

**Polish PIL – Rights *in rem*,  
Int'l Family  
and Inheritance Law**

**Dr. Mateusz Pilich**

Chair of Int'l Private and Trade Law,  
University of Warsaw

**Law applicable  
to ownership  
and other rights *in rem***

# Introduction

- An exclusive connecting factor for ownership (tangible property right) and other rights *in rem* has its roots in the ideas of the 'civil law' culture of the Continental Europe
- It is believed there is a remarkable distinction between the relative (person vs person) and absolute (person vs thing) rights – the property rights are exclusive, no-one is allowed to possess or to use the thing owned by someone, unless permitted by the owner
- Hard to predict *in abstracto* what is the ownership/property right, there are remarkable differences between private law rules of different States (e.g. the right of retention)
- One can say that the law applicable to the rights *in rem* shall apply to the *erga omnes* effects of the right to possess, to use and to dispose of an object of the rights
- Connecting factor is the law of the place where the object of the rights is situated (*lex rei sitae*)



# Examples

- Anton G., living in Berlin, lost his Audi A6 car. One day he gets to know that after having been stolen, the vehicle was bought by the person permanently resident in Poznan, who was unaware that it was illegally possessed due to the perfect forgery of the car registration certificate. Anton G. wants to have his car back, believing that Sec. 935 of the German Civil Code (BGB) shall apply, which prohibits the acquisitive prescription of the thing stolen or otherwise unwillingly lost by the owner. **The possibility of vindication, the period of time needed to acquire the title by the possessor, etc. shall be subject to the law of the place where the car physically is** (be it Poland any other country).
- The Polish international road carrier Alfa Sp. z o.o. (*company limited*) opens its branch in Germany to improve its services to its German customers. It consecutively moves a number of trucks which so far have been registered in Poland and pledged with the registered charge (Polish: *zastaw rejestrowy*). German law does not know such an institution (the pledge requires the pledger to give away the pledged object to the pledgee). **The registered charge is believed to persist but in a changed legal form – for instance, after the trucks passed the State border, the pledgee becomes their formal owner and the pledger is the possessor of the cars.**

# Exceptions to the rule

- Ships, aircraft and railway vehicles – as they permanently cross the State borders, it is believed that they should be legally attached to a certain place – the law applicable to the property rights to such chattels is the law of the State where they are registered or, in the absence of the registration, they have their harbour, the mother station or any similar place – [see Article 42 PIL 2011](#)
- **Goods in transportation (*res in transitu*)** – if the carrier passes the third country (which is not the country of the destination of the goods), or if he drives through the territory being subject to no State sovereignty, there must be another connecting factor than the physical location (practically speaking, it is either **the law of the place of departure or that one of the place of destination**) – [see Article 43 PIL 2011](#)

# **Family law**



# Polish Int'l Family Law and EU Law

- The family matters - the sphere of competence of the sovereign States
- See Article 9 of the Charter of Fundamental Rights of the EU (See Exhibits)
- EU law has the impact on the private int'l law legislation of the Member States (at least indirectly) and one can say that the International Family Law is the field of the shared competence (of the EU and its Members States)
- Conf. Article 81(3) TFEU (see Exhibits) – special legislative procedure and consent of all the States necessary for the adoption of the EU measure

**Law applicable  
to the conclusion  
of the marriage**



# Law Applicable to the Substance of Marriage

- The scope of the law applicable pursuant to **Article 48 PIL 2011** (the ability to conclude marriage):
  - the minimum age for marriage
  - the consent of the third person or the State authority to the marriage
  - the reasons for which the marriage shall be null and void or becomes voidable (sometimes called the 'matrimonial impediments')

# Connecting Factors – The Substance

## Example

- **Polish national Anna J. was converted to Islam. In 2010 she met via Internet a man from the United Arab Emirates, whom she intends to marry. The fiancé has already married another woman.**
- Should Anna J. be allowed to enter into the union? Would it have any legal effects in Poland?

# Case - Comments

- **Article 48 PIL 2011:** connecting factor is the nationality of the person entering into marriage (if, however, the natural person is a stateless or a refugee, his or her domicile or habitual residence shall decide)
- On the other hand, the marriage is concluded **between** two given persons and that is why some of the impediments known only to one party's law make the whole union legally inadmissible
- Polygamy:
  - It is contrary to the Polish (and European) model of the marital union
  - In many Near East (and in particular Arab) countries it is accepted and practised
- Theoretically, two approaches may be expected:
  - Either the inadmissibility of polygamy is treated as the so-called 'two-side impediment' which means that it makes the union inadmissible even if so provided by the law of one party
  - Or the public policy exception should apply to the marital ability of the UAE national (which seems more clear and easy)
- Practically speaking, Polish authorities can make hardly anything to oppose to this marriage
- Effects: there is **no 'recognition of marriage'**, yet still, one should not deny the fact of the very existence of the marriage concluded abroad and Anna J. is allowed e.g. to claim the maintenance



# Law Applicable to the Form of Marriage

- The scope of the law applicable pursuant to **Article 49 PIL 2011**:
  - the requirement of public announcement of the intended marriage (the so-called „banns“)
  - the obligation of the persons betrothed to be present at the certain place at the same time (or, similarly, the possibility to enter into the marriage *in absentia*) => the question of the powers of attorney to represent a person entering into marriage
  - The person, organ or body competent to solemnize the marriage
  - the participation of witnesses
  - the way in which the parties' declarations of entering into marriage have to be taken
  - the registration of the marriage
- What is not the form, should be considered as the substance

# Connecting Factors – The Form

## Example

- Maria T., a Greek national, met during her studies in Germany Georgios K., an ethnic Greek who was born and lived in this country for his whole life and hence he has both citizenships of Germany and Greece. The couple enters into the marriage before the orthodox priest in Hamburg. German law requires the marriage to be concluded in the secular form (before the registrar). Which law shall govern the formal validity of marriage according to Polish Private Int'l Law?

