

**LAW APPLICABLE FOR THE REPRESENTATION  
TO EXERCISE THE CORPORATE RIGHTS OF SHAREHOLD-  
ERS  
IN POLISH COMPANIES**

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ABSTRACT

Shareholders of Polish companies dispose of various rights – property as well as corporate. Majority of corporate rights can be exercised by a representative. Representation, in this regard includes two categories: proxy and statutory representation. Regulations concerning representation vary, depending on kind of company in which they are used (limited liability companies, joint – stock companies or public companies, whose regulation is influenced by European law). In current study representation to exercise corporate rights of shareholders will be examined on the meta-law level. Provisions of international private law shall be observed to determine that which country’s legal regime shall be applied to interpret the institution of representation in cross-border situations. Additionally, it is necessary to distinguish the scopes of laws applicable for different issues connected with representation. The dissertation is aimed to address all abovementioned questions with the reference to European and Polish law.

**Key words:** representation, proxy, law applicable, shareholder

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## 1. INTRODUCTION

Polish notion of “companies” is the category, that in accordance to article 4 §1 point 2 of Polish Commercial Companies Code (hereinafter referred to as: CCC<sup>1</sup>) includes: limited liability companies (hereinafter referred to as the abbreviation: sp. z o.o.) and joint – stock companies (hereinafter referred to as the abbreviation: S. A. ). The group of joint-stock companies is divided into two separate groups: public companies (S. A. which at least one bearer share is dematerialized) and non-public companies (remaining ones).

Each shareholder can participate in the general meeting personally or by a representative. In accordance to Polish law, there exist two main groups of representatives: statutory representatives (for example parents of minor children) and proxy (appointed pursuant to art. 243 and 412 – 413 of CCC). The commercial proxy (Polish *prokura*, art 109<sup>1</sup> and next of Polish Civil Code, hereinafter referred to as PCC<sup>2</sup>) will be considered as a type of proxy. Any difference regarding the commercial proxy will be stressed. From the scope of representation, there are excluded: indirect substitute (person acting on behalf of second party, but on his own account, ex. fiduciary owner of the shares; in such case formally entitled to attend in the general meeting is the fiduciary owner, while materially entitled shall have no possibility to attend the general meeting<sup>3</sup>), messenger (art. 85 PCC), person managing another person’s affairs without mandate (*negotiorum gestor*, art. 752 and next of PCC)<sup>4</sup>.

The topic of the conflict laws in Polish commercial jurisprudence is not new. However, most of the literature focuses on the matters connected with the exercise of shareholders’ prerogatives and the issue of representa-

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<sup>1</sup> Act of 15 September 2000 Commercial Companies Code (Dz.U. no 94, item 1037 with amendments).

<sup>2</sup> Act of 23 April 1964 r. Civil Code (Dz.U. no 16, item. 93 with amendments).

<sup>3</sup> Janusz Szwaja, Andrzej Herbet [in:] *Kodeks spółek handlowych. Suplement do tomów I-IV*, (ed.) Stanisław Sołtyśński, Andrzej Szajkowski Andrzej Szumański, Janusz Szwaja, Warszawa 2009, pp. 405-406.

<sup>4</sup> Jerzy Strzebinczyk, [in:] *Kodeks cywilny. Komentarz*, (ed.) Edward Gniewek, Warszawa 2011, pp. 241-242.

tion is poorly recognized. Additionally, in 2011 new act on Private International Law (hereinafter referred to as: PIL<sup>5</sup>) had been passed, that made irrelevant great amount of literature. Hence, current article focuses on the representation to exercise the corporate laws of shareholders on general meetings. Each type of representation will be examined in respect of the conflict of law norms, in order to determine which law is applicable to the assessment of the content and appropriate form of legal acts.

In Polish legal order, at the top of the hierarchy of conflict norms, there is situated European Union law, especially regulation Rome I<sup>6</sup> and Rome II<sup>7</sup>. Rome I shall apply, in situations involving a conflict of laws, only to contractual obligations in civil and commercial matters. Besides Rome I in art. 1 §2 letter g) explicitly excludes from the scope of its regulation the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party. Though there may be a doubt if this exception covers the representation of shareholders on general meeting (the shareholder's representation during voting act has no binding effect on the principal in relation to third party), additionally art. 1 §2 letter f) excludes issues governed by the law of companies and other bodies, corporate or unincorporated, such as legal capacity and internal organisation of companies and other bodies, corporate or unincorporated. On the other hand, Rome II applies, to non-contractual obligations in civil and commercial matters. Therefore, these regulations have no provisions concerning the representation. Thus, it is necessary to examine national Polish legislation in this regard. The law applicable is indicated by PIL.

The assumption for the following discussion is that the company's seat is situated in Poland. "Registered seat" shall be understood as the place,

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<sup>5</sup> Act of 4 February 2011 Private International Law (Dz.U. no 80, item 432 with amendments).

<sup>6</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177.

<sup>7</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L 199.

which is pointed as seat in company's articles of association and company's public register<sup>8</sup>.

## 2. PROXY AND COMMERCIAL PROXY

The conflict norms are used to determine the law applicable to the content as well as to the form of the proxy. From the relationship of proxy, there need to be distinguished two other legal relationships: basic relationship and executory act<sup>9</sup>. Since XIX century the conception of the proxy detached from the basic relationship progressively displaces in legal systems the conception of the proxy combined. This view was also incorporated to Polish legal system<sup>10</sup>. The legislator's direction seems to be correct. The third party is rarely aware of the contents of the basic relationship. In

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<sup>8</sup> Though this issue is controversial due to unclear regulation of PIL in this regard. However most of the jurisprudence takes the stand presented in current study. See: Ariel Mucha, *Transgraniczne przekształcenie polskiej spółki kapitałowej – uwagi na temat niezgodności art. 270 pkt 2 oraz art. 459 pkt 2 ksh z prawem europejskim*, *Transformacje Prawa Prywatnego* 2015, no 4, pp. 49; Adam Opalski, *Wybrane problemy ustalania prawa właściwego dla osób prawnych w świetle nowej ustawy – Prawo prywatne międzynarodowe* [in:] *Współczesne wyzwania prawa prywatnego międzynarodowego*, (ed.) Jerzy Poczobut, Warszawa 2013, pp. 214-225; Krzysztof Oplustil, *Łącznik siedziby spółki w nowym prawie prywatnym międzynarodowym. Uwagi na tle prawa europejskiego*, *Kwartalnik Prawa Prywatnego* 2011, no. 3, pp. 668-675; Ewa Skibińska, *Pojęcie siedziby spółki handlowej – wybrane zagadnienia* [in:] *Institucje prawa handlowego w przyszłym kodeksie cywilnym*, (ed.) Teresa Mróz, Mirosław Stec, Warszawa 2012, pp. 705. Differently Arkadiusz Wowerka, who points on the place of residence of the management board as company's seat. See: Arkadiusz Wowerka: *System Prawa Prywatnego. Prawo Prywatne Międzynarodowe, vol. 20A*, (ed.) Maksymilian Pazdan, Warszawa 2014, pp. 634; Arkadiusz Wowerka, *Wskazanie statutu personalnego spółek w kontekście unijnej swobody przedsiębiorczości. Jednolity „unijny” łącznik w zakresie krajowego międzynarodowego prawa spółek?* [in:] *Współczesne wyzwania prawa prywatnego międzynarodowego*, (ed.) Jerzy Poczobut, Warszawa 2013, pp. 366-68. Last presented view was shared by Polish Supreme Court in the judgement dated 12 March 2015 r. (I CSK 452/14, LEX no 1660657).

