Overriding Mandatory Provisions in Polish 2011 Private International Law Act[1]

Norme de aplicare imediată în legea poloneză din 2011 privind dreptul internaţional privat

Assistant Professor, Ph. D. ***Anna WYSOCKA-BAR****
Center of Private International Law
Jagellonian University, Poland

Assistant Professor, Ph. ***D. Ewa KAMARAD****
Institute of European Studies
Jagellonian University, Poland

Abstract

The article presents the concept of overriding mandatory provisions as it is shaped in Polish 2011 Private International Law Act. The history of the concept and influences from EU private international law instruments are explained. 2011 PILA allows for the application of the overriding mandatory provisions of the forum, and 'taking into account' of such rules originating from third states. An example of substantive rules qualified by the legislator as overriding mandatory provisions is given. The concept of overriding mandatory provisions is eagerly commented by authors in legal literature, but outside the scope of EU instruments it does not appear in Polish jurisprudence.

Keywords: *applicable law; overriding mandatory provisions; Poland; private international law.*

Rezumat

Articolul prezintă conceptul normelor de aplicare imediată aşa cum acesta este conturat în legea poloneză din 2011 privind dreptul internaţional privat. Sunt explicate istoria conceptului şi influenţele dreptului internaţional privat european. Legea din 2011 permite incidenţa normelor de aplicare imediată ale forului, precum şi posibilitatea de a „avea în vedere” astfel de norme originare din state terţe. Lucrarea oferă şi un exemplu de norme substanţiale calificate de legiuitor ca fiind de

---

[1] The paper is partly based on the research conducted by the authors for the EAPIL Young EU Private International Law Research Network project on Overriding Mandatory Rules in the Law of the EU Member States.

* anna.wysocka@uj.edu.pl.

* ewa.kamarad@uj.edu.pl.

aplicare imediată. Conceptul normelor de aplicare imediată este subiect al unor dezbateri ample în literatura de specialitate, însă, în afara sferei de aplicare a actelor normative europene, nu se regăseşte în jurisprudenţa din Polonia.

Cuvinte-cheie: *legea aplicabilă, norme de aplicare imediată, Polonia, drept internaţional privat.*

1. Introduction

The development of Polish private international law dates back to the nineteenth century, when the first works were written by Polish legal scientists. After World War I, when Poland regained independence, the idea of creating its own conflict of laws emerged. In 1926, the Act on private international law was adopted (PILA 1926)[2]. At the same time, an act on the conflict of laws between the districts was adopted[3], whose task was to settle conflicts between different legal systems that were in force on the territory of Poland. Thus, both legal acts were applied not only in Poland's external relations, but also in settling internal relations. After the unification of substantive private law, the act on the inter-local conflict of laws ceased to apply, while PILA 1926 was replaced by a new legal act in 1965 (PILA 1965)[4].

The new act was introduced mainly because of the social and economic changes that occurred in Poland and around the world, and the desire to face them with the modern regulation[5]. PILA 1965 has been in force for over forty years but some gaps and shortcomings in it were gradually pointed out in the literature[6]. The new act (PILA 2011)[7] was adopted on 4 February 2011 and entered into force on 16 May 2011[8].

PILA 2011 is the basis of domestic private international law and contains conflict-of-law rules indicating the applicable law. Rules on jurisdiction and recognition and enforcement

[2] Act of 2 Aug. 1926 on the Law Applicable to International Private Relations, Dz.U. 1926 nr. 101 poz. 581.

[3] Act of 2 Aug. 1926 on the Law Applicable to Internal Private Relations, Dz.U. 1926 nr. 101 poz. 580.

[4] Act of 12 Nov. 1965 Private International Law, Dz.U. 1965 nr. 46 poz. 290. See: A. Mączyński, *Polish Private International Law*, YPIL 2004, vol. 6, pp. 203-220.

[5] J. Rajski, *The New Polish Private International Law, 1965*, The International and Comparative Law Quarterly 1966, vol. 15, No. 2, pp. 457-469.

[6] M. Pazdan in: M. Pazdan (ed.), *System Prawa Prywatnego. Tom 20 A. Prawo prywatne międzynarodowe*, Wydawnictw C.H. Beck, Warszawa 2014, pp. 130-131.

