Poland

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I. Application of Foreign Law by Judicial Authorities

1. General overview

A leading Polish authority on the subject – Prof. T. Ereciński – makes a useful distinction with regard to the application of foreign law. He differentiates between three types of questions: (1) why do courts apply foreign law (i.e. the theological reasoning behind the application of foreign law); (2) what are the legal grounds for application of the foreign law; (3) what is the nature of foreign law.[2]

The first question has a theoretical character and will not be discussed in more detail in here. It suffices to say that it is often necessary to apply foreign law in order to do the justice to the parties.[3] It is fair for the parties who come from different legal environments to decide the dispute in accordance with the rules which they have or could have taken into account while performing certain actions. Since in private law the public interest in not predominant, the parties' expectations can be enforced through the rules on conflict of laws.

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2 Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 149ff.; Ereciński, "Ogólne zagadnienia stosowania prawa obcego przez sądy", p. 75ff.

3 Jakubowski, "Refleksje nad wieloznacznością pojęcia terytorialność w teorii międzynarodowego prawa prywatnego", p. 87; Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 150.

The second question does not seem to raise any controversies in Poland. It is generally agreed that sufficient legal justification for the application of foreign law by Polish court can be found in the conflict of law rule which provides for the application of a law of a given country.[4]

The third question – as to what is the nature of the foreign law – will be dealt with immediately below.

2. Legal nature attributed to foreign law

It is well established in Polish literature of the subject[5] that foreign law is to be considered as a matter of law and not as a mere fact. Although the principle was never expressed anywhere in statutory law, it has never been questioned in the doctrine, neither before nor after the Second World War. It is unanimously accepted today. Ereciński has convincingly argued that to treat the foreign law as law seems the only logical position. Foreign law is no doubt considered to be the law in the State where it has been promulgated. It is thus hard to understand why the nature or role played by a foreign law should alter as a result of its application by a judge in a different State.[6] Moreover, to treat the foreign law as a mere fact could be viewed as a sort of the degradation or discrimination of that law. Rather than that, Polish law adheres to the position of the equality of foreign and national law.[7]

Foreign law, when applied by the Polish court, remains foreign law. It is neither incorporated into the Polish legal system nor in any way transformed into the national law.[8]

It is nevertheless underlined that the theoretical attitude towards the nature of the foreign law as such (i.e. whether it is considered as law or fact) does not necessarily determine the practical considerations relating to its proof and application.[9] As it is

[4] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 152 (who adopts in that respect the view expressed by Schnitzer in his "Die Anwendung einheimischen oder fremden Rechtes auf internationale Tatbestände", p. 84); Ludwiczak, *Międzynarodowe prawo prywatne*, p. 94. See also 20.1.1983, Supreme Court, III CZP 37/82, *OSNCP*, 1983, No 8, item 107.

[5] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 190; Pazdan, *Prawo prywatne międzynarodowe*, p. 76; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 272; Ereciński, "Ogólne zagadnienia stosowania prawa obcego przez sądy", p. 79; Ereciński, "Stosowanie prawa obcego przez sądy polskie", p. 41; Ludwiczak, *Międzynarodowe prawo prywatne*, p. 107; Walaszek/Sośniak, *Zarys prawa międzynarodowego prywatnego*, p. 129; Przybyłowski, *Prawo prywatne międzynarodowe: Część ogólna*, p. 185; Margoński, "Metodyka ustalania treści obcego prawa spadkowego", p. 68.

[6] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 167.

[7] Pazdan, *Prawo prywatne międzynarodowe*, p. 76, Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 176.

[8] Pazdan, *Prawo prywatne międzynarodowe*, p. 76; Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 157 ff.; Ereciński, "Ogólne zagadnienia stosowania prawa obcego przez sądy", p. 79; Gołaczyński, *Prawo prywatne międzynarodowe*, p. 39.

[9] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, pp. 168, at 178.

shown by the practice of many legal systems, these issues can be resolved differently, irrespective of whether in the particular case foreign law is treated as law or fact.

In spite of a rather unanimous view that the foreign law is to be treated as law, it has been observed that foreign law does not have all the features characteristic of national law. There are several reasons to that. Firstly, there are certain particular measures of ascertaining the content of foreign law, which can assist the judge in his task and which are unavailable with respect to national law. Secondly, foreign law's application can be refused if it violates Polish public policy. Thirdly, foreign law will not be applied if its content cannot be established which obviously is not true of the national law.[10] Fourthly, a view has also been expressed that unlike the national law, the foreign law is applied through a conflict of law rule.[11] The contention that foreign law can assume a hybrid nature *(tertium genus)* has nevertheless been flatly rejected. It is argued that such a solution would be fictitious. At the stage of the decision making process, the foreign law – being the basis for the decision of the court – has to be treated as law.[12] A further observation is made that, even though not recognized as a *tertium materiale*, foreign law does constitute a *tertium processuale*, that is a specific "procedural creature." Most basically, it is treated differently from the national law at the procedural level.[13]

A theoretical doubt has been considered, as to whether foreign law actually is in force in Poland or it is merely applied by the Polish courts even though it is not binding on the Polish territory. The second view seems to be favoured. Thus, although the rules of foreign law do not constitute a part of the Polish legal system, they might be applied because of the conflict of law rules existing in the Polish law, which give effect to the provisions of foreign substantive law.[14]

Although the foreign law is in principle to be treated as law when applied by the court, there are certain circumstances in which the foreign rule of law is not applied as a rule of law but only "taken into account" as one of the facts of the dispute.[15] The

[10] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 177.

[11] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 177. This argument is flawed in our opinion. A better view is that every law – including the forum's own national law – is applied on the basis of the meta-rules of the conflict of laws which require the application of a given legal system to the given circumstances. This is because at least theoretically the rules of private international law are applied in every type of a factual situation – both national and international. Obviously, as a matter of practice, in the purely internal situations, this is normally done automatically and implicitly by any court. See Pazdan, *Prawo prywatne międzynarodowe*, p. 22; Przybyłowski, *Prawo prywatne międzynarodowe: Część ogólna*, p. 3; Walaszek/Sośniak, *Zarys prawa międzynarodowego prywatnego*, pp. 8-9; Drozd, "Czynności notarialne z elementem zagranicznym w obrocie nieruchomościami (zagadnienia wybrane)", 1999, p. 7.

[12] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 177.

[13] Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 273.

[14] Jakubowski, Refleksje nad wieloznacznością pojęcia terytorialność w teorii międzynarodowego prawa prywatnego", p. 67; Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, pp. 183-184.

[15] See Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 153; Pazdan, *Prawo prywatne międzynarodowe*, p. 76.