<sup>9</sup> Jadwiga Pazdan, *Petnomocnictwo w prawie prywatnym międzynarodowym*, Kraków, 2003, pp. 128.

<sup>10</sup> Maksymilian Pazdan, *System Prawa Handlowego, vol. II, Prawo Spółek Handlowych*, (ed.) Stanisław Włodyka, Warszawa 2012, pp. 352.

case of combined theory, the proxy could mislead the third party and it would be very difficult for third party to verify the validity of the proxy<sup>11</sup>. On the other hand, the proxy connected with executory act would cause the casuistry – each proxy would have to be examined in reference to the executory act (according to laws in force in state of the executory act and/or state of proxy's appointment).

The Starting point of the discussion shall be the distinction of laws applicable for different matters in this regard: law applicable for determination of the capacity to appoint the proxy, law applicable to the basic relation between the principal and the proxy, law applicable to the contents of the proxy, law applicable to the form of the proxy and law applicable to executory act of exercising shareholder's rights.

#### A) LAW APPLICABLE TO DETERMINE THE CAPACITY TO GRANT THE PROXY

The Rome I Regulation expressly excludes (art. 1 letter a) issues involving the status or legal capacity of natural persons as well as (art. 1 letter f) issues governed by the law of companies and other bodies, corporate or unincorporated, such as legal capacity. Thus, the capacity shall be determined in accordance to law pointed by private international law of certain state.

In case of natural persons, art. 11 PIL states that (§1) natural person's legal capacity and capacity for acts in law shall be governed by his or her national law. (§2) If a natural person performs an act in law within the scope of an enterprise he/she is running, it shall be sufficient for such a person to have capacity to perform such act according to the law of the state in which the enterprise is run. (§3) The provision of §1 shall not exclude the application of the law governing the act in law, if it results from that law that there are specific requirements as to the capacity to make the juridical act in question. Consequently, the capacity of natural person shall be determined by its national law. Exceptionally (as a subsidiary rule), there may occur a situation, in which there would be applicable

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<sup>11</sup> Ibidem, pp. 352-353.

the law of the state where the enterprise is run<sup>12</sup>. Such determination of capacity is admissible only, if the shares are owned and the rights of shareholder are exercised within the scope of an enterprise of such person. In Polish legal order such case is questionable<sup>13</sup>, which does not preclude this possibility in legal orders of other states.

In the matter of legal persons, art. 17 of PIL states that a legal person shall be governed by the law of the state, in which the person has its seat (§1). However, if the law indicated by the provision of §1 stipulates that the law of the state under which a legal person was established shall be governing, the law of such state shall apply (§2). Under the law indicated above, there falls especially capacity of a legal person (§3 point 4). The subsidiary rule stipulated in art. 18 §1 PIL provides that if a legal person performs an act in law within the scope of the enterprise it runs, it shall be sufficient if such person has the capacity to perform such act, according to the law of the state in which the enterprise is run<sup>14</sup>. A legal person may invoke, in relation to the other party, the limitations concerning its capacity or representation resulting from the law indicated in the provisions of

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<sup>12</sup> Though there are also different views: J. Pazdan, *Prokura w prawie prywatnym międzynarodowym* [in:] *Rozprawy z prawa cywilnego, własności intelektualnej i prawa prywatnego międzynarodowego. Księga pamiątkowa dedykowana Profesorowi Bogusławowi Gawlikowi* (ed.) Jerzy Pisuliński, Piotr Tereskiewicz, Fryderyk Zoll, Warszawa 2012, pp. 696.

<sup>13</sup> Polish Supreme Court stresses that „*owning the shares in commercial companies and their sale is not (as a rule) subject to business activity of natural nor legal persons, including companies which conducts an enterprise, if sale of shares results from the exercise of their prerogatives with regard to the company*”, see: Supreme Court’s judgment dated 02.12.2010, I CSK 10/10, Legalis no 414102; Supreme Court’s judgment dated 23.10.2013, IV CSK 151/13, Legalis no 739734; on the other hand many authors admit the possibility of participation in general meeting by commercial proxy and their voting on behalf of the entrepreneur, simultaneously indirectly admitting that exercise of shareholder’s corporate rights occurs within the scope of running enterprise (Janusz Szwaja, Andrzej Herbert [in:] *Kodeks ...*, *supra* note 2, pp. 403; J. P. Naworski, *Commentary to art.412 Commercial Companies Code*, LEX 2012; Józef Frąckowiak, *Commentary to art.412 Commercial Companies Code*, LEX 2008; Robert Pabis, [in:] *Kodeks spółek handlowych. Tom III B. Spółka akcyjna. Komentarz art. 393-490.* (ed.) Adam Opalski, *Commentary to art.412 Commercial Companies Code*, Legalis 2016). In practice commercial proxies represent shareholders on general meetings, which is hardly ever questioned.

<sup>14</sup> Though there are also different views: Jadwiga Pazdan, *Prokura...*, *supra* note 12, pp. 697.

article 17, §1 and 2, if such limitations are not stipulated in the law of the state in which the act in law was performed only in the case, where the other party was aware of such limitations or was not aware of them as a result of a negligence (art. 18 §2). The provisions concerning legal persons shall accordingly apply to unincorporated entities without legal personality (art. 20 PIL). The company in which the foreign company is a shareholder can be considered as a third party for the purposes of protection stipulated in art. 18 §2 PIL. It would preclude the possibility of abuses from the part of foreign shareholders (and their proxies) being legal persons or unincorporated units that could invoke their incapacity after the general meeting.

Abovementioned laws determine the capacity of a person to grant the proxy (full or limited capacity), specific limitations to legal capacity, consequences of acting by the legal person beyond specific legal capacity, as well as rules of legal persons' representation.<sup>15</sup> However, the fact that the person is entitled to appoint the proxy to exercise rights on the general meeting (namely if that person is a shareholder) shall be determined by the law applicable for shareholder's status (*lex societatis*)<sup>16</sup>.

#### A) LAW APPLICABLE TO BASIC RELATIONSHIP

PIL has resolved the doubts if law applicable for proxy shall be examined separately from the basic relationship. On the grounds of PIL, it is clear that basic relationship has its own applicable law. Usually the basic relationship will arise from the contract. Thus, its governing law shall be examined with regard to regulation Rome I. General rule of the regulation is that the contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or by the circumstances of the case (art. 3). In the absence of choice contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence (art. 4

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<sup>15</sup> Wojciech Popiołek *Prawo właściwe dla wykonywania prawa głosu przez wspólnika spółki kapitałowej* [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, (ed.) Leszek Ogiegło, Wojciech Popiołek, Maciej Szpunar, Kraków 2005, pp. 281.

<sup>16</sup> *Ibidem*, pp. 282.

§1 letter b). In case of an individual employment contract, (in absence of choice) it shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract (art. 8).

Law applicable to basic relationship has little meaning for proxy itself. Sometimes the contract of basic relationship is signed after the proxy has been appointed. However, in some cases the basic relationship may be of significance for relation of proxy. An example of such case is the situation, when in accordance to the basic relationship the agent is appointed automatically in the moment of conclusion of basic contract. In such cases the law applicable for contract will decide when the proxy is granted<sup>17</sup>. Second problematic case arises, when law applicable for basic relationship provides for presumption of proxy appointment and, on the other hand, law applicable for the basic relationship requires clear and written empowerment of the proxy<sup>18</sup>. In such case, law applicable for the form of proxy shall decide about appropriate form. However, requirements stipulated by law applicable for the executory act (for example attaching of the document of proxy to minutes) considered below also shall be observed.