# Case - Comments

- The old medieval formula of the *lex loci matrimonii* (law as in force at the place of the ceremony of marriage) comes first pursuant to **Article 49(1) PIL 2011**
- Yet the ceremony took place outside Poland (Article 49(2) PIL 2011) and the subsidiary connecting factor of the paragraph 2 could be invoked
- The sounding of the latter paragraph („laws”) means here that the parties do not have to possess the same nationality, permanent (domicile) or habitual residence but in order to apply paragraph 2, the court is obliged to state only that the both laws are not in variance with each other and, so to speak, they fit each other so that they can be applied together effectively
- Should any of the parties have dual or multiple nationality, then the general rules of the PIL shall apply (see Article 2 PIL 2011):
  - **the Pole is Pole** „forever and ever”
  - To the foreigner, **the „closest connection test”** shall apply
  - If the latter has the common nationality with another person (as it is stated in Article 49(2) PIL 2011) and the common nationality is the connection criterion, it shall suffice that the law of the common country recognizes him as „its” national
- Here, the woman has only the Greek nationality but the man is a dual national and he is probably more closely connected with Germany – yet we recognize him to be a Greek because the law of this country still finds him to be his own national irrespective of the expatriation



**Law applicable  
to the effects of marriage**

# The notion

- Widely understood, the 'effects' of the marriage mean every legal consequence stemming from the fact that two natural persons are tied with the bond
- Otherwise speaking: both property and personal effects, which may consist in:
  - The change of the family name of the persons concerned
  - The obligations and duties weighting on them, e.g. the duty to contribute to the satisfaction of the family's needs
  - The legal representation of one of the spouses by the other
  - The patrimonial relations between the parties

# Basic rules

- Basically all the effects of the marriage are covered by the same applicable law, which is (Article 51 PIL 2011) the law of their **current** common nationality (paragraph 1), and in the absence of this, their common country of permanent residence (domicile) or habitual residence
- As the 'last resort', the law otherwise strictly connected with both parties shall apply
- „Current“ means that the law governing the relationships between spouses may change with the lapse of time (e.g. the spouses may change the common nationality and, all the more, their country of common residence) – see the next slide



# Change of the law applicable

## Example

- A woman of Polish nationality married in 2001 an Austrian. They have no common nationality and did not conclude any marriage agreement regulating the property issues between them. Both lived until the end of 2009 in Poland, where they bought an immovable. Their title of ownership was entered into the land register (*księga wieczysta*): „Owners: Messrs. A. indivisible joint marital property” (according to Polish law). In 2009 the couple moves to Austria. Does it make any difference as to the marital property?

# Comments

- Obviously yes – the law applicable to the marital property has changed after both have moved to the other country
- The law of Austria now governs the relationships (personal and property)
- The standpoint of the latter with regard to the matrimonial property regime differs considerably from the law of Poland (here: the joint and undivided ownership of the property between spouses – with certain exceptions, in Austria: separate estates in matrimony)
- Hence the immovable property in fact begins to be the fractional co-ownership of both spouses, the rights in fractions being considered as the personal property of each spouse
- But it should not prejudice the previous position of the third parties (e.g. of the Polish bank which credited the purchase of the immovable and secured its rights against the debtors with a mortgage) – see Article 53 PIL 2011
- EU legislative initiative – Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Doc. No. COM(2011) 126 final, published on 16 March 2011

# Matrimonial property and the marriage agreements

- The property regime under the marriage contract (agreement) differs as to the time of connection: the law applicable is more stable and unlikely to change
- Under the new Law of 2011 (Article 52), the spouses may choose the law applicable to their marriage agreement from among one of following laws: the law of nationality, domicile or habitual residence of the either of them
- Admittedly, the choice may be changed afterwards, but it is without the prejudice to the interests of the creditors (Article 4(2) PIL 2011) – **„vested rights” doctrine**
- In the absence of such choice, the law applicable to the marital property and personal relationships between spouses **at the time of entering into the marriage agreement** shall apply



# Marriage and the family name

## Example

- Polish national Monika H. married a Belgian Henrik W. The marriage took place in Warsaw where the marriage certificate was drawn up. Several days later the newlyweds left for Antwerp, where the bridegroom is domiciled. Which law should apply? (important because whereas Polish law provides for the change of name as a consequence of the marriage, Belgian law does not)

# Comments

- Article 15(1) PIL 2011 subjects the name (or surname) of the natural person to the **law of his or her nationality** – the same about the choice of the (sur)name by the spouse
- The exception is, however, the change of the name which basically shall be subject to the law applicable to the assessment of events which led to the acquisition or change of the name or surname (Article 15(2) PIL 2011)
- So far, it was believed that the law applicable should be law of the country which governs the effects of the marriage (decision of the Supreme Court of 8 August 2003, Docket No. V CK 6/02, SCRep.- Civ.Chamber 2004 issue 7-8, pos. 131) – here: Belgian law
- Under the new Law of 2011 this interpretation is expected to persist
- The Polish substantive law (Article 25 of the Family and Guardianship Code) gives a limited option to the spouse to choose the surname (it may be his own family name, the name of the either spouse or the combined name) – **the choice left to Monika H. is governed by her national law and then she is allowed to choose her husband's family name**
- If Monika H. makes no declaration as to her family name, it will remain the same as it was under the law of Belgium (applicable to the effects of marriage)
- The change of the family name of Monika H. (if any), as stated in the marriage certificate, should be recognized by Belgian authorities (see esp. ECJ in *Garcia Avello* and *Grunkin-Paul*)

**Thanks for your attention!**