United States consists in granting a Polish entrepreneur a license to use technologies to which American entrepreneurs have exclusive rights. This is an important reason for establishing 'the close relationship' between this legal system and the given contract.[12] It would probably be sufficient in the light of Sec. 8(2), first sentence, PILA 2011, according to which, when applying the applicable law, it is possible to take into account mandatory provisions of another country with which the assessed legal relationship is closely related, if these provisions, according to the law of that country, apply regardless of which law applies to the relationship in question. However, it cannot be excluded that such grounds would not be sufficient in the light of Article 9(3) of the Rome I Regulation, where it was stipulated to authorize the court to consider only the effect of the overriding mandatory provisions of the law of the country where the

[12] M. Mataczyński, *Przepisy...*, p. 179.

obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.

Anyway, foreign overriding mandatory provisions do not have an automatic effect but their application by the court depends on the court's discretion, taking into account the assessment of the nature of these provisions and their potential impact on a given relationship.