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Introduction to Polish private international law: General part

1. Introduction. Short history, notion and functions of private international law

The well-known Latin maxim says: *ubi societas ibi ius* (where the society is, there is the law). People divided between different tribes, nations and political organisms have created a mosaic of languages, cultures—and legal systems, too. However, the dynamics of human life has never recognized state borders, which naturally posed a great problem to the kings, emperors, and governments, whatever their form was, throughout centuries. What to do, then, when states and their courts are confronted with an "alien" person or element: a foreign individual, imported goods, an overseas investment, and the like? The answer to this question is needed not only as the sphere of public affairs (taxes, trade control, employment administration, social security) is concerned, but—first and foremost—in the field of the private law relationships, where all the partners stand at an equal footing.

The response to the needs of the cross-border commerce was different according to time and epoch. As for the ancient Greeks, Egyptians or Romans, it remained rather a political question: foreigners could be assimilated (i.e. treated as if they were denizens of the country) and, eventually, a distinct branch of law might even have been created for the matters of, say, international contracts.[1] This was the case of the Roman "law of nations" (*ius gentium*), that is, a specialized part of the Roman private law aimed at regulating relationships between people of various origin, be it

[1] For a thorough review of the distant history of the private international law, see H. Lewand, *Conflits des lois dans le monde grec et romain*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1968, issue 3, p. 419 *et seq.*

citizens of Rome (*cives Romani*) or foreigners (*peregrini*).[2] In fact, however, such legal measures, fully dependent upon the will of local rulers, did not mean that any foreign law could have effect in the receiving state. The very access to the legal commerce within the state heavily relied upon the personal element, i.e. the person's origin. No country was as open to foreigners and foreign law as it is the case nowadays.

The turn of the tide in legal thinking came no earlier than in the Middle Ages. Studies on the Roman law inspired mediaeval post-glossators and canonists, first in Italy and then in France and other European countries, to considering its position against the application of local customs and laws (in Latin shortly referred to as "*statuta*"). It must have been an uneasy thing to address the question what laws to apply in Europe divided between dozens of counties, principalities, and free cities, where the central power, if any, usually was far from imposing one set of legal rules upon the whole society. In order to find the just solution, learned jurists set out the general principle that the issue of the substantive law applied by a judge should be detached from the course of the court trial.[3] However, the early methods based on the exegesis of the Roman *Corpus Iuris* in order to find out what rules should actually

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[2] The concept was described in a famous passage of the *Gaius' Institutions* (*Gaii Institutiones*): "All peoples who are governed by laws and customs use law which is partly theirs alone and partly shared by all mankind. The law which each people makes for itself is special to itself. It is called 'state law' [*ius civile*], the law peculiar to that state. But the law which natural reason makes for all mankind is applied in the same way everywhere. It is called 'the law of all peoples' [*ius gentium*] because it is common to every nation. The law of the Roman people is also partly its own and partly common to all mankind." This *ius gentium* largely was an integral part of the Roman private law, not an international law as it is understood nowadays; cf. K. Tuori, *The Reception of Ancient Legal Thought in Early Modern International Law*, [in:] B. Fassbender & A. Peters, *The Oxford Handbook of the History of International Law*, Oxford: OUP 2016, p. 1016-1017.

[3] A well-known solution assigned to an Italian post-glossator Bartolus of Sassoferrato sounded: *Quoad litis ordinationem, inspicitur locus iudicii* („as to the course of proceedings, the place of [handing down] a judgment decides"). This phrase inspired private international law long after it had been written; cf. J. Story, *Commentaries on the Conflict of Laws, Foreign and Domestic*, 2nd London 1841, p. 418. On the other hand, as to the essence of the case, the judge was advised not to follow the local law but rather to apply the law "*quae potior et utilior videtur*" (hence the so-called "better-law" approach, marking the standpoint of certain American "conflict-of-law revolutionists" of the 20th century). Bartolus himself, as many other authors before the mid-19th century did, tried to divide local laws according to their alleged subject-matter so as to enable making decisions when and where to apply them in cross-border cases, depending on the merits. This method, commonly called a "statutist doctrine", had a huge impact on the evolution of the American approach towards the conflict of laws; N. Hatzimihail, *Bartolus and the Conflict of Laws*, 60 REVUE HELLENIQUE DE DROIT INTERNATIONAL [2007], p. 12 *et seq.*; M. Gutzwiller, *Le développement historique du droit international privé*, 29 Académie de Droit international. Recueil des cours [1929-IV], p. 287 *et seq.*; K. Lipstein, *Principles of the Conflict of Laws: National and International*, The Hague-Boston-London 1981, p. 3 *et seq.*

govern the territorial scope of application of each country's laws, was rather unstable in terms of the methodology. It was only in the 19th century when such eminent authors like Joseph Story (the U.S.), Friedrich Karl von Savigny, Karl Georg von Wächter (Germany), and—least but not last—Pascuale Stanislao Mancini (Italy) lied the foundations of private international law in its current standing.[4]