[7] Act of 2 Feb. 2011, Private International Law, Dz.U. 2011 nr. 80 poz. 432. The PILA 2011 has no official English translation. Unofficial English translation by M. Zachariasiewicz is available in YPIL, vol. 13 (2011), pp. 641-656. Available online at https://www.isdc.ch/en/publications/yearbook. Translations into other languages: U. Ernst, *Polen. Gesetz vom 4. Februar 2011: Internationales Privatrecht*, RabelsZ 2012, pp. 639-653; P. Twardoch, M. Zachariasiewicz, *Loi du 4 février 2011 – Droit international privé. The Act on Private International Law dated 4 February 2011*, PPPM 2011, t. 8, pp. 108-138; M. Zachariasiewicz, A. Wowerka, *Das Gesetz vom 4.2.2011 – Das Internationale Privatrecht*, IPRax 2011, z. 6, pp. 609-619, reprint, PPPM 2012, t. 10, pp. 174-204; G. Zou, *Chinese Translation of Private International Law Act 2011*, PPPM 2012, t. 10, pp. 174-204.

[8] A. Mączyński, *Poland* in: J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio, Encyclopedia of Private International Law, Cheltenham 2017, pp. 2421-2433.

of foreign judgments are part of international civil procedure and are set out in the Code of Civil Procedure of 1964[9].

Since 1 May 2004 Poland has been a member of the European Union (EU). Poland was a party to the Rome Convention 1980 on the law applicable to contractual obligations[10] (an international convention opened only to EU Member States) from 1 August 2007. This Convention was replaced by the Rome I Regulation[11] (contractual obligations) on 17 December 2009. In Poland, from the date of their entry into force, the Rome II Regulation[12] (non-contractual obligations), the Maintenance Regulation[13] and the Succession Regulation[14] have also been applicable. Poland is also bound by the Brussels I *bis* Regulation[15] (jurisdiction and judgments in civil and commercial matters) and the Brussels II *ter* Regulation[16] (jurisdiction and judgments in family matters).

Certain EU regulations in the field of PIL which been adopted within the enhanced cooperation (namely, the Divorce Regulation,[17] the Matrimonial Property Matters Regulation[18] and the Property Consequences of Registered Partnerships Regulation[19]) are not applicable in Poland.

Poland has been a member of the Hague Conference on PIL (HCCH) since 29 May 1984. Since that date Poland has acceded to several conventions adopted within this organization. Apart from multilateral treaties Poland is also a party to numerous bilateral agreements,

---

[9] Act of 17 Nov. 1964 – Code of Civil Procedure, Dz.U. 1964 nr. 43 poz. 296.

[10] Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 Jun. 1980.

[11] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 Jun. 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.07.2008, pp. 6-16.

[12] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 Jul. 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.07.2007, pp. 40-49.

[13] Council Regulation (EC) No 4/2009 of 18 Dec. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.01.2009, pp. 1-79.

[14] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 Jul. 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201, pp. 107-134.

[15] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, pp. 1-32.

[16] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.07.2019, pp. 1-115.

[17] Council Regulation (EU) No 1259/2010 of 20 Dec. 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, pp. 10-16.

[18] Council Regulation (EU) 2016/1103 of 24 Jun. 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.07.2016, pp. 1-29.

[19] Council Regulation (EU) 2016/1104 of 24 Jun. 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.07.2016, pp. 30-56.

which contain conflict-of-law rules, rules on jurisdiction, rules on procedural matters and provisions relating to the recognition and enforcement of foreign judgments.

Hence, it should be explained, that PILA 2011 applies only if there is no other instrument (namely, EU regulation or international agreement), which takes precedence.

2. Overriding mandatory provisions before PILA 2011

Before adopting PILA 2011, the concept of overriding mandatory provisions was not regulated either in PILA 1926, or in PILA 1965. Nonetheless, even before 2011 the concept of norms that protect *ordre public* and therefore are applied irrespective of the applicable law designated by the conflict of law rule *(lex causae)* was used by the Polish courts [20] and was commented in Polish legal literature[21].

