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Chapter I
The concept of private international law

Private international law in a narrow sense is a set of legal norms the purpose of which is to distinguish the sphere of operation of various states' legal systems in the field of private law. The Act of 4 February 2011 – Private International Law has abandoned the distinction under private, civil, and family and guardianship law as well as labour law. Therefore, Art. 1 of the Private International Law Act currently states: "this Act specifies the law applicable to private law relationships connected with more than one State". In the Polish doctrine, it is assumed that a conflict-of-law situation occurs when a given civil law relation is linked to more than one state. It may be a relationship of a subjective nature, i.e. in a situation where the parties to a legal relationship reside or have their seat in the territory of different countries; or an objective nature in a situation where the object of the civil law relationship is connected with a foreign legal system. In the present era, the importance of private international law is constantly growing due to the increase in international trade, both in the sphere of private law, e.g. tourism, and economic law, i.e. in connection with the global economy. The development of modern means of transport, and most of all of electronic communication including the Internet, mobile telephony, and satellite television, means that there are more international relations.

The Polish doctrine assumes that the purpose of private international law is to:

(1) ensure international uniformity in the field of private law, or to indicate the appropriate law for the assessment of a given civil law relationship;

(2) contribute to international harmony, to settle matters of private law, or to ensure security and certainty of international trade, to facilitate and support international relations of a private nature.[1]

In recent times, European Union law has been of great importance for the development of private and international law in Poland. The most significant are the regulations which, according to Art. 288 indent 2 of the Treaty on the Functioning of the European Union, are binding for the Member States of the European Union as well as individual entities of those States. Basic regulations in EU law can also be distinguished, which, due to their generality, need to be specified in executive acts. Such regulations are not to be applied directly. A regulation is a legislative act that does not usually require any adaptation to national law. In the area of private law, directives are crucial for the process of approximating the laws of the European Union Member States. Pursuant to Art. 288 indent 3 of the Treaty on the Functioning of the European Union, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed but leaves to the national authorities the choice of form and methods. Therefore, a directive allows only achieving harmonization of the legal systems of the Member States and approximating these regulations in order to reach the same goals. In the field of private law, there are many legal systems that have grown out of different traditions in various legal systems across Europe and in the rest of the world. In Europe, it is possible to distinguish two basic systems: continental law, which is statute law, and Anglo-Saxon law, which is common law. Within the statute law, it is also possible to differentiate between legal systems that originate from the Roman law and German law. Finally, it is possible to observe legal systems that are a modification of the Roman and German law systems, e.g. the systems of the Scandinavian countries, or even Polish law. In the field of European Union law, directives have been used, for example, in the spheres of consumer protection, commercial company law, labour law, and family and guardianship law. On the other hand, the area of private law and international civil procedure is dominated by regulations.

Poland joined the European Union in 2004. And at that moment, the provisions of the EU private international law and international civil procedure came into force. Only in the field of jurisdiction in civil and commercial matters did Poland join the Lugano Convention of 1988 at the invitation of one of the States, a party to this convention. The Lugano Convention offered the same solution as the Brussels Convention of 1968 for jurisdiction and the enforcement of judgments in civil and commercial matters. Therefore, since 2000 – that is, since Poland's accession to this Convention – a very important

[1] *J. Poczobut*, Statut personalny osób prawnych. Pojęcie prawa prywatnego, in: Aurea praxis aurea theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego (eds. *J. Gudowski*, *K. Weitz*), Vol. 2, Warsaw 2011, p. 753.

area of EU law has already been in force. It should be noted that Poland has acceded to the implementation of most European Union regulations in the field of judicial cooperation in civil and commercial matters, omitting only some regulations introduced in the field of enhanced cooperation.

Private international law can be broadly understood and includes norms of private international law in a narrow sense, i.e. conflict of laws (competence) norms and substantive norms, which have an international scope. As already stated, the substantive norms of private international law are the result of the law unification process that is taking place in the modern world. This unification aims at the standardisation of both conflict of laws and substantive norms. According to J. Skąpski, the aim of unifying substantive law is to eliminate conflicts between legal systems of different countries, which is difficult due to the large number of countries that participate in these processes. The unification concerns only selected legal issues, and it is rare to observe complete uniformisation, which leads to the application of the same legal norms to legal relations under foreign law, as well as strictly internal ones. According to M. Pazdan, the unification procedures in the modern world most often result in a specific legal duality. There are two separate legal systems side by side – one regarding legal relations linked with foreign law, and the other concerning legal relations connected to the domestic legal system.

The unification of private law is taking place in the fields of activity of various organizations. The Hague Private Law Conference, the European Union, the Council of Europe, and the UN (through the agendas, e.g. UNCITRAL, UNIDROIT) are among the most prominent.

