Polish PIL – Int'l Family and Inheritance Law

Dr. Mateusz Pilich
Chair in Int'l Private and Trade Law,
University of Warsaw

Law applicable to dissolution of marriage and the legal separation

Marriage dissolution – a case

- The former Iraqi national Iusuf S., who used to serve as the translator to Polish troops in his country of origin, moved to Poland in 2003. 2005 he divorced his wife pronouncing the so-called „talaq” (the divorce formula). 2010 he was granted the Polish nationality. 2011 he met a Polish woman whom he intends to marry. Now he is seeking the recognition of his previous divorce before the Polish court. Which law shall govern the substance of his claim?

Law applicable to the divorce and legal separation

- Polish law treats the divorce as matters reserved for the State court's decision (Article 56 of the Family and Guardianship Code)
- Whether our law applies or not, depends on the circumstances of the case - it is the law of common nationality of the parties **at the time of the request for the dissolution of marriage** (Article 54 PIL 2011)
- Should the spouses have no common nationality, the law of common domicile or habitual residence or, finally, Polish law as the last resort shall apply
- The law applicable governs:
  - The form of the dissolution of marriage (should it be official or private)
  - The effects of the dissolution in the sphere of personal and property regime
  - Maintenance obligations between the divorced spouses
- **„At the time of the request"** means obviously not the time of bringing the claim into the court but it is just the matter of fact (the moment when the spouse disclosed his or her intention to divorce is decisive)

Polish conflicts rules for the divorce and the Rome III Regulation

- **Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III)**
- The Commission's Proposal issued in order to put an end to „forum shopping" in divorce cases (see Brussels IIbis and the ECJ C-168/08 *Hadadi* case)
- The resistance of Sweden (the country with a very 'divorce-friendly' regime) worried about obstacles for its nationals wanting to divorce abroad or mixed couples initiating proceedings in a country
- Poland – rather reluctant (a reversed trend: the policy of the 'protection of the family' might be undermined)
- Enhanced co-operation as the half-measure
- The Regulation entered into force on 21 June 2012
- 14 EU countries participating up to now (the 15th one – Lithuania – starts to apply the Regulation as from 22 May 2014

Rome III – does it make any sense to stay away, Poland?

- Brussels IIbis Regulation (No. 2201/2003) applicable to international matrimonial and family cases
- It enables the automatic (*ex lege*) recognition of a foreign divorce or separation decree within the whole EU
- *Forum shopping* easier than ever before

Law applicable to quasi-marital couple unions

Notion of the „quasi-marital” couple unions

- From the substantive law perspective, natural persons may live in the couples which may be legally recognized or not
  - cohabitation (certain legal effects may be attached thereto)
  - ‘common-law marriage’ (some USA States, e.g. Texas)
  - registered partnerships
  - homosexual marriage
- Polish family law knows only the ‘classical’ heterosexual marital union – what about foreign ones?
- The PIL Act 2011 contains no express rules of conflict relating to any of these categories

Characterisation issues

- Ways of characterisation:
  - 'marriage' (we apply conflicts provisions concerning regular marriage institution, Articles 49 ff PIL)
  - quasi-'contract', 'co-property', etc. (we apply various provisions on the law applicable, depending on the issue at hand)
  - we apply Article 67 PIL (a general gap-filling rule)
- Characterization issues and applicable law:
  - as to the **homosexual marriage,** as it usually stems from the resignation from the sex as a constitutive factor of the institution of marriage, it is to conclude that such unions fall under the scope of the **provisions of the PIL applicable to marriage**
  - registered partnerships are not the marriage even if they approach this model (a substitute of marriage for gay and lesbian persons) – it is claimed that the **law of the country of registration (*lex loci registrationis*)** shall apply