Polish doctrine distinguishes in that regard between two different manners in which the judge proceeds. For one thing judges apply foreign law on the basis of the conflict of law rule. In that case the foreign law constitutes the actual base for the court's ruling. For another thing, when the foreign law does not serve as a ground for a given decision, but – because of the requirements of the applicable law (the law of the forum or of a third country) – it has to be taken into account among the factual circumstances of the case.[16]

It is generally agreed nowadays that Polish courts are entitled to apply the rule of a foreign law, even if such a rule has a public law character.[17] The traditional view that private international law encompasses only the rules of the private law[18] is thus commonly rejected. The main line of reasoning is that in modern legal systems the regimes of the private and public law often interfere. Frequently, it is not possible to resolve a private law dispute without considering certain rules of public law. A rule of foreign public law may thus be applied by a Polish court provided that certain requirements are satisfied, particularly if the public rule "co-regulates" the private law relationship at stake (i.e. the rule of the public law touches upon the subject matter of a private law dispute).[19]

With respect to the principle of "*iura novit curia*", there used to be a certain debate in Poland in the past years. First of all, the traditional view that the judge actually knows the law has to be reconsidered. Facing the avalanche of legal regulations, the modern understanding of the principle can only be that the judge has an opportunity

[16] The most commonly given example is that of the road accident between two Polish citizens domiciled in Poland, which occurs in a territory of a different State. According to Polish private international law the law applicable to the liability arising out of the tort is in this case Polish law. Nevertheless, in order to assess one of the preconditions of the liability – the objective wrongfulness of the behavior of the party who caused the damage, a judge has to take into account the rules of the traffic code of the State where the accident occurred. The judge does not apply the rules from the traffic code – this is reserved for the public authorities of the State where the accident took place. However the judge has to consider the rules of the traffic code in order to assess in its light the preconditions of the tortious liability under the applicable law. See Pazdan, *Prawo prywatne międzynarodowe*, p. 189; Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 153. A different example refers to a rule imposing an embargo on certain products. If a given State introduces a prohibition of import or export of the products, it may prove impossible to perform a contract. The embargo would than have to be considered e.g. in order to consider whether a party, who fails to deliver, can rely on the impractibility, "the circumstances beyond control", "*rebus sic stantibus*" or a similar concept provided for by the law applicable to the contract. It does not mean that the judge applies the rule imposing the embargo. He or she needs only to assess in what way the embargo affects the performance of the contract. This however is only a factual issue. See Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 168.

[17] Pazdan, *Prawo prywatne międzynarodowe*, p. 78; Gołaczyński, *Prawo prywatne międzynarodowe*, p. 59; Ereciński, "Ogólne zagadnienia stosowania prawa obcego przez sądy", p. 77.

[18] 26.3.1982, III CZP 61/80, Supreme Court, *OSNCP*, 1982, No 11-12, item 161.

[19] Popiołek, *Wykonanie zobowiązania umownego a prawo miejsca wykonania. Zagadnienia kolizyjnoprawne*, pp. 63-66; Pazdan, *Prawo prywatne międzynarodowe*, p. 78.

to obtain knowledge about all legal rules.[20] Some believed that because foreign law is applied *ex officio* whenever the Polish private international law requires so, the judge should know (or at least learn) the foreign law and thus "*iura novit curia*" principle applies also in relation to the foreign law.[21] The dominant view however seems to be that the "*iura novit curia*" principle cannot apply to foreign law.[22] An assumption that a judge can by himself obtain full knowledge of foreign law and then correctly apply it is unrealistic. The main obstacles are language difficulties and the lack of access to the foreign sources of law, case-law or doctrine.[23] For this reason, Polish law provides for certain measures of ascertaining the content of foreign law, which are obviously not available with respect to national law, but are rather characteristic of the process of establishing the facts of the case, i.e. information from the Ministry of Justice and an expert opinion. The availability of these measures does not mean that the foreign law is treated as a matter of fact, but admittedly it makes the process of ascertaining its content to some extent similar to the process of establishing the factual circumstances.

3. The role played by the judge and by the parties as regards the plea and proof of foreign law

The rules of private international law are applied *ex officio*. The same refers to the application of the foreign substantive law provisions determined by the relevant conflict rules. The parties are thus not obliged to plead that the foreign law actually applies as a result of operation of certain specific conflict of law rules, nor to prove its content. It is rather the obligation of the court to apply proper law to the facts of the case proven by the parties. The court from its own motion applies the provisions of the p.p.m. (the 1965 Act on Private International Law) in order to find the law applicable to the dispute at hand. Obviously, foreign law is often applied as a result of the choice of law made by the parties. However, if the court finds that the parties have agreed on the choice of law, it is the obligation of this court to apply the chosen foreign law *ex officio*.

The obligation to apply foreign law *ex officio* rests also on the court of the second instance in the proceedings on appeal. Such a court should apply foreign law on its own motion, even if the argument as to the applicability of the foreign law was raised for the first time in the appellate stage and even if the appealing party has not put forward any proof of the content of the foreign law.[24]

The existing principle that the court is obliged to apply the rules of private international law *ex officio* is presently not stated anywhere in the law. It is however

[20] Ereciński, "Zasada iura novit curia w międzynarodowym postępowaniu cywilnym", p. 88; Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 191.

[21] Wierzbowski, *Międzynarodowy obrót prawny w sprawach cywilnych*, p. 199 ff.

[22] Ereciński "Zasada iura novit curia w międzynarodowym postępowaniu cywilnym", p. 89; Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 197; Ludwiczak, *Międzynarodowe prawo prywatne*, p. 109; Margoński, "Metodyka ustalania treści obcego prawa spadkowego", p. 68.

[23] Ereciński, "Zasada iura novit curia w międzynarodowym postępowaniu cywilnym", p. 89.

unanimously accepted in the doctrine[25] and in the case law of the Supreme Court (*Sąd Najwyższy*).[26] Nevertheless, the draft of a new Act on Private International Law[27] envisages a provision which would expressly confirm the said principle.[28]

It is interesting to note that even during the socialist regime in Poland (before 1989), it was underlined by the Supreme Court that *"it is in the interest of the people's state that foreign law – if chosen by the parties – is properly interpreted and applied"*.[29] This was picked up by one of the authors who expressed a view that the proper interpretation and application of the foreign law is required by the principle of the rule of law[30] and confirmed by the Supreme Court in the modern case law, where it was underlined that a decision, which does not clarify the law of which State is applicable infringes the authority of the judicial system and thus the interests of the Republic of Poland.[31]

It has also been noticed in one of the cases decided before the Supreme Court that it is irrelevant whether the applicable foreign law might be considered similar, or even the same, as compared to Polish law. The court is always obliged to apply the law of the country, which has been determined as applicable by the relevant conflict of law rules.[32]

[24] 9.5.2007, II CSK 60/07, Supreme Court, *OSNC*, 2008, No 5, item 53. It should be underlined that it is in principle prohibited to bring any new evidence for the first time in the appellate proceedings (particularly in the commercial disputes).

[25] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 190; Pazdan, *Prawo prywatne międzynarodowe*, p. 77; Ludwiczak, *Międzynarodowe prawo prywatne*, p. 95; Walaszek/Sośniak, *Zarys prawa międzynarodowego prywatnego*, p. 129; Przybyłowski, *Prawo prywatne międzynarodowe*, p. 189; J. Sułkowski, "Conception du droit international privé d'après la doctrine et la pratique en Pologne", p. 628.

[26] 9.5.2007, II CSK 60/07, Supreme Court, *OSNC*, 2008, No 5, item 53; 13.4.2007, III CZP 21/07, Supreme Court, *OSNC*, 2008, No 3, item 34; 19.5.2005, V CK 783/04, Supreme Court, *OSNC*, 2006, No 4, tem 72; 19.12.2003, III CK 80/02, Supreme Court, *OSNC*, 2005, No 1, item 17; 27.3.2001, IV CKN 1380/00, Supreme Court, LEX No 327935; 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48.

[27] The governmental proposal of the Act on private international law presented to the Parliament on 31.10.2008, Doc. No 1277 (www.sejm.gov.pl, visited 22.6.2010).

[28] Draft PIL Act provides in article 11(1): "The Court is obliged to ex officio ascertain the circumstances which determine the applicability of the law, as well as to apply both the rules of private international law and the law applicable determined by these rules on its own motion."