As a result of this long-lasting evolution, today one can speak of the existence of the special method of legal regulation: the "**conflict-of-law method**".[5] As we shall see in the next Chapter of this book, the idea is quite simple: as there is no universal worldwide civil, commercial, family, and labor (private) law, but many different laws in force on different territories, then there must be a kind of a 'signpost'—a set of legal rules whose only task is to guide the national judge so as to make her know where she finds an appropriate legal system to manage the legal question concerned. Understood in a strict manner, private international law does not amount to regulate the essence of the case but symbolically stops at the state's frontier, thus leaving the solution to the substantive legal rules in force in the designated jurisdiction.

From a historical perspective one can speak of a permanent clashing of two principles, namely the **territoriality** and **personality** of laws. Supporters of the former one proceed from a quite reasonable assumption that the sovereignty of the state extends only within its borders, and therefore all laws that the government enacts is aimed at regulating relationships of individuals—be it politically belonging to that state or not—who are present in the territory. Personalists, on the other hand, perceive individuals as subject to distinct states' authorities; thus the latter are

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[4] To be sure, there are profound differences between the private international law in Europe, on the one hand, and its U.S. counterpart, on the other, the American methodology being much more unilateral, i.e. taking care of designating the sphere of application of its own law (*lex fori*) instead of coordinating the spheres of application of various domestic laws and, moreover, linking quite often the question of the law applicable with the courts' jurisdiction; F.K. Juenger, *American and European Conflicts Law*, 30 THE AMERICAN JOURNAL OF COMPARATIVE LAW [1982], p. 117 *et seq*.

[5] An alternative name of the discipline of private international law *stricto sensu*: „law of conflict of laws" comes from the 17th-century treatise by a Frisian lawyer Ulrich Huber (1636-1694) "*De Conflictu Legum Diversarium in Diversis Imperiis*" ("On the Conflict of Different Laws in Different Countries"); T.C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, Cambridge 2009, p. 3; the whole of Huber's work has been translated into English, see D.J. Llewelyn Davies, *The influence of Huber's De conflictu legum on English Private International Law,* 18 BRITISH YEARBOOK OF INTERNATIONAL LAW [1937], s. 49 *et seq*.

bearers of the rights and obligations granted to them by the law of the state of their origin. All legal rules (especially those belonging to private law) are by definition designed to be applied outside the territory. Given that national borders do not stop people from traveling, settling elsewhere, entering into contracts, launching businesses on their own or by overseas companies, acquiring property between themselves, etc., there must be some *modus vivendi* set between these extremes. This exactly is the task of private international law.

To sum up, unlike the public international law, our branch of law does not refer to any relationships to which States as the sovereign bearers of the public authority are parties. The essence of the contemporary private international law (French: *droit international privé,* Spanish: *derecho internacional privado*; German: *internationales Privatrecht*) in its strict sense amounts to delimitating the spheres of application (we may call it the 'competence') of legal systems in matters of private (i.e. civil, commercial, family, or labor) law.[6] No party to such a relationship should be subject to the authority of the other party. Legal systems concerned symbolically are in a conflict with each other as to their possible 'claims' to govern the matter in question. Hence an alternative name of our discipline: law of conflict of laws (French: *le droit de conflit des lois*, German: *das Kollisionsrecht*). Private international law decides what national substantive legal rules apply to decide on a given relationship, when the facts of the case in some way go beyond the jurisdiction of the forum State (the place where a court or a body seized with the case has its seat).

Private international law in the narrow sense contains specific legal rules, which are referred to as 'conflict-of-law rules'. Their only consequence consists in choosing what of many national laws (e.g. Polish, Swedish, or German ones) to apply in particular matters of private law, depending on some material circumstances of a case before the court.