#### B) LAW APPLICABLE FOR THE CONTENT OF THE PROXY (AUTHORITY OF AN AGENT)

Article 23 PIL determines law applicable for the content of the proxy. These provisions apply correspondingly to commercial proxy<sup>19</sup>. The statutory rule for proxy is the choice of law. It is desired, but not required to include the choice of law clause in the proxy document. It would exclude the uncertainty of the choice, taking into account that it is an unilateral legal act and it is unnecessary to address it to anyone. The choice of law can be made also separately from the proxy document<sup>20</sup>. Art 4 PIL deter-

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<sup>17</sup> Jadwiga Pazdan, [in:] *Prawo prywatne międzynarodowe. System Prawa Prywatnego, vol. 20A* (ed.) Maksymilian Pazdan, Warszawa 2015, pp. 860.

<sup>18</sup> Wojciech Popiołek, *Prawo właściwe...*, *supra* note 15, pp. 286.

<sup>19</sup> Jadwiga Pazdan, *Prokura...* *supra* note 12, pp. 693-696.

<sup>20</sup> Jadwiga Pazdan, [in:] *Prawo...* *supra* note 17, pp. 860-861.



mines the rules for choice of law. In accordance to §2 the choice of law shall be made expressly or clearly demonstrated by the circumstances of the case, unless the provision concerning the choice of law provides otherwise. A choice of law made after the legal relationship has already been created shall not adversely affect the rights of third parties (§3). If, while performing a juridical act and before the choice of law, the requirements stipulated by the governing law for the form of such act were fulfilled, the validity of such act cannot be questioned under the law under the law chosen by the parties (§4). If the choice of law is executed, the provisions of articles 11, 17, 24 and 25 (mentioned in current article) shall apply to determination whether the choice of law was made and to assess the validity of such choice of law (§5). The provisions of §2 to §5 shall apply to the change and revocation of the choice of law. To complete the general provisions concerning the choice of law, art. 5 §2 point 1 of PIL needs to be invoked. It states that, while foreign law chosen by the parties as governing indicates Polish law to a given legal relationship, Polish law shall not apply. Thus, in case of choice of law, there cannot occur back reference relating to the content of proxy.

Specific regulations on choice of law included in art. 23 §1 sentence 2 PIL protect the good faith of third persons, in relation to whom the proxy is acting. The principal and the proxy may invoke the choice of law only if third party was aware or could have easily learned about the choice of law. In opposite case third parties are protected by the presumption that the act of choice did not occur. The companies shall be included to the group of third parties protected by cited presumption. If the proxy, during general meeting did not disclose the fact of choice of law and it was not included in the contents of proxy, it shall be ineffective. In such case law applicable is determined by subsidiary rules stipulated in §2. Provisions of art. 23 §1 sentence 3 PIL exclude the possibility of secret choice of law (without the knowledge of the proxy). As in sentence 2, good faith of the proxy is protected by the presumption that the choice of law was not made.

Art. 23 §2 introduces the gradation of laws applicable in absence of choice. Firstly, applicable shall be the law of the state of the representative's seat, where he constantly operates. It relates specifically to professional

attorneys (for example advocates and other professional agents)<sup>21</sup>. Secondly, if the basis of representative's seat cannot be determined, there applies the law of the state, in which the principal's place of business is located, if the representative acts in this place on a permanent basis. It relates specifically to commercial proxies (Polish *prokura*) or the employees, if the commercial proxy or employee is to represent the shareholder on the general meeting. Thirdly, if previous basis cannot be determined, there applies the law of the state, in which the representative actually acted, representing the principal. In that case, there would be applicable the law of the state in which the general meeting takes place, if the proxy is to attend the general meeting by physical presence in the place of the meeting. Finally, only if the proxy failed to use his powers granted by principal, law applicable is determined by the place in which he should have acted in accordance with the principal's will<sup>22</sup>.

The law applicable for the content of the proxy covers the following issues:

- the existence of the act of proxy appointment<sup>23</sup> (art. 24 of PIL refers to *legis causae* in this regard),
- the scope of the proxy<sup>24</sup> (for example the issue if the ordinary act of proxy's appointment transfers on the proxy full principal's powers or whether some specific requirements need to be met to transfer defined prerogative), but if in accordance to applicable law proxy enjoys full spectrum of shareholder's rights, the spectrum shall be "filled" with the rights stipulated by law applicable for executory act<sup>25</sup> (for example the right to demand that his/her objection be put on record upon the resolution being adopted),

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<sup>21</sup> Maksymilian Pazdan, *System ...*, *supra* note 10, pp. 353.

<sup>22</sup> Jadwiga Pazdan, [in:] *Prawo... supra* note 17, pp. 862.

<sup>23</sup> Katarzyna Bagan – Kurluta, *Prawo prywatne międzynarodowe*, Warszawa 2011, pp. 209, Jadwiga Pazdan, [in:] *Prawo... supra* note 17, pp. 869, Maksymilian Pazdan, *System ...*, *supra* note 10, pp. 353-354.

<sup>24</sup> Katarzyna Bagan – Kurluta, *Prawo...*, *supra* note 23, pp. 209, Jadwiga Pazdan, [in:] *Prawo... supra* note 17, pp. 869, Maksymilian Pazdan, *System ...*, *supra* note 10, pp. 354.

<sup>25</sup> Stanisław Sołtysiński, *Prawo właściwe dla spółek prawa handlowego*, Rejent 2001, no 7-8, pp. 286-287.

- the validity of proxy appointment<sup>26</sup>,
- the expiration of the powers of proxy<sup>27</sup>,
- the possibility to appoint proxy with limited legal capacity (although the issue of proxy's legal capacity is regulated by law pointed in art. 11, 17 and 18 of PIL)<sup>28</sup>,
- the possibility to appoint sub-proxy<sup>29</sup>,
- the assessment of defects of will (although the consequences of these defects shall be examined in accordance to law applicable to executory act)<sup>30</sup>,
- the possibility of irrevocable proxy<sup>31</sup>.

Within European Union, the rights of public companies' shareholders concerning proxy are harmonized by directive on shareholders' rights<sup>32</sup>. It includes: provisions concerning right to appoint any other natural or legal person as a proxy holder, abolishment of any legal restrictions to appoint proxies to a single meeting, or to such meetings during a specified period, etc.

If Polish law is applicable to the content of proxy, in accordance to art. 243 §1 and art. 412 §1 CCC a shareholder may participate in the general meeting and exercise his or her voting right personally or by proxy. The proxy may be granted to natural person or legal person<sup>33</sup>. Art. 412 §2 CCC forbids limitations to the right to appoint a proxy at the general meeting and the number of proxies. This article contains mandatory rules, its provisions cannot be modified in the articles of S. A. and general

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<sup>26</sup> Katarzyna Bagan – Kurluta, *Prawo...*, *supra* note 23, pp. 209, Jadwiga Pazdan, [in:] *Prawo...* *supra* note 17, pp. 869,

<sup>27</sup> Katarzyna Bagan – Kurluta, *Prawo...*, *supra* note 23, pp. 209, Jadwiga Pazdan, [in:] *Prawo...* *supra* note 17, pp. 871, Maksymilian Pazdan, *System...*, *supra* note 10, pp. 354.

<sup>28</sup> Katarzyna Bagan – Kurluta, *Prawo...*, *supra* note 23, pp. 209.

<sup>29</sup> Maksymilian Pazdan, *System ...*, *supra* note 10, pp. 354.

<sup>30</sup> Jadwiga Pazdan, [in:] *Prawo...* *supra* note 17, pp. 868, Maksymilian Pazdan, *System ...*, *supra* note 10, pp. 354.

