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CONFLICT-OF-LAW ISSUES OF NON-CONTRACTUAL OBLIGATIONS IN POLISH-UKRAINIAN RELATIONS

Abstract

This article covers the analysis of the law applicable to non-contractual obligations in Polish-Ukrainian relations. Issues described in this article are of great importance because of the large immigration of Ukrainian citizens to Poland, especially in the year 2022 due to the Russian-Ukrainian War. In these matters – if Polish court has the jurisdiction – there is a diversity of sources of law: the International Agreement between Republic of Poland and Ukraine on Legal Assistance and Legal Relations in Civil and Criminal Matters signed in Kiev on 24 May 1993; Hague Convention of 4 May 1971 on the law applicable to traffic accidents and 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 (Rome II). Moreover, Private International Law Act of 2011 does not apply to indicate the law applicable to non-contractual obligations. This raises the issue of mutual relations among those legal acts and their legal norms for conflict of laws related to Polish-Ukrainian non-contractual obligations. The analysis of those mutual relations is presented in this article. Apart from this issue, the article covers the scope of application and connecting factors for the cases concerning the law applicable to non-contractual obligations based on the International Agreement between Republic of Poland and Ukraine on Legal Assistance and Legal Relations in Civil and Criminal Matters.

KEYWORDS

Private International Law, Polish-Ukrainian Convention of 1993, non-contractual obligations, bilateral agreement, material scope, scope of application

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prawo prywatne międzynarodowe, konwencja polsko-ukraińska z 1993 r., zobowiązania pozaumowne, umowa dwustronna, zakres przedmiotowy, zakres zastosowania

1. INTRODUCTION

On 24 February 2022, the Russian-Ukrainian War started, which caused immigration surge of Ukrainian citizens to the Polish territory. It is rated that in year 2024 there were around one and a half million of Ukrainian citizens with valid residence permits in Poland, however the real number of Ukrainians may be even twice as high.[1] This raises the issue of the law applicable to civil-law Polish-Ukrainian relations, especially between Polish and Ukrainian citizens and between Ukrainian citizens on the Polish territory.[2] Among many civil-law matters the non-contractual obligations are the subject of interest.

The issue of non-contractual obligations may be understood in different ways in substantive law of various countries. For example, according to common law system, there is the plurality of various torts and as to the French Civil Code delicts are covered by the general clause.[3] Similarly, there are differences between

[1] On 31 January 2024, the number of Ukrainian citizens with valid residence permits in the territory of Poland was 1,477,854, see *Raport na temat obywateli Ukrainy*, 7, <https://www.gov.pl/attachment/666c43d8-3e85-41b9-a684-eaa6b04b811a> accessed 1 October 2024. However, it is rated that there were even 3 million Ukrainian citizens in Poland in 2023, see Izabela Kacprzak, *Rekordowa liczba cudzoziemców z polskim obywatelstwem. Najwięcej Ukraińców*, <https://www.rp.pl/spoleczenstwo/art38386201-rekordowa-liczba-cudzoziemcow-z-polskim-obywatelstwem-najwiecej-ukraincow> accessed 1 October 2024. Compare, Mateusz Pilich (ed), *Polsko-ukraińska umowa o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych. Komentarz do przepisów w sprawach cywilnych*, Warsaw 2023, 10, footnote 4.

[2] The analysis is undertaken from the perspective of a Polish court although the issue of jurisdiction itself is outside the scope of this article.

[3] See Gerhard Wagner, *Comparative Tort Law*, in Mathias Reimann, Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd edn), DOI: 10.1093/oxfordhb/9780198810230.013.32, 1000.

Polish and Ukrainian law of non-contractual obligations.[4] Such diversity among substantive laws in the matters of non-contractual obligations raises the question which substantive law is applicable.

This issue requires defining private international law *(droit international privé*; *internationales Privatrecht*). It is a branch of law whose legal norms indicate the law applicable to a given legal relationship.[5] Its scope includes issues that result from the application of private law provisions with different content in various countries. Due to the different content of these provisions in respective countries, the following problem arises: which law should be applicable to a given legal relationship? The conflict-of-law rule of private international law indicates this law. In this way these norms regulate private law relations indirectly by indicating the applicable law which contains substantive norms that should be applied in a particular case.[6] Therefore, the conflict-of-law rule determines the scope of application of the substantive laws of the respective States.[7]

Legal norms of private international law are always applicable. However, if all the circumstances of the case are related to one country, the law of this country is the only applicable one. On the contrary, only in the cases in which there is an 'international element' there is a possibility of application of laws of different countries. Therefore the 'international element' is presented as 'the alarm bell' for the application of private international law.[8]

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[4] E.g., differently than in Poland, the Ukrainian law of unfair competition does not cover acts against consumers, see Law of Ukraine on Protection against Unfair Competition in English language accessible at <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/ua/ua012en.pdf> accessed 30 June 2023.

[5] The view of Andrzej Mączyński presented in Marcin Czepelak, *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*, Warsaw 2008, 42.

[6] Andrzej Mączyński, *Statut personalny osób fizycznych. Refleksje de lege lata i de lege ferenda,* in Wacław Uruszczak, Paulina Święcicka, Andrzej Kremer (eds), *Leges sapere. Studia i prace dedykowane Profesorowi Januszowi Sondlowi w pięćdziesiątą rocznicę pracy naukowej,* Kraków 2008, 309.

[7] Kazimierz Przybyłowski, *Zagadnienie definicji prawa prywatnego międzynarodowego. Komunikat*, Sprawozdania Wrocławskiego Towarzystwa Naukowego, 1958, 13A, 71.

[8] The conflict-of-law rules of private international law do not need the existence of the so-called 'foreign element' for their application. However, it is the so-called 'alarm bell' that reminds about the need to apply the conflict-of-law rule. Moreover, the existence of a foreign element is not a prerequisite for the application of the conflict-of-law rule. (See Kazimierz Przybyłowski, *Prawo prywatne międzynarodowe. Część ogólna*, Lwów 1935, 3, Kazimierz Przybyłowski, *Zagadnienie definicji*..., 71, Henryk Trammer, *Zasięg obowiązywania prawa prywatnego międzynarodowego*, PiP 1966, issue 12, 868-869, 872, Piotr Mostowik, *Bezpodstawne wzbogacenie w prawie prywatnym międzynarodowym*, Warsaw 2006, 11–12, Anna Juryk, *Alimenty w prawie prywatnym międzynarodowym*, Warsaw 2012, 18, Maksymilian Pazdan, in *Prawo prywatne międzynarodowe. System Prawa Prywatnego,* Vol 20A, Warsaw 2015, 17–18).

Private international law may be understood in 'narrow' and 'broad' meaning. The 'narrow' one includes only conflict-of-law provisions.[9] On the contrary, the 'broad' one covers also international civil procedure issues, like jurisdiction as well as recognition and enforcement of foreign judgments.[10] This article – due to the scope of the analysis – discusses only the conflict-of-law issues of non-contractual obligations in Polish-Ukrainian relations.

2. SOURCES OF LAW CONCERNING LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS IN THE POLISH-UKRAINIAN RELATIONS

The sources of law concerning the conflict-of-law rules to non-contractual obligations that are applicable, if Polish court has the jurisdiction, are the normative acts of the international and European Union's origin. Namely, Poland and Ukraine concluded the International Agreement between the Republic of Poland and Ukraine on Legal Assistance and Legal Relations in Civil and Criminal Matters signed in Kiev on 24 May 1993;[11] both countries are also parties to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents[12] and Poland is bound by 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 (Rome II).[13] Additionally, in Poland, the core normative act for law applicable issues is the Private International Law Act of 2011.[14] However, this normative

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[9] This 'narrow' meaning of private international law is applied, e.g., in Germany and Poland. (See about Germany, Giesela Rühl, in *Encyclopedia of Private International Law,* Jürgen Basedow and others (eds), Vol 2. Cheltenham, Northampton: Edward Elgar Publishing, 2017, 1380).