The best example of such rules would be special rules on the inheritance of farms in Poland, which existed in Poland in various forms from 1963 to 2001 (when they were declared unconstitutional by the Constitutional Tribunal)[22]. These rules were applied to the inheritance of farms located in Poland, even if in accordance with PILA 1964 a foreign law, being national law of the deceased at the time of death, constituted *lex successionis*[23].

Before adopting PILA 2011, the terminology regarding overriding mandatory provisions has not been standardized. At the beginning, in literature the terms "acts of a very positive and imperative nature" (pl. *ustawy o silnie pozytywnym, imperatywnym charakterze)* and "public order laws" (pl. *ustawy porządku publicznego)* were used. Later, these provisions were named "provisions of direct application" (pol. *przepisy bezpośredniego zastosowania*) and "necessary use norms" (pl. *normy koniecznego zastosowania).*

When 1980 Rome Convention entered in force in Poland in 2007, the term „mandatory rules" present in Article 7 of the Convention was translated into Polish as *przepisy wymuszające swoje zastosowanie* which literally means "provisions forcing their application". The same term was chosen in PILA 2011. Lately, there was a suggestion in Polish literature to use the term *nadrzędne przepisy imperatywne*, which is supposed to be a more fitting translation of English term "overrising mandatory provisions"[24].

3. A rule on overriding mandatory provisions in PILA 2011

It should be noted, on the one hand, that the concept of overriding mandatory provisions of the *forum* existed in Poland long before Rome Convention 1980 and long

[20] E.g. resolution of Supreme Court of 28 May 1969, III CZP 23/69.

[21] M.A. Zachariasiewicz, *Art. 8. Przepisy wymuszające swoje zastosowanie* [in]: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018, p. 155.

[22] For the overview of these rules see the summary in English of the judgement of the Constitutional Tribunal of 21 January 2001, signature: P 4/99 at https://trybunal.gov.pl/fileadmin/content/omowienia/P_4_99_GB.pdf (access: 1 February 2023).

[23] See for example, decision of Supreme Court of 6 March 1970, I CR 3/70.

[24] M. Tomaszewski, *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 237.

before joining EU in 2004. On the other hand, a clear provision devoted to this concept appeared for the first time in the PILA 2011. The legislature admitted in the explanation to the proposal to PILA 2011 that the concept of overriding mandatory provisions is modelled after Article 7 Rome Convention 1980, even though it is clear that Article 8 PILA 2011 applies only to legal situations outside the scope of EU instruments[25]. When PILA 2011 was adopted, Rome Convention 1980 has already been replaced by Rome I Regulation. Hence, commentators, on one hand, always refer to EU instruments when discussing the concept of overriding mandatory provisions in PILA 2011. On the other, it was also stressed that this concept as used in Rome I Regulation or Succession Regulation should not influence the understanding of provisions on overriding mandatory provisions contained in PILA 2011. The latter should be understood in the autonomous way as refers to scope not covered by the EU instruments[26]. So far, we are not aware of any court practice concerning Article 8 PILA 2011.

Article 8 of the PILA 2011 is the rule devoted to overriding mandatory provisions. It reads as follows:

Article 8

1. The determination of a foreign applicable law does not prevent the application of the rules of Polish law, if it clearly results from their content or purpose that they should be applied to a given legal relationship irrespective of the law otherwise applicable.

2. When applying the law determined under the provisions of this act, effect may be given to the mandatory rules of another state with which the considered legal relationship has a close connection, if under the law of that state the rules in question should be applied irrespective of the law otherwise applicable to that legal relationship. In considering whether to give effect to these provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application[27].

4. The notion of „overriding mandatory provisions" under PILA 2011

PILA 2011 understands as overriding mandatory provisions, only these provisions of law that override the applicable law *(lex causae).* Rules that could theoretically be qualified as 'overriding mandatory provisions', which belong to the law applicable to the given case *(lex causae)* are applied based on conflict of law rule, taking into account also Article 6 PILA

---

[25] Sejm RP VI kadencji, druk 1277. See also: M. Czepelak, *Międzynarodowe prawo zobowiązań Unii Europejskiej*, Warszawa 2012, p. 485.

