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Introduction to Polish private international law: General part

1. National (autonomous) sources of Polish private international law

Private international law is not really "international" in the sense of its origin. It was born within states, as part of civil and commercial law, and not in relations between states. For this reason, its original source is national and not international legislation. Poland is no exception in this respect. In a very extensive system of sources of private international law, the role played by the provisions of the national provenience is still primary, in spite of their step-by-step retreat. The basic normative acts of this category include the Act of 4 February 2011 on private international law (hereinafter abbreviated as "*PILA 2011*"). It entered into force on the 16th of May, 2011, thus replacing the statutory act on the same matter of 12 November 1965. The latter, in turn, replaced an earlier Law of 1926.

The Act of 2011 is in fact a true code of private international law. It contains separate general and specific parts, divided into 17 chapters in total (the other 2 chapters contain amending and introductory provisions). In some Sections of the Law (e.g. Sec. 28 (1), 34, 56 (1), 59 (1), 63, and 66[1]) there are references to the international and European legal instruments containing conflict-of-law rules. Such 'references' should be approached with some caution, because, firstly, their catalog is not exhaustive, and secondly, they can sometimes be misleading, e.g. if there is a collision between different legal instruments containing overlapping legal rules, which result in the application of divergent legal systems. There are cases in which the appropriate

conflict-of-law rule is not the one of the legal instrument set out in the respective Section of the PILA 2011.[1]

Codification of private international law in Poland does not exhaust all matters of conflict-of-law law at national level. Conflict of law rules are contained also in a number of particular Laws, which include the following Acts—

1. of 18 September 2001 on the Maritime Code (Articles 355–359);
2. of 18 July 2002 on the provision of electronic services (Article 3a);
3. of 2 April 2004 on certain financial collaterals (Article 13);
4. of 28 April 1936 on the Law of promissory notes and bills of exchange (Articles 77–84);
5. of 28 April 1936 on the Law of checks (Articles 62–68).

2. Sources of international law

Efforts to harmonize private international law at the international level date back for over 100 years. The sense of harmonization is expressed in the rising predictability and legal certainty: parties to cross-border transactions may easily foresee what law applies, no matter where in the world the lawsuit is filed. Otherwise, the so-called *forum shopping* may occur—this is a phenomenon frequently associated with an intentional manipulation of the grounds of jurisdiction in order to obtain the most favorable court decision.

The first one who called to conclude one or many international agreements governing private international law was an Italian scholar and politician Pascuale Stanislao Mancini (1817–1888). His efforts were effective only after his death: his close friend, a Dutch lawyer Tobias M.C. Asser (1838–1913) urged his government to convene a diplomatic conference to discuss a draft uniform code of private international law. The conference held in The Hague in 1893 brought modest results but it was agreed that there was a need for regular meetings and work on conventions

[1] Critically about the legislative technique used, see A. Mączyński, *Ustawowe odesłania do umów międzynarodowych i rozporządzeń dotyczących prawa prywatnego międzynarodowego,* w: J. Gołaczyński, P. Machnikowski (red.), *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Profesora Edwarda Gniewka,* Warszawa 2010, s. 373 i n.

devoted to specific legal issues. The Hague Conferences were first convened *ad hoc* diplomatic events, and from 1955 they were finally given the form of an international (intergovernmental) organization, called the Hague Conference on Private International Law (French: *Conférence de la Haye de droit international privé,* commonly abbreviated as "*HCCH*"). The group of its members was constantly growing; currently it associates 71 countries, including Poland (since 1984), as well as the European Union as a supranational organization (since 2007).

The contribution of the HCCH to the development of conflict of law is difficult to overestimate. It consists not only in the direct preparation of texts of the international conventions open for the states' accession (not necessarily members of the organization), but also in a significant influence on the autonomous laws of nation states. As to the list of the draft international conventions, there are at least a few worth mentioning—

1. Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
2. Convention of 4 May 1971 on the Law Applicable to Traffic Accidents
3. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
4. Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

A constantly updated list of conventions, together with the list of signatories, is available on the HCCH website.[2]

International legislation in the field of broadly understood private international law is also created by other international organizations. It is worth mentioning here the names: the International Institute for the Unification of Private Law (UNIDROIT) or the United Nations Commission on International Trade Law (UNCITRAL). However,

[2] See http://www.hcch.net/ (last visited 1/06/2020).

their activity is more focused on the field of uniform substantive law (civil and commercial), as for instance one of the cornerstones of the international trade law, *viz.* the UN Convention of 1980 and the New York Convention of 1974, both adopted within the framework of the UNCITRAL system.