[10] This 'broad' meaning of private international law that also includes the law of nationality and citizenship and law of the aliens is applied, e.g., in France, Belgium, and Italy. (See Giesela Rühl, in *Encyclopedia* ..., 1380–1381.)

[11] In Polish language: 'Umowa między Rzecząpospolitą Polską a Ukrainą o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych sporządzona w Kijowie dnia 24 maja 1993 r., Dz.U. 1994 No 96 item 465', hereinafter 'the Polish-Ukrainian Convention'. See the international agreements in Ukraine in Анатолій ДОВГЕРТ, *Міжнародне приватне право: зміна концепції*, Київ Алерта 2024, 41.

[12] In Polish language: 'Konwencja o prawie właściwym dla wypadków drogowych, sporządzona w Hadze dnia 4 maja 1971 r., Dz.U. 2003 No 63 item 585', hereinafter 'Hague Convention'. Even if Ukraine was not the party to the Hague Convention, Polish Court would apply it, as this Convention contains a provision about its universal application (Art. 11).

[13] OJ L 199, 31 July 2007, 40–49, hereinafter 'Rome II Regulation'. According to Art. 3, Rome II Regulation has universal application, which means that if a Polish court has jurisdiction, it applies Rome II Regulation also to matters related to Non-Member States, like Ukraine.

[14] In Polish language: 'Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe, t.j. Dz. U. z 2023 r. item 503', hereinafter 'PIL of 2011'.

act does not apply to conflict of laws in non-contractual obligations matters in the Polish-Ukrainian relations, as all scope of those matters is covered either by the Polish-Ukrainian Convention, Hague Convention or Rome II Regulation.[15]

As there are diverse sources of law for the law applicable to non-contractual obligations – in case if a Polish court has the jurisdiction – it is important to define the mutual relation of those normative acts and their legal norms.

First to consider is the relation of the Polish-Ukrainian Convention and Rome II Regulation for non-contractual obligations. The Polish-Ukrainian Convention contains Article 97 'Relationship to other agreements'. According to this provision, 'This Agreement [Polish-Ukrainian Convention] does not affect the provisions of other agreements applicable to one or both of the Contracting Parties'. Moreover, the Rome II Regulation contains Article 28 marked with the following title: 'Relationship with existing international conventions'. Section 1 of this Article concerns relation of the Rome II Regulation to international agreements between Member State(s) and Non-Member State(s). According to this provision, 'This Regulation [Rome II Regulation] shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations'. There are two possible interpretations of

[15] Art. 33 and 34 PIL of 2011 only inform about the Rome II Regulation and Hague Convention, but they are not the legal basis of application of those legal acts. In Polish language, the term *przepis informacyjny* (information provision) was used by Jacek Gołaczyński, *Wybrane zagadnienia na tle ustawy z 4.2.2011 r. – Prawo prywatne międzynarodowe*, Monitor Prawniczy 2011, No 11, 575. The creators of PIL of 2011 call such provisions as the references to EU regulations. (See Maksymilian Pazdan, *Koordynacja krajowego i europejskiego prawa prywatnego międzynarodowego*, in *Współczesne wyzwania prawa prywatnego międzynarodowego,* Jerzy Poczobut (ed), Warsaw 2013, 228. The different name is 'reminder provisions' (Andrzej Mączyński, *Europejski kontekst rekodyfikacji polskiego prawa prywatnego międzynarodowego*, in *Finis legis Christus. Księga pamiątkowa dedykowana księdzu Profesorowi Wojciechowi Góralskiemu z okazji siedemdziesiątej rocznicy urodzin*. Vol 2, Józef Wroceński, Jan Krajczyński (eds), Warsaw 2009, 1184). Such a way of creating provisions was criticised in Polish doctrine. (See Andrzej Mączyński, *Opinia z dnia 16.12.2008 r. o projekcie ustawy – Prawo prywatne międzynarodowe (druk sejmowy No 1277)*, 9 accessible at <http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=1277≥ accessed 30 June 23; Andrzej Mączyński, *Przeciwko potrzebie uchwalania nowej ustawy – Prawo prywatne międzynarodowe,* Zeszyty Prawnicze, Biuro Analiz Sejmowych 2009, No 1, 25; Andrzej Mączyński, *Ustawowe odesłania do umów międzynarodowych i rozporządzeń unijnych dotyczących prawa prywatnego międzynarodowego*, in *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Profesora Edwarda Gniewka*, Jacek Gołaczyński, Piotr Machnikowski (eds), Warsaw 2010, 378ff). The only Article of PIL of 2011 that could apply is Article 35 according to which 'Civil liability for acts and omissions of authorities exercising official authority in a given country shall be governed by the law of that country'. However, in Polish-Ukrainian relations, Art. 35 PIL of 2011 is not applied because of application of the Polish-Ukrainian Convention. (See more, Krzysztof Pacuła, *O „zakresie przedmiotowym" i „zakresie sytuacyjnym" konwencyjnych norm kolizyjnych*, Problemy Prawa Prywatnego Międzynarodowego, Vol 32, 2023, 53, <https://doi.org/10.31261/PPPM.2023.32.03> accessed 1 October 2024).

this provision: (1) first – that those two provisions neutralize; (2) second – that Article 97 Polish-Ukrainian Convention does not apply to intra-EU instruments like EU Regulations[16] but only to international agreements and, therefore, Article 28 (1) Rome II Regulation explicitly resolves this conflict in such a way that the Polish-Ukrainian Convention takes precedence over the Rome II Regulation.[17] The second interpretation is supported by the author of this article. The teleological interpretation of Article 97 Polish-Ukrainian Convention cannot be against the literal interpretation of this provision. As the provision uses the word 'agreement' it is difficult to understand it in such a way as if it also covered the EU Regulations which are part of the EU secondary law. Moreover, Article 28(1) Rome II Regulation literally applies to international agreements between Member State(s) and Non- Member State(s) that were in force when the Rome II Regulation was adopted, which is the case of the Polish-Ukrainian Convention.[18] The latter preceded the accession of Poland to the European Union.[19] Also it is important to add that Poland notified to Commission the Polish-Ukrainian Convention as having precedence to the Rome II Regulation according to Article 29 Rome II Regulation.[20]

[16] Different view was presented by Andrzej Mączyński during the Conference "Thirty Years of the Polish-Ukrainian Agreement of 1993 on Legal Aid: Evaluation of Effectiveness in Civil and Commercial Matters" that was organised by Warsaw University on 30 March 2023. This view presented similar function of international agreements and EU regulations and on this basis allowed for application of Art. 97 Polish-Ukrainian Convention also to EU regulations.

[17] Similarly, Jadwiga Pazdan in *System Prawa Prywatnego T 20B, Prawo prywatne międzynarodowe*, Maksymilian Pazdan (ed), Warsaw 2015, 744; See in general about Art. 28 (1) Rome II in Jan von Hein, *Konflikte zwischen völkerrechtlichen Übereinkommen und europäischem Sekundärrecht auf dem Gebiet des Internationalen Privatrechts*, in Dynamik und Nachhaltigkeit des Öffentlichen Rechts Festschrift für Professor Dr. Meinhard Schröder zum 70. Geburtstag, Matthias Ruffert (ed), Berlin 2012, 41.

