Polish PIL – International Law of Contractual Obligations (Incl. Uniform Sales Law)

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Law applicable to contractual obligations (summary and completion of the previous lecture)

Previous lecture

- Sources of law:
  - national (2011 Act on PIL, special conflicts rules e.g. in 1936 Law on Promissory Notes and Bills of Exchange, 1936 Law on Cheques)
  - European (Rome I/II Regulations)
  - international (e.g. 1974 and 1980 Int'l Sales Conventions)
- Both European and international instruments take precedence over the national law provisions (no matter whether conflicts or substantive ones)
- The date of entering into the contract is important (see the next slide)
- The leading role of the choice of law applicable by the parties
- The difference between the choice of law and the incorporation of substantive rules into the contract
- Express/implied choice, its form
- The effectiveness and validity of the choice (Articles 3 (5) and 10 (1) Rome I)

Law sources: intertemporal problems

- Polish law of conflicts step by step replaced by the international and European provisions
- The 1980 Rome Convention:
  - signed in 2005
  - ratified in 2007
  - replaced by the Rome I Regulation with regard to contracts concluded **on and after the 17th of Dec. 2009**
- Promulgation (See Exhibits, p. 1, and Constitution of the Rep. of Poland):
  - Article 100 (2) of the 1980 UN Vienna Convention on Contracts for the International Sale of Goods (CISG) – entry into force: 1 January 1995 but promulgated in Polish Official Journal in 1997
  - Article 17 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations
  - Entry into force of the Rome Convention: 1 August 2007 or 22 January 2008?
  - Article 88 of Polish Constitution

International Sales Law - the interplay between substantive and conflict rules

Sales Law of the UN – an overwiev

Poland is a party to the United Nations Conventions:

- on Contracts for the International Sale of Goods, adopted in Vienna, 11 April 1980 (Journal of Laws 1997 No. 45, pos. 286):
  - 79 States – the last one is Brazil
  - All the most important countries of the international trade, incl. China, Germany and the USA belong (unlike e.g. the UK)
- on the Limination Period in the International Sale of Goods, adopted in New York, 14 June 1974 (Journal of Laws 1997 No. 45, pos. 282 and 284):
  - 28 acts of ratification, accession or succession
  - All countries of the Central Europe are parties

CISG – Case #1

Polish producer of furniture negotiates the contract with the UK undertaking for the sale of its products. The parties communicate via Internet and agree as to the jurisdiction of Polish courts. After the first part of the goods has been delivered, the British party begins to question the existence of the contract and refuses to pay the price.

Should Polish courts apply CISG?

CISG – Comments to the Case #1

(1) Article 1 CISG sounds:

This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The Convention applies before Polish courts **on the basis of the PIL** as the part of a Contracting State's substantive law (pursuant to Article 4 of the Rome Convention)

CISG – Case #2

Polish citizen buys the immovable in Spain being assisted by the Spanish real estate agent. No choice of law has been agreed.

Is the transaction the „international sale of goods”? Does the CISG apply?

CISG – Comments to the Case #2

(1) „Sale of goods" has an autonomous meaning. Both terms („sale", „goods") should be interpreted without any reference to the national private law.

- **„Goods"** are something material having also the measurable economic value.
- **„Sale"** is a contract of exchange: **goods against money**

Examples of contracts:

(a) contracts for the manufacturing and the delivery of the goods to the purchaser (even partly from materials of the latter) – Article 3 (1) CISG

(b) „mixed" contracts (goods + services), provided that the goods constitute a „preponderant part" of the seller's obligations – Article 3 (2) CISG

(c) sale of the computer standard software, according to some views no matter whether on CDs or „dematerialised" (downloaded from the Internet)

(2) Agency contract beyond the scope of the CISG – governed by the national law

(3) Immovables are 'goods' in a litteral sense, yet it is believed that goods in the CISG have to be movables. => It is an 'international' sale but **subject to the law applicable to the „contracts relating to a right in rem" (Article 4 (1)(d) Rome I)**

