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Introduction to Polish private international law: Specific part

Marriage in the conflict of laws

Introductory remarks

Marriage is a universal phenomenon but contemporarily it does not always mean the same thing. This fact causes important troubles for a national judge in Poland and elsewhere.

The key problem is the decision whether only heterosexual couples are included in the cross-border context. In accordance with Article 18 of the Polish Constitution, marriage as a relationship between a woman and a man remains under the protection and protection of the Republic of Poland. Neither the 2011 Private International Law Act nor the 1965 Family and Guardianship Code define marriage. However, during the work in the Sejm and Senate on the draft of private international law (Sejm Document No. 1277, the 6th term), amendments were set forth with the aim of introducing a legal definition of 'marriage' as a relationship between a man and a woman, and prohibiting the application of any foreign provisions regulating partnerships of persons of the same of sex. Finally they were abolished and not included into the new Law.

According to one of the definitions in the Polish scholarly literature, formulated in the context of Polish substantive law, marriage is a permanent, but not inseparable, monogamous legal relationship between a man and a woman who, in accordance with the law, voluntarily entered into a legal act of marriage before a competent public official or clergyman of a church or other religious association, as a result of which they became equal subjects of marital rights and obligations of a personal and property nature for the purpose

of living together and realizing the good of the spouses and the good of the established family. However, characterizing a marriage on the basis of it would cause considerable practical difficulties related to the application of foreign law.

Example. A consensual marriage contracted abroad without a participation of any authority could be found inexistent or equal to an informal cohabitation. The same could be said about the marriage established in accordance with a foreign law of, say, a Near-East state which does not fully implement the principle of equality for women in marriage.

Of course, concepts of the private international law cannot be equated with relevant concepts of substantive law. This is related to the special function of conflict-of-law rules, which consists in delimiting the scope of application of laws in force in individual countries. It is therefore not possible to determine a marriage within the meaning of private international law without specifying the law governing the elements of that legal relationship. There are features that clearly distinguish marriage from purely factual relationships (e.g. cohabitation) and other legal relationships (e.g. registered partnership)—

1. designation of the subjects of marriage, which can only be people of the opposite sex;
2. permanence of this relationship, which during the lifetime of the spouses can be dissolved only under the conditions and in the form specified by an applicable law pursuant to Article 54 PILA 2011.

Marriage within the meaning of private international law is, therefore, a long-lasting but not inseparable relationship between a man and a woman, arising between parties having the option of entering into it in a form determined by the law of the state in which marriage is concluded, and if the marriage is concluded outside Poland—alternatively, in the form required by the law of the nationality of both spouses or by the law of their common domicile or habitual residence, which creates permanent personal and property relations between the parties regulated by applicable law. According to the dominant opinion, marriage within the meaning of the provisions of the private international law does not include same-sex marriage permitted in many of the contemporary states; there are, however, voices in support of an opposite view that both heterosexual and homosexual relationships are included, which

of course does not mean that the effects of the application of applicable foreign law cannot be subject to control of the Polish public policy (*ordre public*).

Substantive conditions of marriage are governed by the law designated by Sec. 48 PILA 2011—

The ability to conclude a marriage is determined towards each of the parties by the law of his or her nationality as of the day when the marriage is concluded.

The aforementioned substantive premises of marriage comprise, first and foremost, the **minimum age** for entering into it, the **difference of sexes**, and, moreover, the **lack of so-called matrimonial impediments** or, simpler, obstacles (e.g. bigamy, kinship, mental illness, etc.).

The following conflict-of-law provision, Sec. 49 PILA 2011—

(1) The formal validity of marriage is governed by the law of the state in which it is concluded.

(2) If a marriage is concluded outside of the Republic of Poland, it suffices to comply with formal requirements provided for by the law of nationality of both spouses, or by the law of the place of their common domicile or habitual residence as of the day when the marriage is concluded.

—refers to the formal requirements, that is, first and foremost, to the issues of the authority competent to receive declarations of marriage (a civil status officer, a clergyman, etc.), banns, marriage ceremonies, required documents, and—in principle—to the validity of marriage contracted by a proxy. It is irrelevant in terms of the private international law whether the domestic substantive law treats the religious form of marriage as the material precondition of its legal existence (resolution of the Joint Civil Chambers of April 12, 1929, I.N.7/29, OSP 1930, z. 10, item 300).

Capacity of contracting marriage

The applicable law (Sec. 48 PILA 2011) is designated, as to each of the parties, by the nationality connecting factor. If any of the future spouses is a national of two or more states at the same time, the conflict shall be resolved pursuant to Sec. 2 PILA 2011. In the case of stateless persons or refugees, the domicile or the habitual residence replaces the nationality in its function of the connecting factor (Sec. 3 PILA 2011).

