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Introduction to Polish private international law: Specific part

Agency (legal and voluntary representation) in private international law

Private-law entities may enter into legal transactions either on their own or represented by agents. The conflict-of-law legislator has distinguished two conflict-of-law rules pertaining to the law applicable to the statutory (Sec. 22 PILA 2011) and voluntary representation, the latter being referred to as the 'power of attorney' (Sec. 23 PILA 2011). They take into account differences in the status of both types of agents who act on behalf of someone else.

Section 22 PILA sets out a principle that has long been confirmed by the case law of the Supreme Court: the statutory representation is governed by the law applicable to the underlying legal relationship that gives rise to the representation (*lex causae*).

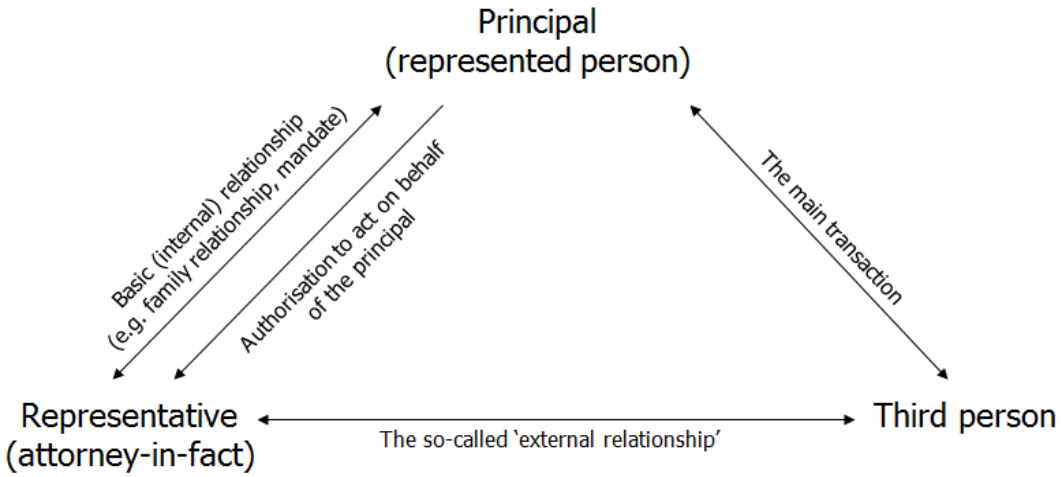
Example. In a case adjudicated by the Supreme Court, there was a doubt as to what law should apply to the representation of a minor child by his mother in proceedings pertaining to the estate left by the boy's deceased father. While the first court characterized this issue as governed by the law applicable to the succession, which principally was approved on appeal, the Supreme Court corrected this false assumption—the question who represents the child in and out of the courtroom naturally belongs to the sphere of parental responsibility. Hence the law that applies to the parents' competence to take care of, and carry on authority over, the child's person and assets shall also decide what juridical acts can be done by the mother on her own on the child's behalf.[1]

[1] S.C. order of 15 July 2005, IV CK 20/05, OSNC 2006/6/106.

Similarly, for instance, the implied statutory representation **between spouses** shall be subject to the law applicable to the effects of marriage (Sec. 51 PILA 2011). Consequently, an **incapacitated** person—e.g. due to the mental illness—should be represented by a person empowered to act on her behalf by the law applicable to guardianship and similar protective measures, as it logically is an element of the guardian's duties (Sec. 60 PILA 2011).

Of course, activities of corporate bodies, as e.g. the board of directors or the company's managers, are subject to the law governing the moral persons (Sec. 17 PILA 2011), which may be derived directly from the text of the Law (see Sec. 17(3)(6) PILA 2011).

The **voluntary representation** (power of attorney) is a more complex case. As it is directly an interested person who designates her agent, the question arises what law should be competent in this respect? The relationship between a *principal* (a represented party), an *agent* (called an 'attorney-in-fact'), and a *third person* with whom the juridical act is to be concluded might be visualized as a triangle made of actually four different relationships.



Between a principal and an attorney in fact there may—but it must not—be an underlying contract or another basic relationship. As a matter of fact, the power of attorney may be given with or without it; according to the nineteenth-century German school of pandects, it is independent from any other private law relationship. The principal unilaterally empowers attorney-in-fact to represent him or her against a third person in the main transaction.

The lawgiver's presumption of an independent character of the power of attorney influences the concept of connecting factors in the Law, which supports the principal's unilateral action. Pursuant to Sec. 23(1) PILA 2011—

The authority of an agent is governed by the law chosen by the principal. However, towards a third person, with whom the agent has made a juridical act, the chosen law can only be invoked if the third person was aware or could have easily learned about the choice of law. The principal may invoke the chosen law against the agent only if the latter was aware or could have easily earned about the choice of law.

The unilateral choice of law by the principal is in line with the international law instruments, as for instance the Hague Convention of 14 March 1978 on the law applicable to agency (not ratified by Poland).[2] It is effective, however, only if made known to third persons and the interested private attorney. As the result, it is suggested that the choice the law applicable be in writing, esp. in a document of authorization.

If the choice of law is lacking or ineffective, the law applicable shall be, as appropriate—

- the law of the state in which the agent has her seat where she constantly operates—which suits those *independent agents* who represent others within the framework of their trade and profession (e.g. authorization of a Polish legal counsel who negotiates the business contract for his American client shall be governed by Polish law, whereas in the case of a German commercial representative authorized by his Austrian principal, German law applies, etc.);
- the law of the state in which the principal's business is located, if it also constitutes the place where the agent constantly operates—refers to the case of a *dependent agent* employed by her principal;
- the law of the state in which the agent actually acted while representing the principal, or in which the agent should have acted according to the intention of the principal—fits all cases of an *ad hoc* representation.

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[2] K. Reszczyk-Król, *Law Applicable to Voluntary Representation in Some European Legal Systems*, 10 Journal of Private International Law [2014], p. 265 *et seq.*