[29] 21.4.1979, III CRN 305/78, Supreme Court, *OSPiKA*, 1980, No 5, item 82 (the case concerned the application of the New York law on the maritime transport).

[30] Ereciński, "Glosa do wyroku z 21 IV 1979, III CRN 305/78", p. 145.

[31] 26.10.1997, II CKU 53/97, Supreme Court, Legalis database.

[32] See 9.5.2007, II CSK 60/07, Supreme Court, *OSNC*, 2008, No 5, item 53. Errors in that respect are however sometimes made by the Polish courts. It occasionally happens that a court, faced with the foreign law, attempts to interpret it in light of the understanding given to a similar legal concept known in Poland. To that effect: 8.1.2003, II CKN 1077/00, Supreme Court. This is plainly wrong. See Zachariasiewicz/Żarnowiec, "Dorozumiany

The application of foreign rules is not subject to reciprocity of the State the law of which is to be applied.[33] It is thus irrelevant whether the court of the given foreign State would apply Polish law in an equivalent situation.[34] Similarly, the lack of diplomatic relationships between Poland and a given State is not an obstacle to the application of law of the latter.[35] In a similar way, the fact that a State is not recognized under international law does not constitute a reason to refuse the application of its law.[36]

The Polish legal tradition imposes an active role on a judge with respect to the task of determining the applicability of the foreign law, and in relation to the duty to ascertain the content of foreign law. Article 1143 of the k.p.c. (the Polish Code of Civil Procedure), after amendments of 2008, now expressly states that the court ascertains and applies the foreign applicable law *ex officio*.[37] Throughout years this principle was

wybór prawa: Glosa do wyroku Sądu Najwyższego z dnia 8 stycznia 2003 r., II CKN 1077/00, niepubl.", pp. 156-157.

[33] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 191; Pazdan, *Prawo prywatne międzynarodowe*, p. 77; Gołaczyński, *Prawo prywatne międzynarodowe*, p. 39.

[34] Pazdan, *Prawo prywatne międzynarodowe*, p. 77.

[35] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 208.

[36] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 208.

[37] Art. 1143(1) states: *"The court on its own motion ascertains and applies the applicable foreign law. The court may request the Ministry of Justice to provide the text of this law and to describe the practice of foreign courts."* It should be noted that Art. 1143 k.p.c. which provides for an obligation of the court to act *ex officio*, speaks of *"ascertaining"* the content of foreign law and not of "proving" it. Although the methods of *"ascertaining"* the content of foreign law are similar to the measures employed in order to prove the facts, the important difference between the two is that an obligation to determine the content of foreign law – unlike the facts of the case – rests on the court and not on the parties. This difference is underlined by using a word "ascertain" instead of "prove" in Art. 1143(1). In the older literature a dominant opinion seemed to be that the foreign law is actually being proven. See Ehrlich, Gliklich, "Prawo jako przedmiot dowodu", p. 107; Siedlecki, *Postępowanie cywilne w zarysie*, p. 303; Skierkowska, *Międzynarodowe postępowanie w sprawach alimentacyjnych*, p. 101. In one of the judgments it was however observed that *"foreign law is not strictly speaking subject to a proof, but ascertaining its content often requires that an expert's opinion is admitted as the evidence to that effect"* (14.11.1999 Warsaw Court of Appeals, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48). One author has observed that whether the foreign law is "ascertained" or "proved" is of no decisive significance. The important question is what kind of evidence rules apply to the process of ascertaining the foreign law. See Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 217; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 277. However, because Art. 1143 k.p.c. speaks of *"ascertaining"* the content of the foreign law and not of "proving" it, we prefer to use the former term in the discussed context.

unanimously supported in the Polish case law[38] and doctrine.[39] Judges may however take advantage of the help offered by the parties if the parties are knowledgeable in that respect or are willing to provide their assistance, but the court may not derive any negative consequences for the parties from the fact that the content of foreign law has not been provided by them.[40] At least theoretically thus, the parties are not required to plead nor to prove the foreign law and they cannot be exposed to any negative procedural consequences for their lack of activity in that respect.

It is also generally agreed that the duty of the court is not limited to ascertaining the content of the black letter rules. The court also has to inquire into the interpretation of the given foreign law, whether stemming from the case law or doctrine,[41] i.e. the judge has to investigate the practical aspects and find out how the foreign law is applied in the State of its origin, as if he or she were a foreign judge.[42] If the applicable law is that of the country where precedents are the source of law, the Polish court should closely consider the relevant case law in order to decide the dispute.[43] Moreover, if there is a need to interpret a contract, the Polish court has to apply the rules on the interpretation of contracts from the foreign applicable law.[44]

In one of the judgments, the Supreme Court has observed that when ascertaining the content of the given foreign law, it is insufficient to proceed under an assumption that *"such a Romanist legal system can be deemed to be based on certain principles"*. To the contrary, the court should always base its decision on the concrete rules of the applicable foreign law, whether their source is legislation or court precedents.[45]

It seems that the clearly active role of a judge with respect to the application of foreign law is rooted in the tradition of Polish procedural law, dominated under communism by the principle of a "substantive truth" (as opposed to the principle of

[38] 9.5.2007, II CSK 60/07, Supreme Court, OSNC, 2008, No 5, item 53; 13.4.2007, III CZP 21/07, Supreme Court, OSNC, 2008, No 3, item 34 – the obligation to collect information on the foreign law rests also on the land registry court; 11.8.2004, II CK 489/03, Supreme Court, LEX No 523625; 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48.

[39] As noted by K. Przybyłowski, the court is both entitled and at the same time obliged to collect information on the content of the foreign applicable law. Przybyłowski, *Prawo prywatne międzynarodowe*, p. 189. See also Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, pp. 197-198; Pazdan, *Prawo prywatne międzynarodowe*, p. 77; Margoński, "Metodyka ustalania treści obcego prawa spadkowego", p. 68.

[40] See the case law cited in note 26 *supra*.

[41] 11.8.2004, II CK 489/03, Supreme Court, LEX No 523625. See also Pazdan, *Prawo prywatne międzynarodowe*, p. 76; Gołaczyński, *Prawo prywatne międzynarodowe*, p. 39; Przybyłowski, *Prawo prywatne międzynarodowe*, p. 187 and the pre-war literature and jurisprudence cited therein.

[42] Ereciński, "Ogólne zagadnienia stosowania prawa obcego przez sądy", p. 82; Margoński, "Metodyka ustalania treści obcego prawa spadkowego", p. 69.

[43] 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48.

[44] 19.5.2005, V CK 783/04, Supreme Court, OSNC, 2006, No 4, item 72. See also Gołaczyński, *Prawo prywatne międzynarodowe*, p. 39.

[45] 19.12.2003, III CK 80/02, Supreme Court, OSNC, 2005, No 1, item 17.

the "formal truth"). For many years, the civil procedure was not that much seen as a framework for excavating the colliding interests of the parties, but rather as a process of finding a true answer to the problem. The parties were thus not considered to be in the ultimate control of the dispute. The right solution was to be found by the judge. After the collapse of the communism, the Polish civil procedure was gradually changing towards more adversarial proceedings (however, it would be misleading to suggest that the principle of "substantive truth" has been totally rejected). It thus seems, that when looking from the practical point of view, nowadays more burden is put on the parties with respect to how foreign law is pleaded and ascertained, that it used to be a few decades ago. This occurred as a result of amendments to the general law of procedure, and a change as to general expectations of the courts towards the parties (particularly in the commercial disputes), although the theoretical attitude towards the application of foreign law has not been modified (neither by positive law nor jurisprudence).