Bilateral conventions between Poland and other countries constitute a special category of international treaties in the field of private international law. They have different titles, although the most common is the 'Convention on legal assistance and legal relations in civil, family, labor and criminal matters.' Such legal instruments are in force between Poland and Austria, Belarus, countries of the former Yugoslavia, Bulgaria, the Czech Republic and Slovakia, Estonia, France, Lithuania, Latvia, Mongolia, Cuba, Russia, Romania, Ukraine, and Vietnam. These agreements govern not only private international law, but also certain aspects of international procedural law (civil and criminal). It should be clarified here that their legal nature is limited to regulating mutual relations between the two Contracting States only. As a result, their conflict-of-law rules apply only if the situation is sufficiently related to the law of both countries (e.g. recognition of a child of nationals of one contracting party in the territory of another Contracting State, compensation claims for a traffic accident involving the citizens of one of the countries on the territory of another country, etc.). Conflict of law rules of international conventions may indicate as the applicable law only one of these two countries, so they are so-called bilateral conflict of laws rules. A close connection with the law of a third country often determines the lack of sufficient grounds for the application of the standards of those conventions, although - due to the lack of standards universally regulating their scope - the final answer depends on the circumstances of the individual case.

3. EU law

As a supranational integration organization with the essential characteristics of a federation of states, the European Union has long sought to harmonize private international law between Member States. The initial content of the 1957 Treaty of

Rome (EEC) did not contain any grounds for this, except for Article 220, providing for the possibility for Member States to negotiate, inter alia on mutual recognition of companies, as well as simplifying formalities regarding mutual recognition and enforcement of court and arbitration awards. Therefore, the first legal act containing common conflict-of-law rules for the Member States, the 1980 Rome Convention on the Law Applicable to Contractual Obligations, was adopted outside the properly conceived system of Community law.

A gradual change in this state of affairs was first brought by the Maastricht Treaty (Treaty on European Union) creating a new area of intergovernmental cooperation in the field of justice; then the Treaty of Amsterdam communitarized the legislation on the conflict of laws in civil matters, expressly conferring on the EU institutions (mainly the Council) the power to legislate measures aimed at the harmonization of law of the Member States in the field of the conflict of laws and jurisdiction 'to the extent necessary to ensure the proper functioning of the internal market". Finally, the Treaty of Lisbon introduced Article 81 of the Treaty on the Functioning of the European Union, which essentially took over the content of the existing Article 65 TEC, though with some changes.

In the current shape of Article 81 TFEU allows the European Parliament and the Council to constitute, in the ordinary legislative procedure, measures to ensure, inter alia, compliance of the rules applicable in the Member States in the field of applicable law and jurisdiction disputes. Exceptionally, measures in the field of family law with cross-border effects may be adopted by the Council in accordance with a special legislative procedure - unanimously and after consulting the European Parliament. The Council may also use the so-called *passerelle clause*, i.e., at the request of the European Commission, a decision determining those aspects of family law with cross-border implications that may be the subject of acts adopted by the ordinary legislative procedure (i.e. by a majority, not by unanimity). Such a decision shall be adopted by

the Council unanimously and after consulting the European Parliament. To date, no practical use of this opportunity has been reported.

In spite of its unquestionable outcomes, the communitarization of private international law has proved not fully successful. First, when negotiating the Treaty of Amsterdam, some countries reserved the exclusion from the application of the provisions on migration policies, which resulted i.a. in their being not bound by instruments of secondary law governing the civil judicial cooperation. Article 81 TFEU does not apply to Denmark at all, while Ireland has agreed the so-called *opt-in*, i.e. a reservation under which it can freely decide whether it wants to participate in the adoption and application of a given secondary law instrument or not. The will of each of these two countries is notified to the Council of the European Union.

On the basis of these provisions, the European Union first harmonized international contract law, currently regulated by two EP and Council regulations—

1. No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), preceded by the Rome Convention of 1980, which the Regulation replaced in respect of contracts concluded from 17 December 2009 (Article 28 Rome I)[3];
2. No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).[4]

The next step, still successful, turned out to be the adoption of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.[5]

Further instruments, belonging to the field of the international family law, were not universally accepted by all the Member States and had to be adopted within the

[3] OJ L 177, 4.7.2008, p. 6.
[4] OJ L 199, 31.7.2007, p. 40.
[5] OJ L 201, 27.7.2012, p. 107.

framework of the so-called enhanced cooperation. These are the Council Regulations—

1. No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation[6];
2. No. 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[7];
3. No. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.[8]

So far, none of them has been accepted by Poland.

The European Union is also the party to the Hague Protocol on the Law Applicable to Maintenance Obligations. This international treaty has been ratified by the then European Community, instead of the Member States taking part to the judicial cooperation in civil matters, due to the EU exclusive competence in the field of the conflict of laws.[9]

4. Conflict of international, European and statutory conflict-of-law rules

The phenomenon of overlapping, and sometimes incompatible, conflict of law rules of different provenance (national, European, international) is one of the most basic problems in the practice and theory of private international law—

Example 1: vehicles driven by Polish and Belarusian citizens are colliding on the territory of the Republic of Lithuania, which results in the death of a Belarusian driver;

[6] OJ L 343, 29.12.2010, p. 10.
[7] OJ L 183, 8.7.2016, p. 1.
[8] OJ L 183, 8.7.2016, p. 30.
[9] Council Decision No. 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ L 331, 16.12.2009, p. 17.

children of the deceased file the lawsuit against the insurer of the person liable for an accident before the competent Polish court.