[18] Compare, Judgment of the European Court of Justice of 4 May 2010 in case TNT Express Nederland BV v AXA Versicherung AG, C-533/08, European Court Reports 2010 I-04107, paras 46, 56; Judgment of the European Court of Justice of 12 October 2023 in case OP v Notary Justyna Gawlica, C-21/22, ECLI:EU:C:2023:766, para 38; Judgment of the European Court of Justice of 21 March 2024 in case 'Gjensidige' ADB v 'Rhenus Logistics' UAB, 'ACC Distribution' UAB, C-90/22, ECLI:EU:C:2024:252, para 45; See Peter Mankowski, in *European Commentaries on Private International Law. Commentary Volume III*, Ulrich Magnus, Peter Mankowski (eds), Köln 2019, Art. 28 Rome II-Regulation note 10ff, 689–690.

[19] See more on the example of Austrian-Czech bilateral agreement and Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs OJ L 93, 31 March 2006, 12–25 (no longer in force) in Monika Pauknerová, *EU Regulations and International Conventions – Shifts in Time*, in Entre Bruselas y La Haya. Estudios sobre la unificatión internacional y regional del Derecho internacional privado. Liber Amicorum Alegría Borrás, Madrid Barcelona Buenos Aires São Paulo 2013, 679–680.

[20] See more, Krzysztof Pacuła, *O "zakresie przedmiotowym"...,* 57–58; See about the relations of the Polish-Ukrainian Convention to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ

The second matter to discuss is the relation of the Polish-Ukrainian Convention and the Hague Convention. At the beginning, it is worth mentioning that both Poland and Ukraine are parties of the Hague Convention.[21] As it was already underlined in the paragraph above, the Polish-Ukrainian Convention contains Article 97. Similarly, there is Article 15 in the Hague Convention. According to the latter one: 'This Convention shall not prevail over other Conventions in special fields to which the Contracting States are or may become Parties and which contain provisions concerning civil non-contractual liability arising out of a traffic accident'. In this case, both Article 97 of the Polish-Ukrainian Convention and Article 15 of the Hague Convention neutralize.[22] It means that both the Polish-Ukrainian Convention gives priority to the Hague Convention and the Hague Convention gives priority to the Polish- Ukrainian Convention. As a result, it is not possible to present the general rule of the relation between the Polish-Ukrainian Convention and the Hague Convention on the basis of Article 97 of the Polish-Ukrainian Convention or Article 15 of the Hague Convention. Therefore, in order to establish the relationship between the Polish-Ukrainian Convention and the Hague Convention it is necessary to compare the content of both international agreements. In this way, it is possible to asses which provisions are more special and apply in the effect.[23] It should not be arbitrarily stated that an international agreement which is bilateral is more special than a multilateral one. Rather, the content of both international agreements, and more precisely, the scope of their legal norms should be compared and the more detailed legal norm should be applied.[24] For this purpose Article 1 of the Hague Convention should be compared to Article 35 (1) of the Polish-Ukrainian Convention. According to Article 1 Hague Convention, the scope of this international agreement is 'civil non-contractual liability arising from traffic accidents'. On the contrary, the scope of Article 35 (1) Polish-Ukrainian Convention is 'liability for damage not resulting from contractual relations (delicts)'. This comparison shows that the Hague Convention is more detailed than the Polish-Ukrainian Convention, as it concerns the

L 177, 4 July 2008, 6–16, Mateusz Pilich, (ed), *Polsko-ukraińska ..*, 147–149; Compare about the validity of the list of conventions, Tristan Azzi, Edouard Treppoz, *Contrefaçon et conflits de lois: quelques remarques sur la liste des conventions internationales censées primer le règlement Rome II*, Recueil Dalloz, 2011, No 19, point 17.

[21] See <https://www.hcch.net/en/instruments/conventions/status-table/?cid=81> accessed 30 June 23.

[22] Compare, Marcin Czepelak, *Umowa międzynarodowa …*, 276. This view was expressed when Ukraine was not a party to the Hague Convention.

[23] The problem of relation of the Polish-Ukrainian Convention and the Hague Convention in a case concerning claims after death of a person in a car accident was not discussed by the court in judgment of Appeal Court in Warsaw of 7 March 2019, I Aca 1810/17, <https://orzeczenia.waw.sa.gov.pl/content/$N/154500000000503_I_ACa_001810_2017_Uz_2019-03-07_001> accessed 30 June 2023. In this case, the court simply applied the Polish-Ukrainian Convention in order to find applicable law.

[24] See Mateusz Pilich, *Polsko-ukraińska…*, 163.

liability arising only from traffic accidents and not from all delicts. Therefore, the Hague Convention precedes the Polish-Ukrainian Convention in case of the law applicable to non-contractual obligations.[25] For example, in the case heard by a Polish court concerning a car accident that happened to a Ukrainian and Polish citizen in Poland in 2024, the applicable law should be indicated on the basis of the Hague Convention and not the Polish-Ukrainian Convention.

Similarly, the Hague Convention takes precedence over the Rome II Regulation.[26] In this case, the Hague Convention takes precedence over the Rome II Regulation on the basis of Article 28 (1) Rome II Regulations. All argumentation that was described above with regard to the relation between Article 28(1) Rome II Regulation and Article 97 Polish-Ukrainian Convention is also supporting the relation between Article 28(1) Rome II Regulation and Article 15 Hague Convention. As a result, the Hague Convention takes precedence over the Rome II Regulation in cases of law applicable to non-contractual obligations arising from traffic accidents.

As Private International Law Act of 2011 does not apply to law applicable to non-contractual obligations, the relations among the described normative acts are as follows. Firstly, the Polish-Ukrainian Convention takes precedence over – in principle – the Rome II Regulation. Secondly, the Hague Convention takes precedence over – in principle – both the Polish-Ukrainian Convention and the Rome II Regulation as well. However, the abovementioned analysis is only the

[25] Similarly, e.g., Justification of the Judgment of Appeal Court in Warsaw (Wyrok Sądu Apelacyjnego w Warszawie) of 22 November 2013, I ACa 784/13, <https://orzeczenia.waw.sa.gov.pl/content/$N/154500000000503_I_ACa_000784_2013_Uz_2013-11-22_001> accessed 30 June 2023. Differently, the Judgment of District Court in Lublin [Wyrok Sądu Okręgowego w Lublinie] of 23 April 2015, IX Ca 488/14 <https://orzeczenia.lublin.so.gov.pl/content/$N/153005000004527_IX_Ga_000488_2014_Uz_2015-04-23_001≥ accessed 30 June 2023; and Judgment of the Supreme Court – Civil Department [Wyrok Sądu Najwyższego - Izba Cywilna] of 19 December 2003, III CK 155/02, Legalis, and Judgment of Appeal Court in Warsaw of 7 March 2019, I Aca 1810/17, <https://orzeczenia.waw.sa.gov.pl/content/$N/154500000000503_I_ACa_001810_2017_Uz_2019-03-07_001≥ accessed 30 June 2023. In those three cases, the courts simply applied the Polish-Ukrainian Convention in order to indicate applicable law and did not analyse the possibility to apply the Hague Convention. In the judgment of District Court in Sieradz (Sąd Okręgowy w Sieradzu) of 2 October 2019, I Ca 367/19 <https://orzeczenia.sieradz.so.gov.pl/content/$N/152520000000503_I_Ca_000367_2019_Uz_2019-10-02_001> accessed 30 June 2023, the court mentioned both the Polish-Ukrainian Convention and the Hague Convention but did not analyse its mutual relations.