One of the practical differences can be seen at the level of appeal to the Supreme Court. The rules relating to this last resort measure have changed importantly since the fall of communism. Back in the 80s it was thought that the Supreme Court on appeal (which was called a "revision") should still apply foreign law *ex officio*, even if the need to apply the foreign law turned out only once the case had reached the level of the Supreme Court.[46] Nowadays, because of the strict requirements for appeal to the highest court (presently called "cassation"), a different approach is taken. The party filing cassation has to precisely indicate a concrete rule of law breached by the lower court. This applies to the foreign law as much as to the Polish law.[47] Consequently, it is hard to imagine the Supreme Court applying the foreign law *ex officio*, because the very requirements set for the cassation force the complaining party to precisely indicate the rule of the foreign law, which has been breached.

4. The means by which the content of foreign law may be ascertained. Cooperation between the court and the parties

Polish law provides for certain special measures, which the court can use in order to ascertain the content of the foreign law. Two of them are mentioned in Article 1143 k.p.c. (information from the Ministry of Justice and an expert opinion)[48] and the third comes from the European Convention on Information on Foreign Law of 1968 (the "London Convention"), under which the court may formulate a request to a Contracting State, asking for assistance in ascertaining the content of the foreign law.[49] Nevertheless, Article 1143 k.p.c. makes clear that the court may also use any

[46] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 274.

[47] See 29.9.2000, I CKN 698/00, Supreme Court, Legalis database. Compare 27.3.2001, IV CKN 1380/00, Supreme Court, LEX No 327935.

[48] Art. 1143(3) provides: *"For the purpose of ascertaining the content of the foreign law or foreign court practice or determining whether there is reciprocity, the court may also take advantage of other measures, in particular call for an opinion of experts."*

[49] See e.g. 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48; Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 213 *et seq.*; Ereciński,

other measure available to it under the Polish procedural law in order to ascertain the content of the foreign law. The court may thus consult any databases or other sources, whether provided by the parties or collected by the judge himself.[50]

The measure most widely used by the courts is the request under Article 1143(1) k.p.c. for the information on foreign law to be provided by the Ministry of Justice.[51] This measure is also referred to in Paragraph 5 of the Regulation of the Ministry of Justice of 28.1.2002,[52] which provides that the requesting court should precisely define the legal issue that is to be resolved under foreign law. Together with the request, a court passes also the file of the case. In reply the Ministry presents general information on the foreign law. The Ministry is neither allowed to offer any specific solutions of the case pending before the court, nor to provide different information than requested by the court (e.g. information based on a different foreign law), because it has its own assessment of what information would be useful to the court.[53] Usually however, only the text of the foreign law is provided, without further explanations.[54] The Ministry's reply makes a document of a public authority and its official character cannot be questioned, however the content of the answer presented by the Ministry is subject to the free assessment of the court. Therefore, the parties are allowed to contest the accurateness of the information on the foreign law given by the Ministry.[55]

The second measure, which the court may use in order to ascertain the content of the foreign law is an opinion of an independent expert (or a scientific institute) who

"Ogólne zagadnienia stosowania prawa obcego przez sądy", p. 80 ff.; Ciszewski, "Europejska Konwencja o informacji o prawie obcym", p. 135 ff.

50 He may also use a source of foreign law provided by the Ministry of Justice under Art. 1143 in a different case, to which a judge has access. See 17.10.2008, I CSK 105/08, Supreme Court, *OSNC*, 2009, No 11, item 153.

51 The number of requests has been growing with the development of the market economy in Poland, particularly in the civil and commercial matters. See Ereciński, "Ogólne zagadnienia stosowania prawa obcego przez sądy", p. 82; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 279; Margoński, "Metodyka ustalania treści obcego prawa spadkowego", p. 70. The information on foreign law from the Ministry of Justice is provided free of charge.

52 The Regulation of the Ministry of Justice of 28.1.2002 relating to the detailed actions of the courts in the disputes concerning the international civil proceedings and the criminal proceedings in international affaires, *O.J.* of 1.3.2002.

53 Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 227; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 280.

54 Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 225.

55 Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, pp. 226; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 280.

possesses a knowledge on the foreign law.[56] Under Polish procedural law, an expert is regularly called upon by the court when the specific, often technical, information is necessary.[57] According to Article 1143(3) k.p.c. he can also be asked to provide the information on the content of foreign law.[58] Expert's opinion should contain general information and not attempt to resolve the specific dispute pending before the court as this would encroach on the competences reserved to the court.[59]

As already explained, when ascertaining the content of foreign law comes into question, Polish law attributes an active role to a judge, who has the duty to determine and apply the foreign law. It is however underlined in the doctrine that there is also a room for cooperation between the court and the parties in that respect.[60] The court may ask the parties for assistance on the search for the content of foreign law, although no negative consequences may be imposed on a party who failed to provide such information. Thus, the parties may help the court by providing texts of the foreign legislation, case law or even doctrinal works. They are also allowed to present a private expert opinion on the content of the foreign law, although such an opinion is treated only as a private statement of the party. If persuaded, the court will nevertheless rely on it. Therefore, even though the active role with respect to ascertaining the content

56 Such an opinion was called upon e.g. in 27.3.2001, IV CKN 1380/00, Supreme Court, LEX No 327935; 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48.1999.

57 The opinion of such an expert is treated as an important source of evidence in Poland and is valued much higher than an opinion of the parties' expert. The latter is not typical for the Polish law of civil procedure and can only be treated as a private statement of a party. See Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 233; Ereciński, "Glosa do wyroku z 21 IV 1979, III CRN 305/78", p. 143.

58 The expert's opinions as to the content of foreign law are not however that popular in court practice. See Margoński, "Metodyka ustalania treści obcego prawa spadkowego", p. 74; Ciszewski, "Europejska Konwencja o informacji o prawie obcym", p. 136. The costs of an expert's opinion are included in the general costs of the proceedings and are payable – in principle – by the losing party, as in accordance with the regular rules of civil procedure. However, if the parties wish to provide a privately nominated expert's opinion, the costs incurred to that effect are at their own expense and are not recoverable. If a party is granted a temporary exception from the costs of legal proceedings, it will not be obliged to make an advance for the costs of the expert's opinion. However, if such a party looses the case, the court would normally impose on such a party the obligation to cover the costs of the proceedings, including the costs of the expert's opinion, unless in its discretion it decides that these costs should be born by the other party or the Treasury.

59 The court should not invite an expert to provide the concrete solutions of the case by asking specific questions how to resolve the given legal issue. It is not in the competence of the expert to apply the legal rules to the circumstances of the case. See Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, pp. 226-231.

60 Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, pp. 222-223.

of foreign law is prescribed for a judge, it is in the best interest of the parties to assist the court and to present the foreign law in the manner most advantageous for them.[61]

Under Polish law, the parties are not obliged to plead the foreign law because a duty to apply the rules of private international law and to determine the applicability of a foreign law rests on the court. The parties are however well advised to assist the court and plead the foreign law. In that respect, the foreign law can be alleged by the parties through any method known to the Polish civil procedure. Thus, the parties can allege the applicability of a foreign law in their pleading to the court, both expressly and tacitly (by invoking provisions of a certain foreign law) or submit at the hearing that the dispute is governed by a given foreign law.

5. The sufficient determination of the content of foreign law in a reasonable time

Under Polish law it is the court that ultimately controls the process of ascertaining the content of foreign law. It is therefore up to the judge to assess whether his knowledge of the foreign law is sufficient in order to constitute the basis for his substantive decision, i.e. to resolve the dispute. Consequently, this question should be decided by every judge on a case by case basis.