Parties' capacity of contracting marriage means that there are **no obstacles to marriage under the law of nationality of each of the future spouses** (i.e. nupturients), as well as there are certain prerequisites fulfilled for entering into marriage (e.g. the difference in sex, compatible parties' statements made before a competent officer or a clergyman etc.). However, the capacity is not assessed *in abstracto* and—irrespective of the wording of Sec. 48 PILA 2011—may not be assessed separately as to each of the future spouses. Quite contrariwise, the capacity to marry another has to be evaluated on the basis of the concrete circumstances, taking into account with whom the marriage shall be concluded.

No need to mention that each of the state organs has to reckon with the potential *renvoi* (remission) foreseen in Sec. 5 PILA 2011, which may result in the application of the Polish law.

Traditionally, two groups of marriage obstacles have been distinguished. The **first one** applies only to one of the future spouses, regardless of the other party with whom the marriage is to be concluded. It includes, for example, obstacles to the minimum age, incapacitation, mental illness or mental retardation. The **second one**, in turn, concerns the relative position of the one party against another (e.g. kinship, affinity, adoption, and the previous wedlock). These two groups are referred to in the older scholarly literature as, respectively, *unilateral* and *bilateral marriage obstacles*—

1. **Unilateral obstacles** were to be applied only to that party whose law provided for it. Example: in Poland minimum age for marriage is 18, whereas in a foreign state X it is 17. Each party's capacity to marry shall be assessed in accordance with his or her national law requirement.
2. **Bilateral obstacles** were characterized by the fact that they also applied to foreigners intending to marry in Poland. For instance, the obstacle of bigamy set out in Sec. 13 of the Family and Guardianship Code results in the lack of capacity of a Polish national to marry a foreigner who is in a valid wedlock, even though the national law of the latter does not provide for such an impediment.

More recently, it was assumed that such a division makes no sense. Thus marriage cannot be concluded in Poland not because of the concept of bilateral obstacles, but simply due to the possible **intervention of the public policy exception** (Sec. 7 PILA 2011) against an applicable foreign law (example: a foreign substantive law rule, providing for the possibility of

polygamy, will be repelled and, as the result, the foreign party will lose his possibility to marry another woman.

Recognition of foreign divorces and legal separations in Poland

If a decision dissolving, annulling or establishing the non-existence of a future spouse's marriage was issued by a foreign court or authority, the head of the civil status registry office may accept declarations of entering into marriage only if such a judgment or a decision is effective in Poland. According to Sec. 1145 of the Code of Civil Procedure, judgments of courts of foreign countries issued in civil cases are subject to recognition from by law, unless there are obstacles set out in Sec. 1146 CCP; in accordance with Sec. 11491 of the Code of Civil Procedure these provisions shall apply *mutatis mutandis* to the decisions of bodies other than foreign countries in civil matters. Moreover, numerous international agreements concluded by Poland provide for the effectiveness of these *de plano* judgments, i.e. without the need for recognition by Polish courts. These are, first and foremost, the Hague Convention on the Recognition of Divorces and Legal Separations of 1 June 1970 (Journal of Laws of 2001 No. 53, item 561) and Brussels II bis Regulation.

Widely supported position states that divorces declared before the religious courts (e.g. in Iran, Libya, etc.) should be recognized on the condition that they comply with the rules of a particular legal system and the jurisdiction adopted within it, and in any case provided that the parties were not able to choose a different way of obtaining a divorce. In this respect, Polish private international law differs from European law, in which religious divorces were expressly excluded from the scope of the Rome III Regulation on cross-border divorces and separations (see the CJEU in C-372/16, *Sahyouni*, EU:C:2017:988). Divorces made by a juridical act (in particular private divorces in numerous countries of the Middle East and South-West Asia) cannot, by their very nature, be the subject of judicial recognition proceedings. However, the complex problem of the effectiveness of such legal actions in Poland should be resolved taking into account the public policy exception (order of the Court of Appeal in Katowice of 20 August 2009, case No. I ACa 410/09).