<sup>31</sup> Jadwiga Pazdan, [in:] *Prawo...* *supra* note 17, pp. 868, M. Pazdan, *System ...*, *supra* note 10, pp. 354.

<sup>32</sup> Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184,

<sup>33</sup> Mateusz Rodzynkiewicz, *Commentary to art.412 Commercial Companies Code*, LEX 2014.

assembly by-laws. On the other hand, a shareholder can limit the scope of proxy's powers. Provisions concerning sp. z o.o. (art. 243 §1 CCC) admit the possibility of limitation of the right to participate in the general assembly and exercise voting rights by proxy. Art. 412 §3 CCC states that a proxy shall exercise all rights of the shareholder at the general assembly, unless the contents of the proxy provide otherwise. It is also possible to grant proxy to two (or more) persons and entitle one to attend the general meeting, second one to vote<sup>34</sup>. A proxy may appoint a sub-proxy, if this results from the content of the proxy (art. 412 §4 CCC).

According to art. 243 §4 and 412 §7 CCC the provisions on the exercise of voting right by proxy (not only art. 412 and 243 CCC, but all articles in this regard)<sup>35</sup> shall apply to the exercise of voting right through another representative. This group contains commercial proxies<sup>36</sup>.

#### A) LAW APPLICABLE FOR THE FORM OF THE PROXY.

The conflict rules concerning the contents of the proxy shall be examined separately from the norms concerning the form of the proxy<sup>37</sup>. However, the conflict rules regarding the form point directly to the law applicable for the contents of the proxy as a legal act (art. 25 §1 sentence 1 in connection with art. 23 of PIL). In consequence the principal is entitled to choose the law applicable for proxy (art. 23 PIL) and doing that he will simultaneously choose law applicable to the form in which the proxy shall be granted. Law applicable for the form of the proxy cannot be chosen

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<sup>34</sup> Janusz Szwaja, A. Herbert [in:] *Kodeks ...*, *supra* note 2, pp. 390.

<sup>35</sup> Michał Bieniak, [in:] *Kodeks spółek handlowych. Komentarz*. Jacek Bieniak, Michał Bieniak, Grzegorz Nita-Jagielski, Krzysztof Oplustil, Robert Pabis, Anna Rachwał, Marcin Spyra, Grzegorz Suliński, Marcin Tofel, Robert Zawłocki, Warszawa 2011, pp. 1232.

<sup>36</sup> See: Janusz Szwaja, Andrzej Herbert [in:] *Kodeks ...*, *supra* note 2, pp. 403, Jan Paweł Naworski, *Commentary to art.412...*, *supra* note 13; Józef Frąckowiak, *Commentary to art.412...*, *supra* note 13; Robert Pabis, [in:] *Kodeks spółek...*, *supra* note 13; doubts in this regards has Maciej Bielecki (see: Maciej Bielecki, *Ograniczenia prokury*, *Monitor Prawniczy* 2007, no. 1, Legalis).

<sup>37</sup> Paweł Czubik, *Artykuł 25 nowej ustawy Prawo Prywatne Międzynarodowe – przełom dla notariatu RP?*, *Nowy Przegląd Notarialny*, 2011/1, pp. 35-36.

apart from law applicable for the act itself. Art. 25 PIL does not allow the choice of law applicable solely for the form of juridical act.

So, as a general rule *legis causae* apply. If *legis causae* determine the form, there is no possibility of back reference, due to provisions of art. 5 §2 point 2 PIL. Invoked article states that, where foreign law indicated as governing requires Polish law to be applied to a given legal relationship, Polish law applies, with exclusion of the case if the back reference concerns only to the form of an juridical act. Thus, through *lex causae*, there cannot occur the back reference relating solely to the form of proxy.

Additionally, PIL in art. 25 §1 sentence 2 introduces subsidiary rule, in absence of adherence to the general rule. It points to the law of the state in which the juridical act has been made. In this case, the act is done in the place of appointment of an agent<sup>38</sup>. Generally, *legis causae* determine the form, however form determined by *lex loci actus* is sufficient.

The exceptions from the general rules included in §2 of art. 25 PIL apply only to creation, fusion, division, transformation or liquidation of a company<sup>39</sup>. Exercise of the rights and duties connected with the status of a shareholder and proxy to exercise them are not included in enumeration, so the exception does not cover the matters connected with representation of a shareholder on a general meeting.

The regulation of law applicable for the form of the proxy covers the following issues:

- the requirements regarding the method of making the declaration of will, meaning the legal form of the act of proxy appointment (for example form in writing, form of notarial deed, necessity of witnesses to the act of appointment, etc.),
- the substitutability of the form required by law for certain act or substantive law effect<sup>40</sup>,
- the sanction for non-obedience of the requirements relating to the form of proxy (*ad solemnitatem, ad eventum, ad probationem*)<sup>41</sup>,

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<sup>38</sup> Jadwiga Pazdan, [in:] *Prawo... supra* note 17, pp. 767.

<sup>39</sup> Jarosław Szewczyk, *Forma prawna zagranicznego pełnomocnictwa*, Monitor Prawa Handlowego 2015 no. 2, pp. 25.

<sup>40</sup> Jadwiga Pazdan, [in:] *Prawo... supra* note 17, pp. 778.

<sup>41</sup> *Ibidem*.

- the issue of possible validation of proxy granted in inappropriate form (in this case as *lex causae* shall be used law applicable for the vicarious act)<sup>42</sup>.

If Polish law applies, the form of the proxy is determined by commercial law. These are the provisions of CCC embodied in art. 243 and art. 412<sup>1</sup> §1 (these articles are *legis specialis* to regulation of art. 99 of PCL). In sp. z o.o. this institution is introduced by the article 243 CCC. It shall be granted in writing (under the pain of nullity) and shall be attached to the minutes book. In non-public S. A. the proxy to participate in the general assembly and exercise the voting right shall be made in writing or else it shall be null and void (art. 412<sup>1</sup> §1 CCC). Consequently, in public S. A. the proxy to participate in the general assembly and to exercise the voting right shall be made in writing or electronically. Where the proxy is made electronically, it shall not be required to confirm it with a secure electronic signature verifiable with a valid qualified certificate (art. 412<sup>1</sup> §2 CCC).

It is worth to mention that in EU countries the form of proxy in public companies is harmonised by directive on shareholder's rights. In accordance to its art. 11 §1 member states shall permit shareholders to appoint a proxy holder by electronic means. Moreover, member states shall permit companies to accept the notification of the appointment by electronic means, and shall ensure that every company offers to its shareholders at least one effective method of notification by electronic means. Art. 11 §2 of directive provides that member states shall ensure that proxy holders may be appointed, and that such appointment be notified to the company, only in writing. Beyond this basic formal requirement, the appointment of a proxy holder, the notification of the appointment to the company and the issuance of voting instructions, if any, to the proxy holder may be made subject only to such formal requirements as are necessary to ensure the identification of the shareholder and of the proxy holder, or to ensure the possibility of verifying the content of voting instructions, respectively, and only to the extent that they are proportionate to achieving those objectives. Therefore within EU one can assume that in public companies

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<sup>42</sup> *Ibidem*, see also: Jacek Górecki, *Forma umów obligacyjnych i rzeczowych w prawie prywatnym międzynarodowym*, Katowice 2007, pp. 167.

the requirements for proxy's form are not stricter than provided in the directive on shareholder's rights.