[26] M. Mataczyński, *Przepisy wymuszające swoje zastosowanie – wybrane zagadnienia*, „Problemy Prawa Prywatnego Międzynarodowego" 2017, t. 18, s. 63.

[27] Translation of Article 8 of the PILA 2011 is taken from: M. Zachariasiewicz, YPIL, vol. 13 (2011), pp. 641-656.

2011[28]. Article 6 (1) PILA 2011 states that the law applicable based on the conflict of law rules includes public law rules, which under the applicable law should be applied to a given legal situation. This provision seems to encompass both foreign public law and public law of the *forum*[29]. The qualification of a given provision as part of the public law should be done in accordance with the law applicable. In practice this provision requires that first a conflict of law rule of the PILA 2011 indicates the law applicable to the given situation, then within this law *(lex causae)* one should find the answer to the question whether and to what extent its public law rules should be applied. They will be applied only if applicable law *(lex cause)* wishes so[30].

It seems that the above provision does not provide for any grounds on which the application of foreign public law rules could be refused (for example, when the public law rules of the applicable law serve only the interest of the state, which issued those rules). This would be possible only based on the general institution of private international law, i.e., public policy clause[31]. Article 6 (1) PILA 2011 is a novelty in Polish private international law. There were no similar rules in the previous PILA 1965 and PILA 1928. It was underlined in the legal literature that this provision changes the understanding of private international law, as now law applicable to the given situation covers also public law and, therefore, the distinction between private and public law becomes less relevant[32]. The above provision was inspired by Article 13 Swiss PILA.

Polish legal system in general distinguishes between public and private law rules. The basic criterion for this distinguishing is who is takin 'advantage' (lat. utilitas) of law. The task of public law norms is to benefit the society as a whole. Unlike private law, it therefore protects public interests rather than individual interests[33]. Since as overriding mandatory provisions can be treated only those provisions that are crucial for protecting country's public interests, most often public law provisions will have such character. Despite this it cannot be ruled out that provisions belonging to private law will be treated as overrising mandatory rules. Firstly, because sometimes it is hard to strictly distinguish between public and private law (e.g. in the case of labour law provisions). Secondly, it is possible that even though the provision belongs to private law, it serves to protect public interests. As an example of such provisions those that provide protection to "weaker" party of civil law

[28] M.A. Zachariasiewicz, *Art. 8. Przepisy wymuszające swoje zastosowanie* [in]: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018, s. 163.

[29] J. Poczobut, *Art. 6* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 199.

[30] J. Poczobut, *Art. 6* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 200.

[31] J. Poczobut, *Art. 6* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 200.

[32] J. Poczobut, *Art. 6* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 201.

[33] T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2019, s. 157-160.

relations can be given[34]. Overriding mandatory provisions include mainly norms which protect public interests but also those serving merely or predominantly private interests.

5. Overriding mandatory provisions of the forum

In accordance with Article 8 PILA 2011, overriding mandatory provisions are treated differently, depending on them being a part of Polish legal system (so forum) or of the legal system of another country.

When it comes to overriding mandatory provisions of the *forum* (namely, of Polish legal system) they are described as such provisions of Polish law from the content or purpose of which it follows unequivocally that they govern the given legal relationship irrespective of the applicable law. Article 8 (1) PILA 2011 seems similar to Article 9 (1) Rome I Regulation. The difference is that Rome I Regulation provides that overriding mandatory provisions are regarded as crucial for safeguarding country's public interests, such as its political, social or economic organisation, while Article 8 (1) PILA 2011 mentions the special „content or purpose" of these provisions. In the legal literature in Poland overriding mandatory provisions are usually defined as provisions of key importance for the protection of public order in the state, which due to their purpose or nature are applicable irrespective of the law applicable to the given situation[35]. This understanding seems consistent with the definition in the Article 9(1) Rome I Regulation.

Hence, there are some preconditions that have to be fulfilled in order to qualify a given provision as an overriding mandatory provision, in cases where the legislator did not indicate it clearly in the provision itself. Once the preconditions are met and, therefore, a given provision of the *lex fori* is characterised as an overriding mandatory provision, then it seems that no other conditions must be fulfilled in order to apply them. Article 8 (1) PILA 2011 which concerns overriding mandatory rules of the *lex fori* provides simply that they regulate (pl. *regulują)* a given situation, no matter which law is applicable. The use of word "regulate" means that they must be applied by the court. In practice, Article 8 (1) PILA 2011 comes into play if law applicable *(lex causae)* is a foreign law.