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[6] Pursuant to the famous passage of Justinian's *Corpus Iuris Civilis*, repeated both in *Digesta*, D 1.1.1.2, and again in the *Institutes* (*Institutiones*), I. 1.1.1, attributed to Ulpianus: "Public law is concerned with the organization of the Roman State, while private law is about the well-being of individuals" (*Publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet*).

Examples: Typical situations in the field of private international law include, e.g., the dissolution of a wedlock between a Polish and an American; a contract for the management of a Polish limited liability company by a Pole who has been living in Germany for the last twenty years; liability of a Polish insurer for a policyholder who caused a road accident during his stay in England. The role of private international law, as it has already been explained, is solely to 'show the way' to the law of a particular nation which is competent to govern the relationship in question. Private international law does not apply, in turn, to the question of whether a Polish tax resident has the right to joint annual tax return with a person with whom he entered into a civil partnership under Scottish law during his stay in Edinburgh; whether the issue of certain financial instruments by a Polish joint-stock company on the Dutch market must be authorized by the Polish supervisory authority; in what mode the branches of foreign insurers are allowed to be set up in Poland. Such issues, even though they refer to the private law somehow, should be addressed to the local public law.

According to the often raised concept, private international law does not apply to relations related to only one country. In order for conflict-of-law rules to apply, there should be a cross-border element (alternatively called 'foreign', 'external' or 'international'), as e.g. foreign nationality, domicile, habitual residence of the party or parties, the situation of property in another country, etc.[7] Purely intra-country relationships are believed to rest outside the sphere of private international law rules. This theory is strongly represented in judicial decisions[8] and supported by a great part of the scholarly opinions[9], in spite of being occasionally contested. To be sure,

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[7] M. Pazdan, *Prawo prywatne międzynarodowe,* wyd. 15, Warszawa: LexisNexis 2012, p. 21 (marg. No. 5); similar concepts are adopted worldwide, e.g. in the French (*élément d'extranéité*), the Spanish (*elemento extranjero*), and the German (*Außenbeziehung*) conflict of laws systems.

[8] Supreme Court judgments: of 25 Feb. 1999, I CKN 1032/97 (*Lex nr 50758*); of 27 Apr. 2001, V CKN 228/00 (*Lex nr 550949*); of 9 May 2007, II CSK 60/07 (OSNC 2008, No. 5, Pos. 53).

[9] W. Ludwiczak, *Międzynarodowe prawo prywatne,* Warszawa 1990, p. 12 i n.; E. Wierzbowski, *Międzynarodowy obrót prawny w sprawach cywilnych,* Warszawa 1971, p. 11; J. Jakubowski, *Prawo międzynarodowe prywatne. Zarys wykładu,* Warszawa 1984, p. 8; T. Ereciński, *Prawo obce w międzynarodowym postępowaniu cywilnym,* Warszawa 1980, p. 8–9.

the existence of such an element sometimes is unimportant (e.g. a foreign nationality of an owner of a real estate in Poland) and sometimes even hard to evidence, which does not mean that private international law should not apply. All in all, when the court discovers the existence of an external element, it should be an "alarm bell" indicating the need to apply conflict of laws rules.

Private international law is an expansive branch. Its exact limits are an often discussed matter, in particular in the context of the cross-border litigation. When a party files a claim in court, for obvious reasons, she is interested in whether the national or foreign court is competent, as well as in determining the legal system on the basis of which the court will hand down a ruling in her case. Besides, the question of the law applicable to the substance of the dispute will not appear at all until the court verifies its international jurisdiction. On the other hand, since a given case may well be pending abroad due to the parallel grounds of jurisdiction in two or more countries, then the question of applicable law may ultimately be irrelevant, while national courts or bodies will have only to recognize or examine the enforceability of a foreign court decision in the country. That is why basic questions of the international civil procedure: *jurisdiction of courts* and the *recognition and enforcement* of foreign judgments are treated in many European countries as the part of private international law in a wider sense.[10] In many jurisdictions cross-border civil procedural issues and private international law in a narrow sense find their place in the same legal instrument.[11]

However, in Poland (as for instance in Germany) this is not the case. The science of private international law, though naturally paying much attention to procedural issues and stressing the strict connection between both disciplines, does not

[10] Cf. in France, M.-Ch. Meyzeaud-Garaud, *Droit international privé*, 2e éd., Paris: Bréal 2008, p. 8-9: conflicts of laws (*conflits de lois*) and conflicts of jurisdiction/authorities (*conflits de juridictions*) are commonly understood as two principal branches of the private international law; in England, cf. P. Rogerson, *Collier's Conflict of Laws*, 4th ed., Cambridge: CUP 2013, p. 52 et seq.