[26] More, Claudia Rudolf, *Das Haager Straßenverkehrsübereinkommen und das Haager Produkthaftungsübereinkommen im Verhältnis zur Rom II-VO Konkurrenz und Ergänzung*, in *Festschrift Martin Schauer*, Astrid Deixler-Hübner, Andreas Kletečka, Georg Schima, Wien 2022, 465, 474–476; Marek Świerczyński, Łukasz Żarnowiec, *Prawo właściwe dla odpowiedzialności za szkodę spowodowaną przez wypadki drogowe z udziałem autonomicznych pojazdów*, Zeszyty Prawnicze 19.2/2019, 104, Jadwiga Pazdan, in *System* ..., 744; Compare Maciej Szpunar, Krzysztof Pacuła, in *Prawo prywatne międzynarodowe. Komentarz*, Maksymilian Pazdan (ed), Warsaw 2018, 1028.

first step to answering the question: to which non-contractual relations does the Polish-Ukrainian Convention apply? In other words, in the second step, it is necessary to check the objective, temporal, territorial and situational scope of application of the Polish-Ukrainian Convention for non-contractual relations.

3. NON-CONTRACTUAL OBLIGATIONS COVERED BY THE POLISH-UKRAINIAN CONVENTION

3.1. OBJECTIVE SCOPE

The scope of application of bilateral international agreements should be determined in relation to a particular type of case, e.g., non-contractual obligations and not in general terms.[27] The Polish-Ukrainian Convention is a bilateral international agreement and contains special legal norm for the law applicable to non-contractual obligations expressed in Article 35 (1). As it has already been described above, it is necessary to assess the scope of application of the legal norm expressed in Article 35(1). The objective scope of application determines which non-contractual obligations are covered by the legal norm expressed in Article 35 (1) Polish-Ukrainian Convention.

The title of this provision is: ‘Obligations not arising from contractual relations’. However, the scope of this provision is described in the following manner: ‘liability for causing damage not resulting from contractual relations (delicts)’. Such wording of the scope of Article 35(1) Polish-Ukrainian Convention – different from the title of this provision – raises the question: which non-contractual obligations are included in the scope of this provision?

Interpretation of international agreements is regulated in Section 3 of the Vienna Convention on the Law of Treaties.[28] According to its Article 31 (1), ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Additionally, Article 31(3) (b) states that ‘There shall be taken into account, together with the context: any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. The supplementary means of interpretation of the treaties are mentioned in Article 32. This provision gives the possibility to use the preparatory work of

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[27] Krzysztof Pacuła, *O „zakresie..*, 75; Compare Marcin Czepelak, *Umowa międzynarodowa…,* 167.

[28] Vienna Convention of the Law of Treaties of 23 May 1969 (Journal of Laws 1990, No 74, item 439), hereinafter ‘Vienna Convention’.

the treaty and the circumstances of its conclusion for the interpretation of international agreements.

The wording of the scope of Article 35 (1) Polish-Ukrainian Convention and the title of this provision surely excludes out of its scope the obligations resulting from contractual relations as well as obligations resulting from unilateral legal acts.[29] Moreover, this international agreement does not apply to procedural law institutions.[30] Additionally, the objective scope of this provision covers delicts, e.g., non-contractual obligations arising out of violations of privacy and rights relating to personality as well as acts and civil liability for omissions of authorities exercising official authority in a given country.[31] Moreover, it covers not only property non-contractual matters as the title of Chapter III 'Property matters' would suggest but also non-property non-contractual matters.[32]

However, the literal interpretation of Article 35(1) Polish-Ukrainian Convention does not explain, if this provision covers only delicts or also other non-contractual obligations,[33] like obligations arising out of unjust enrichment, acts performed without due authority in connection with the affairs of another person (*negotiorum gestio*) or dealings prior to the conclusion of a contract (*culpa in contrahendo*). Although creators of the Polish-Ukrainian Convention probably wanted to fully regulate all relations resulting in civil law matters (so also all the non-contractual obligations), which would justify applying by analogy this provision in all non-contractual obligations,[34] this provision does not fit non-contractual obligations other than delicts, e.g., unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*. Moreover, Article 31(1) Vienna Convention orders 'good faith' interpretation in accordance with the ordinary meaning. The expression 'liability for causing damage not resulting from contractual relations (delicts)' used in Article 35(1) Polish-Ukrainian Convention confirms that only delicts should be covered by the scope of this provision.[35] From the perspective of a Polish court, in cases such as unjust enrichment, *negotiorum gestio* or *culpa in contrahendo* applicable law should be determined by respective provisions of the Rome II Regulation (Articles 10-12) [36] and from the perspective of a Ukrainian

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[29] See Mateusz Pilich, *Polsko-ukraińska…,* 162.

[30] See Justification of the Supreme Court Resolution of 24 January 2020, III CZP 50/19, Legalis No 2275647.

[31] See more Krzysztof Pacuła, *O „zakresie..*, 79.

[32] See more Krzysztof Pacuła, *O „zakresie..,* 77.

[33] See more Mateusz Pilich, *Polsko-ukraińska…*, 162.

[34] See Piotr Mostowik, *Bezpodstawne...*, 148–151.

[35] See Jadwiga Pazdan, in *System…*, 746, Mateusz Pilich, *Polsko-ukraińska…,* 162.

[36] See more, Jadwiga Pazdan, in *System...*, 750; Marek Świerczyński, Łukasz Żarnowiec, in *System Prawa Prywatnego. Prawo prywatne międzynarodowe,* Vol 20b, Maksymilian Pazdan (ed), Warsaw 2015, 838–842; Łukasz Żarnowiec, in *System Prawa Prywatnego. Prawo prywatne międzynarodowe,* Vol 20b, Maksymilian Pazdan (ed), Warsaw 2015, 842–857.

court, respective provisions of the Ukrainian Private International Law should be taken into consideration.[37][38]

Moreover, those delicts that cause civil non-contractual liability arising from traffic accidents are excluded from the objective scope of application of the Polish-Ukrainian Convention as they are covered by the Hague Convention. According to Article 1 sentence 2, a traffic accident shall 'mean an accident which involves one or more vehicles, whether motorised or not, and is connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access'.[39]

Therefore, from the objective scope perspective, Article 35 (1) Polish-Ukrainian Convention covers obligations arising out of delicts (narrow understanding) different than traffic accidents. Therefore, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* are excluded out of the scope of application of the Polish-Ukrainian Convention. However, violations of privacy and rights relating to personality and acts and omissions of authorities exercising official authority in a given country are covered by the objective scope of application of the Polish-Ukrainian Convention.

3.2. SITUATIONAL SCOPE

The Polish-Ukrainian Convention does not contain any provision that would describe to which situations it applies in general, neither does it contain any provision referring to non-contractual obligations.[40] It is the reason of an immense unpredictability of court judgments in Poland concerning cases with a 'Ukrainian factor'.[41]

One of the important 'voices' of theoreticians of private international law is that, in general, the legal norms of the bilateral international agreements cover the matters in which the jurisdiction is granted to the courts of one of the two contracting States and the applicable law is the material law of the other contract-

[37] See Anatoliy Dovgert, *Codification of Private International Law in Ukraine*, Yearbook of Private International Law, Vol 7 (2005), 131–159.

[38] Compare Krzysztof Pacuła, *O „zakresie* … 78, who recommends first applying other legal norms from the Polish-Ukrainian Convention and not immediately the Rome II Regulation.