A consequence of directive's implementation is differentiation of requirements regarding forms of proxy in Polish national legal system. In public companies it shall be granted in writing or electronically. In non-public S. A. and sp. z o.o. proxy shall be also "in writing", which needs to be determined in accordance to PCC. PCC in art. 78 provides that to observe the form in writing one shall append one's handwritten signature to the document containing the declaration of intent. Due to necessity for observance of the primacy of EU law, pro-European interpretation need to be applied to the notion "in writing" in respect of proxy in public S. A. <sup>43</sup>. Consequently, handwritten signature may not be demanded from a public S. A. 's shareholder appointing the proxy to exercise the rights on general assembly, since directive does not set such requirement. Thus in public companies it is not required to append handwritten signature to the proxy. Shareholder may be identified through facsimile, PIN number or password<sup>44</sup>. The form "in writing" in case of public company is also met, if the proxy is sent to the company via fax or scan<sup>45</sup>.

In public companies, there exists second method to appoint the proxy: by electronic means (ex. e-mail). Issuing declaration of intent in such form consists in this, that arranged in specific structure set of data is recorded on IT data storage (material or device used to record, storage and read out the data in analogue or digital form)<sup>46</sup>. It does not require providing with

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<sup>43</sup> Andrzej Herbet [in:] *Kodeks spółek handlowych. Suplement do tomów I-IV*, (ed.) Stanisław Sołtysiński, Andrzej Szwaja, Andrzej Szumański, Janusz Szwaja, Warszawa 2009, pp. 411.

<sup>44</sup> Krzysztof Oplustil, *Pełnomocnictwo do występowania na walnym zgromadzeniu akcjonariuszy spółki publicznej po nowelizacji kodeksu spółek handlowych ustawą z 5.12.2008 r.*, Przegląd Prawa Handlowego 2009, no 11, pp. 7.

<sup>45</sup> Krzysztof Oplustil, *Pełnomocnictwo do ...*, *supra* note 44, pp. 7; though in Polish doctrine there exists also opposite view, qualifying scan as well as fax as „electronic means” (Mateusz Rodzynkiewicz, *Kodeks spółek handlowych. Komentarz*, Warszawa 2009, pp. 847-848 and Marta Korniluk, Radosław Kwaśnicki, *Praktyczne aspekty prawne pełnomocnictw do udziału w zgromadzeniach spółek kapitałowych po nowelizacji 3.08.2009 r.*, Przegląd Prawa Handlowego 2009, no 9, pp. 20).

<sup>46</sup> Andrzej Herbet [in:] *Kodeks ...*, *supra* note 43, pp. 412; Wojciech Kocot, *Korzystanie z sieci teleinformatycznych w stosunkach korporacyjnych spółek akcyjnych*, Przegląd Prawa Handlowego 2011, no 2, pp. 7-9.

an advanced electronic signature verifiable by means of a valid qualified certificate (art. 78 §2 of PCC).

On the margin, it is worth to mention that the provisions of PIL are applicable only in absence of conventional regulation. Poland signed multiple conventions on assistance in civil matters<sup>47</sup>. Conventional provisions regarding the form of the legal act could be divided into two groups. First one introduces solutions very similar to ones provided by PIL. This group contains conventions with Bulgaria<sup>48</sup>, Czechoslovakia<sup>49</sup>, Estonia<sup>50</sup>, former Yugoslavia<sup>51</sup>, Cuba<sup>52</sup>, Lithuania<sup>53</sup>, Latvia<sup>54</sup>, Romania<sup>55</sup>, Ukraine<sup>56</sup>, Hungary<sup>57</sup>, Vietnam<sup>58</sup>, Russia<sup>59</sup>. Second group stipulates that, the law applicable for the form shall be law of the state, where the act was done. To this group there can be included conventions with Belarus<sup>60</sup>, Korea<sup>61</sup> and France<sup>62</sup>.

#### A) LAW APPLICABLE TO THE EXECUTORY ACT.

The issue of executory act is strongly connected with the problem of shareholder's status. The prevailing view of Polish doctrine states that the law applicable to determine the status of shareholder, his legitimation to attend in the general meeting and to exercise his rights, is the law of the

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<sup>47</sup> Jadwiga Pazdan, [in:] *Prawo... supra* note 17, pp. 762.

<sup>48</sup> Dz. U. 1963, no. 17, item 88 with amendments.

<sup>49</sup> Dz. U. 1989, no. 39, item 210 with amendments.

<sup>50</sup> Dz. U. 2000, no. 5, item 49 and 50.

<sup>51</sup> Dz. U. 1963, no. 27, item 162.

<sup>52</sup> Dz. U. 1984, no. 47, item 247.

<sup>53</sup> Dz. U. 1994, no. 35, item 130.

<sup>54</sup> Dz. U. 1995, no. 110, item 534.

<sup>55</sup> Dz. U. 2002, no. 83, item 752.

<sup>56</sup> Dz. U. 1994, no. 96, item 465.

<sup>57</sup> Dz. U. 1960, no. 8, item 54 with amendments.

<sup>58</sup> Dz. U. 1995, no. 55, item 289.

<sup>59</sup> Dz. U. 2002, no. 83, item 750.

<sup>60</sup> Dz. U. 1987, no. 24, item 135.

<sup>61</sup> Dz. U. 1995, no. 128, item 619.

<sup>62</sup> Dz. U. 1969, no. 4, item 22.



state, where the company is registered (*lex societatis*)<sup>63</sup>. Art. 17 §3 point 7 PIL states that under *lex societatis* fall the acquisition and loss of the status of a shareholder or membership and the rights and duties connected therewith. Thus, this law determines who is a shareholder, when a person becomes a shareholder, what prerogatives and under which conditions can be exercised by such person. Also the manner of exercise falls under the scope of *lex societatis*, which stipulates specific requirements for exercise of shareholder's rights.

As examples of issues falling under law applicable to the executory act there can be cited:

- the notification about the acquisition of shares<sup>64</sup>,
- the blockage of shares on the brokerage account for specific period before the general meeting<sup>65</sup>,
- the determination if the documents need to be placed or blocked in/ by the institution registered in the same state as the company (and if not, one needs to determine if foreign institution is sufficient “equivalent” to domestic one and the document issued by it is “equivalent” to domestic one)<sup>66</sup>,
- the necessity to acquire certain documents legitimizing to attend the general meeting<sup>67</sup>,
- the necessity to leave the shares in the company before general meeting<sup>68</sup>,
- the question if and to what extent limited proprietary rights on share permit the entitled party to exercise shareholder's rights (even in case, if the contract of establishment of limited proprietary right falls under the law of different state)<sup>69</sup>,

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<sup>63</sup> See for example: Stanisław Sołtysiński, [in:] *Prawo spółek handlowych*, (ed.) Andrzej Koch, Jacek Napierała, Kraków 2005, pp. 696; W. Popiołek, *Prawo właściwe...*, *supra* note 15, pp. 282.

<sup>64</sup> Wojciech Popiołek, *Prawo właściwe...*, *supra* note 15, pp. 283.

<sup>65</sup> *Ibidem*.

<sup>66</sup> *Ibidem*.

<sup>67</sup> *Ibidem*.

<sup>68</sup> *Ibidem*.

<sup>69</sup> *Ibidem*, pp. 284.

- the method of voting<sup>70</sup>,
- the possibility of proxy voting<sup>71</sup>,
- the possibility of granting the proxy to company's officer/director/employee<sup>72</sup>,
- the limits to the number of possible proxies<sup>73</sup>.

There is no doubt that *lex societatis* determines the way of constructing of intent declaration acts issued by companies' bodies. It relates especially to general meeting's resolutions, including their form. That corresponds with the rule of art. 25 of PIL. If act of voting is determined by *lex societatis*, the same law as *lex causae* applies to its form.