Documents required from a foreigner in cases of marriage in Poland

In accordance with Sec. 79 (1) of the Law of 28 November 2014 on the Civil Status Records, a foreigner intending to enter into marriage in Poland is obliged to submit to the head of the registry office—

- an assurance that he is not aware of the circumstances excluding marriage (see Sec. 76(1), points (1) and (4) of the Law),
- a copy of the birth certificate (and if he was previously in a marriage—a copy of a marriage certificate with an annotation about its termination, annulment or declaration of its non-existence or a copy of a marriage certificate with a document confirming its cessation or annulment or a document confirming the declaration of non-existence of a marriage, if on the basis of other submitted documents it is impossible to determine the data necessary to prepare the act marriage), and
- a document stating that in accordance with applicable law he may enter into marriage ('marriage capacity certificate') unless pursuant to the provisions of the private international law his ability to marry is assessed under Polish law. Such a document should be issued by a competent authority of a foreign state and specify the possibility of marriage with the person indicated in the certificate.

The latter document therefore states the relative possibility of getting married, and not the abstract ability of the foreigner according to the applicable foreign law. Along with other required documents, the certificate of the possibility of marriage by a foreigner constitutes proof of the foreigner's marital status and confirmation of the content of foreign law and means that the marriage is admissible according to the applicable law and should be considered valid in the country whose law is applicable to assess the substantive conditions of marriage.

If the receipt of a document encounters obstacles that are difficult to overcome, a Polish court may, in non-litigious proceedings, release a foreigner from the obligation to submit this document (Sec. 79(2), first sentence of the Law on Civil Status Records). In particular, the following situations are involved—

1. the law of a foreigner's origin (nationality, domicile, habitual residence) does not provide for the issue of such documents at all or these documents do not meet the requirements of Polish law;
2. a foreigner cannot obtain a document due to exercising the right of asylum in Poland or breaking all contacts with the country of origin;
3. postal communication with a given country is interrupted due to e.g. a war or an internal unrest;
4. a foreigner cannot obtain a certificate because of the existence of a marriage obstacle, the application of which in Poland would be contrary to the basic principles of the Polish legal order.

A foreigner's application is examined by the competent district court in non-litigious proceedings (Sec. 562 of the Code of Civil Procedure); whether in a specific case the foreigner is able to marry in accordance with his native law (Article 79 (2) second sentence of the Law). The court should at the same time examine the possibility of marriage by a foreigner not only in the light of the foreigner's native law or other foreign law, relevant to assessing the substantive conditions of marriage validity, but also from the point of view of the compliance of effects of foreign law application with the basic principles of the Polish legal order (Sec. 7 PILA 2011).

Formal requirements of contracting marriage

The content of Sec. 49 PILA 2011 indicates that the marriage ceremony in Poland shall always be governed by the Polish substantive law (it is the conclusion derived from paragraph (2) of the provision in question). Only if marriage is being celebrated abroad, alternative rules of paragraph (2) may come to play, insofar as it is necessary to keep marriage valid. These are based on reference to the law of: (a) the nationality of spouses (not necessarily a common one, may well be understood as requirements common to two different national laws), or (b) the place of their common domicile, or their (c) common habitual residence—as of the day when the marriage is concluded. Of course, they only supplement the basic connection—to the law at the place of ceremony of marriage (*lex loci celebrationis matrimonii*). If none of these laws has been abided by, legal sanctions are subject to the latter applicable law.

It should be emphasized that in assessing the formal conditions for the validity of a marriage contracted abroad, the public policy exception (Sec. 7 PILA 2011) principally does not apply. However, a foreign consensual marriage of a Polish citizen cannot be recognized as existing under Polish law, since it is in fact entered into without any form (as, for instance, '*marriage by telephone'* known to the legal systems of some US states). The non-recognition results either from the *ordre public* or from a simple characterization of such a couple union as a purely factual relationship (viz. cohabitation, not marriage).

Consular marriages

The practice of countries that has existed around the 19th century (shaped as a result of the colonization process of Africa and Asia) provides for the possibility of marriages abroad by citizens of a given country before their own consul—so-called '*consular marriages*'. In this way, automatic recognition of the legal existence of a wedlock with the home country is ensured, which could be questioned if the citizens of that country enjoyed the local form of nuptials.

Private international law itself does not provide for any guidance in this respect, still the prerequisites of the above referred institution may be established by examining of the content of substantive law provisions of different countries and the analysis of international public law. In brief, there are four conditions set out in the scholarly literature—

1. The domestic substantive law (family law) of the state who sent the consul (the *sending state*) must first foresee consular marriage as a legal institution. Many states do so, incl. Poland (Sec. 1(3) of the Family and Guardianship Code).
2. The state where the consul exercises her functions (i.e. the *receiving state*) has to accept—at least tacitly—solemnizing marriages by consuls of the sending state. It usually takes place in a form of bilateral consular treaties (conventions) concluded between interested states. There is no general provision to that effect in the law of nations: in particular, it is not adopted in the Vienna Consular Convention of 24 April 1963, which only stipulates that consuls may exercise the function of civil status

registrars "provided that there is nothing contrary thereto in the laws and regulations of the receiving State" (Article 5(f)).[1]

3. At least one spouse, and usually both, have to possess the nationality of the sending state (e.g. only two Poles may stand before the Polish consul in a foreign jurisdiction to solemnize their marriage).
4. In order to avoid any violation of the receiving state's sovereignty, none of the spouses should be a national of that state.