[39] See more Marek Świerczyński, Łukasz Żarnowiec, *Prawo właściwe* .., 108–109.

[40] Such provision is, e.g., in the Hague Convention which in Art. 11 says '(…) this Convention (…) shall be applied even if the applicable law is not that of a Contracting State'.

[41] Similar problems arose, e.g,. in the case of application of Art. 36 of the International Agreement between Poland and Czechoslovakia on the regulation of legal transactions in civil matters of 4 July 1961 (Journal of Laws 1962, No 23, item 103) in the Resolution of Full Courthouse of the Civil Department of the Supreme Court (Uchwała Pełnego Składu Izby Cywilnej SN) of 5 October 1974, III CZP 71/73, OSPiKA 1976, No 11, item 202. See more Marcin Czepelak, *Umowa międzynarodowa…,* 177–178.

ing State.[42] Additionally, the prevailing view is that the situational scope of such bilateral international agreement should be assessed separately to each provision of such a bilateral international agreement (e.g., to Article 35 Polish-Ukrainian Convention) and not in general to the whole international agreement.[43] The lack of provision on the situational scope and the 'case-to-case' approach causes the unpredictability of law as to the situational scope of the Polish-Ukrainian Convention and its Article 35(1).

In case of Article 35 (1) Polish-Ukrainian Convention, there is no single clear answer to its situational scope of application. According to one view, it applies to situations of delicts which happened on the territory of one of the contracting States and the obligation was created between parties, out of which at least one 'belongs'[44] to the other contracting State.[45] According to the other view, Article 35 (1) Polish-Ukrainian Convention applies to situations of delicts where an event happened in Poland or in Ukraine, if parties of the state of facts of delicts have the domicile (seat) in Poland or Ukraine and – what is disputable – Polish or Ukrainian citizenship, under condition that all the elements of the case are not purely national.[46]

The issue that is commonly accepted is that the bilateral agreements, such as the Polish-Ukrainian Convention, contain 'double-sided' legal norms which indicate the law of one of the two countries being the contracting parties of the international agreement.[47] However, it is also underlined in the literature on the example of choice of law that the law different than the law of one of the contracting parties may be chosen by the parties of the contract.[48] Nonetheless, this excep-

[42] See Andrzej Mączyński, *Dziedziczenie testamentowe w prawie prywatnym międzynarodowym: ustawowe i konwencyjne unormowanie problematyki formy,* Zeszyty Naukowe Uniwersytetu Jagiellońskiego, 1976, issue 75*,* 37; Andrzej Mączyński, *Wielość źródeł prawa prywatnego międzynarodowego i spowodowane nią kolizje norm kolizyjnych (na przykładzie norm dotyczących zobowiązań alimentacyjnych (2012))*, in Andrzej Mączyński, *Rozprawy i studia z prawa prywatnego międzynarodowego*, Warsaw 2017*,* 664.

[43] Mateusz Pilich, *Polsko-ukraińska…*, 70, Krzysztof Pacuła, *O „zakresie..* , 75; Compare, Marcin Czepelak, *Umowa międzynarodowa…,* 167.

[44] It is not clearly explained what is understood by the phrase that a party 'belongs' to contracting State. It seems that a legal person should have a seat in such a country. On the contrary, in case of natural persons, it may mean citizenship, domicile or habitual residence.

[45] See Mateusz Pilich, *Polsko-ukraińska…*, 163–164. The Author allows for the application of this provision in case if some elements of the unlawful event take place in third states under condition that according to court they are not legally important and there is a close connection with the contracting States.

[46] See Krzysztof Pacuła, *O „zakresie…*, 87–88, 89.

[47] See Marcin Czepelak, *Umowa międzynarodowa…,* 179. Mateusz Pilich, *Polsko-ukraińska…,* 70.

[48] It is, however, important to remind that the law chosen by the parties at the moment when the Polish-Ukrainian Convention was concluded had to be related to the contract. As the contract was related to Poland or Ukraine, it seems that only one of those laws could be chosen for the contract. Still, such argumentation is based on the historical interpretation of the international

tion should confirm the rule that only in situations related to Poland or Ukraine, so in cases where Polish or Ukrainian law is applicable, the situational scope of the Polish-Ukrainian Convention is relevant. So, if as a result of application of a legal norm, e.g. Article 35(1) Polish-Ukrainian Convention, German law is indicated, then surely the situation is out of the scope of application of this Convention.

However, even if Polish or Ukrainian law is applicable under Article 35(1) Polish-Ukrainian Convention, it is not enough to justify the application of this international agreement itself from the perspective of its situational scope. For example, a German company with a registered seat in Berlin caused delict to a Ukrainian company with a registered seat in Lviv and the event giving rise to the damage happened in Warsaw. In such a case, Polish law would be applicable on the basis of Article 35(1) Polish-Ukrainian Convention. However, it seems that there is no justification for the application of the Polish-Ukrainian Convention to this situation, as this case does not correspond to the strictly 'two-sided' (bilateral) scope of application.

Such strictly 'two-sided' (bilateral) scope of application of legal norms of the Polish-Ukrainian Convention is characterised in the following way. Firstly, the conflict-of-law rule can only indicate Polish or Ukrainian law. Secondly, the connecting factor as well as other relevant circumstances of the case should also be related to Poland or Ukraine (e.g. the Convention will not apply to a situation where a Ukrainian mother gives birth to a child in Poland and the father of the child does not have Polish or Ukrainian citizenship).[49] In other words, significant elements of the relationship should be 'restricted' only in Poland and Ukraine.

In theory of private international law, 'purely internal' situations are known. For such situations, choice of law does not change the applicable law, it only changes the application of *ius dispositivi* of the law indicated by the conflict-of-law rule (e.g. Article 14 (2) Rome II). Similarly, in case of the Polish-Ukrainian Convention, the situation should be 'purely' Polish-Ukrainian in the scope of significant elements of the case. This raises the question, how to estimate such elements for non-contractual obligations.

As there is no provision in the Polish-Ukrainian Convention on its situational scope of application, the interpretation should be conducted accordingly to the Vienna Convention. Therefore, Article 35(1) Polish-Ukrainian Convention should be interpreted 'in good faith' in accordance with 'the ordinary meaning' and in light of its 'object and purpose' (Article 31 (1) Vienna Convention). In order to determine the situational scope, the wording of Article 35 (1) Polish-Ukrainian Convention should be used, that is its hypothesis and disposition (especially the

agreement. On the contrary, dynamic interpretation of an international agreement allows nowadays for choosing any law for the contract.

[49] See Michał Wojewoda, *Rejestracja urodzin dzieci obywatelek Ukrainy przybyłych do Polski w związku z agresją rosyjską*, Metryka, Studia z Zakresu Prawa Osobowego i Rejestracji Stanu Cywilnego, XII 2022, No 1–2, 49 and literature in footnote 28.

connecting factor).[50] This means that in order to determine the situational scope of the Convention, its legal norms are applied, although it is not certain whether they can be referred to, as at this stage it is not known yet whether a given State or legal relationship falls within the situational scope of the Convention. Such undesirable reasoning has to be conducted, as there is no clear provision on the situational scope of the Polish-Ukrainian Convention.