6. Overriding mandatory provisions of a third state

In Article 8 (2) PILA 2011, overriding mandatory provisions are described as the mandatory provisions of the law of another country with which the given legal relationship has a close connection, if under the law of the latter country those provisions are applicable irrespective of the law governing the given relationship.

Article 8 (2) PILA 2011 is different from its Rome I Regulation counterpart when it comes to giving effect to the overriding mandatory provisions of a third state. Article 8 (2) PILA

[34] M. Tomaszewski, *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, pp. 238-239.

[35] M.A. Zachariasiewicz, *Art. 8. Przepisy wymuszające swoje zastosowanie* [in]: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018, p. 156.

2011 allows to give an effect to the mandatory provisions of the law of a third state with which the given legal relationship has a close connection, whereas Rome I Regulation points to provisions being part of the law of the country where the obligations arising out of the contract have to be or have been performed and only if they render the performance of the contract unlawful. In other words, the possibility of applying overriding mandatory provisions of a third state upon Article 8 (2) PILA 2011 is much broader than the one given by the Article 9(3) Rome I Regulation[36].

When it comes to rules which might be qualified as overriding mandatory rules of the *lex cause* they are simply applied as part of law applicable to the given legal situation. It is the duty of the court to apply the law applicable and to ascertain its content. The court is supposed to do it *ex officio*. Consequently, the court must apply these rules (however we would not call them overriding mandatory rules, as they do not have to "override" the applicable law). Hence, Article 8 (2) PILA 2011 does not concern the provisions of *lex cause,* which could potentially be qualified as overriding mandatory provisions if the law of another country was applicable *(lex causae).*

When it comes to overriding mandatory rules of law of another foreign country (other than the *lex causae),* Article 8 (2) PILA 2011 provides that only foreign overriding mandatory rules, with which the legal situation at hand is closely connected (pl. *ściśle związany)* may be taken into account. When understood literally, the provision requires close connection between the legal issue at hand and overriding mandatory rules, and not necessarily with the law of the country of their origin in general. In the legal literature it is understood as the close connection between the legal situation and that state. This connection should be quite intensive. It is argued that this connection should also be demonstrated by the circumstances that are usually used as connecting factors by conflict of law rules (for example: nationality, domicile, seat, place where the object of the legal relationship is located or place of performance)[37]. Additionally, these rules may be taken into account only if, in accordance with the law of the state of their origin, they are applied irrespective of the applicable law. The above means that Polish authorities may treat as overriding mandatory rules only those rules that are treated as such in the country of their origin. This character of the rule should be stated clearly in a foreign provision or should result from the foreign court practice[38].

Foreign overriding mandatory rules may be taken into account no matter if the law applicable is Polish law or the law of another country[39]. When deciding whether foreign overriding mandatory rules should be taken into account one should bear in mind their nature and aim, as well as effects, which would result when taken into account and those,

[36] M.A. Zachariasiewicz, *Art. 8. Przepisy wymuszające swoje zastosowanie* [in]: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018, p. 164.

[37] M. Tomaszewski, *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, pp. 242-243.

[38] M. Tomaszewski, *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 243.

[39] M. Tomaszewski *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 241.

which would result when omitted. In the legal literature it was suggested that the analysis of the nature and aim of these rules requires consideration whether they are protecting interests and values which are worthy recognition[40]. As the example the following interests and values that might be worthy of recognition are given: free competition, combat against corruption, protection of environment and protection of cultural heritage. At the same time interests which are, for example, serving discriminatory purposes would not be worthy of recognition. Also the pursuit of the international judicial harmony should be treated as worthy recognition[41]. Hence, answering the above question, it seems that indeed, at least as suggested in legal literature, PILA 2011 requires a coincidence between the interests or values behind the overriding mandatory rule concerned and those of the *forum*.