The European Union plays a major role in the harmonisation of private law, namely civil law, family and guardianship law, and labour law. This organization, in order to achieve its goals, conducts the process of both unification and approximation of various legal systems in force in individual Member States. The legal mechanism for these operations is European law. The EU doctrine distinguishes primary and secondary European law. The most important role in the process of unification and harmonisation (approximation) of private law is played by secondary European law. Legal remedies included in secondary European law contain regulations and directives, recommendations, decisions, and opinions. A regulation, according to Art. 189 para. 2 of the Treaty of Rome establishing the European Economic Community, is binding both for the Member States of the European Union and individual entities from these countries. Certainly, in order to be able to apply a given provision in a specific case, it must be sufficiently clear and unambiguous. European law also distinguishes what are called basic regulations, which, due to their generality, need to be specified in executive acts. Such regulations are not directly applicable. A regulation is therefore a legal instrument that ensures the achievement of a uniform legal order in all Member States. Usually, in this

case any adaptation measures are unnecessary. However, in the area of private law, a greater role in the process of approximation of laws in the Member States is played by directives. Pursuant to the provisions of Art. 189 para. 3 of the Treaty of Rome, a directive is addressed to the Member States by imposing on them an obligation to achieve the objective set out in a directive, leaving, however, the freedom to choose the means to achieve this goal. Thus, a directive only allows harmonisation of different legal systems, i.e. bringing them together by achieving the same objectives. In the area of private law in Europe, and even more so in the rest of the world, there are many legal systems based on different traditions. The largest number of directives has been issued in the area of consumer protection: Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising; Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products; Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.[2] In the sphere of company law, a significant role is played by First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community; Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent; Third Council Directive 78/855/EEC of 9 October 1978 based on Article

[2] More in: *E. Łętowska*, Prawo umów konsumentów, Warsaw 1999 and the literature cited therein.

54(3)(g) of the Treaty concerning mergers of public limited liability companies.[3]

Under the third pillar of the European Union, which includes issues related to cooperation in internal affairs and the justice systems of the European Union countries, it was also decided to include some conventions developed by the Hague Private Law Conference and the Council of Europe in the *acquis communautaire*. However, these conventions most often have a conflict-of-law and not substantive nature.

The best example of substantive norms of private international law is the Convention on Contracts for the International Sale of Goods from 1980. The applicability of such substantive norms does not result from the conflict of laws rule. They directly normalize the legal relationships they concern.

[3] *M. Safjan* (ed.), Prawo Wspólnot Europejskich a prawo polskie. Prawo spółek, Warsaw 1996.

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Chapter II
Sources of Polish Private International Law

1. National codifications

Private international law provisions refer to classic issues such as jurisdiction, conflict of laws (or choice of law as used by common law legal writers), and recognition and enforcement of foreign judgments in the area of civil and commercial as well as family and succession cases involving a foreign element. By virtue of the principles laid down in the Constitution of the Republic of Poland, the Constitution, statutes, ratified international agreements, and regulations are sources of universally binding law (Article 87 para. 1 of the Polish Constitution).[1]

The principal national source of private international law is the **Private International Law Act of 4 February 2011** (hereinafter referred to as PIL Act of 2011) that entered into force on 16 May 2011.[2] The new national codification replaced the Private International Law Act of 12 November 1965 that was effective from 1 July 1966 till 15 May 2011.[3]

The PIL Act of 2011 provides for conflict-of-law rules that designate the law applicable to personal, family or commercial relations which involve a foreign element, while special rules to determine jurisdiction of Polish courts as well as other procedural issues in cross-border cases are laid down in the Polish Code of Civil Procedure of 17 November 1964.[4]

In addition to rules included in the PIL Act of 2011, provisions on special conflict of laws are designated to supplement the sets of substantive law

[1] Journal of Laws of 1997 No. 78, item 483.

[2] Journal of Laws of 2011 No. 80, item 432, consolidated version published in Journal of Laws of 2015, item 1792.

[3] Journal of Laws of 1965 No. 45, item 290.

[4] Consolidated version in Journal of Laws of 2018, item 155, Articles 1097 to 1153^{25}.

rules tailored to regulate issues where, historically or due to their complex legal nature, (own) sets of requirements are sought:

- Articles 77 to 84 of the Act of 28 April 1936 on Letters of Exchange and Promissory Notes (consolidated text, Journal of Laws of 2016, item 160);
- Articles 62 to 68 of the Act of 28 April 1936 on Cheques (Journal of Laws No. 37, item 283, as amended);
- Articles 355 to 357 of the Maritime Code Act of 18 September 2001 (consolidated text, Journal of Laws of 2016, item 66);
- Articles 3a to Article 3a[1] of the Act of 18 July 2002 on Providing Services by Electronic Means (consolidated text, Journal of Laws of 2017, item 1219);
- Article 13 of the Act of 2 April 2004 on Certain Financial Collaterals (consolidated text, Journal of Laws of 2016, item 891);
- Articles 11 para. 2 and 14 of the Aviation Law Act of 3 July 2002 (consolidated text, Journal of Laws of 2017, item 959).