However, it has to be underlined that it is the obligation of the court to consider whether there is a need to employ any of the measures from Article 1143 k.p.c. It would constitute a violation of this provision, if the court refused to make use of these measures and applied Polish law under Article 7 p.p.m., convinced of the impossibility to ascertain the content of foreign law.[62]

According to Article 7 p.p.m., if it is not possible to ascertain the content of the applicable foreign law, Polish law will be applied, as a measure of last resort.[63] There is no time frame in which the court is obliged to continue the attempts to ascertain the content of the foreign law.[64] Some believe that in the case where the foreign law is to

[61] In the judgment of 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48 has observed that a party cannot subject its legal position with regards to the merits of the case on the courts' determination of the content of foreign law. In other words the party cannot wait with its substantive submission until the court will provide it with all of the rules of the foreign law. It has to be assumed that a party involved in an international transaction knows the foreign law and is capable (and thus obliged to do so) of formulating its claims and submissions under the law that it deems applicable. Only then, and within the scope of the parties submission, the court is obliged to ascertain the relevant content of foreign law.

[62] 11.8.2004, II CK 489/03, Supreme Court, LEX No 523625; 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48.

[63] Art. 7 p.p.m. states that: "*If it is not possible to determine the circumstances on which the applicability of foreign law depends, or it is not possible to ascertain the content of the applicable foreign law, the Polish law shall be applied.*"

[64] According to T. Ereciński it is not possible to infer a "reasonable", "adequate" or similar time frame from the wording of Art. 7 p.p.m., as it stands today. See Ereciński, "Ogólne zagad-

be applied, the principle of expediency of proceedings is less intense and gives a floor to the necessity to completely and adequately ascertain the content of the foreign law.[65]

Under no circumstances is the court allowed to reject or dismiss the claim because of the fact that the content of the foreign law cannot be ascertained.[66] The furthest the court can go is to apply the *lex fori*.

Nevertheless, it should once again be observed that a refusal on the part of a court to take advantage of the available measures of proof and premature application of the *lex fori* under Article 7 p.p.m. constitutes a violation of Article 1143 k.p.c. Such a judgment of a court cannot stand and may be repealed. As underlined both in the doctrine and case law of the Supreme Court, the "temptation" to apply *lex fori* should be restrained. The court should undertake all possible efforts of establishing the content of foreign law.[67]

Moreover, any doubts as to the content of foreign applicable law do not constitute an impossibility of ascertaining its content. Similarly, a "gap" in the foreign legal system (lack of legal regulation with respect to a certain factual situation) does not justify the refusal of the application of foreign law. Both these instances are simply a matter of interpretation of the foreign law, which should be made in accordance with the rules of interpretation laid down in the applicable foreign legal system.[68]

Lastly, it is worth mentioning that Article 11(2) of the Draft PIL Act sets a time frame in which the court should repeat the endeavors in order to ascertain the content of foreign law. Namely, if this is not possible within a "reasonable" period of time, the court is allowed to apply Polish law.[69]

6. Rejecting the application of foreign law

According to Article 6 p.p.m.: "*the foreign law cannot be applied if its application would have consequences contrary to the basic principles of the Polish public policy*".[70] This provi-

nienia stosowania prawa obcego przez sądy", p. 82; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 282.

[65] If necessary the court can protect the interests of the parties by granting a temporary relief. See Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 281.

[66] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 254.

[67] 11.8.2004, II CK 489/03, Supreme Court, LEX No 523625; 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48; Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 255; Ludwiczak, *Międzynarodowe prawo prywatne*, p. 109.

[68] Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 252.

[69] Art. 11(2) of the Draft PIL states: "If ascertaining the content of the foreign applicable law is not possible within a reasonable period of time, Polish law should be applied."

[70] The public policy exception has an extensive doctrinal coverage in Poland. See e.g. Sośniak, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym*, p. 1 ff.; Sośniak, "Les effets de l' application de la clause d'ordre public dans la doctrine et la législation contemporaines de droit international privé", p. 177 ff.; Tomaszewski, "Glosa do postanowienia SN z 26.8.1974", item 141c; Zawada, "Klauzula porządku publicznego w międzynarodowym

sion is treated as a kind of a "safety clause", which allows a judge to refuse to apply foreign law in certain exceptional circumstances when its application would be against the essential principles underlying Polish legal system.[71] The *ordre public* encompasses primary – but not exclusively – the principles established in the Polish Constitution. Core rules underlying the particular fields of law also form part of the public policy. However, not all of the mandatory rules contained in Polish statutes fall within the notion of the public policy – the scope of the latter is much narrower. Article 6 p.p.m. is a flexible instrument leaving a wide range of discretion to a judge, who can decide which rules of the Polish system are sufficiently essential to bar the application of the particular foreign law.[72]

What is often underlined is that the public policy operates when a concrete situation requires. Only if the consequences of application of the foreign law in the individual case – and not the rules of foreign law *in abstracto* – are incompatible with the Polish *ordre public*, may the court refuse to apply the foreign law.[73]

Most of the cases in which the exception of public policy was used concerned marriage and family law (e.g. polygamy,[74] restrictions on marriage for nationality reasons, or a discriminatory character of a divorce, which can be effectuated by a unilateral statement by a man,[75] etc.).

postępowaniu cywilnym", p. 73; Zawada, "Klauzula porządku publicznego w prawie prywatnym międzynarodowym (na tle orzecznictwa Sądu Najwyższego w sprawach z zakresu prawa rodzinnego i spadkowego)", p. 71; Zachariasiewicz, "Klauzula porządku publicznego jako podstawa odmowy uznania lub wykonania orzeczenia sądu polubownego w polskim prawie arbitrażowym na tle prawnoporównawczym", p. 61.

71 Pazdan, *Prawo prywatne międzynarodowe*, p. 72; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 291. See also 2.6.1980, I CR 124/80, Supreme Court, *OSNCP*, 1981, item 1.

72 Pazdan, *Prawo prywatne międzynarodowe*, p. 73; Ludwiczak, *Międzynarodowe prawo prywatne*, p. 92.

73 Pazdan, *Prawo prywatne międzynarodowe*, p. 73; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 291; Ludwiczak, *Międzynarodowe prawo prywatne*, p. 90. Some decisions of the Polish Supreme Court were wrong because the public policy clause was applied *in abstracto*. See 22.6.1972, III CZP 34/72, Supreme Court, *OSNCP*, 1973, No 4, item 52; 26.8.1974, I CR 608/74, Supreme Court, *OSP*, 1976, No 7-8. This was well explained by Tomaszewski in a gloss to the latter of the mentioned judgments.

74 11.10.1974, II CR 735/74, Supreme Court, *OSP*, 1976, No 7-8, item 142; 22.6.1972, III CZP 34/72, Supreme Court, *OSNCP*, 1973, No 4, item 52; 26.8.1974, I CR 608/74, Supreme Court, *OSP*, 1976, No 7-8; 16.11.1971, III CRN 404/71, Supreme Court, *OSNCP*, 1972, No 5, item 91; 11.10.1969, I CR 240/69, Supreme Court, *PiP*, No 2.

75 20.8.2009, I ACa 410/09, Katowice Court of Appeals, *OSA Katowice*, 2009, No 4, item 6; 20.1.1983, Supreme Court, III CZP 37/82, *OSNCP*, 1983, No 8, item 107.