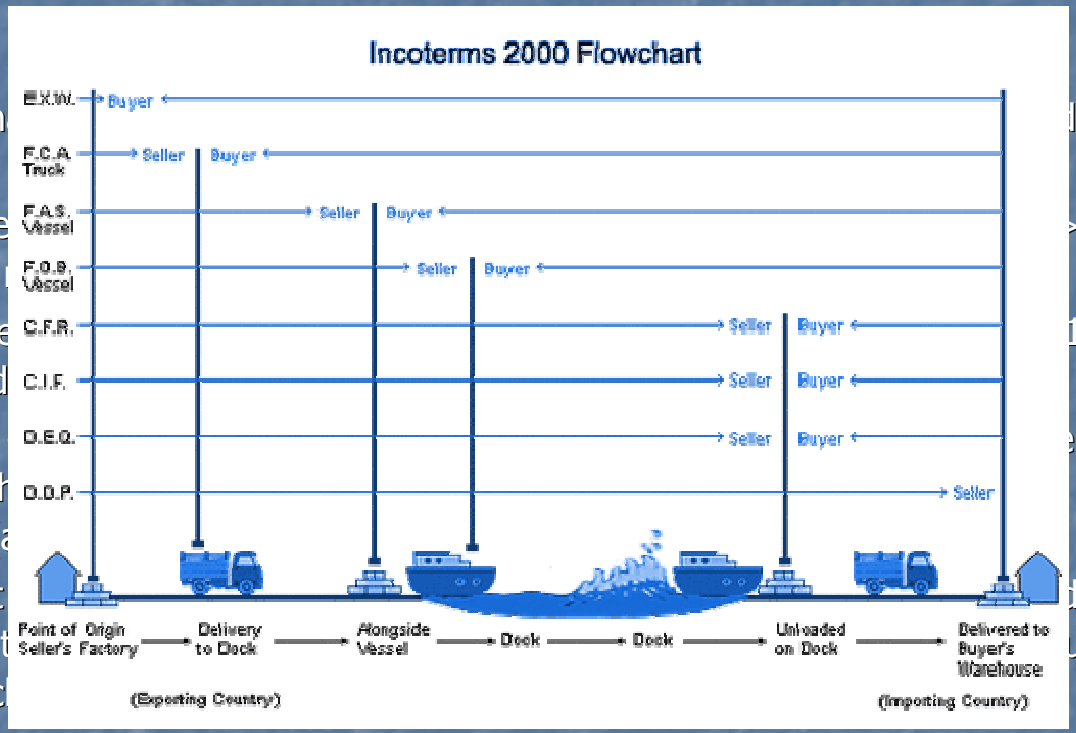
Spanish civil law applies

CISG – Case #3

Belarusian company Alpha OOO (limited liability company) undertakes to deliver 2,000 tons of the propan-butan gas. Price fixed as $950/t FCA Terespol. After the sudden price increase, the deliverer withdraws. The Polish party sues them in Poland for the damages plus interest. Belarusian company calls into question the existence of the contract and claims that it could not sign it because it really had no such quantity of gas.

Is the transaction covered by CISG? Do we have to apply the PIL to find the law applicable to the requirements for the contract being concluded? What about the interest rate and the defense against the claim?

CISG – Comments to the Case #3



(1) The sale of n… …ded from the CISG.

(2) Formal existe… … no formalities required, no …

(3) Essentialia ne… …14 (quantity and price of good…

(4) Interest rate … …eral rules on interest, we h… … according to Article 4 (1)(a…

(5) The claimant … …dant to show evidence that… …use out of his control (Artic…

(6) **„FCA"** stands for **„Free Carrier"** at a fixed place of destination (the seller has to handle out goods to the carrier at this place and so he becomes free from the risk and responsibility)

Law applicable to contractual obligations in the absence of choice (general rules)

Article 4 of the Rome I Regulation

- Contains the so-called 'objective' connecting factors (as opposed to the 'subjective' one – the law choice by the parties – in Article 3)
- Applicable to the contracts concluded after 17 December, 2009 (Article 29)
- Covers all the contracts, except these falling under Articles 5-8: consumer, insurance and employment contracts
- Essential changes, as compared with Article 4 of the 1980 EC Rome Convention on the Law Applicable to Contractual Obligations (see Exhibits):
  - The closest connection was a general rule under the Convention – is only supplementary under the Regulation
  - Strict connecting factors for the enumerated types of contracts (and not only the presumptions of the closest connection with certain substantive law as before)
  - The possibility of 'dismemberment' of the contract (i.e. its division into parts governed by various national laws) by the court itself is no longer expressly foreseen (but probably it is still conceivable in exceptional cases) – for an example, see ECJ C-133/08 *ICF* (summary of the judgment it Exhibits)