Within European Union, the rights of public companies' shareholders concerning executory acts are also harmonised to some extent. Directive includes multiple provisions concerning acting by proxies in a conflict of interest, holding proxies from several shareholders, casting votes for a certain shareholder differently from votes casted for another shareholder, etc. On the other hand, certain issues are subject to Member States discretion, for example: duty to disclose certain information by persons possibly acting in the conflict of interest, voting instructions and sub-proxies.

If Polish law applies to executory act, the shareholder's prerogatives can be exercised by entitled person on the basis of limited proprietary rights: usufruct and pledge<sup>74</sup>. Polish CCC provides for some restrictions to the institution of proxy. According to art. 412<sup>2</sup> §1 CCC (correspondingly 243 §2 for sp. z o.o.) neither a management board member nor an employee of the company may act as proxies at a general meeting. This provision does not apply to a public company, however in such case the proxy is obliged to disclose to the shareholder any circumstances indicating the existence or the possibility of arising of a conflict of interests. In such case granting a sub-proxy shall also be excluded (art. 412<sup>2</sup> §3 CCC). Such proxy may vote only in accordance with instructions given by the shareholder (art.

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<sup>70</sup> Ibidem.

<sup>71</sup> Wojciech Popiołek, *Prawo własciwe...*, *supra* note 15, pp. 285; also Jadwiga Pazdan ([in:] *Prawo...* *supra* note 17, pp. 869), stressing that the possibility of making a legal act by proxy shall be examined in accordance to law applicable to executory act.

<sup>72</sup> Wojciech Popiołek, *Prawo własciwe...*, *supra* note 15, pp. 285.

<sup>73</sup> Ibidem.

<sup>74</sup> Janusz Szwaja, Andrzej Herbet [in:] *Kodeks ...*, *supra* note 2, pp. 392.

412<sup>2</sup> §4 CCC). Subsequent restrictions are stated in art. 413 §1 CCC (correspondingly 243 §2 for sp. z o.o.) stipulating that a shareholder shall not, either personally or by proxy or as another person's proxy, vote on adoption of resolutions concerning his accountability to the company on whatever account, including on granting him a vote of acceptance, release from an obligation to the company, or a dispute between him and the company. However a shareholder of a public company may vote (only) as a proxy on adoption of resolutions concerning him in person, as referred to above. Nevertheless, in such case the provisions of article 412<sup>2</sup> §3 and 4 apply accordingly.

According to art. 243 §4 and 412 §7 CCC the provisions on the exercise of voting right by proxy (not only 412 and 243 CCC, but all articles in this regard)<sup>75</sup> shall apply to the exercise of voting right through another representative. This group contains commercial proxies<sup>76</sup>.

### 3. STATUTORY REPRESENTATION

Statutory representation consists in this, that the relationship of representation originates from the legal act instead of the principal's act/declaration of will. The relation results directly from statutory provisions or from authority's decision (court's or administrative authority's) issued on the statutory basis<sup>77</sup>. Unlike proxy, this group is heterogeneous. It contains: parental authority over minor children, guardianship and curatorship for persons with no or limited legal capacity.

The statutory representation becomes relevant in relation to exercise of corporate rights on general meetings if a minor inherits shares in a company or acquires it through donation, a shareholder becomes incapacitated,

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<sup>75</sup> Michał Bieniak, [in:] *Kodeks ...*, *supra* note 35, pp. 1232.

<sup>76</sup> See: Janusz Szwaja, Andrzej Herbert [in:] *Kodeks ...*, *supra* note 2, pp. 403, Jan Paweł Naworski, *Commentary to art. 412...*, *supra* note 13; Józef Frąckowiak, *Commentary to art.412...*, *supra* note 13; Robert Pabis, [in:] *Kodeks spółek...*, *supra* note 13; doubts in this regards has Maciej Bielecki (see: Maciej Bielecki, *Ograniczenia...*, *supra* note 36).

<sup>77</sup> Jerzy Strzebinczyk, [in:] *Kodeks ...*, *supra* note 4, pp. 243.

a legal person being a shareholder cannot conduct its own affairs due to the lack of proper bodies, etc.

The manner of representation of legal persons is excluded from the scope of statutory representation. Those entities act through their bodies, in accordance to “theory of the body”<sup>78</sup>, not concurrent “theory of representation”<sup>79</sup>. Of course, in foreign legal order, for legal persons, there may apply theory of representation. In such a “foreign” case, the relationship of statutory representation shall be examined according to *lex societatis* of such legal person being shareholder (§3 point 6 in relation to §1 of art. 17 PIL), while the executory act shall be determined by *lex societatis* of the company in which the share is owned and shareholder’s rights exercised (§3 point 7 in relation to §1 of art. 17 PIL). It should be (again) noted at this point, that art. 18 PIL states that a legal person may invoke in relation to the other party the limitations concerning its capacity or representation resulting from the law indicated in the provisions of article 17 §1 and 2, if such limitations are not stipulated in the law of the state in which the act in law was performed only in the case where the other party knew of such limitations or did not know about them due to negligence.

To this extent, the issue of partnerships (or wider unincorporated entities without legal personality which have been granted the legal capacity by virtue of statutory law) is subject to discussion in Polish legal doctrine. Solving of the issue if there applies to partnerships “theory of the body”, “theory of representation” or “intermediate theory” lies outside the scope

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<sup>78</sup> Maciej Gutowski, *Sankcja wobec czynności prawnej dokonanej przez „falszywy organ” osoby prawnej*, Przegląd Prawa Handlowego 2008 no. 3 pp. 46; Jerzy Strzebinczyk, [in:] *Kodeks...*, *supra* note 4, pp. 241; Edward Gniewek, [in:] *Kodeks cywilny. Komentarz*, (ed.) Edward Gniewek, Warszawa 2011, pp. 91; Przemysław Sobolewski, [in:] *Kodeks cywilny. Komentarz*, (ed.) Konrad Osajda, Legalis 2016, *Commentary to art. 38 of Civil Code*; Maksymilian Pazdan, *Kodeks cywilny. Komentarz do art. 1-449<sup>10</sup> vol. I*, (ed.) Krzysztof Pietrzykowski, Legalis 2015, *Commentary to art. 38 of Civil Code*.

<sup>79</sup> Though, in Polish doctrine there functions also the hybrid theory, assuming the necessity of *mutatis mutandis* application of the provisions concerning power of attorney to the way of operating of companies’ bodies (see: Stanisław Sołtyński, *Skutki działań pias-tunów wadliwego składu zarządu lub rady nadzorczej w spółkach kapitałowych oraz spółdziel-niach*, [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, (ed.) Leszek Ogiegiło, Wojciech Popiołek, Maciej Szpunar, Kraków 2005, pp. 1367-1390).

of current study<sup>80</sup>. However, in case of search of governing law, abovementioned provisions of art. 17 and 18 PIL shall apply to partnerships *mutatis mutandis* (due to art. 21 of PIL). The same (art. 17, 18 and art. 17, 18 in relation with art. 21 PIL) concerns the liquidators of legal persons and partnerships, though it is not clear if in Polish legal order the liquidator is a representative or a body<sup>81</sup>.

In case of statutory representation, three groups of applicable laws need to be identified: the law applicable for determination of legal capacity of represented person, law applicable to statutory representation and law applicable to the executory act performed by the representative acting on behalf of represented person. The first group is governed by law pointed in accordance with the rules described in I. a) above. Those divagations apply accordingly to statutory representation. Subsequent groups are described below.

#### A) LAW APPLICABLE TO BASIC RELATIONSHIP OF STATUTORY REPRESENTATION

In accordance to art 22 PIL statutory representation shall fall under the law governing in respect of the legal relationship from which the empowerment to represent results. Consequently, each relationship will need to be examined separately, with the observance of relevant PILs and conventional articles pointing to law governing specific relation of representation.

