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Law Applicable to Legal Relationships Relevant in Lawyer's[1] Practice – Chosen Remarks from a Polish Perspective

I. Preliminary issues

Freedom of personal movement as well as the intensification of international business cooperation have a significant impact on the provision of services on the legal market. Lawyers often face the challenge of providing legal services to foreigners or foreign legal persons. It is mentioned in doctrine that legal services market was exclusively national 30 years ago, nowadays it is taking on international dimension despite the fact that this market is strictly regulated[2]. It requires proper preparation to provision of legal services as well as additional qualifications, including those related to knowledge of foreign languages. Challenging may be also legal framework that regulates the relationship between lawyer and client, if legal services are provided to foreigners or foreign legal persons.

Considerations contained in this paper have been devoted to issues concerning determination of law applicable to the contract on provision of legal services and the power of attorney authorizing lawyer to representation of his

[1] Terms: "*lawyer*" in this article refers to advocates admitted to practicing in Poland according to Act of May 26, 1982 Law on Advocates (consolidated text, Journal of Laws of 2018, item 1184, as amended) and attorneys-at-law admitted to practicing in Poland according to Attorneys-at-Law Act of July 6, 1982 (consolidated text, Journal of Laws of 2018, item 2115) as well as foreign lawyers admitted to practicing in Poland according to Act of July 5, 2002 on the Provision of Legal Assistance by Foreign Lawyers in the Republic of Poland (consolidated text, Journal of Laws of 2016, item 1874).

[2] See *M. J. Chapman*, *P. J. Tauber*, Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services, 16 Mich. J. Int'l L. 941 (1995), available at http://repository.law.umich.edu/mjil/vol16/iss3/13, p. 943.

client before a court or other competent state authority, in a situation where the factual elements of the relationship between lawyer and his client are connected with more than one country (within factual background of legal relationship exist foreign element). This paper does not address public law issues related to the possibility of providing legal services abroad or access to the legal services market in other countries. Therefore, Directive 2005/36/EC of the European Parliament and of the Council of September 7, 2005 on the recognition of professional qualifications[3], Council Directive 77/249/EEC of March 22, 1977 to facilitate the effective exercise by lawyers of freedom to provide services[4], Directive 98/5/EC of the European Parliament and of the Council of February 16, 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained[5] are outside the scope of this paper. It is devoted only to the problem of determining law applicable to private law relations between the lawyer and his client, namely contract on provision of legal services and power of attorney granting by client.

II. Law applicable to contract on provision of legal services

Provision of legal services consisting of legal advice or representation before courts and other state authorities is based on a contract between a lawyer and a client. The contract between a lawyer and client, like any other market transaction, is governed by private law provisions. Agreement between a lawyer and a client constitutes a contract for the provision of services, from a Polish civil law perspective. This agreement is not a typical contract concluded in the Civil Code, it is an unnamed contract to which provisions on the contract of mandate are appropriately applicable based on Art. 750 of the Polish Civil Code[6]. Of course, it is possible to distinguish several subtypes of this contract, which, however, does not preclude their general qualification[7]. If a legal relationship between a lawyer and a client contains a foreign element, then there is a need to determine law applicable for this relation. The foreign element may be one of the factual factors of a legal relationship like parties to contract, place of residence or seat in different states, different citizenship or

[3] Official Journal of the EU, L 255 of September 30, 2005, p. 22.
[4] Official Journal of the EU, L 78 of March 26, 1977, p. 17.
[5] Official Journal of the EU, L 77 of March 14, 1998, p. 36.
[6] See *S. Płażek*, Nowe usługi powiatu w zakresie nieodpłatnej pomocy prawnej, [in:] *M. Mączyński*, *M. Stec* (eds.), Działalność gospodarcza jednostek samorządu terytorialnego, Warszawa 2016, p. 294.
[7] See *S.W. Ciupa*, Umowa o świadczenie pomocy prawnej, [in:] *A. Beraza* (ed.), Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania, Warszawa 2010, p. 70 ff.