Case study

- **German businessman Anton G., living in Bremen (FRG), gave a new BMW car to his son Johann G., habitually resident in Poland, as a birthday present. Polish car registration office calls into question the validity of the gift. Which law governs the transaction?**
- Article 4 is applicable:
  - We have to look through the whole paragraph 1 – *prima facie* none of 8 special types of contracts fits (if the subject-matter of the gift had been the immovable, it would probably have fallen under the letter c of the paragraph)
  - The 'resident' connecting factor is the 'characteristic performance' rule in par. (2) – idea of the Swiss researcher Adolf Schnitzer
  - Anyway, we could apply the rule of par. (3) if it's assessed that the contract is manifestly more closely connected with another country
- The characteristic performance rule seems to be appropriate => the law of the donor, i.e. **German law**, shall apply
- Eventually, taking into account that the car is to be registered and used in Poland, where the donee is resident, there is a basis for the application of **Polish law** under the 'closer relationship' rule of par. (3)

Carriage contracts (Article 5 of the Rome I)

- A quite complex regulation of the law applicable to the contracts for carriage (of both passengers and goods)
- Peculiarities against the background of Article 4:
  - **Carriage of goods** (par. 1): the law applicable in the absence of the choice by the parties is:
    1) the law of the country of the habitual residence of the carrier
    2) otherwise, the law of the agreed place of delivery
  - **Carriage of passengers** (par. 2):
    1) **the limited choice of law**: (a) of the country of the passenger's habitual residence, (b) of the carrier's habitual residence or central administration, (c) of the place of departure or destination
    2) In the absence of such a choice, the law of the country of:
       - the passenger's habitual residence, where the place of departure/destination is situated in this country
       - the carrier's habitual residence, where these requirements are not met.

Law applicable to consumer and insurance contracts

Consumer contracts (Article 6 Rome I)

- Meaning of the term: 'B2C' contracts (the professional against the person who acts in order to satisfy his or her personal (non-professional/non-commercial) needs
- Special conflicts rules protecting the weaker party against the abuse of the contracting potential of the professional
- Depending on the parties' characteristics, every contract (but for the carriage and insurance contracts) can be qualified as „consumer" contract

Case #1

- Polish businessman Andrzej J., permanently resident in Warsaw, spent his holidays in Florida, USA. During his stay there, he got an advertisement leaflet in Polish issued by the American real estate agency from Miami, offering the holiday appartments on the Gulf of Mexico for the sum of $10,000 p.a., paid in advance. He immediately went to the office of the company and signed the contract in English containing i.a. the reference to the General Terms of Business of the offeror, where the choice of the law of British Virgin Islands was inserted. Andrzej J. has only the very basic command of English. As our hero had not paid, the real estate agency sued him in Poland for the prime of $10,000 plus additional costs. Should the dispute be settled according to the law of British Virgin Islands? Otherwise, which law governs the litigious contract?

Comments to the Case #1 (I)

Structure of Article 6 quite complex (see Exhibits):

- In the first place the court examines the list of exclusions (par.4) => if there's any, the contract falls under Articles 3 and 4
- After that, the minimum connection with the State of the consumer's habitual residence has to be established:
  - either the professional pursues his commercial or professional activity in that country
  - or at least he directs, by any means, such activities to that country or to several countries incl. that country (see ECJ C-585/08 *Pammer & Hotel Alpenhof*)

  If not => the contract falls under Articles 3 and 4
- In the end, it's examined whether there was a choice of law by the parties => if yes, while applied, the law chosen has to be compared with the law in force at the place of habitual residence of the consumer and if the latter secures a better level of protection for consumers, it shall apply (but only to a particular issue – **the mosaic of various legal solutions** arises)
- Had the parties not chosen any law applicable, the law of the consumer's habitual residence applies

Comments to the Case #1 (II)

Is our contract covered by Article 6?