Example 2: a national of Ukraine, residing in Poland on the basis of a residence permit for a fixed period is entering into a lease agreement with a Polish limited liability company for the premises for the purposes of economic activity. In the contract, the parties have not chosen the applicable law. The Polish court is to rule on the lessor's claim for payment of overdue rent.

In the first example, Article 91, paragraphs (2) and (3) of the Polish Constitution provide for the precedence over the domestic law of ratified international treaties and secondary law adopted by an international organization of which the Republic of Poland is a member on the basis of a ratified international agreement. A collision will therefore occur between: (i) the Hague Convention on the Law applicable to traffic accidents of 4 May 1971; (ii) the Polish-Belarusian Convention on Mutual Legal Assistance and Legal Relations in Civil, Family, Labor and Criminal Matters; (iii) the Rome II Regulation on the Law Applicable to Non-Contractual Obligations. By using the so-called *compliance clauses* contained in given legal instruments, the Hague Convention should be used to decide, rather than the bilateral convention, because it concerns specific issues (cf. Article 105 of the Polish-Belarus Convention and Article 15 of the Hague Convention on the Law applicable to Road Accidents), and the last mentioned convention entered into force between the two states later than the bilateral convention. On the other hand, a regulation as an act of EU law does not take precedence over international agreements concluded by Member States with third countries before its entry into force (Article 28 (1) Rome II). By the way it is worth noticing that due to the third states' participation, the Hague Traffic Accidents Convention rules out the application of the Rome II Regulation even in the intra-Union context (e.g. for accidents that involve the Polish and the Czech drivers).

In the second example, Article 32 of the Polish-Ukrainian bilateral convention takes precedence over Article 4 Rome I. Such an result should be derived pursuant to Article 25 (1) Rome I, which mirrors Article 28 (1) Rome II.

In terms of collisions between particular instruments of international law in the field of the conflict of laws, due regard is to be had to the provisions of Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969.

5. Customary PIL rules. Creative role of the case law and scholarly contributions

Any codification of private international law must develop in accordance with the needs of legal life. New substantive institutions and types of private law relations appear in the substantive law of states, for which there is a need of the response in a form of adequate conflict-of-law rules, even when such institutions or legally defined situations are completely unknown to the law of the court (*lex fori*).

Obviously, appropriate conflict-of-law rules may be shaped informally, on a bottom-up basis: as customary law. Contemporarily, this is rather a rare phenomenon, but still it may happen; e.g. the principle that the state's liability for damages for acts or omissions in the exercise of public authority (*acta jure imperii*) is subject to the law of that state results from the international custom that gave rise to the state's immunity from jurisdiction[10] (in Poland it was expressed in Sec. 35 of PILA 2011).

Also the science of law, and even more the case law, contribute to the emergence of new conflict-of-law rules. In Poland, this seems to come up rather infrequently, due to the early and rather complete codification of private international law rules. In countries where it did not take place in the same form, the situation was quite different. The French conflict of law practically emerged as the case law of the French Court of Cassation: for instance, we owe to it the institution of the *renvoi au premier dégre* (remission).[11] German courts, together with the local academia, significantly

[10] P. Grzegorczyk, *Immunitet państwa w postępowaniu cywilnym,* Warszawa 2010, p. 25.

[11] See the famous judgments of the Court of Cassation in *Forgo* case: of 24 June 1878 and of 22 February 1882, available at http://www.lexinter.net/JPTXT2/succession_mobiliere.htm (last visited: 16.3.2013).

contributed to shaping the concept of the 'seat' of moral persons, today not always well received in Europe, although still having a lot of supporters behind our western border—and still not codified in the German Introductory Law to the Civil Code (EGBGB).[12] The EU's partial rejection of the concept of the seat of moral persons in the conflict of laws has not been the legislative instrument but came mostly through the judgments of the Court of Justice, e.g. in the *Überseering* and *Polbud* cases.[13] Last but not least, the work of the learned jurists (specifically of the Swiss scholar Adolf Schnitzer) resulted in the formation of the concept of the so-called 'characteristic performance', used for the designation of the law applicable to contracts in the absence of the parties' choice.[14]

The Act on Private International Law of 2011 contains a general provision that allows filling gaps and seeking law applicable on an *ad hoc* basis. Section 67 PILA 2011 provides that in the absence of an indication of the applicable law in this Act, specific provisions in force in the Republic of Poland, ratified international agreements and European Union law, the relationship within the scope of this Act should be governed by the law of the country with which that relationship is most closely connected. When applying this provision, the court should examine the overall factual situation and apply the law whose links to the case seem to be of the primary importance.

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[12] For a detailed discussion in the Polish literature, see W. Klyta, *Spółki kapitałowe w prawie prywatnym międzynarodowym,* Kraków 2002, p. 44 et seq.

[13] See judgments: of 5 November 2002, C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, EU:C:2002:632; of 25 October 2017, C-106/16 *Proceedings brought by Polbud - Wykonawstwo sp. z o.o.*, EU:C:2017:804.

[14] P. Piroddi, *International Subcontracting in EC Private International Law*, 7 YEARBOOK OF PRIVATE INTERNATIONAL LAW (2005), p. 289 et seq., 313.