[11] See e.g. Switzerland (Federal Act of 18.12.1987 on Private International Law) and Belgium (Code of Private International Law of 16.07.2004).

characterize jurisdiction and circulation of foreign court decisions as questions belonging to the sphere of PIL.[12]

2. Private international law in a wider sense. Uniform law

The application of international private law to cross-border private law situations is a „necessary evil" because it is noticed that it brings various disadvantages. One of the parties quite often gains a natural advantage over the other because the law which is better known to her becomes applicable. In addition, there are natural complications experienced by a court of a given state involved in resolving a dispute for which foreign law is applicable. Ideally, foreign law should be applied as a court of law would do in a given country, but for many reasons this is impossible to implement.

That is why the idea of unifying the law has appeared quite a long time ago, and thus of adopting at least similar substantive norms in many countries. Usually, the method of its implementation is the conclusion of international treaties[13], or at least model laws[14], that regulate specific areas of civil law relations going beyond the territory of the state. This is the phenomenon of the harmonization of private law among nations. When it brings about the same set of substantive 'black letter' legal rules, it usually is referred to as the unification of law; hence the legal instruments setting out such rules are called the 'uniform law.'

A large number of such international agreements were concluded in the field of the international transportation law. It is enough to mention the following conventions which are binding for Poland:

1. Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924 (Journal of Laws of 1937, No. 33, item 258, as amended)

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[12] M. Pazdan, *Prawo prywatne międzynarodowe,* wyd. 15, Warszawa: LexisNexis 2012, p. 26 (marg. No. 14).

[13] Great efforts in that regard have been done by the International Institute for the Unification of Private Law (UNIDROIT) set up in 1926 in Rome, https://www.unidroit.org/ (last visited: 20/05/2020).

[14] They may well be enacted by the competent international organizations in a form of their secondary legislation (such as e.g. the EU Directives) or as model law or even 'soft law', left for the decision of sovereign nation states whether to implement it or not (as the OECD or UNCITRAL instruments).

2. Berne Convention on International Carriage by Rail of 9 May 1980 (COTIF), accompanied by the Uniform Rules concerning the Contract of International Carriage of: Passengers by Rail (CIV), and Goods by Rail (CIM) (revised by the Vilnius Protocol of 1999, Journal of Laws of 2007 No. 100, item 674)
3. Geneva Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (CMR) (Journal of Laws of 1962, No. 49, item 238).

The law of international sale of goods is undoubtedly of fundamental importance for international trade. Uniform law instruments include:

1. the UN Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods ('CISG', Journal of Laws of 1997 No. 45, item 286; amendment: Journal of Laws of 2011 No. 230, item 1374)
2. New York Convention of 14 June 1974 on the Limitation Period in the International Sale of Goods (Journal of Laws of 1997 No. 45, item 282; amendment: Journal of Laws of 1997 No. 45, item 284).

Although uniform law is considered to be part of a separate branch of law, called by many researchers "international trade law" (German: *internationales Handelsrecht*), in a broader sense it can also be referred to as part of private international law. The functional link between uniform law and private international law in a narrower sense seems to be decisive in this respect. The uniform law instruments strive at accomplishment of the same goal as the conflict of laws law but with other means. Not without significance is the fact that uniform law is not entirely autonomous. The legal instruments constitute a parallel legal regime (e.g. sales law in Poland is regulated in the Civil Code, in partly different ways for B2B and consumer contracts, and still the CISG constitutes another body of legal rules on the same matter), which hardly can be construed as exhaustive and self-working. Fragmented international treaties require supplementation through domestic law, the latter being designated

by conflict-of-law rules of private international law. Interesting examples of such a coupling of uniform law and conflict of laws law are provided in particular by the law on the international sale of goods.

Example. The CISG, which gives the party whose rights arising from the contract were infringed by the other party the right to demand payment of interest on sums in arrears (Article 78), yet it does not provide for the way of calculating the interest rate. In two judgments of the Supreme Court it has been stated that the national judge cannot derive it from any relevant market data but has to rely, first and foremost, on the law applicable to the contract of sale, currently designated pursuant to Articles 3 and 4 of the Rome I Regulation.[15]

[15] S.C. judgments: of 9 October 2008, V CSK 63/08, OSNC 2009/10/143; of 17 October 2008, I CSK 105/08, OSNC 2009/11/153.