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place of contract performance in different state than its conclusion etc[8]. Law applicable to contract on provision of legal services shall be determined according to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I)[9]. Rome I contains a general regulation on law applicable for contracts and specific provisions on certain types of contracts within which one party is weaker in economic sense like consumer contract, insurance contract, employment contract. Having in mind the subject of this paper what is relevant is the analysis of regulation on consumer contracts.

First of all, there is a need to determine wheather contract on provision legal services concluded with a natural person may be qualified as consumer contract on Rome I or not. If the answer is affirmative, then there is a need to focus also on regulation concerning indication law applicable to consumer contract on legal services within meaning of Rome I.

According to Art. 6 (1) contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession with another person acting in the exercise of his trade or profession is a consumer contract, if professional: pursues his commercial or professional activities in the country where the consumer has his habitual residence, or by any means, directs such activities to that country or to several countries including that country. However, the contract which fulfils the abovementioned criteria is not a consumer contract if only services are to be supplied to the consumer exclusively in a country other than that in which he has place of habitual residence. It follows from Art. 6 (4) (a) Rome I. For example, if a natural person with habitual residence in Germany wants to use legal services concerning representation in Polish court, then contract is not a consumer contract to which provisions of Art. 6 (1) and (2) Rome I shall not apply[10]. In conclusion, if a foreigner in a scope not related to his business or professional activity concludes a contract for the provision of legal services in Poland by a Polish legal adviser or advocate, such a contract will not be a consumer contract if attorney-at-law are provided exclusively on a Polish territory. Such an agreement cannot be considered as a consumer one if a lawyer with his habitual residence in Poland directs his activities abroad but services are to be provided to the consumer exclusively in Poland.

Contract on provision of legal services, even for natural persons, cannot be qualified as it was already mentioned as a consumer contract, if services are to be provided exclusively on the territory of Poland by lawyers with place of habitual residence in Poland. In connection with the above, in order to deter-

[8] See *J. Gołaczyński*, Prawo prywatne międzynarodowe, Warszawa 2017, p. 3.

[9] Official Journal of the EU, L 177 of July 4, 2008, pp. 6–16; hereinafter: "Rome I".

[10] See and cf. *M. Czepelak*, Międzynarodowe prawo zobowiązań Unii Europejskiej, Warszawa 2012, p. 202.

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mine law applicable to such a contract, shall be applicable general conflict of laws regulation concerning indication law applicable to contractual obligations, contained in Art. 3 and Art. 4 Rome I[11]. Parties to contract are free to choose law applicable for a contract, according to Art. 3 Rome I. Parties are able to make partial choice of law indicating law applicable to certain duties or certain part of their contractual relation. On the other hand, they can choose law applicable for all issues consisting of contractual obligation. Parties choosing law applicable in regard to full scope of application of objective conflict of law rules exclude their application at all. The choice of law may be simple or compound, it is simple if parties indicate law of only one state as applicable, however, if they indicate more than one legal system as applicable exhausting the entire scope of the obligation, then it is a compound choice of law[12]. The choice of law shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. Rome I provides freedom of form in which testimony statements by the parties shall be made[13]. Contracts on provision of legal services are not always concluded in writing, in the event of concluding such an agreement orally and implicitly establishing the law applicable to it through choice of law, substantial difficulties may arise in connection with a possible demonstration that the choice of law has been made and what its content is. Therefore, it is highly recommended to conclude contracts and choice of law clauses in writing in order to avoid inconvenience on the evidence level.