- Characterization of the contract – it certainly falls under Article 6 Rome I (halidays have nothing to do with business)
- List of exclusions – effect of the comparison negative:
  - The contract is not for the supply of services, for the carriage, it is not a financial instrument, within the framework of the market in financial instruments, as defined in Article 4 (1)(h) Rome I
  - The contract is related to a right in rem or tenancy of the immovable but it is undoubtedly a timesharing contract covered by the EC Directive 94/47

  Generally speaking, **it is a consumer contract**
- Minimum connection test (par. 1, 2nd part):
  - The offeror (i.e. the professional) carries on no business activity in Poland
  - One cannot say that the issuance of the leaflets in Polish are enough to be characterized as 'directing' such an activity towards Poland

  The **contract is not covered by Article 6**
- Could the court eventually invoke the concept of the 'internationally mandatory rules' (otherwise speaking: overriding statutes) to protect the purchaser? **See Article 9 Rome I and Article 30 (2) PIL 2011 (both in Exhibits)**

Insurance contracts (Article 7 Rome I)

- The provision under the strong influence of the *acquis communautaire,* complicated and unclear
- Some references to the directives harmonizing the EU insurance market (par. 2 and 6)
- Possible divergencies between the application of the Regulation in different Member States due to the regulatory discretion under par. 3, 2nd subpar. and under par. 4

Case #2

- Andrew J., an English businessman living in Gdańsk, bought a yacht. The German insurer offered him a packet of insurance, covering both the theft and sinking, as well as third party insurance (insurance of civil liability arising out of the sea navigation). What law is applicable?

Comments to the Case #2

- The point of departure in searching the law applicable is the characteristics of the risk, which may be either a '**large'** or a '**mass'** risk (as well as the risk in the life insurance, which in spite of its specificity belongs to the same group as the 'mass' risk itself)
- Notwithstanding our associations, „large" and „mass" risks are not necessarily the same as the „large" or „small" amount of the loss or of the damages – these are technical terms taken from the 73/239/ECC Directive
- The risks connected with the yacht and with any other sailing unit are „large" by definition => **Article 7 (2) Rome I applies here**:
  - The free choice of law
  - Otherwise, the law of the insurer's habitual residence (**German law**) shall apply
- Should the risk be a 'small' risk, then the protective par. 3 shall apply:
  - The choice of law by the parties is not free
  - The law of the place of situation of the risk (i.e. most frequently the law of the policy holder's habitual resindence) – here: **Polish law** – shall apply

Law applicable to individual employment contracts

Employment contracts (Article 8 Rome I)

- The sounding of the provision basically maintains the underlying concepts of Article 6 of the Rome Convention
- Law applicable to individual employment contracts is:
  - **the law chosen by the parties** – which applies as long as it is remains without prejudice to the legal position of the employee as granted to him by the law applicable in the absence of the choice (otherwise, the latter law squeezes out the law chosen and is applied instead)
  - in the absence of such choice:
    - Article 8 (2) Rome I: the law of the country **in which or**, failing that, **from which the employee habitually carries out his work** in performance of the contract (wherein the temporal employment in another country doesn't alter the law connection)
    - Article 8 (3) Rome I: failing the requirements stated above, the law of the country **where the employee's place of business** is situated.

Case #1

- Polish track driver Janusz C. works for the Czech international road carrier „Alfa" Společnost s ručením omezeným (*Limited Liability Company*) seated in Ostrava, CZ. His employment contract specifies that the place of work is the „Czech Republic and the whole Europe". At the same time, Janusz C. still lives in the nearby Poland. His truck is registered and stationed in Poland where „Alfa" has its branch. The employer permanently violates the employees' rights, which finally leads the members of the staff to establishing the trade union organization. Janusz C. is one of its founders and is elected as its president. Two weeks later the governing board fires him. Janusz C. brings a claim against his employer before the court in Ostrava, arguing that Polish law should protect him as the president of the trade union's unit. The law of which country shall apply?

Comments to the Case #1 (I)

- At the first sight, the work is not performed in one and the same country – especially it is not performed in the Czech Republic but rather in Poland and other European countries
- We don't know where the employer has its place of business (i.e. his transport base) – let's assume it is CZ
- We don't have any information about the law choice, let's assume there's no any
- The applicable law – alternatives:
  - The place in which or from which the contract is performed by the employee
  - The place of the employer's place of business
- The latter connecting factor should be applied restrictively, i.e. as the 'last resort' (**ECJ C-29/10 *Koelzsch***) only if there is no single country being the employee's centre of professional activity
- It seems that it is the place from which our driver usually started his rides and where his track was kept, i.e. the Czech Republic => Czech law should apply (Article 8(2) Rome I)

Thanks for your attention!