The hypothesis of the legal norm expressed in Article 35(1) contains the expression: 'liability for damage not resulting from contractual relations (delicts)' and its connecting factors are: 'common citizenship' and 'the event giving rise to the obligation'. Literal interpretation of Article 35(1) gives reason to estimate that the common citizenship and the event giving rise to the obligation for delict should be 'located' in Poland and Ukraine. The expression of 'the event giving rise to the obligation' may seem to be unclear and there are two interpretations of its meaning: one supports the view that it is the place of the event as well as the effect and the law most closely to the case that should be indicated;[51] the other – that it is just the place of the event.[52] The author of this article supports the first view. Apart from the flexibility of the application of Article 35(1) for different kinds of torts, it excludes out of the situational scope of application of the Polish-Ukrainian Convention such delicts where the direct damage occurred in a third State.[53] This is the way, how 'the event giving rise to the obligation' has been interpreted in Polish doctrine.[54] On the contrary, Ukrainian doctrine supports the second way of understanding this term.[55] However, it is worth reminding that the understanding of the term in national law should not determine its understanding in an international agreement. Moreover, literal interpretation seems to indicate only the place of the event. Nevertheless, the wording is not precise and, therefore, additionally, on the basis of 'object and purpose' of the international agreement according to Article 31(1) Vienna Convention, it is possible to use the interpretation of this connecting factor in Polish and Ukrainian law.[56] Moreover, the delict should be 'closed' on the territory of Poland and Ukraine. Therefore, multi-state delicts that cross the borders of those two countries due to the event or the direct damage are excluded out of the scope of the application of Article 35(1) Polish-Ukrainian

[50] See Marcin Czepelak, *Umowa międzynarodowa…* 168*,* Krzysztof Pacuła, *O „zakresie..,* 81.

[51] See more, Mateusz Pilich, *Polsko-ukraińska…,* 165-166.

[52] See Krzysztof Pacuła, *O „zakresie…*, 83.

[53] Compare Krzysztof Pacuła, *O „zakresie…*, 83, footnote 88.

[54] For the Polish Private International Law, see Mieczysław Sośniak, *Lex loci delicti commissi w prawie międzynarodowym prywatnym*, S.C. 1963/IV, 170; Mieczysław Sośniak, *Zobowiązania nie wynikające z czynności prawnych w prawie prywatnym międzynarodowym,* Katowice 1971, 91–95.

[55] See Katerina V Manuilova, *Systema koliziinykh norm u sferi deliktnykh zobov'iazan*, Yurydychnyi elektronnyi naukovyi zhurnal, 2015, No 4, 80–82.

[56] Compare, Krzysztof Pacuła, *O „zakresie…,* 71–73.

Convention (e.g. if the event takes place in Poland, Ukraine and Slovakia, then the case is excluded out of the situational scope of the Convention).[57] As a result, the Convention should be applicable to such delicts that are 'located' only in Poland or Ukraine.

In Ukraine, there exist territories of unclear international status such as the districts of Donetsk and Luhansk in eastern Ukraine, as well as the Crimean Peninsula.[58] This raises the question, if the delict is 'located' in such territories (e.g. the event giving rise to the damage happened in Donetsk in year 2024), is it still in Ukraine and is it still 'two-sided' (Polish-Ukrainian)?

The doctrine of public international law distinguishes the 'legal' and 'factual' succession of States. The first type occurs if the territory was transferred legally to another State or became an independent State legally. However, the second one – the one that occurs in the case of the territories in question – happens already at the moment of the factual occupation of the territory.[59] Public international law clearly treats the separation from Ukraine of the Crimean Peninsula and its eastern territories as illegal.[60] On the contrary, from the perspective of private international law, even only 'factual' occupation is not an obstacle for application of the material law of such a non-recognised entity.[61] However, this approach should be limited to the application of material law. It should not be expanded to the conflict of law rules that indicate this law. As a result, if the event giving rise to the damage takes place in Donetsk in 2024, then the situational scope of the Polish-Ukrainian Convention is still fulfilled. Similarly, if the tort has happened both in the territory of Ukraine and in Donetsk, then the connection with Ukraine seems to be sufficient for the situational scope of Article 35 (1) Polish-Ukrainian Convention.

Additionally, subjective elements of the legal norm expressed in Article 35 (1) should be interpreted for assessing its situational scope. In order to apply the Polish-Ukrainian Convention, parties of the tort should 'belong' to Poland or Ukraine.[62] The literal interpretation suggests that if parties have 'common citizenship' of Poland or of Ukraine, then the situational scope of the Convention is confirmed. The citizenship should be interpreted as effective citizenship.[63] In

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[57] Compare, even if some elements of delict are located in third countries, it is sufficient that the main elements of the tort are most closely connected to Poland or Ukraine, Mateusz Pilich, *Polsko-ukraińska*..., 164. However, such an interpretation comes with a risk of uncertainty and the risk of too broad application of the Polish-Ukrainian Convention.

[58] Jürgen Basedow, *Non-Recognised States in Private International Law*, YPIL Vol 20, 2018/2019, 2.

[59] See Anna Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka,* Warsaw 2006, 475–476.

[60] Remigiusz Bierzanek and others, *Prawo międzynarodowe publiczne,* Warsaw 2023, 271.

[61] Jürgen Basedow, *Non-Recognised*…, 13.

[62] See more, Mateusz Pilich, , *Polsko-ukraińska*..., 163.

[63] ibid, 77–78, 164.

case of legal persons instead of common citizenship, the common registered seat is the connecting factor according to Article 35(1) and Article 1(4).[64] However, citizenship or registered seat does not seem to be the only personal link to Poland or Ukraine. Both the title and the preamble of the international agreement may be used to interpret the aim and the object of the international agreement.[65] On the basis of the title and the preamble, this international agreement does not seem to cover only relations between Polish and Ukrainian citizens but also other subjects that are closely related to Poland or Ukraine.

Notwithstanding, the domicile or habitual residence has no effect on applicable law according to Article 35 (1) Polish-Ukrainian Convention. However, the domicile is one of the bases of jurisdiction in such cases according to Article 35(2).[66] Therefore, it seems that if one party has the citizenship of Poland or Ukraine and the other party has the citizenship of a third State, then this other party should at least have domicile in Poland or Ukraine. Also, it is possible that none of the parties (victim or perpetrator) have Polish or Ukrainian citizenship, but the delict took place in Poland or Ukraine. In such a case, to confirm the situational scope both parties should have domicile in Poland or Ukraine although such circumstance is not expressly mentioned in Art 35(1).

To sum up, in order to establish the situational scope of Article 35 (1) Polish-Ukrainian Convention from the Polish court perspective (thus Polish court should have the jurisdiction on the basis of Article 35 (2)), the place of the delict should be in Poland or/and Ukraine and both subjects (victim and perpetrator) should be related to Poland or Ukraine by citizenship (seat) or domicile; and all the elements of the case should not be purely national (Polish or Ukrainian).

3.3. TERRITORIAL SCOPE

Territorial (or geographical) scope describes the country in which the normative act (e.g. international agreement) is valid. In case of the Polish-Ukrainian Convention, it is in force on the territory of Poland and Ukraine. As a result, both Polish as well as Ukrainian authorities (especially courts) apply this international agreement.

As the territory of Poland has stable state borders, it is easy to determine which courts apply the Polish-Ukrainian Convention if the objective, situational and temporal scope are fulfilled. This article covers only the application of the

[64] ibid, 30–31, 164.

[65] See Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016, point 39, <https://www.icj-cij.org/sites/default/files/case-related/154/154-20160317-JUD-01-00-EN.pdf.> accessed 30 June 2023.

[66] See more, Krzysztof Pacuła, *O „zakresie* …, 86, 88.