If parties to contract on provision of legal services do not make choice of law applicable, then it should be determined according to conflict of laws rules based on objective connecting factors. Of course, the same rules apply if the choice of law has been made and it is invalid or ineffective. Article 4 Rome I contains four general principles on law applicable to contractual obligation. First of all, Art. 4 (1) Rome I contains a catalogue of contracts intended to indicate law applicable to each specific type of contract. If the contract is contained in general types of contracts listed in the catalogue, then law applicable to it is indicated by prescribed conflict of law rules from a catalogue[14]. If contract is not listed in catalogue or it contains features characteristic to more than two typical contracts listed in catalogue, then Art. 4 (2) Rome I shall apply, according to which applicable is the law of a state in which place of habitual residence has a party obliged to fulfil characteristic performance. This

[11] See and cf. *C.G.J. Morse*, [in:] *J. Chitty* (ed.), Chitty on Contracts. General Principles. Volume I, 31st edition, 2012, p. 2265 et seq.

[12] See and cf. *P. Rodziewicz*, [in:] *R. Strugała* (ed.), Wykładnia umów. Standardowe klauzule umowne. Komentarz praktyczny z przeglądem orzecznictwa. Wzory umów, Warszawa 2018, p. 383.

[13] Ibidem, p. 382.

[14] See and cf. *M. Czepelak*, Międzynarodowe…, p. 163.

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principle is called a characteristic performance principle[15]. As a rule characteristic performance is a non-pecuniary performance, therefore if both parties to a contract are obliged to fulfil performance, characteristic one is those which do not rely on obligation to pay specified amount of money[16]. Nevertheless, if law applicable for a contract has been established by a catalogue principle (Art. 4 (1) Rome I) or characteristic performance principle (Art. 4 (2) Rome II), but it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated by mentioned principles, the law of that other country shall apply. The abovementioned corrective clause directly follows from Art. 4 (3) Rome I. This principle seeks to correct the indication of Rome I general rules in a situation where, circumstances of a specific case, manifestly show that the most strictly connected law with a contract is other law than this which the EU legislator *in abstracto* prefers, according to certain connecting factors on which are based objective conflict of laws rules[17]. Last but not least, the principle in Art. 4 (3) Rome I intended to determine a law applicable to contract is the closest connection principle. According to this principle, if the law applicable cannot be determined according to catalogue or characteristic performance principle, then the contract shall be governed by the law of the country with which it is the most strictly connected. This principle requires court or another authority applying law to take into account all relevant facts concerning concluded contract by parties and on their basis determine with which country this contract is the most strictly connected.

The most important principle intended to indicate law applicable to a contract on provision of legal services seems to be a catalogue one. As it was already mentioned, the contract concerning legal services is a type of contract concerning provision of services in general, therefore law applicable for it shall be established according to Art. 4 (1) (b) Rome. This provision indicates that a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. In case of a contract on provision of legal services in order to determine the law applicable it is necessary to establish where lawyer has a place of habitual residence as a service provider. Therefore, the law of the state of his place of habitual residence is the law applicable to contract on provision of legal services. However, it should be remembered that legal services shall be performed not only in

[15] See and cf. *E. Rott-Pietrzyk*, [in:] *M. Pazdan* (ed.), Prawo prywatne międzynarodowe, System prawa Prywatnego, t. 20B, Warszawa 2015, p. 183.

[16] See and cf. *A. Bonomi*, Conversion of the Rome Convention on Contracts into an EC Instrument: Some Remarks on the Green Paper of the EC Commision, [in:] *P. Sarcevic*, *P. Volken* (eds.), Yearbook of Private International Law, Vol. V, 2003, p. 71.

[17] See and cf. *P. Rodziewicz*, Stwierdzenie treści oraz zastosowanie prawa obcego w sądowym postępowaniu cywilnym, Warszawa 2015, p. 14.

