Professor Associate, Dr. Mateusz Pilich © 2020

Introduction to Polish private international law: General Part

Incidental question

The problem of the so-called 'incidental question' amounts to a situation when, in the course of deciding the case, the judge has to consider an issue subsidiary to the actual subject matter of the case to be decided. In other words, the decision as to the merits depends on the decision pertaining to another legal situation.

Example. In the Canadian case *Schwebel v. Ungar*[1], the Ontario courts, and finally the Supreme Court of Canada, had to face the impact of a foreign divorce on the capacity to remarry. The defendant woman had married her first husband in Hungary, where she had been living at the time, according to Jewish rites. The union was validly concluded in the light of the Hungarian law. However, soon afterwards both spouses left for Israel with an intention to settle there. On their way to the country of destination, they spent some time in a refugee camp in Italy, where the husband handed over the bill of divorce (*ghet*) pursuant to the Israeli religious law and then he left the defendant. Both spouses arrived to Israel separately and were received as divorced according to the local law; still, private divorces were invalid in both Italy and Hungary. After several years in Israel, the defendant paid a visit to Canada where she met and married her second husband - the plaintiff to the case. After becoming aware of Ms. Ungar's first marriage, Mr. Schwebel petitioned the

[1] [1964] 48 DLR (2d) 644 (Ontario Court of Appeal), [1965] SCR 148 (Supr. Court), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/4411/index.do (last visited: 23/03/2020); see T.C. Hartley, *The Recognition of Foreign Divorces: Schwebel v. Ungar (Or Schwebel)*, 4 Weekly Law Reports [1965], p. 99 *et seq*.

Ontario High Court for a declaration that his wedlock with the defendant was void due to the bigamy.

As we can see, the main question was the validity of the second marriage (concluded in Ontario, Canada), whereas the incidental question was whether the defendant had actually been divorced before she married the plaintiff. The private international law of the province of Ontario would lead to the application of the Israeli law, which was the law of the defendant's domicile at the time of entering into her second marriage. Israeli law recognized the Italian divorce and regarded her as a single woman. On the other hand, the application of Ontario conflict rules on divorce led to a contrary result, as it was Hungarian law that applied (spouses' common domicile at the time of the alleged divorce). Therefore, in the eyes of the Ontario court, the defendant (the wife) would still have been married to her first husband, while the plaintiff (viz. the 2nd husband), who was domiciled in Ontario, had no capacity to marry her. In spite of that argument, the Canadian court, applying Israeli private international law and not the Ontario one, held the marriage valid.[2]

As the Polish case law is concerned, it was found that the conclusion of a valid contract obliging to transfer the title of property shall be an incidental question as regards the transfer itself.[3] Similarly, the valid conclusion of an agreement obliging to the transfer of property has been classified as the incidental question in the case of the acquisition of property.[4]

For the purpose of the systematic explanation of the problem it seems noteworthy to highlight that the incidental question is independent of the subject matter of the main case; it means an autonomous legal relationship, which must be properly classified into the legal category (scope) of the relevant conflict of law provision. Such a question clearly does not follow the subject matter of the main case; yet there is a clear need to settle it before proceeding to the main issue. If, then, the law applicable to the main issue is a foreign legal system, a Polish court could raise the following doubt: whose private international law should

---

[2] J.G. Collier, *Conflict of Laws*, 3rd ed., Cambridge: CUP 2001, p. 28.

[3] See judgment of the Polish Supreme Court of 19 December 2003, III CK 80/02 (OSNC 2005, issue 1, item 17).

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

apply to the preliminary issue? Is it the law of conflict of laws as in force at the seat of the court? Or rather the foreign private international law, which is part of the law proper as to the main issue?

The option of the court applying its own set of the conflict of law provisions (resolving the incidental question according to the *lex fori*, which is called in the German legal literature a 'independent connection'—*selbstständige Anknüpfung*, as it does not depend on law applicable to the principal question) favors the so-called internal harmony of decisions, that is, the convergence of decisions within a given state. On the other hand, it might be expected that the Polish court, which somehow replaces a foreign court, shall hand down a judgment according to more or less the same rules as the judge in another state would do. Such an expectation, which backs an ideal of the so-called international harmony of decisions, is based on the application of foreign conflict-of-laws rules designated as applicable to the main question (i.e. according to the *lex causae*, the doctrine is also referred to as the so-called 'dependent connection' of the incidental question—in German: *unselbstständige Anknüpfung*).[5]

Despite the doubts expressed in the doctrine, the position of jurisprudence in this matter is quite clearly outlined. In the above-mentioned rulings[6], the Supreme Court advocated the application of Polish conflict-of-law rules to an incidental question on a par with the main issue. In fact, it is rare for the courts to do otherwise, since the application of foreign conflict of law provisions might be perceived as lacking an express authorization from the lawgiver and hence controversial. Nevertheless, a deviating solution may be justified by considerations of fairness and equity in a given case.

[5] M. Pazdan, *Prawo prywatne międzynarodowe*, 15th ed., Warszawa 2012, p. 64; J. Kropholler, *Internationales Privatrecht*, 6th ed., Tübingen 2006, p. 221–222 (§32).

[6] Cf. judgments referred to in fn. 3 and 4.