7. Possibilities of review of the judgment rendered on the basis of foreign law

In Poland it is possible to appeal a judicial decision which contains errors with respect to the application of foreign law all the way up to the Supreme Court (i.e. it is permitted to file the so called "cassation").[76] Any of the following reasons could justify an appeal and a cassation: wrong application of the conflict of law rules (application of the "wrong" law)[77] or failure to apply the rules of private international law (i.e. application of the *lex fori* instead of a foreign applicable law),[78] incorrect application of the foreign law (its erroneous interpretation, application or inadequate determination of the content of foreign law),[79] insufficient efforts of the court in order to ascertain the content of foreign law under Article 1143 k.p.c.,[80] and erroneous refusal of the application of the foreign law because of the alleged violation of public policy.[81]

Wrong application of the conflict of law rules constitutes a breach of the national law. Therefore, it does not raise any particular issues and is treated as a violation of any other rule of Polish law.[82]

On the other hand, the possibility to appeal the erroneous application of foreign law stems from the fact that the matter of foreign law is deemed to be a matter of law. The rules of the Code of Civil Procedure concerning appeal and cassation (Arts. 368 and 398^3 k.p.c. respectively) do not distinguish between national and foreign law. Therefore, in accordance with the principle of *lege non distinguente*, one is not allowed to distinguish between the foreign and Polish law when assessing the grounds of the appeal (cassation).[83] Consequently, the erroneous application of foreign law is treated in the same way as incorrect application of the Polish law.

76 Pazdan, *Prawo prywatne międzynarodowe*, p. 77; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 294; Ludwiczak, *Międzynarodowe prawo prywatne*, p. 110; Walaszek/Sośniak, *Zarys prawa międzynarodowego prywatnego*, p. 130. Similarly, under the old legal regime, it was possible to bring a "revision". The foreign and Polish law was treated the same at the stage of an appeal also before the II World War. See Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 268-269; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 296.

77 9.5.2007, II CSK 60/07, Supreme Court, *OSNC*, 2008, No 5, item 53; 29.9.2000, I CKN 698/00, Supreme Court, Legalis database.

78 10.11.2005, V CK 293/05, Supreme Court, LEX No 424343; 27.2.2004, V CK 307/03, Supreme Court, Legalis Database; 26.10.1997, II CKU 53/97, Supreme Court, Legalis database.

79 19.12.2003, III CK 80/02, Supreme Court, *OSNC*, 2005, No 1, item 17; 27.3.2001, IV CKN 1380/00, Supreme Court, LEX No 327935.

80 11.8.2004, II CK 489/03, Supreme Court, LEX No 523625; 15.11.1999, I ACa 780/99, Warsaw Court of Appeals, *Prawo Gospodarcze*, 2000, No 8, p. 48.

81 See Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, pp. 298-299.

82 Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 269.

83 Ereciński, *Prawo obce w sądowym postępowaniu cywilnym*, p. 270; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 294 *et seq*; 21.4.1979, III CRN 305/78, Supreme Court, *OSPiKA*, 1980, No 5, item 82.

8. Multilateral and bilateral conventions as regards the proof of foreign law

Poland is a party to the European Convention on Information on Foreign Law, done at London on 7.6.1968 (which entered into force in Poland on 15.12.1992), as well as to its Strasbourg Protocol of 15.3.1978 (which entered into force on 15.12.1992).[84]

As to bilateral agreements relating to legal cooperation in civil and/or criminal matters, Poland has signed and ratified agreements with a significant number of countries. These agreements usually contain an obligation to provide the other contracting State with an information on the law of the signatory to the agreement. Agreements containing such an obligation were concluded with: Algeria on 9.11.1976;[85] Austria on 11.12.1963;[86] Belarus on 26.10.1994;[87] Bosnia and Herzegovina;[88] Bulgaria on 4.12.1961;[89] China on 5.6.1987;[90] Cyprus on 14.11.1996;[91] Cuba on 18.11.1982;[92] Czechoslovakia on 21.12.1987;[93] Egypt on 17.5.1992;[94] Estonia on 27.11.1998;[95] Finland on 27.5.1980;[96] Greece on 24.10.1979;[97] Hungary on 6.3.1959;[98] Italy on 28.4.1989;[99] North Korea on 28.9.1986;[100] Libya on 2.12.1985;[101] Lithuania on 26.1.1993;[102] Latvia on 23.2.1994;[103] Macedonia;[104] Morocco on 21.5.1979;[105] Mongolia on 19.10.1998;[106]

[84] O.J. of 30.5.1994.
[85] O.J. of 2.4.1982.
[86] O.J. of 9.2.1974.
[87] O.J. of 15.11.1995.
[88] A succession agreement of 22.12.2006 under which the Agreement with Yugoslavia of 6.2.1960 (O.J. of 28.6.1963) remains binding as between Poland and Bosnia and Herzegovina; M.P. of 15.7.2008.
[89] O.J. of 20.4.1963.
[90] O.J. of 26.3.1988.
[91] O.J. of 30.4.1999.
[92] O.J. of 11.10.1984.
[93] O.J. of 21.6.1989, with the amendments as between Poland and Czech Republic introduced by agreement of 30.10.2003 (O.J. of 4.11.2005).
[94] O.J. of 17.3.1994.
[95] O.J. of 29.1.2000.
[96] O.J. of 18.11.1981.
[97] O.J. of 8.2.1982.
[98] O.J. of 25.2.1960.
[99] O.J. of 16.3.1992.
[100] O.J. of 18.8.1987.
[101] O.J. of 30.4.1987.
[102] O.J. of 18.3.1994.
[103] O.J. of 27.9.1995.
[104] A succession agreement of 9.5.2007 (O.J. of 19.2.2009) under which the Agreement with Yugoslavia of 6.2.1960 (O.J. of 28.6.1963) remains binding as between Poland and Macedonia.
[105] O.J. of 24.3.1983.
[106] O.J. of 12.3.2003.

Russia on 16.9.1996;[107] Romania on 15.5.1999;[108] Syria on 16.2.1985;[109] Tunisia on 22.3.1985;[110] Turkey on 12.4.1988;[111] Ukraine on 24.5.1993[112] and Yugoslavia on 6.2.1960.[113] With Belgium on the other hand Poland has an agreement devoted exclusively to the information on the foreign law concluded on 17.12.1986.[114]

The bilateral agreements do not seem to be regularly invoked before the courts (there is no published case-law known to us where these agreements would be applied in order to request information on the law of the other contracting party). On the other hand, there is a certain practice with respect to the London Convention, which has occasionally been applied by Polish courts. One of the problems that occurred in practice was a question of how detailed the request for information can be, and more precisely: can the referring court form its question in such a manner that the answer of the authorities of the addressed State provides a specific solution to the case pending before the referring court.[115]

II. Application of Foreign Law by Non-Judicial Authorities

1. General overview

In Polish law there are no provisions, which govern the application of foreign law by non-judicial authorities. The guidelines from case-law in this respect are scarce. The application of foreign law by non-judicial authorities has been discussed in some scholarly writings, however not extensively.[116] To a large extent the application of foreign law by non-judicial authorities constitutes a *terra incognita*.