Public policy considerations

- Polish Constitution contains a provision (Article 18) on the heterosexual character of marriage and the protection of such unions
- Its content and effects seem to be problematic: *Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.*
- It is not the obstacle to recognize at least some effects of foreign marriages or registered partnerships, even not concluded between the parties of different sex
- Changing attitude of the courts may soon iniciate an open discussion (see the resolution of the Supreme Court of 27 July 2012, III CZP 65/12: right of tenancy for the homosexual partner of the deceased tenant)

Law applicable to the relationship to children and the parental responsibility

Problematics of the child's origin

- Generally speaking, the child's origin may be established:
  - compulsorily (determination of parenthood = affiliation)
  - voluntarily (recognition of parenthood)
- All the ways of establishing the origin of a child are subject to **the law of his or her <u>nationality</u>** (not to the law of the nationality of parents)
- Variations as to the authoritative **time of connection**:
  - **Compulsory** establishment of parenthood/origin – **the time of the child's birth** is decisive (only if the law applicable at that moment of time provides for no way of establishment of parenthood, the law from the moment of the affiliation shall apply)
  - **Voluntary** establishment of parenthood/origin – **the time of the recognition** is decisive (here the above mentioned rule is reversed because in the absence of the recognition, the child's national law at the moment of his/her birth shall apply)
- Questions falling within the scope of the applicable law are esp. the **affinity** (whether the child is sb's descendant) and **whether or not the child may use the family name of his or her father or mother**
- Parental responsibility, property and personal consequences of parenthood are governed by the law specified by the Hague Convention (see next slide)
- Some legal systems (e.g. Polish) make it possible to recognize even an unborn child. Whether or not the foetus may be recognized at all and at what time the bond of affinity arises, shall be subject to the **law of the mother's nationality at the moment of the recognition**.

Parental responsibility

- The broad term encompassing a variety of questions, i.a. the legal respresentation of the minor by his or her parents, the power to decide on the child's personal matters, the place in which the child has his/her residence, etc.
- Since 11 Jan. 2010 governed by the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- Main features of the Convention:
  - A child is defined as a person under 18 (older persons characterized as 'adults', no matter what the age of consent)
  - jurisdictional, substantive and conflict provisions – an interesting combination of different methods
  - With regard to the ex lege parental responsibility, law of the **child's (current) habitual residence** applies (subject to change with the lapse of time)
  - Based on the idea of the automatic effectiveness (recognition) of the protective measures taken by the competent authorities in all the Contracting States (Article 23)
  - Generally competent are the authorities of the habitual residence of the child (Article 5)
  - These organs basically apply their own law, the lex fori, so that the law applicable shall be that one of the habitual residence (Article 15(1))

Law applicable to maintenance obligations

Sources of law

- Article 63 PIL 2011 entered into force on 18 June 2011
- Until this date, the 1973 Hague Convention on the Law Applicable to Maintenance Obligations (Journal of Laws 2000 No. 39, pos. 444)
- New 2011 Law on the Private International Law:
  - contains only the referral to another instrument, namely to the Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10/01/2009, s. 1)
  - that Regulation itself refers in its Article 15 to the international convention - the Hague Protocol on the Law Applicable to Maintenance Obligations (see Exhibits)
  - Under the Protocol (Article 24), an international organization of the economic integration (like the EU) may acceed to the Protocol instead of the Member States
  - Council of the EU did so pursuant to its Decision No. 2009/941 of 30 Nov. 2009 (OJ L331, 16/12/2009, p. 17)
  - The Protocol has the retrospective effect, i.e. it applies in the Member States after its entry into force also to the maintenance cases which raised before that date
- In other words:
  - Rulings on the international maintenance obligations before 18 June 2011 shall be subject to the law specified by Hague Convention
  - Court decisions in these matters as from 18 June 2011 shall be subject to the law specified by the Hague Protocol