Generally, the scope of the law applicable for statutory representation determines:

- the status of a person as a representative<sup>82</sup>,

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<sup>80</sup> The theories and argumentation of their supporters, see: Aleksander Witosz, *Prowadzenie spraw i reprezentacja spółek osobowych*, Warszawa 2013, pp. 55-75.

<sup>81</sup> It seems that the theory of liquidator as a representative dominates in Polish jurisprudence (see: Supreme Court's judgment dated 20.10.2011, IV KK 129/11, Legalis number 400911, Andrzej Kidyba, *Komentarz aktualizowany do art. 301-633 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych*, LEX 2015, *Commentary to art. 466 of Commercial Companies Code*).

<sup>82</sup> Łukasz Żarnowiec, [in:] *Prawo prywatne międzynarodowe. System Prawa Prywatnego*, vol. 20A [ed.:] Maksymilian Pazdan, Warszawa 2015, pp. 830.

- the existence of the empowerment to represent<sup>83</sup>,
- the scope of the powers to represent<sup>84</sup>, (the issue if the entitlement to represent transfers on the representative authorisation to exercise all prerogatives of represented person or if some specific requirements need to be met to exercise some extent of them), but if in accordance to applicable law representative enjoys full spectrum of represented person's rights, the spectrum shall be "filled" with the rights stipulated by law applicable to executory act<sup>85</sup>,
- the expiration of the entitlement to represent<sup>86</sup>,
- acting out of the scope or without the empowerment to represent<sup>87</sup>, however the consequences of such act shall be determined in accordance to the law applicable to executory act<sup>88</sup>,
- the necessity of acquisition of specific court's permission to represent a person to certain extent and the moment of such acquisition<sup>89</sup>,
- the possibility of being the other party in an act in law, which he performs on behalf of the principal<sup>90</sup>.

## I. PARENTAL AUTHORITY OVER MINOR CHILDREN

The parental authority is subject to conventional regulation. Art. 56 PIL refers to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, done at Hague on 19

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<sup>83</sup> Ibidem.

<sup>84</sup> Ibidem.

<sup>85</sup> Stanisław Sołtysiński, *Prawo właściwe...*, *supra* note 25, pp. 286-287.

<sup>86</sup> Łukasz Żarnowiec, [in:] *Prawo...*, *supra* note 82, pp. 830.

<sup>87</sup> Ibidem.

<sup>88</sup> Differently: Łukasz Żarnowiec ([in:] *Prawo...*, *supra* note 82, pp. 830) stating that the consequences shall be determined with observance of the law applicable for the statutory representation.

<sup>89</sup> Łukasz Żarnowiec, [in:] *Prawo...*, *supra* note 82, pp. 830.

<sup>90</sup> Ibidem.

October 1996<sup>91</sup> (hereinafter referred to as: the Convention) in the issues regarding the law governing in respect of the matters in the scope of parental authority and contacts with a child (§1). If the child's ordinary stay is changed to the stay in a state which is not a party to the Convention, the law of such state shall determine, from the moment of such change, the conditions for the application of the measures undertaken in the state of the child's former ordinary stay.

Art. 15 §1 of Convention referring to the law applicable states that in exercising their jurisdiction under the provisions of chapter II of the Convention, the authorities of the contracting states shall apply their own law (*legi fori*). Consequently, paternal authority will be determined by general rule stated in art. 5 of the Convention and specific provisions of art. 6-14. General rule stipulates that the juridical or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property. However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection (art. 15 §2). It is doubtful that clauses of protection of child's property and substantial connection with another state would justify use of specific jurisdiction rule. Though, due to inaccuracy of the prerequisites national authority/court can possibly use this subsidiary rule.

It is worth to mention that according to article 52, the Convention does not affect any international instrument to which contracting states are parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument (§1). Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the parties to such agreements, provisions on matters governed by Convention (§2). Consequently, multiple agreements signed by Poland need to be observed in this regard. The

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<sup>91</sup> Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, done at the Hague on 19 October 1996 (OJ L 151, 11.6.2008, p. 39; Dz. U. 2010, No. 172, item 1158).

group includes: Belarus, Bulgaria, Czechoslovakia, Estonia, former Yugoslavia, Korea, Cuba, Lithuania, Latvia, Mongolia, Romania, Ukraine, Hungary, Russia, France, Austria<sup>92</sup>.

If Polish law applies to statutory representation of minor children, in accordance to article 95 §1 of act Family and Guardianship Code (hereinafter referred to as: FGC) parental authority covers in particular the rights and duties of parents to exercise care over the person and the property of the child and the child's upbringing, respecting his/her dignity and rights. Parental authority should be carried out as required for the welfare of the child and in the social interest (§3). Before taking any decisions on major issues concerning the person or the property of the child, the parents should listen to him/her, as long as the mental development, state of health and maturity of the child permits this, and take his/her wishes into account, as far as reasonable (§4). As a rule, parents are statutory representatives of the child being under their parental authority. If the child remains under the parental authority of both parents, each of them may act alone as a legal representative of a child (art. 98 §1 FGC).

The most significant institution for exercise of shareholder's rights is the manner of managing the child's property. According to art. 101 §3 FGC parents cannot, without the authorisation of the guardianship court, perform any acts exceeding the scope of ordinary management, and cannot consent to the child performing such acts. The notion of "ordinary management" is a general clause and its interpretation need to be performed *ad casum*. In accordance to dominant view of doctrine and judicature "ordinary management" covers only legal acts that do not result in possible detriment to minor's property and do not encumber it (for example gratuitous property increment). On the other hand, acts causing minor's property encumbrances exceed beyond the scope of this notion<sup>93</sup>. It is not evident, however it seems that exercise of most of corporate rights, especially voting right will require authorisation of guardianship court. It is particularly the case, if the minor owns most of the shares in the

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<sup>92</sup> The conventions are invoked by: Łukasz Żarnowiec, [in:] *Prawo ...*, *supra* note 82, pp. 822-823.

<sup>93</sup> Janusz Gajda, *Kodeks Rodzinny i Opiekuńczy. Komentarz.* (ed.) Krzysztof Pietrzykowski, Warszawa 2015, pp. 652.



company (for example through inheritance or donation). Then, exercise of his voting rights would have significant impact on company's strategy and way of operating. Consequently, this could have significant impact on minor's financial situation. If parent, acting as minor's representative, fails to obtain necessary court's decision, the performed act shall be null and void<sup>94</sup>. It cannot be confirmed by subsequent court's decision<sup>95</sup>.

## II. GUARDIANSHIP

According to art. 2 of abovementioned Convention (the Convention refers to children from the moment of their birth until they reach the age of 18 years), it applies to children (even) under guardianship, but only till 18 years of age. Consequently, if the dependent is younger than 18 years of age, law applicable for guardianship is determined by Convention; above that age, governing law is pointed by PIL. Art. 60 PIL states that the establishment of guardianship or other measures for the protection of a person of full age shall fall under such person's national law (§1). Though, where a Polish court adjudicates on the measures referred to in §1 in relation to a foreigner having his/her place of residence or the place of ordinary stay in the Republic of Poland, the Polish law shall apply (§2). The enforcement of the measures referred to in §1 shall fall under the law of the state on whose territory the person to whom such measures refer has its place of ordinary stay (§3).

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<sup>94</sup> Resolution of full Civil Chamber of Supreme Court dated 24.06.1961, I CO 16/61, OSNCP 1963, no 9, item 187; judgment of Supreme Court dated 19.09.1967, III CR 177/67, OSNCP 1968, no 6, item 104; judgment of Supreme Court dated 27.11.2008, IV CSK 306/08, LEX no 531562; judgment of Supreme Court dated 25.11.2009 r., II CSK 262/09, LEX no 599836.