It seems that most frequently, the question of foreign law may come into play before notaries *(notariusz)*, who in Poland have a quasi-public position. Another authority which is likely to be faced with a foreign legal system is the Civil Registry *(Urząd Stanu Cywilnego)*, where most important personal information is entered into (birth, death, marriage, etc.). The land and commercial registrars are on the other hand kept by the

[107] O.J. of 24.6.2002.
[108] O.J. of 24.6.2002.
[109] O.J. of 10.10.1986.
[110] O.J. of 14.4.1987.
[111] O.J. of 20.1.1992.
[112] O.J. of 14.9.1994.
[113] O.J. of 28.6.1963.
[114] O.J. of 18.7.1990.
[115] The decision of the Warsaw Court of Appeal of 24.9.2009 (I ACa 995/08) pending on appeal before the Supreme Court.
[116] See Pazdan, "Cudzoziemiec klientem polskiego notariusza", p. 172 ff.; Pazdan, "Notariat a prawo prywatne międzynarodowe", p. 197 ff.; Pazdan, "Czynności notarialne w międzynarodowym prawie spadkowym", p. 99 ff.; Sztyk, "Czynności notarialne w obrocie prywatnym międzynarodowym", p. 297 ff.; Drozd, Czynności notarialne z elementem zagranicznym w obrocie nieruchomościami (zagadnienia wybrane)"., p. 7 *et seq.*; Oleszko, "Stosowanie prawa obcego przez polskiego notariusza", p. 207 ff.

courts, and should thus be treated as judicial authorities. It is also conceivable, although not common in the practice, that a need to take into account foreign (private) law may arise before an administrative body (e.g. if the administrative authority has to assess the validity of the power to represent a certain person, which was granted abroad).

The question whether foreign law is to be treated as law or fact before a non-judicial authority has not been discussed in the Polish doctrine or case law. It is submitted that under a general rule applicable in Poland, the foreign law should be considered as law, also when applied by the non-judicial authorities. However, a notary applies foreign law in a different sense than a court, because for him the foreign law in question will not provide a basis for a binding decision. The notary only assists the parties in their transaction (usually by providing the notary deed form for the document) and in that respect has an obligation to apply the rules of law. The notary's assessment, for example as to whether the contract is valid under the applicable law, is not binding for the parties or for any court.

2. Similarities and differences between the system of application of foreign law by judicial and non-judicial authorities

In Poland, the notary is said to know the law (Polish law). He or she is obliged to provide the parties with necessary advice and to inform them about the legal consequences of their transaction[117]. He shall refuse to act if the parties' transaction would violate the rules of law.[118] According to the unanimous opinion in the doctrine, the above refers only to Polish substantive and private international law.[119] Nevertheless, it is an obligation of the notary to take into account the conflict of law rules and to inform the parties whether Polish or foreign law applies to their transaction.[120] Unlike the courts however, the notary does not have an obligation to ascertain the content of foreign law nor to inform the parties about the consequences of its application.[121]

As a consequence of the above, the principle of *iura novit curia* does not apply to notaries,[122] nor – in our view – to other non-judicial authorities applying the foreign law.

[117] Art. 80 of the Law on Notaries. The Act of 14.2.1991 – the Law on Notaries, (uniform text published in O.J. of 14.10.2008.

[118] Art. 81 of the Law on Notaries.

[119] Pazdan, "Cudzoziemiec klientem polskiego notariusza", p. 174; Pazdan, "Notariat a prawo prywatne międzynarodowe", p. 208; Pazdan, "Czynności notarialne w międzynarodowym prawie spadkowym", p. 100.

[120] Pazdan, "Cudzoziemiec klientem polskiego notariusza", p. 174; Pazdan, "Notariat a prawo prywatne międzynarodowe", p. 208; Pazdan, "Czynności notarialne w międzynarodowym prawie spadkowym", p. 100; Oleszko, "Stosowanie prawa obcego przez polskiego notariusza", p. 212; Drozd, "Czynności notarialne z elementem zagranicznym w obrocie nieruchomościami (zagadnienia wybrane)", p. 8.

[121] Pazdan, "Cudzoziemiec klientem polskiego notariusza", p. 175; Pazdan, "Notariat a prawo prywatne międzynarodowe", p. 208; Pazdan, "Czynności notarialne w międzynarodowym prawie spadkowym", p. 100; Oleszko, "Stosowanie prawa obcego przez polskiego notariusza", p. 212.

Since the notary has an obligation to take into account the conflict of law rules, the parties do not have to plead the application of foreign law. Nonetheless, in practical terms, considering the lack of experience of most of the notaries in the international transactions, it is rather advised that the parties suggest to the notary that under the circumstances underlying their transaction, the foreign law might be applicable.

On the other hand, the notary has neither obligation to ascertain the content of the foreign law, nor to assist the parties in that respect. Therefore, if the parties wish to convince the notary of the particular content of foreign law, they would have to provide the necessary proof.[123]

The situation seems to be different before the Civil Registry. This is an official public body functioning within the structure of the municipality. It is an administrative authority of the State. Taking into account the general principles accepted in Poland with respect to the application of the foreign law, it may be contended that the Civil Registry has an obligation both to apply the conflict of law rules and – at least in principle – to ascertain the content of foreign law. The same would apply to other administrative authorities.

With respect to the notaries, the answer to the question of how is the foreign law pleaded and proved is different than in case of judicial authorities. In case of a notary the legislator attributes to him an active role with respect to Polish private international law (i.e. obliges the notary to make aware the parties that a foreign law applies to their transaction under the Polish conflict of law rules), but not with respect to the proof of the content of foreign law. The latter is up to the parties. Moreover, if the parties are not able to convincingly present the content of foreign law to the notary, he may refuse to undertake a transaction, because he is unable to guarantee that it complies with all the requirements of the applicable law.[124] An important reason why this is the case, is that the notary has no effective means of ascertaining the content of the foreign law at his disposal. He is not allowed to ask for the assistance of the Ministry of Justice under Article 1143 k.p.c., nor entitled to make a request for the information on foreign law under the London Convention.[125] The notary could possibly ask for an

[122] Pazdan, "Cudzoziemiec klientem polskiego notariusza", p. 174; Pazdan, "Notariat a prawo prywatne międzynarodowe", p. 208; Pazdan, "Czynności notarialne w międzynarodowym prawie spadkowym", p. 100; Oleszko, "Stosowanie prawa obcego przez polskiego notariusza", p. 212.

[123] Strictly speaking, to talk in this context of "proving" the foreign law is a generalization, because the notary hardly takes any evidence and conducts any formal evidentiary proceedings. However, the notary requests certain information and documents from the parties and so it may be said that the parties "prove" certain factual circumstances.

[124] Oleszko, "Stosowanie prawa obcego przez polskiego notariusza", p. 212.

[125] Pazdan, "Cudzoziemiec klientem polskiego notariusza", p. 176; Pazdan, "Notariat a prawo prywatne międzynarodowe", p. 209; Oleszko, "Stosowanie prawa obcego przez polskiego notariusza", p. 210; Sztyk, "Czynności notarialne w obrocie prywatnym międzynarodowym", p. 301.

opinion of an expert in the given foreign law[126] but such an opinion would only have the value of a private document.[127]

Things might be different when it comes to the application of the foreign law by the Civil Registry. In our view, in principle this public authority has an obligation to apply the foreign law of its own motion. Generally thus, the parties are neither required to plead nor to prove the content of foreign law. These actions should be carried out by the Civil Registry. However, this may not be the case in all of the circumstances. A most common instance of the application of foreign law before Civil Registry concerns a situation, in which a foreign citizen wishes to enter into a marriage in Poland. According to Article 56(1) of the Law on Acts of Civil Registry[128] such a foreigner is obliged to present a document certifying that under the applicable law (the law of his nationality) there exist no obstacles for his marriage. In a sense, this means that he is also obliged to prove the content of the foreign law, which is to allow him to enter into a marriage. It is only if a foreigner is unable to present such a document because of the reasons difficult to overcome that a court may exempt him from this obligation. Such a court is then obliged to apply the applicable foreign law[129] in order to decide whether the foreigner is allowed to enter into a marriage.[130]

Authorities such as the Civil Registry should be treated similarly to the courts with respect to the discussed issue. Thus in principle, the Civil Registry, if manifestly unable to ascertain the content of foreign law, may apply Polish law instead, as provided for in Article 7 p.p.m.