Effects of marriage

It is a principle that personal and property relations between spouses are subject to the common law of their nationality (Sec. 51 (1) PILA 2011). In the absence of a applicable common law, the law of the country in which both spouses have a place of domicile shall apply, and in the absence of a place of residence in the same country, the law of the country in which both spouses have their habitual residence. If the spouses do not have their habitual residence in the same country, the law of the country with which the spouses are otherwise most closely connected (Sec. 51 (2) PILA 2011) shall apply. This rule does not foresee any exceptions as far as the personal effects of marriage are concerned.

A new solution compared to the old Act of 1965 is to enable the parties to choose the law applicable to effects of marriage as regards property relations, including matrimonial property agreements (Sec. 52, paras. (1) - (3) PILA 2011). Similarly, a provision appeared in the new act providing special protection for the good faith of the spouse's creditor (Sec. 53 PILA 2011).

The personal effects of marriage (referred to in the Act as "personal relationships between spouses") include in particular issues of the obligation to live together, mutual assistance and loyalty, the obligation to cooperate for the good of the established family, and to settle important family matters. The scope of this concept also includes the issue of the family name of the spouses, despite the fact that there is a separate conflict of law provision

[1] Cf. B. Sen, *A Diplomat's Handbook of International Law and Practice*, The Hague 1965, p. 240–241.

in this respect (Sec. 15 PILA 2011). Some marital relations are of mixed personal and property nature, especially the use of one of the spouses by the apartment of his spouse, activities in matters of ordinary management or the abovementioned obligation of the spouses to contribute to satisfying the needs of the family (in connection with e.g. the spouse's personal efforts to raising children). In this respect, they should also be included as personal rather than property effects; it is therefore not possible to choose the law applicable to these matters.

As to the form of the choice of law applicable to matrimonial property relations or a matrimonial property agreement, it is sufficient to comply with the form provided for by the chosen law or by the law of the country where the law was chosen (Sec. 52(3) PILA 2011). The commented provision excludes, with regard to the form of choice of law, the application of general conflict of law rules regarding the form of juridical acts referred to in Sec. 25 PILA 2011.

Divorce and legal separation

Pursuant to Sec. 54 of the Private International Law of 2011—

(1) The termination of marriage is governed by the law of the state of which both spouses are nationals at the time when the termination of marriage is requested.

(2) In the absence of a common law of nationality, the law of the state in which both spouses are domiciled at the time when the termination of marriage is requested applies, and if spouses are not domiciled in the same state at that time—the law of the state in which both spouses had their last habitual residence applies, as long as one of them has still his or her habitual residence there.

(3) If the circumstances do not allow the applicable law to be determined pursuant to paragraphs (1) and (2), the termination of marriage is governed by Polish law.

(4) Paragraphs (1) to (3) mutatis mutandis apply to a separation.

The dissolution of the marriage is its termination during the life of both spouses as a result of a legal event determined by applicable law. In Poland it requires a constitutive court decision issued in a divorce case (see Sec. 56 et seq. of the Family and Guardianship Code; Sec. 425 ff. of the Code of Civil Procedure). They belong to the sphere of jurisdiction of

the regional courts (*sądy okręgowe*; Sec. 17 (1) of the Code of Civil Procedure). Also in many foreign countries, marriage is dissolved on the basis of a decision (act of authority) of a state body in the form of a decision issued by a court or an administrative body (e.g. the registrar office).

In conclusion, it should be stated that if the divorce statute provides for the dissolution of marriage by an act of authority, the jurisdiction of the body competent to decide on divorce is Polish law (*lex fori*). However, *lex fori processualis* must be used in a way that does not lead to distortion of foreign substantive law applied by a Polish court.

Example. The divorce between a Polish wife and a Norwegian husband whose last common habitual residence was Norway should be governed by Norwegian law. The competence of a Polish court will be governed by Polish procedural law (*lex fori processualis*). As the latter does not know administrative divorces, unlike Norwegian does, the case should be heard by the court in a contradictory civil procedure; the grounds for the divorce, however, should be taken from the Norwegian not from the Polish substantive law. Moreover, the procedure should be as simple as possible, taking into account that after one-year separation, no special reason for the divorce application is needed.