Polish-Ukrainian Convention, in cases where Polish courts have the jurisdiction. In other words, it analyses the Polish-Ukrainian Convention from the perspective of a Polish court before which the case is pending. On the contrary, it does not cover issues which Ukrainian courts apply the Polish-Ukrainian Convention.

3.4. TEMPORAL SCOPE

The Polish-Ukrainian Convention contains the provision that deals explicitly with the entrance into force of this international agreement. It is Article 98 which states that this international agreement is subject to ratification and enters into force after sixty days from the exchange of instruments of ratification which should take place in Warsaw. The exchange of instruments of ratification took place on 15 June 1994 in Warsaw.[67] Therefore, the entrance into force from the perspective of international law took place 60 days from 15 June 1994. However, on that date the Polish-Ukrainian Convention was not published in Polish Journal of Laws (Dziennik Ustaw RP), yet. It happened on 14 September 1994.[68] From this date, 14 days of *vacatio legis* had to pass and the Convention entered into force on 29 September 1994.[69]

However, there is no provision of the Polish-Ukrainian Convention that clarifies, how to apply it ‘in time’ to non-contractual obligations that lasted over time before, on and after 29 September 1994. Therefore, the civil law conflict-of-time rules should be applicable. As a rule, the new law should be the better law. Thus, the new conflict-of-law international agreement must be applied when estimating the law applicable to the assessment of events that occurred during its period of validity, even if these events concern relations that arose during the period of validity of the previous conflict-of-law act.[70] Additionally, to assess an event stretched over time, started but not completed under the old conflict-of-law act, the law indicated by the new act should generally be applied.[71] Therefore, it seems that from the perspective of the law applicable to non-contractual obligations, the event giving rise to such obligation should happen (or if the event is stretched over time, it should end) on or after 29 September 1994. What is more, the victim and the perpetrator should have common citizenship on or after that date in cases when common citizenship is the connecting factor.

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[67] Oświadczenie rządowe w sprawie wymiany dokumentów ratyfikacyjnych Umowy o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych między Rzecząpospolitą Polską a Ukrainą, sporządzonej w Kijowie dnia 24 maja 1993 r z dnia 16 czerwca 1994 (Journal of Laws No 96, item 466).

[68] Journal of Laws of 1994, No 96, item 465.

[69] Mateusz Pilich, *Polsko-ukraińska*..., 253.

[70] Monika Jagielska and others, in *Prawo prywatne międzynarodowe, Komentarz*, Maksymilian Pazdan (ed), Warsaw 2018, Part I, Chapter 6, point VIII, Legalis.

[71] Monika Jagielska and others, in *Prawo*…, Part I, Chapter 6, point VIII, Legalis.

4. LAW APPLICABLE TO NON- CONTRACTUAL OBLIGATIONS UNDER THE POLISH-UKRAINIAN CONVENTION

The law applicable to non-contractual obligations covered by the Polish-Ukrainian Convention is analysed from the perspective of a Polish court, having the jurisdiction to rule such cases. There is a special legal norm expressed in Article 35 (1) Polish-Ukrainian Convention that indicates the applicable law to such cases. Differently than in Article 14 Rome II Regulation, this provision does not allow for the choice of law[72] for delicts. Parties cannot decide about the applicable law by expressing their will.

The legal norm expressed in Article 35 (1) Polish-Ukrainian Convention includes the cascade of connecting factors, starting from the common citizenship of the plaintiff and the defendant (Article 35(1) sentence 2); and then – the event giving rise to the obligation (Article 35(1) sentence 1). The determination of applicable law should start on the basis of the connecting factor of the common citizenship. In case of lack of common citizenship, the event giving rise to the obligation indicates the applicable law.

It is important to explain the meaning of the connecting factor of the common citizenship of the plaintiff and the defendant from Article 35(1) sentence 2 Polish-Ukrainian Convention. In this provision, the words 'plaintiff' and 'defendant' are used instead of 'victim' and 'perpetrator'. However, expressions 'plaintiff' and 'defendant' which relate to the position of the subjects in the court trial, should be interpreted as parties of a tort that are a victim (a person that may be a plaintiff) and a perpetrator (a person that may be a defendant).[73]

If both parties are natural persons and have only one citizenship (Polish or Ukrainian), Article 35(1) sentence 2 Polish-Ukrainian Convention gives the clear answer as to the applicable law. But it gets more complicated in a situation, if one of the parties or both parties have more than one citizenship. In such a situation, the rule of the effective citizenship should decide which of the citizenships is decisive.[74] The effective citizenship is this citizenship with which the person is most closely connected. For example, a person has Polish and French citizenship but lives in France. In such a case, the person is treated as a French, not Polish citizen.

Although Article 35 (1) sentence 2 Polish-Ukrainian Convention expresses only citizenship as the connecting factor, it should also be respectively applied to

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[72] See more about the choice of law for delicts in Krzysztof Pacuła, *Granice swobody wyboru prawa dla zobowiązań pozaumownych na tle rozporządzenia Rzym II*, in Joanna Boroń and others, *Autonomia woli w prawie prywatnym międzynarodowym i arbitrażu*, Katowice 2015, 23–44.

[73] See Mateusz Pilich, *Polsko-ukraińska…,* 164, footnote 186.

[74] See more about the effective citizenship in Mateusz Pilich, *Zasada obywatelstwa w prawie prywatnym międzynarodowym: zagadnienia podstawowe*, Warsaw 2015, 356.

legal persons.[75] In case of such entities like legal persons or organizational entities that do not have legal personality by the virtue of Article 1(4) Polish-Ukrainian Convention, the connecting factor from Article 35(1) sentence 2 is interpreted in such a way that it concerns persons established in accordance with the laws of Poland or Ukraine and that have their seat in one of those countries (e.g. two legal persons established in Poland who have a registered seat in Poland). In this case, the real seat is not the connecting factor as Article 1(4) Polish-Ukrainian Convention explicitly refers to a registered seat. Additionally, the seat is defined as a registered seat according to Article 25 (2) Ukrainian Private International Law.[76]

On the second step of the cascade of the connecting factors expressed in Article 35(1) sentence 1, there is 'the event giving rise to the obligation'.[77] The concept of the event giving rise to the obligation is not defined in the Polish-Ukrainian Convention. In Polish doctrine, there are two different points of view about the meaning of this connecting factor: the broad one, which states that it is the place of the event and the effect, but the law most closely to the case should be indicated,[78] and the narrow one, according to which it is just the place of the event.[79] As has already been mentioned above in point 3.2 of this article, the author supports the first view. Although literal interpretation would seem to indicate the place of the event only. However, the wording is not precise and, therefore, additionally, on the basis of 'object and purpose' of the international agreement according to Article 31(1) Vienna Convention, it is possible to use the meaning of this connecting factor in Polish and Ukrainian law.[80] According to Polish law, on the basis of the interpretation of Article 31 § 1 PIL from 1965,[81] the concept of an event giving rise to the obligation includes both the place of occurrence of the action

[75] See similarly as to the interpretation of Art. 31 § 2 of the Polish Private International Law from 1965 Justification of resolution of the Supreme Court of 5 October 1974, III CZP 71/73, OSNCP 1975 No 5 item 72; Glosa: W Braś OSPiKA 1976/11, 478 – approving, regarding the application of Art. 31 § 2 of the PIL of 1965 to a situation where one of the parties is a legal person with its registered office in a given country, and the other party is a natural person with a place of domicile in the same country and being a citizen of that country, see Justification of the judgment of the Supreme Court of 22 November 1972, II CR 458/72, OSNCP 1973 No 7-8 item 139; Compare, Glosa: Mieczysław Sośniak OSPiKA 1974/1 item 6 – approving; K. Zawady, OSPiKA No2/1975, item 32 – approving in point I, letter a; For the inclusion of legal persons in the scope of Art. 31 § 2 of PIL of 1965, see Barbara Tracz-Pasternak, *Właściwość prawa personalnego stron dla zobowiązań nie wynikających z czynności prawnych*, PiP 1980 No 2, 89–90.