III. Final Comments and Conclusions

Our general assessment of the model of application of foreign law in Poland is that it is correct and should be preserved. It is both conceptually coherent and theoretically well justified. It provides for equality of legal systems thus respecting the laws of other countries. It also protects justified (under the applicable foreign law) interests of the parties. It has the potential of operating effectively in practice.

The existing problems stem rather from specifically practical concerns which do not necessarily underpin the system as such. An important degree of discrepancy seem to exist between the principles of application of foreign law, as defined in theory by the doctrine, as well as by the Supreme Court, and the daily practice of many lower courts.

126 Pazdan, "Notariat a prawo prywatne międzynarodowe", p. 209.

127 Moreover, its costs would have to be imposed on the parties, which usually do not wish to incur additional costs at the stage of entering into a transaction before the notary.

128 The Law on Acts of Civil Registry of September 29, 1986 (uniform text published in O.J. of 30.6.2004.

129 A court has an active role in that respect. See Domański, "Zwolnienie cudzoziemca z obowiązku złożenia dokumentu stwierdzającego możność zawarcia małżeństwa", p. 83.

130 Disputes of this kind have relatively often been heard by the Supreme Court. See 20.1.1983, III CZP 37/82, Supreme Court, *OSNCP*, 1983, No 8, item 107; 26.8.1974, I CR 608/74, Supreme Court, *OSP*, 1976, No 7-8; 22.6.1972, III CZP 34/72, Supreme Court, *OSNCP*, 1973, No 4, item 52.

Firstly, the examples of decisions can be found where a court – driven by a "temptation" to apply the Polish *lex fori* – too readily makes an assumption that a choice of law was made by the parties, because of the fact that their pleadings and statements to the court referred only to Polish law.[131] Such practice is highly questionable taking into account the fact that the courts are obliged to determine and apply the foreign law *ex officio* and that the choice of law can only be established if the real (and not hypothetical) intention of the parties is present.[132] Secondly, occasionally it occurs that courts compel the parties to supply the relevant content of foreign law, under a sanction that the proceedings will be suspended or even discontinued. This is obviously incorrect because the obligation to ascertain the content of foreign law (just as in case of the national law) rests on the court and not on the parties.[133]

The problem is clearly the lack of adequate education of the judges who are not prepared to manage complex international disputes and to apply laws different from the one in which they were trained. Moreover, there are general problems with language skills, which make it even more demanding for the judges to ascertain the content of foreign law. Another issue is that there is also a scarcity of professional expert institutes, which could provide competent information on foreign law to the courts. The existing academic structures specializing in comparative and foreign law are rare and not adequately equipped in terms of library and data base resources, as well as lacking sufficient personnel.

There are no plans to reform the current model as such. For many years, the principle that foreign law is to be treated as law and that the court applies it *ex officio* has been rather uncontroversial in Poland and the doctrine has not formulated any important criticism in that respect. If anything, it is rather the "law in action", not the "law in books", which constitutes a problem in Poland.

Nevertheless, there are certain changes which already have been made and some that are yet to come with a view to clarifying certain principles. In 2008 a clarification was introduced to Article 1143 k.p.c. (see above). In the Draft PIL Act on the other hand, a new Article 11 is proposed, which expressly provides for an obligation of the court to apply the conflict of law rules of its own motion (up till now this rule was not expressed anywhere in legislation). Moreover, it would be clarified that the Polish law may be applied instead of foreign law if the latter cannot be determined within the

131 24.1.2006, I ACa 795/05, Poznań Court of Appeals, *OSA*, 2007, No 5, item 15. A similar discrepancy between the principles advocated by the doctrine of private international law and the practice of the lower courts seems to exist in other European jurisdictions. See Hausmann, "Pleading and Proof of Foreign Law – a Comparative Analysis", p. I-3; Magnus/Mankowski, Joint Response to the Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernisation (http://ec.europa.eu/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm, visited 22.6.2010), p. 18.

132 See Zachariasiewicz/Żarnowiec, "Prawo właściwe dla międzynarodowej umowy sprzedaży towarów oraz dla przedawnienia (uwagi na tle wyroku Sądu Apelacyjnego w Poznaniu z dnia 24 stycznia 2006 r., I ACa 795/05)", pp. 67-69.

133 See Ereciński, "Ogólne zagadnienia stosowania prawa obcego przez sądy", p. 80; Ereciński/Ciszewski, *Międzynarodowe postępowanie cywilne*, p. 282.

reasonable period of time. Sometimes it is proposed that notaries should have access to means of ascertaining the content of foreign law. However, no specific proposals to that effect have been made so far.

In 2004 Poland has implemented the Council Directive 2002/8/EC of 27.1.2003 on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for disputes.[134] Therefore, the citizens from other EU member states have full access to the measures of legal aid available for Polish citizens, i.e. a temporary exception from the costs of the proceedings and a free legal representation.

In our view a European law instrument in the field of the application of foreign law is both undesirable and unfeasible. The application and treatment of foreign law is a matter deeply rooted in the procedural traditions of each and every member State of EU. Many of the specific issues arising in that respect (e.g. what are the measures of proof of the foreign law, or on whom does the burden of proof rests) are intertwined with the rules of civil procedure of a given State. Therefore, in our opinion, to unify the rules on the application of foreign law without a simultaneous unification of the systems of the civil procedure is bound to fail.

Moreover, unlike the lack of unification of the rules of jurisdiction or recognition of judgments, the differences in the application and treatment of foreign law among the member states, in our opinion, do not constitute a serious obstacle to the functioning of the common market and the EU citizens' access to justice. Obviously, a uniform procedural code would greatly support these goals. In the present situation however, national rules on the application of foreign law are just another procedural peculiarity of each member State – a one a foreigner has to take into account when litigating in another State and certainly not the most burdensome.

Lastly, the convenience of judges should be weighed against the potential (in our view rather fictitious) benefits of unification. It has to be remembered that a European law instrument, confined to the question of application of foreign law, would constitute yet another piece of legislation dealing with a very limited legal problem, and could thus cause additional confusion and hurdle for the judges.

Nevertheless, was the European Union to introduce a legislative measure attempting at harmonization or unification of rules relating to the application of foreign law, the following principles are to be – in our view – recommended.

Firstly, the foreign law should be treated as law not as a matter of fact. The underlying reason is that to treat the foreign law of another EU member State as fact could be seen as a discrimination of that law in comparison to the treatment afforded to the national law.

Secondly, the instrument should have a universal application (i.e. should apply also with respect to the laws of the non-EU States), in order to avoid a necessity to apply two different sets of rules.

Thirdly, although some general principles can apply equally to both judicial and non-judicial authorities, not all of the rules of the instrument could apply to certain

[134] OJ L 26 of 31.1.2003, p. 41. The Directive was implemented in Poland by an Act of 17.12.1004 on the legal aid in the civil law proceedings conducted within the Member States of the European Union and on the legal aid in the settlement procedure before the commencement of the proceedings (O.J. of 17.1.2005).

non-judicial authorities. This refers particularly to notaries, whose function and a way in which they proceed is fundamentally different from litigation in the courts. The specific nature of such an authority has to be taken into account.

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