<sup>95</sup> Resolution of full Civil Chamber of Supreme Court dated 30.04.1977, III CZP 73/76, OSNCP 1978, no 2, item 19; judgment of Supreme Court dated 27.11.2008, IV CSK 306/08, LEX no 531562; Tomasz Sokołowski, *Kodeks Rodzinny i Opiekuńczy. Komentarz.* (ed.) Henryk Dolecki, Tomasz Sokołowski, LEX 2013, *Commentary to art. 101 of the Family and Guardianship Code.*

Through reference to art. 1107 §2 and §3 of Code of Civil Procedure (hereinafter referred to as: CCP)<sup>96</sup>, art. 60 §4 PIL introduces application of Polish law to cases, in which:

- Polish courts are authorised (if necessary) to decide in matters connected with guardianship and curatorship over the dependant’s property placed in Republic of Poland, if the dependant is a foreigner and has his/her place of residence or the place of ordinary stay abroad, under the condition that proves to be necessary in dependant’s interest,
- Polish courts are authorised to decide in matters connected with guardianship and curatorship, if the matter reveals adequate connection with Polish legal order and if there occurs urgent necessity to grant protection to the foreigner, who is staying in Poland and has his/her place of residence or the place of ordinary stay abroad.

The same applies to the enforcement of the measures adjudicated in accordance to art. 1107 §2 and §3 CCP.

If Polish law applies, the guardianship can be exercised over a minor child, if neither of the parents has parental authority, or if the parents are unknown, or over a completely legally incapacitated person. In first case law applicable is pointed by the Convention, in second by art. 60 PIL. In the area of exercise of shareholder’s rights, there is significant art. 156 of FGC, that corresponds with art. 101 §3 FGC. It requires an authorisation (permission) of the court for all important matters concerning the person or property of a minor. Art. 156 FGC applies to guardianship over a minor as well as over completely legally incapacitated person (in last case through reference introduced in art. 175 FGC). Therefore, comments made above at occasion of art. 101 FGC apply correspondingly. However, the scope of “important measures” is narrower than the scope of “ordinary management”<sup>97</sup>. Thus, guardian will have less discretion in exercise of property rights on behalf of the dependant. Court’s permission will be needed even to exercise corporate rights that have relatively little significance.

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<sup>96</sup> Act of 17 November 1964 Civil Procedure Code (Dz. U. 1964, no. 43, item 296, with amendments).

<sup>97</sup> Janusz Gajda, *Kodeks Rodzinny i Opiekuńczy. Komentarz.* (ed.) Krzysztof Pietrzykowski, Legalis 2015, *Commentary to art. 156 of Family and Guardianship Code.*

### III. CURATORSHIP

Considerations made above, as regard art. 60 PIL (including reference to CCP) apply correspondingly to curatorship. Additionally, provisions of art. 61 state that the curatorship of a legal person shall be governed by the law of the state under which such person falls. Art. 62, in turn stipulates that the curatorship to settle a specific matter shall be governed by the law of the state under which such matter falls.

In Polish legal system, curator (that could be relevant for the exercise of shareholder's rights) could be appointed for:

- partially incapacitated person (to represent it and manage its assets, but only if the guardianship court so decides) – art. 181 FGC,
- person with a disability (if he/she needs assistance to carry out any issues or matters of a particular type, or to settle a particular case) – art. 183 FGC,
- absentee (*curator absentis*; persons that due to their absence, cannot conduct their own affairs and have no representative) – art. 184 FGC,
- curator for legal person that cannot conduct its own affairs due to the lack of proper bodies, appointed by guardianship court (such a curator shall attempt to set up the bodies of the legal person, or to liquidate it if necessary; he would not be equipped with the competence to exercise shareholder's rights)<sup>98</sup> – art. 42 PCC,
- curator appointed by registry court in accordance to art. 26–33 of the act on National Court Register<sup>99</sup> (though such a curator would not be equipped with the competence to exercise shareholder's rights)<sup>100</sup>.

Art. 178 §2 FGC commands corresponding application of the guardianship provisions to curatorship to the extent not regulated

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<sup>98</sup> Przemysław Sobolewski, [in:] *Kodeks cywilny. Komentarz*, (ed.) Konrad Osajda, Legalis 2016, *Commentary to art. 42 of Civil Code*; Edward Gniewek, [in:] *Kodeks... supra* note 78, pp. 96-97.

<sup>99</sup> Act of 20.8.1997 r. about National Court Register (Dz.U. 2013 r. item 1203 with amendments).

<sup>100</sup> Monika Tarska, [in:] *Komentarz do art. 1–60 ustawy o Krajowym Rejestrze Sądowym. Kodeks spółek handlowych. Pozakodeksowe prawo handlowe. Komentarz. vol. 5*, (ed.) Stanisław Sołtysiński, Andrzej Szajkowski, Andrzej Szumański, Janusz Szwaja, Legalis 2015, *Commentary to art. 26 of the act on National Court Register*.

by the provisions on appointing a curator. The regulation of curatorship is quite laconic, therefore all commented above articles concerning the restrictions of guardian's authority apply. Particularly it relates to restricted discretion in exercise of property rights on behalf of the dependent (art. 178 §2 in relation with 156 FGC).

#### B) LAW APPLICABLE TO THE EXECUTORY ACT

The issue of executory act in case of statutory representation, as in case of proxy, is strongly connected with the problem of shareholder's status. Thus the comments concerning scope of law applicable for executory act refer accordingly to statutory representation. This is a consequence of the fact that the crucial issue here is the status of represented person as a shareholder.

Art. 243 §4 and 412 §7 CCC state that the provisions on the exercise of voting right by proxy (not only art. 412 and 243 CCC, but all articles in this regard)<sup>101</sup> shall apply to the exercise of voting right through another representative. This group contains parental authority, guardianship and curatorship<sup>102</sup>. The representatives shall submit appropriate documents to the minutes proving that they are empowered to statutory representation, especially to exercise corporate rights on general meeting on behalf of their dependants.<sup>103</sup>

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<sup>101</sup> Michał Bieniak, [in:] *Kodeks ...*, *supra* note 35, pp. 1232.

<sup>102</sup> See: Janusz Szwaja, Andrzej Herbet [in:] *Kodeks ...*, *supra* note 2, pp. 403, Andrzej Kidyba, *Komentarz aktualizowany do art. 301-633 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych*, LEX 2015, *Commentary to art. 412 of Commercial Companies Code*.

<sup>103</sup> Janusz Szwaja, Andrzej Herbet [in:] *Kodeks...*, *supra* note 2, pp. 401, Andrzej Kidyba, *Komentarz...*, *supra* note 102; Jan Paweł Naworski, *Commentary to art. 412 of Commercial Companies Code*, LexisNexis 2003.

## 5. CONCLUSIONS

The regulations of conflict rules are very complicated due to the fact that they are multicentric (the conflict laws are created by the EU institutions, national legislators, bilateral and multilateral conventions or international agreements) as well as multi-layered (also referred to as the meta-law, as it points which law is applicable in specific situation). In relation to proxy the situation is complicated also by the fact that proxy refers to two more legal relationship. The same applies to statutory representation. Those issues need to be examined carefully due to the fact that failure to comply to the appropriate law may cause not only the nullity of the executory act alone, but also the suite for nullity or repeal of whole general meeting's resolution. Many complications connected with conflict laws, presented in current article, shall encourage the interested parties to expressly choose the law, in every situation that is possible, to avoid subsequent complications.

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