Pursuant to Article 8 (2) PILA 2011, in considering whether to give effect to mandatory provisions of a third state, regard shall be had to their nature and purpose and to the consequences of their application or non-application. As indicated above, when it comes to foreign overriding mandatory provisions, they may only be taken into account. The rules may (pl. *można)* be taken into account, but it is not obligatory. There is a margin of appreciation when deciding whether to take or not foreign overriding mandatory rules into account. The question is what does it mean to take foreign overriding mandatory rules into account (pl. *uwzględnić).* It is underlined that this expression was used purposefully in PILA 2011, instead of the word "apply" (pl. *stosować)* in order to allow for a flexible approach towards foreign overriding mandatory rules (for example, the court does not have to apply strictly the sanction provided for by overriding mandatory provisions)[42].

7. Substantive law rules qualified as overriding mandatory provisions

Article 8 (1) PILA 2011 can be the legal basis for the overriding nature of Polish imperative provisions when their specific scope of application results from the analysis of their content or purpose *(ratio legis).* Such an analysis may lead to the "discovery" of an unwritten and implied unilateral conflict-of-law rule, which is a *lex specialis* and determines the priority scope of application of the relevant imperative provisions. Classification of Polish imperative provisions into the category of overriding mandatory provisions should not be made too precipitately. Article 8 (1) PILA 2011 requires strictly that such a qualification arises undoubtedly from the content or the purposes of the relevant provisions. It is suggested in the legal literature that when analysing the objectives, one should first of all pay attention to the features indicated in Article 9 (1) of the Rome I Regulation, and therefore consider whether compliance with the analysed provisions is an important element of protecting the country's public interests, such as political, social or economic organisation. Establishing that a given imperative provision is primarily intended

[40] M. Tomaszewski *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 243.

[41] M. Tomaszewski *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 243-244.

[42] M. Tomaszewski, *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, pp. 243-242.

to protect the public interest will strongly support its overriding feature, especially when only granting it such character will ensure that that provision has maximum effectiveness in international cooperation[43].

When it comes to examples of rules which might be perceived as constituting in Poland 'overriding mandatory provisions' within the meaning of Article 8 (1) PILA, it might be indicated that in accordance with Civil Code, interest on capital and interest for delay may not be higher than the so called maximal interest, which are set by the reference to an indicator published by the National Bank of Poland *(Narodowy Bank Polski).* If such interest provided for in the legal act are higher, only maximal interest are due. Article 359 § 2^3 (interest in capital) and art. 481 § 2^3 (interest for delay) Civil Code states that contractual clauses may not exclude or limit what flows from above provisions on maximal interest also if a choice of foreign law was made. It was confirmed by the court practice that the above constitute overriding mandatory provisions that are applied even though foreign law is applicable (see: judgment of the Supreme Court *Sąd Najwyższy* issued on 6 April 2017, signature: III CSK 174/16). The above provision may play a role in cases within the scope of application of Rome I[44], but also outside of its scope.

Interestingly, the last part of the above provisions mentions literally choice of foreign law *(wybór prawa obcego).* The above provision makes it clear that the rules on maximal interest must be observed even if foreign law is applicable, however the part of the provision referring to the making of the choice of applicable law *(dokonanie wyboru prawa obcego)* might suggest that rules on maximal interest must be observed only in cases when foreign law is applicable based on choice made by the parties, but not when foreign law is applicable due to the operation of the conflict of law rule using an objective connecting factor. In the legal literature it was suggested that the above is only a mistake made by the legislator and therefore rules on maximal interest apply always when foreign law is applicable no matter if due to the choice of law made by the parties or operation of the conflict of law rule[45].

We are not aware of any current (under the PILA 2011) court practice concerning the overriding mandatory provisions outside the scope of application of the EU private international law instruments. The only court practice we are aware that referred to the concept of overriding mandatory provisions concerned application of Rome I Regulation (for example the mentioned above judgment of the Supreme Court issued on 6 April 2017, signature: III CSK 174/16, which concerned loan agreement).

When it comes to legal literature, one may find statements that a given provision constitutes an overriding mandatory rule (but also respective criticism of this standpoint), for example Article 180 Commercial Companies Act, which state that the disposal or pledge

---

[43] M. Tomaszewski, *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, pp. 240-241.