2. Multilateral conventions on private international law as a source of binding law in Poland

Poland is bound by numerous international conventions that cover citizenship, family and guardianship, civil procedure, taking evidence or service, or issues with practical implications for their application in cross-border civil and commercial cases.

Uniform conflict-of-law rules in selected issues of civil, commercial or family relations can be applied worldwide by many countries of different legal cultures, social, economic and political systems. Article 91 para. 1 of the Polish Constitution provides that a ratified international agreement (once it has been promulgated in the Journal of Laws of the Republic of Poland – *Dziennik Ustaw*), belongs to the domestic legal order and must be applied directly, unless its application depends on the enactment of a statute. Article 91 para. 2 refers to the priority of an international agreement over a domestic statute, provided such an agreement has been ratified upon prior consent granted by statute, if such an agreement cannot be reconciled with the provisions of the statute in question. Article 91 para. 3 refers to the direct applicability and precedence of the laws enacted by an international organization in the event of a conflict of laws, if an agreement, ratified by the Republic of Poland, establishing an international organization provides so.

Numerous conventions on conflict of laws have been adopted under the auspices of the Hague Conference on Private International Law (Hague Conference) which is an inter-governmental organization with 83 members (82 states and the European Union) representing all continents.

An increasing number of non-member states are also becoming parties to the Hague Conventions. As a result, the work of the Conference encompasses 150 countries around the world, eliminating many conflicts that no longer need to be resolved by domestic private international law codifications. The statutory mission of the Conference is to work for the "progressive unification" of private international law in personal and family or commercial situations which are connected with more than one country. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure, and from child protection to the matters of marriage and personal status.[5]

Poland became a member of the Hague Conference in 1984. Since then it has been a contracting party to sixteen Hague Conventions and one Protocol (the list below is not exhaustive):[6]

- Convention of 12 June 1902 relating to the settlement of guardianship of minors (Journal of Laws 1929, No. 80, item 596);
- Convention of 17 July 1905 relating to deprivation of civil rights and similar measures of protection (Journal of Laws 1929, No. 80, item 598);
- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants (Journal of Laws of 1995, No. 106, item 519);
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Journal of Laws of 1995, No. 108, item 528; see corrigendum added in Journal of Laws of 1999, No. 93, item 1085);
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention), (Journal of Laws of 2000, No. 39, item 448; see corrigendum added in Journal of Laws of 2002, No. 01, item 17);
- Convention of 30 June 2005 on Choice of Court[7] Agreements ("Choice of Court Convention"), (O.J. L 133, 29.5.2009, p.1);
- Convention of 23 November 2007 on International Recovery of Child Support and Other Forms of Family Maintenance (O.J. L 192, 22.7.2011).

[5] For the mission and work, and status chart, see the official website of the Hague Conference at https://www.hcch.net/en/about. All links hereinafter updated as of 30 March 2019.

[6] For the full list of conventions to which Poland is a contracting party, see https://www.hcch.net/en/states/hcch-members/details1/?sid=61.

[7] 2014/887/EU: Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements (O.J. L 353, 10.12.2014, p. 5).

The PIL Act of 2011 makes direct reference to the following Hague Conventions:

- Article 34 PIL Act of 2011 refers to the Convention of 4 May 1971 on the Law Applicable to Traffic Accidents (Journal of Laws of 2003, No. 63, item 585) to determine the law applicable to non-contractual civil liability arising from traffic accidents;
- Articles 56 and 59 PIL Act of 2011 refer to the 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 (O.J. L 151, 11.6.2008, p. 39; Journal of Laws of 2010, No. 172, item 1158); the former to designate the law applicable to matters concerning parental care and contacts, and the latter to the guardianship and care over a child.

As a general principle, respect for international commitments entered into by the Member States means that adopting new EU measures should not affect the application of international conventions to which one or more Member States are a party at the time when a regulation has been adopted. Consistency with the general objectives of the regulation requires, however, that it takes precedence, as between Member States, over conventions concluded exclusively between two or more Member States in so far as such conventions concern matters governed by the regulation.[8] Poland is bound by the Hague Conventions as a result of their approval by the European Union.

2.1. Custom as a source of private international law in Poland

Customary law understood as evolving from long customary practice, shared pattern of behaviour, having persisted over a long time[9] is of little significance for developing conflict-of-law rules due to the lack of statutory recognition of a custom as a source of binding law under the Polish Constitution.

However, Polish legal commentators tend to take into account the possibility of such rules evolving from solutions based on the usage of the same connecting factor under the guidelines set out by Article 67 PIL Act of 2011.[10]

[8] For example, the EU Member States are bound by Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (O.J. L 7, 10.1.2009), not by the Hague Convention.

[9] *N. Duxbury*, Custom as Law in English Law, Cambridge Law Journal, 2017, available in LSE Research Online at: http://eprints.lse.ac.uk/70258/8/Duxbury_Custom%20as%20law_author_2017%20LSERO.pdf.

[10] See, for example, *M. Pazdan*, Prawo prywatne międzynarodowe, Warsaw 2012, p. 45.