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a manner consistent with the law applicable for them but also they should be provided in consistence with provisions on practice of legal profession, which indicates how services should be provided by a lawyer. The best examples are the rules regarding professional secrecy and avoiding conflicts of interest. They are often not directly regulated in the contract, but there is no doubt that these duties are binding for a lawyer who provides services for his client[18]. It seems that the regulations concerning the performance of legal profession form the legal framework for the provision of services by a lawyer to the client, indicating the manner in which the lawyer shall perform his obligation towards client and establishing a number of additional duties in connection with the provision of services. The abovementioned arrangements as well as the provision of Art. 9 (3) Rome I lead to a question whether provisions concerning some duties within provision of legal services like regarding professional secrecy or avoiding conflict of interests by a lawyer are overriding mandatory rules? According to Art. 9 (3) Rome I, effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. Considering whether to give effect to those provisions, it is necessary to analyze their nature and purpose as well as the consequences of their application or non – application. It seems that the laws which are in force in Poland regarding the legal professions and provision of legal services, including those laying down the obligation to keep professional secrecy and avoiding conflicts of interest are absolutely mandatory regulations, which should always supplement obligations arising out from the contract for the provision of legal services. In connection with the above, it should be recognized that these provisions will always be applied regardless of which law will be chosen by the parties as appropriate for the contract on provision of legal services, if only contract is to be performed in Poland, by a lawyer practicing legal profession in the territory of Poland. These obligations are related to the need to ensure and promote basic civil rights related to the possibility of using professional legal assistance. In view of the above, it is to be assumed that the provisions regarding the lawyer's duties are intended to pursue important public interests.

Regardless of overriding mandatory rules, it should be remembered that the standard of providing legal services depends, to a large extent, on the rules of ethics codes and professional deontology[19], which directly do not regulate rights and duties between the lawyer and the client, but affects the manner

[18] See and cf. *S.W. Ciupa*, Umowa…, p. 74 ff.

[19] Advocates in Poland are obliged to obey The Set of Rules on Ethics and Dignity of Advocate Profession (Code of Advocates Ethics) – *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu* (*Kodeksu Etyki Adwokackiej*); attorney-at-law in Poland are obliged to obey Code of Ethics of Attorneys-at-Law – *Kodeks Etyki Radcy Prawnego*.

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in which the lawyer shall perform his obligations under the contract for the provision of legal services and constitute a prism through which is made the assessment of the manner in which the lawyer performs his services.

III. Law applicable to power of attorney granted to lawyer

If a contract on provision of legal services relies on representation of client by a lawyer in courts, public authorities or to perform legal acts on behalf of a client, then there is a need for the client to grant the lawyer proper authorization (power of attorney) in order to enable him to perform the contract. Plenipotentiary is a separate life situation from a contract on provision of legal services for which there is a need to determine law applicable separately from a mentioned contract. It should be emphasized that power of attorney is a civil law institution, however, on the basis of court or administrative proceedings there are additional provisions imposing specific regulations on requirements that power of attorney has to fulfil. Conflict of laws rules intended to indicate law applicable to power of attorney are contained in Art. 23 of the act of February 4, 2011 the Private International Law. This regulation may be divided into two. First, in Art. 23 (1) PIL there is an expressly stated competence of principal to choose law applicable to power of attorney[20]. According to this provision, the power of attorney shall be subject to the law chosen by the principal. Therefore, principal granting a power of attorney may indicate the law applicable to which it will be subject. In case of provision of services of legal representation, the power of attorney may be subject to the same law as the contract for the provision of services or these two private international law issues may be subject to different applicable laws. Choice of the law applicable to the power of attorney depends solely on the client's will other than in the case of a contract for provision of legal services that requires a concerted will of the parties to contract[21]. However, law chosen by principal may be invoked in regard to the third person only where the latter knew or could readily have known about the choice. The same principle is applicable in relations to attorney, as Art. 23 (1) PIL governs principal may invoke the law chosen in regard to the representative only if the latter knew or could readily have known about the choice. If a principal does not choose law applicable or it is invalid or ineffective then law applicable to power of attorney is indicated by conflict of laws rules based on objective connecting factors from Art. 23 (2) PIL[22]. Conflict

[20] See and cf. *J. Pazdan*, [in:] *J. Poczobut* (ed.), Prawo prywatne międzynarodowe. Komentarz, Warszawa 2017, p. 415.
[21] See and cf. ibidem, p. 416.
[22] See and cf. *J. Pazdan*, [in:] *M. Pazdan* (ed.), Prawo prywatne międzynarodowe. System prawa Prywatnego, t. 20A, Warszawa 2014, p. 862 et seq.