[44] One of the authors found this provisions contrary to Article 9 Rome I as maximal interest – in the opinion of that Author – is not crucial for the economic organization of the state. See: M. Mataczyński, *Przepisy wymuszające swoje zastosowanie– wybrane zagadnienia*, Problemy Prawa Prywatnego Międzynarodowego 2017, t. 18, p. 78.

[45] M. Czepelak, *Międzynarodowe prawo zobowiązań Unii Europejskiej*, Warszawa 2012, p. 489.

of a share in a limited liability company must be effected in the written form with signatures confirmed by the notary public[46]. Usually commentators indicate that overriding mandatory rules are those that belong to public law (foreign exchange law, antitrust law, laws on export or import licenses, embargo in trade relations, sanitary law, construction law, traffic law and occupational health and safety)[47]. No specific examples are given though.

8. Other questions relating to overriding mandatory provisions under PILA 2011

In *Nikiforidis* (C-135/15, para. 51), the Court of Justice of the EU, explained that Article 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a state other that mentioned in Article 9 (namely, state of the forum or of the state where the obligations arising out of the contract have been performed) from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the applicable law *(lex causae).* The above suggests that in certain laws there is a possibility that overriding mandatory provisions may be considered if a substantive law rule of the *lex causae* allows for it.

We are not aware of any Polish law provision that would literally allow courts to take foreign overriding mandatory provisions into consideration at the level of substantive law. Article 58 § 1 Civil Code states that a legal act which is contrary to the statute or aimed at circumventing the statute is in general invalid. Article 58 § 2 Civil Code provides also for the invalidity of a legal act which is contrary to principles of social coexistence *(zasady współżycia społecznego).* We are not aware of any literature/court practice that would suggest that these provisions could allow in Poland for taking into account foreign overriding mandatory provisions.

Under PILA 2011 overriding mandatory provisions of EU Member States should be treated equally to overriding mandatory provisions of third states. Nothing in the PILA 2011 might be interpreted as suggesting that overriding mandatory provisions of EU Member States might be treated differently than overriding mandatory provisions of third states. As mentioned above, we are not aware of any court practice concerning Article 8 PILA 2011. When it comes to commentators, on one hand they always refer to EU instruments when discussing the concept of overriding mandatory provisions in PILA 2011. On the other, it was also stressed that this concept as used in Rome I Regulation or Succession Regulation should not influence the understanding of provisions on overriding mandatory provisions contained in PILA 2011. The latter should be understood in the autonomous way as refers to scope not covered by the EU instruments[48].

There is no provision in PILA 2011 that would address the issue of potentially conflicting overriding mandatory provisions. We are not aware of any court practice with that respect.

---

[46] W. Klyta, Forma czynności prawnych w międzynarodowym prawie spółek. Uwagi prawnoporównawcze [in]: M. Jagielska, M. Pazdan, E. Rott-Pietrzyk, M. Szpunar (eds.) Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi, Warszawa 2017, p. 925.

[47] M. Tomaszewski, *Art. 8* [in]: J Poczobut (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2017, p. 239.

[48] M. Mataczyński, *Przepisy wymuszające swoje zastosowanie – wybrane zagadnienia*, „Problemy Prawa Prywatnego Międzynarodowego" 2017, t. 18, s. 63.

In the legal literature it was suggested that the conflict between two overriding mandatory provisions should be solved be giving priority to the provision most interested in regulating the situation at hand, protecting the most important interests and values, worthy protection on the international level or resulting in best legal effects[49]. No specific examples are given. Similarly, there is no provision in the PILA 2011 that would address the issue of circumvention of the application of overriding mandatory provisions through prorogation agreement. Moreover, we are not aware of any court practice/legal literature with that respect.

9. Conclusion

PILA 2011 entered into force more than ten years ago. One of the novelties of PILA 2011 in comparison to its predecessors is a provision on overriding mandatory provisions included in Article 8, even though the concept has been already known in Poland for decades. The concept of overriding mandatory provisions is eagerly commented by authors in legal literature, but interestingly is not to be found in Polish jurisprudence outside the scope of EU instruments.

[49] M.A. Zachariasiewicz in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018, s. 164.