Maintenance Convention and Protocol

- Both instruments show similarities:
  - The notion of the „family law relationship" from which the maintenance obligation follows was not defined and shall be subject to the frexible interpretation (it is not contrary to the Protocol to characterize in this way
  - The law specified as applicable applies universally (whether or not it is the law of the Contracting State)
  - The main connecting factor is the current habitual residence of the maintenance creditor
  - The change of the place of habitual residence has the effect in the change of applicable law (which, however, does not affect the right to maintenance with regard to periods of time which have passed)
- The differences are numerous and important:
  - The Protocol lets the parties choose the applicable law (the Convention does not)
  - The sequence of the connecting factors considerably differs (e.g. the law of parties' common nationality goes next to the habitual residence of the creditor under the Convention – and under the Protocol it is applied only as the 'last resort' between descendant and ascentant persons)

Law applicable to the international adoption

Sources of law

- Article 57 PIL:
  1. **Single adoption** shall be subject to the law of the country whose nationality the **adopter (the adopting party)** holds (paragraph (1))
  2. **Common adoption** shall be subject to the law of the country whose **nationals both adopters** are (failing that, to the law of their common domicile, habitual residence, or to the otherwise strictly connected law)
- Article 58 PIL:
  - **Adoptee's personal law** has to be observed as to the law provisions concerning:
    - his, and his legal representative's, consent to the adoption;
    - the permission of the competent State authority;
    - the adoption restrictions because of the change of the place of previous the permanent residence to the place of residence in the other country

Relationship between Articles 57 and 58

- Both Articles apply simultaneously, no matter whether the adopter is a single person or the adoption is common
- The application of the laws designated applicable (adopter's and adoptee's personal law) is **cumulative**, which means that the adoption cannot be valid without respecting both

Law applicable to inheritance matters

Sources of law

- At the moment, no European instrument (Proposal for the Council and EP Regulation on the law applicable to inheritance is still pending)
- Polish domestic law – PIL 2011, Articles 64 to 66
- International Conventions: Convention on the conflicts of laws relating to the form of testamentary dispositions, concluded in the Hague on 5 October 1961 (Journal of Laws 1969 No. 34, pos. 284) – with regard to the form of wills

Connecting Factors – The Substantial Issues

- If the decedent makes a will, he or she may choose as the law applicable (Article 64(1) PIL 2011):
  - The law of his nationality, or
  - The law of the country in which he is domiciled (permanently resident), or
  - The law of the country of his habitual residence
- It is interesting to pose the question whether the decedent may choose the law even if in fact he or she does not dispose his property by will (i.e. where there is no substantive disposition at all)
- In the absence of any choice whatsoever (no matter express or implied), the law applicable shall be the **law of the decedent's nationality <u>at the time of his or her death</u>**
- This law governs e.g. the question who the intestate heir is, in what order and proportion heirs come into the inheritance, how the interests of the nearest family circle concerning the inheritance are protected, whether the decedent may dispose by a testamentary legacy
- As to the last point: the transmition of the title to the particular object of property left by the decedent (e.g. of the immovable, the collection of pieces of art, a car) is subject to the *lex rei sitae*
- Substantive validity of testaments is subject to the law of nationality of the decedent **at the time of making this act** (it is reasonable, as the decedent can hardly foresee whether his or her future nationality will possibly make his or her will void or voidable)

Convention on Form of Wills

- Article 66 PIL 2011 refers to the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (in Exhibits)
- The Convention applies universally (irrespective of the status of the country whose law is specified as applicable)
- The law specified as applicable (fully alternative):
  - The law of the decedent's nationality (*lex patriae*) at the time of either making the will or the testator's death
  - The law of his or her domicile (*lex domicilii*) at either of the above mentioned moments
  - The law of his or her habitual residence at either of the above mentioned moments
  - The law of the country where the will was made (*lex loci actus*)
  - With regard to immovables - the law of the country where the immovable is situated (*lex rei sitae*)
- Poland ratified the Convention with the reservation pursuant to its Article 12, which stipulates that the State may exlude from its application to such testamentary clauses which do not relate to matters of succession (e.g. the establishment of a foundation under Polish law, the recognition of the child by the testator under the Italian Civil Code)

Thanks for your attention during the whole semester!