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of laws rules based on objective connecting factors intended to indicate law applicable to power of attorney are arranged into a three-step cascade[23]. According to the first step law applicable to power of attorney is the law of the country of the representative's seat, in which he acts on a permanent basis. The second one assumes that applicable is the law of the country, in which the principal's place of business is situated, if the representative acts in this place on a permanent basis. Finally, according to the third and last principle, applicable is law of the country, in which the representative has acted, representing the principal, or in which he should have acted in accordance with the principal's will. In regard to power of attorney which is granted to lawyer applicable shall be first principle of the mentioned cascade. Power of attorney according to this principle is subject to law of the country of the representative's seat, in which he acts on a permanent basis. As it is emphasized in the doctrine of private international law, this rule applies to representatives dealing with the professional representation of other entities, including attorneys-at-law and advocates[24]. If the Polish law is chosen as law applicable to power of attorney granting authorization to representation in court proceedings or public authorities, then complications do not occur. However, they appear if the chosen law applicable is the foreign law, however, then raises a question concerning application of applicable substantive regulation on plenipotentiary with provisions regulating power of attorney in court proceedings or administrative proceedings. In case of procedural power of attorney for representation in court or administrative proceedings, it is necessary to distinguish the relationship between the party and its representative, the so – called internal relationship, and external relationship between the attorney and the recipient of his activities. The internal relationship is regulated by the applicable substantive law, depending on the choice of law made by principal or conflict of laws rules based on objective connecting factors[25]. On the other hand, external relationship between representative and recipient of his or her activity (court or authority) is regulated by procedural law[26]. In fact procedural rules regulates performing of procedural acts performed by lawyer on behalf of his principal. Therefore it shall be noted that in regard to court proceedings the principle *lex fori processualis* is applicable[27]. The question arises whether the basis for the application of procedural rules of forum in regard to power of attorney is the abovementioned principle or rather they are overriding mandatory rules and they on their own decide about the scope of their application. Irrespectively

[23] See and cf. ibidem, p. 862.
[24] See and cf. *J. Pazdan*, [in:] *J. Poczobut* (ed.), Prawo…, p. 418.
[25] *H. Ciepła*, [in:] *A. Marciniak, K. Piasecki* (eds.), Kodeks postępowania cywilnego. Komentarz. t. I. Art. 1–366, available at Legalis Database.
[26] Ibidem.
[27] See *P. Rodziewicz*, Stwierdzenie…, p. 201.

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of the use of one of the two abovementioned concepts external relations of plenipotentiary is governed by law of the forum state, while the internal relationship power of attorney is regulated law applicable, which may be *lex fori* or foreign law. However, justification for this is the fact that the procedural power of attorney is regulated by the procedural law this is subject to the *lex fori processualis*.

IV. Conclusions

Summarizing, the freedom of movement within European Union and increased personal traffic, as well as intensification of international economic turnover led to a situation where lawyers very often provide legal services to foreigners or foreign legal persons. This creates a need to determine law applicable to the relationship between lawyer and his client. It concerns both the contract on provision of legal services, as well as power of attorney if it is required by the range of services provided for a client. This means that in the scope of the business activity run by advocates or attorneys-at-law, they should take into account the indicated differences related to the provision of legal services to foreigners and foreign legal persons, compared to providing legal services to domestic entities. Law applicable to the indicated legal relations is determined by general legal instruments of private international law, like Rome I and PIL. However, it should be noted that in the case of providing legal services, the legal provisions concerning manner of provision of legal services, in particular those relating to professional secrecy and avoiding conflict of interests, are overriding mandatory rules and they should prevail over the provision of law applicable to contract on provision of legal services, if only law applicable to contract ensures a lower or not so intense range of protection as law which is in force in state of contract performance.

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