[76] Art. 25(2) states that: 'For the purposes of this Act, the seat of a legal person is the state in which that person is registered or otherwise established in accordance with the law of that state'.

[77] In Polish language: *zdarzenie będące źródłem zobowiązania* (Eng. 'the event giving rise to the obligation').

[78] See more Mateusz Pilich, *Polsko-ukraińska...,* 165–166.

[79] See Krzysztof Pacuła, *O „zakresie…*, 83.

[80] Compare Krzysztof Pacuła, *O „zakresie...,* 71–73.

[81] Act of 12 November 1965 – Private International Law (Journal of Laws No 46, item 290 as amended) – not in force.

and its effect. At the same time, the effect is not tantamount to damage but to the infringement of a legal good.[82] Therefore, there may be difficulties in locating a single place where an event in the form of a tort occurred.[83] In Polish doctrine, a flexible approach to the qualification of the connecting factor under Article 31 § 1 ppm 1965 was supported.[84] The connecting factor of *legis loci delicti commissi* can be interpreted as the place where the perpetrator acted or failed to act or as the place where the effects of this behaviour occurred. Such distinction has the legal meaning when the abovementioned facts occur in different countries, which is the case of the so-called multi-state torts.[85] Similar broad interpretation of the event giving rise to the obligation is supported by the Ukrainian Private International Law.[86] As a result, also the connecting factor from Article 35(1) – the event giving rise to the obligation – should be understood broadly as the unlawful act (omission of action) of the person and as the effect of the unlawful behaviour.[87] Such broad understanding of this connecting factor allows for flexible interpretation and adjustment of Article 35(1) to different types of delicts such as acts of unfair competition where the effect of the tort is more important than the place of the action. However, in most cases the act and the effect are located in one country and then this connecting factor indicates the law of one country (Poland or Ukraine).

In some rare situations, like the example of the tort that happened on the trade route from Ukraine to Poland or the tort with event in one country (e.g. in Ukraine) and the effect in another country (e.g. in Poland), this connecting factor does not indicate one law. One of the proposals for a solution in such 'multi-state' torts (in this case of 'two-states' i.e. Polish-Ukrainian torts) is to analyse whole legal situation and find which of the laws is most closely connected with this tort.[88] Another solution would be to apply the law of the place of the event[89] as the provision uses the word 'event giving rise to the obligation', which suggests that the more important element of the delict is the event and not the effect. Finally, in

[82] For example, if a person buys spoiled food in country A, eats it in country B, and falls ill in country C, the damage will occur in country C and the effect will occur in country B. (see Witalis Ludwiczak, *Międzynarodowe prawo prywatne,* Warsaw 1990, 204.)

[83] Witalis Ludwiczak, *Międzynarodowe...,* 204.

[84] See Bronisław Walaszek, Mieczysław Sośniak, *Zarys prawa międzynarodowego prywatnego*, Warsaw 1973, 191.

[85] See Jerzy Jakubowski, *Prawo międzynarodowe prywatne, Zarys wykładu*, Warsaw 1984, 115.

[86] See provisions in Chapter VII of the Act 'Laws on conflict of laws relating to non-contractual obligations' of the Ukrainian Private International Law accessible <https://zakon.rada.gov.ua/laws/show/2709-15#Text> accessed 30 June 2023, hereinafter 'Ukrainian Private International Law'; See also Anatoliy Dovgert, *Codification of...,* 154–155.

[87] See *Polsko-ukraińska…*, 165, footnote 188; Compare Krzysztof Pacuła, *O „zakresie…*, 83.

[88] See Mieczysław Sośniak, *Lex loci ...*, 170; Mieczysław Sośniak, *Zobowiązania…*, 91–95; Mateusz Pilich, *Polsko-ukraińska…*, 165.

[89] See Mateusz Pilich, *Polsko-ukraińska…*, 166.

some cases, it is possible to 'divide' tort and then to apply the law of one country to the part of the delict located in that country and to another part of the delict – the law of the second country in which that second part of the delict is located. It seems that for such multi-state torts, located in Poland and Ukraine, applying the law that is most closely connected to the tort is the most appropriate one, as it leads to applying one law to whole non-contractual obligation and is still covered by the broad understanding of the 'the event giving rise to the obligation'.

The multi-state torts raise also one more question about the delicts in which 'the event giving rise to the obligation' is located not only in Poland or Ukraine but also in some other country. Should such non-contractual obligation be excluded out of the application of the Polish-Ukrainian Convention or should it be divided into a part located in Poland-Ukraine and a part located in a different country, then the Polish-Ukrainian Convention would be applicable only to part of the tort is located in Poland-Ukraine. It seems that in cases of such non-contractual relations that are also located (event or effect) in other states than Poland or Ukraine, they should be in whole excluded from the scope of application of the Polish-Ukrainian Convention.[90]

5. SUMMARY

The Polish-Ukrainian private law relations in the field of law applicable to non-contractual obligations are characterised by the variety of sources of law: the Polish-Ukrainian Convention, the Hague Convention and the Rome II Regulation. The article analyses those issues and concludes that – in general – the Polish-Ukrainian Convention takes precedence over the Rome II Regulation, but the Hague Convention takes precedence over both the Polish-Ukrainian Convention and the Rome II Regulation.

Additionally, it is important to underline that the Polish-Ukrainian Convention has very narrow situational scope for non-contractual obligations as it should be applied only to the 'so called' strictly bilateral legal relation. However, there is no precise provision that determines the scope of the application of the Polish-Ukrainian Convention to non-contractual obligations (and to other civil or commercial matters). Therefore, the court in each case has to interpret the Polish-Ukrainian Convention in order to determine to which bilateral non-contractual obligations it applies. Such situation causes immense unpredictability of law.

Moreover, Article 35(1) is terminologically imprecise as regards its scope of application ('liability for causing damage not resulting from contractual relations (delicts)' and the first cascade of connecting factors (the common citizenship of

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[90] Compare Mateusz Pilich, *Polsko-ukraińska*..., 164.

a plaintiff and a defendant)). This additionally causes difficulties in its interpretation. The next issue of the Polish-Ukrainian Convention is that it is dated in the 1990s and its regulation reflects obsolete approach to the law applicable to non-contractual obligations. Firstly, the Polish-Ukrainian Convention does not allow for the choice of law for non-contractual obligations like the Rome II Regulation. Secondly, main connecting factor from Article 35(1) sentence 1 is based on the event giving rise to the obligation and not only the damage, which is treated as the element that is closer to the victim and, therefore, better protecting its interests. Thirdly, the diversity of torts in private international law is not reflected by legal norm expressed in Article 35(1), e.g., it does not provide the accurate solution for the territorial torts, such as acts of unfair competition or infringement of intellectual property rights. All the abovementioned reasons cause such effect that the treaty that should facilitate the resolution of the disputes in the Polish-Ukrainian torts from the perspective of private international law, does not fulfil its function anymore, especially from the perspective of a Polish court and other conflict-of-law rules for non-contractual obligations of the Rome II Regulation and the Hague Convention.[91]

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[91] There are suggestions to terminate this international agreement, see Krzysztof Pacuła, *O „zakresie* .., 90.

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